1. Overview

Under the *Fair Work Act 2009* (Fair Work Act), employees in the national workplace relations system have defined rights and are protected from adverse action in breach of those rights.

**Adverse action** includes dismissing or refusing to employ someone, discriminating against them, or otherwise injuring them in their employment (for example, by demoting them, or reducing their overtime or ordinary hours of work).

This guide outlines the sorts of rights that are protected, what constitutes a contravention and how an application to Fair Work Australia can be made.

Examples used are for illustrative purposes only. If you are involved in a general protections case before Fair Work Australia, it is recommended that you read Part 3-1 of the Fair Work Act.

**Please note:**
- Fair Work Australia staff cannot advise you whether or not you should make an application or how best to run your case.
- If you wish to make a general protections application relating to a dismissal, the application must be lodged **within 60 days** of the dismissal taking effect. There is no time limit for applications that do not relate to dismissal.
- You cannot make a general protections dismissal application at the same time as an unfair dismissal application. You can only make one claim about a particular incident at any one time.

2. About general protections disputes

The general protections provisions of the Fair Work Act aim to protect employees from adverse action in breach of a number of defined rights. Those rights are categorised as:

- **workplace rights**—such as the entitlement to a benefit under a workplace law or the entitlement to make a complaint or inquiry
- **industrial activities**—such as the right to take industrial action or to belong or not to belong to a union or employer association
- **other protections**—such as freedom from discrimination or the entitlement to take a temporary absence from work due to illness or injury
- **sham arrangements**—where a person’s employment status is misrepresented as an independent contractor.
A general protections dispute occurs when adverse action is taken—or when a threat to take adverse action occurs—\textit{because} a person has one of these rights, exercises such a right or, in some cases, proposes to exercise such a right.

For example, an employee may claim a breach of the general protections provisions if he or she is dismissed and can show that the dismissal was \textit{because} he or she had taken temporary leave due to illness.

An employee cannot claim a breach of the general protections provisions simply because he or she was dismissed while on temporary leave due to illness.

If you are making a general protections application to Fair Work Australia you will need to identify:
- the adverse action taken or threatened against you
- the right that was breached by that action or potential action
- the document that provided that right—the relevant workplace law, award, agreement or contract of employment.

\textbf{Who is covered by the general protections?}

The general protections provisions apply to employees in the national workplace relations system, which covers the majority of businesses in Australia and all employees in Victoria, the Northern Territory and the Australian Capital Territory.

An application can also be made by a prospective employee, an independent contractor or a person who has entered into a contract for services.

Most general protections disputes involve an employee and their employer.

\textbf{Who is not covered by the general protections?}

The following are generally not covered by the national system:
- most state government public sector employees and most local government employees (except in Victoria, Tasmania, the Northern Territory and the Australian Capital Territory).
- employees of Western Australian sole traders, partnerships, or other non-constitutional corporations.

If you are unsure whether you are an employee in the national workplace relations system, please call Fair Work Australia on 1300 799 675.

If you are not an employee in the national workplace relations system and you have been dismissed you may be able to make an application for unlawful termination. For more information on unlawful termination please call Fair Work Australia on 1300 799 675.

\textbf{3. Types of general protections disputes}

\textbf{Workplace rights}

A person must not take adverse action against another person because the other person has a workplace right or exercises a workplace right.

The term ‘workplace right’ has a broad meaning. A person has a workplace right if he or she:
• has an entitlement under a workplace law or a workplace instrument such as an award or enterprise agreement
• is able to initiate a proceeding under a workplace law or workplace instrument
• is able to make a complaint or inquiry in relation to their employment.

Industrial activities

Industrial activities cover activities associated with freedom of association including:
• becoming or not becoming members of industrial associations (e.g. trade unions, employer organisations)
• representing or advancing the views, claims or interests of an industrial association
• taking part in protected industrial action or refusing to take part in industrial action.

A person must not take adverse action against another person because they engaged in or proposed to engage in industrial activity (such as belonging to or participating in a union), including refusing to participate in any industrial action.

Other protections

Discrimination

An employer must not take adverse action against an employee or prospective employee because of their 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.

An employer is only allowed to do so in limited circumstances when the action is:
• taken because of the inherent requirements of the particular position, or
• in accordance with doctrines, tenets, beliefs or teachings of a particular religion or creed and taken in good faith to avoid injury to the religious susceptibilities of that religion or creed, or
• not unlawful under any anti-discrimination law in force in the place the action is taken.

Temporary absence due to illness or injury

An employer must not dismiss an employee because they have been temporarily absent from work because of illness or injury if:
• they have a doctor’s certificate (or other evidence under regulation 3.01 of the Fair Work Regulations 2009), and
• they are on paid sick leave or they have had less than three months unpaid sick leave in the last year.

Sham arrangements

An employer must not tell an employee that they are being hired as an ‘independent contractor’ if they are really an employee.

An employer must not dismiss or threaten to dismiss an employee in order to hire them as an independent contractor doing the same or substantially the same work.
4. Making an application

Who can apply?

The general protections provisions apply to employees and prospective employees in the national workplace relations system, and to independent contractors and persons who have entered contracts for services.

To make an application you must show that adverse action was taken against you and identify the right that was breached. If possible, identify any relevant document such as an award, enterprise agreement, contract of employment or relevant legislation, including the Fair Work Act.

Remember that some sections of the general protections provisions only apply to particular situations and only certain people may be able to apply. For example, s.352 of the Fair Work Act, which deals with temporary absence due to illness or injury, applies only to an employee who has been dismissed.

There are no qualifying periods or remuneration caps for a general protections application. This means general protections apply from the start of your employment and, in some cases, before you are employed and apply no matter what you earn.

What should the applicant consider?

A person making a general protections application is alleging that their employer, or prospective employer, has broken the law. It is important, therefore, that the applicant ensures their claim is accurate and is supported by evidence.

It is advisable to seek independent legal advice if you are unsure whether or not to make a general protections application.

When you come to Fair Work Australia for a conference you will need to:

- identify the right you have exercised or attempted to exercise
- identify the relevant workplace instrument (such as an award or enterprise agreement) or workplace law that contains that right
- describe the adverse action taken and how it affected you.

You may have a lawyer or paid agent help you to prepare and/or lodge a copy of written documents, such as an application or submissions.

Time limit

General protections applications concerning dismissal must be made within 60 days of the dismissal taking effect.

There is no time limit for general protections applications to Fair Work Australia that do not relate to dismissals.

How do I apply?

If you wish to make a claim you need to complete Form F8.

Form F8 is available from the Fair Work Australia website and from all Fair Work Australia offices.
Application fee

There is an application fee of $64.20 to make a general protections application.

This fee can be waived if its payment would cause serious financial hardship.

Requirement for employer to respond

The employer named in the application form as the ‘respondent’ will receive from Fair Work Australia:

- a copy of the completed application form
- form F8A Employer’s response to application for Fair Work Australia to deal with a general protections dispute.

The employer must complete Form F8A and lodge it, together with any supporting documents, with Fair Work Australia and the applicant within seven days or as instructed by Fair Work Australia.

What is ‘service’?

At the end of Form F8A there is a section titled ‘Service requirements’. This requires that the completed F8A form be given by the employer to the applicant within seven days or any other time period specified by Fair Work Australia.

Rules 9 and 10 of the *Fair Work Australia Rules 2010* detail how applications may be served. For example, you can serve the applicant by sending the document by Express Post (retaining the sender’s copy of the identifying barcode), registered post to the address specified for the applicant in the application or by email to the email address for the applicant specified in the application.

The rules are available from the Fair Work Australia website and from all Fair Work Australia offices.

5. The conference process

General protections cases are usually dealt with in private before Fair Work Australia, with a Fair Work Australia member assisting those involved to reach a resolution by agreement if possible.

This process involves alternative dispute resolution, using techniques such as conciliation or mediation. The Fair Work Australia member may make a recommendation or express an opinion, but cannot make a binding decision or order.

If attempts to reach a resolution are not successful, the applicant can only progress the matter through making a separate application to the Federal Court of Australia or the Federal Magistrates Court.

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

*If the general protections matter involves a dismissal:*

Fair Work Australia will convene a private conference and those involved must attend.

If attempts to resolve the dispute are unsuccessful, Fair Work Australia must issue a certificate.

This certificate states that Fair Work Australia has been unable to settle the case and is proof that the matter has been to a conference.
The applicant can then make an application to the Federal Court or Federal Magistrates Court to deal with the matter. This must occur within 14 days of the certificate being issued.

*If the general protections matter involves action other than dismissal:*

If you are still employed, but allege there has been a contravention of the general protections provisions, you may make an application to Fair Work Australia to deal with the dispute.

You may also make an application if you are a prospective employee and you believe you were discriminated against prior to accepting or commencing employment.

If the parties agree to participate, Fair Work Australia will convene a private conference to deal with the dispute.

If the parties do not agree to participate in a Fair Work Australia conference, or if the dispute remains unresolved after the conference, the applicant can make an application to the Federal Court of Australia or the Federal Magistrates Court to deal with the matter.

An applicant in a general protections matter involving action other than dismissal does not have to make an application to Fair Work Australia before making an application to the Federal Court of Australia or the Federal Magistrates Court.

**Preparing for a conference**

Fair Work Australia conferences in general protections matters are usually private and held face-to-face.

You are advised to bring all relevant documents to the conference. These may include copies of pay slips, any correspondence (including emails, letters and text messages), and extracts of the relevant workplace law, award or enterprise agreement.

You may have a lawyer or paid agent help you to prepare and/or lodge a copy of written submissions.

**Do I have to be represented by someone?**

There is no requirement for you to have another person appear for you in proceedings at Fair Work Australia. You will need the permission of the Fair Work Australia member dealing with your case if you wish to be represented by a lawyer or paid agent, unless that person is:

- one of your employees or officers (if you are an employer)
- employed by a union or employer organisation, a peak union or peak employer body.

If you decide to represent yourself in proceedings it will be easier for you if you are well prepared. You may consider bringing one or more individuals with you for support. However, in a private conference you should be prepared to tell the member dealing with your case why you would like the presence of such individuals.

**What if I need an interpreter?**

There is no cost to you if you require an interpreter at a Fair Work Australia conference, but you must make a request for Fair Work Australia to provide an interpreter, either when lodging your application or before the day of the conference.

**Finding your way to a conference**

If you are required to attend a conference at Fair Work Australia you will be notified of the date, time and location by mail. This is known as a notice of listing.
On the day of the conference, however, you should check the hearings and conferences list for further information.

The list is published in capital city newspapers and on the Fair Work Australia website (on the Hearings & conferences page) each day. Printed copies can be found at Fair Work Australia public counters, near the courtrooms or, in some premises, on the building’s ground floor. If your conference is in a regional courthouse you may have to ask for information at the inquiry counter.

The list identifies all of the cases for a particular day, together with the Fair Work Australia members dealing with them, the times of the hearings and conferences and the location (the floor and the room number).

**At the conference**

When you are addressing a Fair Work Australia member refer to them by their title, e.g. Deputy President or Commissioner. Fair Work Australia staff at the hearing or conference can advise you of the appropriate form of address.

Make sure you arrive for the conference early—proceedings begin on time. Notify Fair Work Australia staff when you arrive by approaching them in the hearing or conference room. If you are delayed for any reason it is important that you contact Fair Work Australia as early as possible to ensure a message is sent to the appropriate staff.

If you have a mobile phone or pager, make sure it is switched off in the conference or hearing room.

**Privacy**

In general, private conferences are confidential. Details will usually only be disclosed to the parties directly involved or their representatives.

**Remedies**

The best result that can be achieved through Fair Work Australia is a settlement of the general protections application by the parties. Fair Work Australia cannot make a decision or order in relation to a general protections application.

**6. The role of the courts**

The power to enforce the general protections provisions of the Fair Work Act is held by the Federal Court of Australia or the Federal Magistrates Court. In the event that a person is found to have breached the general protections provisions of the Fair Work Act, the Court can issue a fine and/or order reinstatement and/or compensation.

**7. Further information**

Fair Work Australia staff can provide you with information over the telephone or at one of our offices. While staff cannot provide legal advice or advice on how best to run a case, they can give information on:

- Fair Work Australia processes
- how to make an application to Fair Work Australia, and how to respond to an application that is made against you
- how to fill out forms
- where to find useful documents such as legislation and decisions
- other organisations which may be able to assist you.
You can contact Fair Work Australia:

**By email:** Send an email to inquiries@fwa.gov.au.

**By telephone:** Call 1300 799 675.


If you need help to communicate with us, you can use the Translating and Interpreter Service on telephone number 131 450. If you have a hearing, sight or speech impairment, you can use the Speech to Speech Relay through the National Relay Service on 133 677.

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This guide is not intended to be comprehensive, but is designed to assist in gaining an understanding of Fair Work Australia and its work. Fair Work Australia does not provide legal advice.