



Delegates' Guide to the Fair Work Act

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GLOSSARY

Adverse Action Action which is in breach of the General Protections Provisions of the FW Act and is considered to be unfavourable to a worker

Consultation Clause A clause in an EA stating that an employer is required to consult with employees and their representatives about major workplace changes

Dispute Settlement Clause A clause in an EA that provides a process by which disputes at workplaces can be resolved

EA Enterprise Agreement

FW Act Fair Work Act

FWC Fair Work Commission

FWO Fair Work Ombudsman

Good Faith Bargaining A process which requires employers, employees and unions to use their best efforts to agree to and implement an effective bargaining process

NES National Employment Standards

Small Business Fair Dismissal Code A code for small businesses to follow when dismissing an employee in order to make the dismissal fair

INTRODUCTION

This booklet is a quick reference for workplace delegates (sometimes called workplace representatives or shop stewards) about the FW Act. It includes information about the workplace rights of union members and fellow workers, and about your rights as a delegate. Use it in conjunction with your award or EA, and any written handbook or guide for delegates that may be available from your union.

It is crucial that delegates understand the FW Act and how to use it to strengthen union organisation in the workplace.

Good delegates are essential to ensuring that all workers have enforceable rights at work.

Read this booklet and keep it with you at work.



THE ROLE OF A DELEGATE

Delegates hold important positions in their union. Delegates are critical to the improvement of pay and conditions.

Every union will have its own definition of the role and responsibilities of a delegate. However, all Australian unions, through the ACTU, have agreed on some general principles.

The following is from the ACTU Charter of Delegates' Rights.

Union delegates shall have:

- i. the right to be treated fairly and to perform their role as union delegate without any discrimination in their employment;
- ii. the right to formal recognition by the employer that endorsed union delegates speak on behalf of union members in the workplace;
- iii. the right to bargain collectively on behalf of those they represent;
- iv. the right to consultation, and access to reasonable information about the workplace and the business;
- v. the right to paid time to represent the interests of members to the employer and industrial tribunals;
- vi. the right to reasonable paid time during normal working hours to consult with union members;
- vii. the right to reasonable paid time off to participate in the operation of the union;
- viii. the right to reasonable paid time off to attend accredited union education;
- ix. the right to address new employees about the benefits of union membership at the time that they enter employment;

- x. the right to reasonable access to telephone, facsimile, photocopying, internet and e-mail facilities for the purpose of carrying out work as a delegate and consulting with workplace colleagues and the union;
- xi. the right to place union information on a notice board in a prominent location in the workplace; and
- xii. the right to take reasonable leave to work with the union.

These rights are basic and fair. Union delegates are entitled to know their role is recognised and respected.



DELEGATES' CHECKLIST

Things to remember:

- It's important to know the facts about the law and where to find further information, but there's no substitute for power and organisation on the job.
- Take another union member to any meeting you have with management. Never attend a meeting with management alone.
- Keep a diary and always write things down. This can be used as a legal document.
- Have a copy of your EA or award with you at all times.
- Manage people's expectations. Don't promise anything you can't deliver.
- Carry membership forms and pens at all times.
- Know your organiser's and your union's contact details.
- Attend union training regularly.
- Remember you represent the members.



WHAT IS THE FAIR WORK COMMISSION?

The FWC is a one stop industrial relations shop.

What does the FWC do?

- Sets and adjusts award wages and makes minimum wage orders.
- Regularly reviews and varies awards.
- Makes bargaining orders (scope orders, majority support determinations and good faith bargaining orders).
- Supervises protected action ballots and the taking of industrial action.
- Approves EAs.
- Conciliates and, in some cases, arbitrates (settles) disputes.
- Deals with disputes about right of entry.
- Determines whether an award or EA applies in a transfer of business.
- Determines unfair dismissal claims.
- Assists with general protections and adverse action claims.



WHAT IS THE FAIR WORK ACT?

The FW Act is the legislation which governs employment and industrial relations in Australia.

- Australian Workplace Agreements (AWAs) are gone.
- The fundamental right to bargain collectively is protected.
- Union delegates have real protection.
- Workers cannot be dismissed unfairly.
- Workers have rights to make complaints regarding their employment.
- Workers are protected from being discriminated against at work.



WHAT ARE THE NES?

Workers now have a new safety net consisting of the ten NES and modern awards. The NES are the minimum standards which apply to all employees in Australia. The terms of an EA or modern award cannot undercut the NES. The NES can't be traded off.

The NES are:

- 38 hour week (full time) plus reasonable additional hours. Employees have the right to refuse unreasonable overtime.
- 12 months' unpaid parental leave with a right to request an additional 12 months' leave.
- The right to request flexible working hours.
- 4 weeks' annual leave plus 1 extra week for some shift workers.
- 10 days' personal/carer's leave and 2 days' compassionate leave.
- Employees to receive a Fair Work Information Statement setting out their rights (including their right to join a union) when starting employment.
- Unpaid community service leave – for things such as emergency service duties and jury service.
- All national and state public holidays.
- Long service leave.
- Notice of termination and redundancy pay.

BARGAINING

All workers have the right to be represented in bargaining. Employers must recognise and bargain in good faith with the workers' bargaining representatives.

The union is the default bargaining representative for union members. Delegates can take part in bargaining.

Within 14 days of agreeing to bargain, the employer is obliged to send a written notice to all employees informing them of their right to representation. This is called a Notice of Representational Rights.

What happens if a group of workers want an EA?

If a majority of workers in a workplace want an EA, and the employer refuses to bargain, an application for a Majority Support Determination can be made to the FWC.

Bargaining representatives involved in bargaining for an EA have to:

- recognise and bargain with the other bargaining representatives;
- attend and take part in meetings at reasonable times;
- provide relevant information in good time (unless it's confidential or commercially sensitive);
- respond in good time to proposals from other bargaining representatives;
- genuinely consider these proposals and give reasons for the responses; and
- not behave in a way that undermines freedom of association or collective bargaining.

This doesn't mean that they have to:

- make concessions during bargaining; or
- agree on the terms to be included in the EA.

If parties don't bargain in good faith, parties can apply to the FWC to intervene.

BARGAINING - KEY POINTS

As a delegate remember:

- You are vital to ensuring power at work. Your union and your colleagues appreciate your hard work and dedication.
- All workers have the right to be represented in bargaining.
- If you or other workers receive a Notice of Representational Rights from your boss, make sure you inform your organiser or your union office straight away.
- When your boss sends out Notices of Representational Rights it's a good time to talk to non-members about joining the union. It's their chance to have a say and be represented by the union in bargaining.
- Employees have the right to see and consider an EA 7 days prior to voting on it.
- Employees must have the terms of the EA explained to them.

EAS: A FEW FACTS

What is an EA?

An EA is an agreement made between employers and employees about terms and conditions of employment.

What can be in an EA?

- Wages and wage increases.
- Conditions such as:
 - penalty rates;
 - allowances;
 - classifications;
 - leave and leave loading;
 - working hours;
 - shift arrangements.
- Union rights such as:
 - union training leave and paid time off to participate in union activities;
 - union notice boards.
- Secure Jobs rights such as:
 - ensuring contractors cannot be exploited and used to undercut regular employees' wages and conditions;
 - casual conversion clauses.
- Family Friendly rights such as:
 - work/life balance clauses.
- Superannuation protections such as:
 - default funds;
 - higher levels of superannuation.

EAS: WHAT HAS TO BE INCLUDED?

In addition, all EAs must have:

- **A consultation clause** - an employer is required to consult with employees and their representatives about major workplace changes as well as changes to rosters and hours of work. For example, if an employer proposes to get rid of the night shift, they would be obliged to consult with employees and their representatives about this. For union members, the union is their representative.
- **A flexibility clause** - which allows changes to some working conditions in order to meet the genuine needs of the employer and an individual employee. Individual flexibility arrangements must be in writing and can be terminated by either party giving four weeks' notice.
- **A nominal expiry date** - 4 years or less.
- **A dispute settlement procedure** - which allows for employee representation. For example, if a group of workers are in dispute about their overtime not being paid, they can have their union negotiate on their behalf to resolve the dispute. This clause should ideally specify that disputes are referred to the FWC for mediation, conciliation and finally arbitration in the event the parties cannot settle them. The clause should cover all matters under the EA, the NES and other work-related matters.



TAKING ACTION

Employee industrial action includes not attending work, work bans, and performing work in a different manner to which it is normally carried out (in a way that limits, restricts or delays the work performed). Employer industrial action includes locking workers out. For industrial action to be protected under the FW Act, a protected action ballot must be conducted (usually by the Australian Electoral Commission) and can only be taken after the current EA expires and after the FWC makes an order authorising the ballot.

Before action can be taken, 50% of union members must vote in the ballot and more than 50% of those who voted must vote in favour of the action. The action must be taken within 30 days of the ballot results being declared. Three working days' notice must be given to the boss before taking action. In some cases the FWC might increase this notice period.

It is important that delegates encourage colleagues to vote in the ballot. A big "yes" vote demonstrates power at work and can often get the boss to agree to more employee claims. In some cases the message a big "yes" vote delivers to the boss will mean that industrial action is not needed.

UNFAIR DISMISSAL

What's unfair?

A worker has been unfairly dismissed if the FWC finds that:

- they were dismissed; and
- the dismissal was harsh, unjust or unreasonable; and
- the dismissal was not a case of genuine redundancy.

Employees cannot claim unfair dismissal if the employer is a small business employer (employs fewer than 15 full time equivalent employees) and they follow the Small Business Fair Dismissal Code.

What happens when someone is sacked?

All employees are protected from unfair dismissal, provided they have served a qualifying period (12 months for small business and 6 months for everyone else). A qualifying period is essentially a probationary period. Unlike WorkChoices, employees can still make an unfair dismissal claim if the employer says they were sacked for "operational reasons".

What to do?

If you or a member believe you have been unfairly dismissed you should contact your union. An application must be made to the FWC within 21 days of the dismissal.

What happens next?

The FWC will notify your employer of your application.

A telephone conciliation conference will be arranged to assist both sides to attempt to resolve the matter by agreement. If a resolution can't be reached, a hearing will usually be held.

If the FWC finds the dismissal was unfair your employer can be ordered to either:

- reinstate you (give you back your job); or
- compensate you for up to 26 weeks' pay.

These are the maximum orders available. Most cases settle for amounts well below the cap of 26 weeks' pay.

This is what happened to a real worker*

Billy, a carpenter had been working at Atlas Carpentry for 7 months. Atlas employed 25 tradespeople and 15 administration staff. Without any explanation, Billy's manager told him Atlas no longer required him to work and dismissed him. Billy had an excellent work history.

Billy contacted his union who told him that this was not allowed under the FW Act. Fortunately for Billy, large employers cannot unfairly dismiss anyone who has completed a 6 month minimum period of employment.

Billy fought the dismissal and was eventually reinstated. The FWC found that Billy's termination was harsh, unjust and unreasonable.

**This is a case study. All decisions of the FWC will be based on the individual circumstances and merits of the case.*

GENERAL PROTECTIONS - PROTECTING YOUR RIGHTS

The general protections provisions of the FW Act protect workplace rights, freedom of association and provide protection from discrimination. These protections apply to all workers, including delegates and contractors.

Remember, as a delegate you may also have additional rights specified in your EA. Employers can't take adverse action against a worker because they have or use their rights at work. For example, an employer can't fire an employee because they make a complaint that they're not getting their minimum entitlements, or because they have engaged in lawful industrial activities.

What is a Workplace Right?

- an entitlement to the benefit of, or a role or responsibility under, a workplace law, award or EA;
- the ability to initiate or participate in proceedings under a workplace law, award or EA;
- the ability to make a complaint or inquiry about your employment.

What is Adverse Action?

- firing an employee;
- not giving an employee legal entitlements such as pay or leave;
- changing an employee's job to their disadvantage;
- treating an employee differently than others;
- not hiring someone; or
- offering a potential employee different (and unfair) terms and conditions for the job, compared to other employees.

What is Discrimination?

An employer must not take adverse action against a worker (or prospective worker) 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. These are "protected attributes".

Direct discrimination occurs when someone is treated unfavourably because of a protected attribute.

Indirect discrimination occurs where a person imposes, or proposes to impose, a requirement, condition or practice that has, or is likely to have, the effect of disadvantaging people with a protected attribute, and that is not reasonable.

In addition, an employer must not dismiss a worker because he or she is temporarily absent from work because of illness or injury. The general position is that up to 3 months' absence is temporary. An employee also needs to comply with notice and evidence requirements.

What to do?

If you or a member believe your general protections have been breached and you have suffered adverse action you should contact your union. An application must be made to the FWC within 21 days if there has been termination of employment.

What happens next?

The FWC will notify your employer of your application.

A conciliation conference will be arranged to assist both sides to attempt to resolve the matter by agreement. If the complaint involves the termination of employment your boss has to attend the conference. If there was no termination of employment your boss can decide whether or not to attend.

RIGHT OF ENTRY

If you can't solve issues at your workplace you can have your union organiser attend.

To enter a workplace, union officials must hold a right of entry permit. They must give at least 24 hours', but not more than 14 days' written notice before a visit.

An organiser can enter premises during working hours for three purposes:

- Investigating breaches of the FW Act/award/EA;
- To hold discussions with members and potential members;
- To exercise right of entry under State or Territory OH&S Law.

Employers must not hinder a union official exercising right of entry.



KEY THINGS TO REMEMBER

- The NES can't be traded off. They are the absolute minimum safety net. Awards and EAs can only provide better standards.
- Employers must recognise and bargain with workers' representatives, such as their union.
- If a majority of workers in a workplace can demonstrate to the FWC that they want an EA, their employer must bargain with them.
- If you, or a member, believe you've been unfairly dismissed, dismissed because you exercised your workplace rights or because you were discriminated against, talk to your union office and lodge a claim with the FWC within 21 days.
- Workers have the right to make a complaint about their working conditions and not be discriminated against.
- All workers have the right to participate in lawful industrial activities.
- Every worker has the right to join a union.

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