



GENERAL PROTECTIONS BEST PRACTICE GUIDE

Australia



The *Fair Work Act 2009* (Cth) (FW Act) contains a broad set of general protections against discriminatory, unfair or unlawful conduct. The general protections prohibit coercion, misrepresentation, unlawful termination, discrimination and more, creating civil remedy provisions that can be enforced in court.

OVERVIEW

The general protections protect “workplace rights” as defined broadly in the FW Act. The general protections prohibit “adverse action” being taken against a person when that person decides to, or not to, exercise a “workplace right” or engage, or not engage, in “industrial activities”. An employee is also protected from adverse action because of their race, colour, sex, age and other grounds.

In essence, the provisions protect employees, employers and independent contractors against unfair, unlawful and discriminatory treatment in the workplace. The FW Act also contains very broad options to remedy conduct that breaches the general protections that provide immediate access to the court system, particularly for some discrimination claims.

KEY POINTS

Broad nature of protections has the potential to apply to many workplace decisions and activities.

Employees are also protected from discrimination in the workplace with immediate access to the courts and interim injunctions for some claims.

Unions will not hesitate to litigate before the courts any breaches of the general protections.

CASE STUDY NO 1 - ADVERSE ACTION BY AN EMPLOYER

Zoe has not been receiving pay slips from her employer and raises this issue with the Fair Work Ombudsman. Soon after, her hours are reduced. Zoe believes that her hours have been reduced because of her complaint to the Fair Work Ombudsman.

One of the options available to Zoe, her union (if she is a member) or a Fair Work Inspector to remedy the breach is to seek an interim injunction from a court. If satisfied that Zoe's hours were cut because of the complaint, the court could issue an interim injunction requiring the employer to resume normal working hours until the matter is finally determined. When the application is finally determined, the employer could also be fined and ordered to pay compensation to Zoe.

WHAT IS "ADVERSE ACTION"?

The general protections prohibit an employer from taking adverse action against an employee because the employee has a workplace right, or because of an employee's decision on whether or not they will exercise a workplace right. Adverse action to prevent the exercise of a workplace right is also prohibited.

Adverse action is taken by an employer against an employee if the employer undertakes any of the following:

- Dismisses the employee
- Injures the employee in their employment (eg by reducing the employee's hours or number of shifts per week or taking unwarranted disciplinary action)
- Alters the position of the employee to the employee's prejudice (eg by suspending or demoting the employee)
- Discriminates between the employee and other employees.

The protection is also enlivened if the employer threatens to take or organises adverse action.

CASE STUDY NO 2 - ADVERSE ACTION BY A UNION

Paul is a self-employed electrician and has been engaged by a hospital to perform maintenance work. On his first day on the job, Paul is approached by a union delegate and asked if he is a member of the union. Paul is not a member. Any conduct by the union to have Paul removed from the site is adverse action and prohibited. A decision by the hospital to end Paul's engagement under pressure from the union is also adverse action by the hospital and is prohibited.

WHAT ARE "WORKPLACE RIGHTS"?

Entitlement, roles or responsibilities

An employee has a workplace right if they have an entitlement, role or responsibility under a workplace law, workplace instrument (ie a collective agreement or award) or order of an industrial body (ie Fair Work Australia or a court).

Employee entitlements under a workplace law or workplace instrument include:

- Usual entitlements to annual leave, personal/carer's leave, redundancy payments and wages
- The right to be absent from work during parental leave
- The entitlement to benefits set out in a collective agreement
- An employee's right to be represented by a bargaining representative of their choice during negotiations for a new agreement.

An employee's role or responsibility under a workplace law or workplace instrument can arise in many situations, such as an employee's role:

- In a grievance procedure set out in a collective agreement to provide support to an employee pursuing a grievance
- Under a workplace law, which is defined broadly to include the FW Act and any state-based legislation regulating employment relationships (which would include all occupational, health and safety legislation).

It is important to be aware that workplace rights are also extended to prospective employees.

CASE STUDY NO 3 - PROTECTION OF AN EMPLOYEE'S ROLE OR RESPONSIBILITY

Michael is nominated as a Health and Safety Representative (HSR) in the workplace under a state OH&S law. Following this appointment, Michael does not receive a wage increase at his next performance review. He believes the decision is because of his appointment as a HSR.

Michael can pursue a claim in court alleging that his employer has taken adverse action against him (the failure to provide a pay increase) because of his role as a HSR. If the court is not satisfied with the employer's explanation, it could order the employer to compensate Michael for the lost earnings. The court may also decide to impose a penalty on the employer for breaching the general protections.

Ability to be involved in a process or proceeding

An employee has a workplace right if the employee has the ability to initiate or be involved in a process or proceeding under workplace laws or workplace instruments.

Protecting an employee's ability to initiate or be involved in a process or proceeding would cover activities such as an employee's:

- Agreement to cash out paid annual leave or paid personal/carer's leave
- Right to meet with a union official who has satisfied the requirements to enter the employer's premises to hold discussions
- Decision to participate in protected industrial action.

Ability to inquire or complain

An employee has a workplace right if they have the ability to make an inquiry or complaint about their employment generally or to a person or body that has the capacity under a workplace law to seek compliance with that law or with a workplace instrument.

WHAT ARE "INDUSTRIAL ACTIVITIES"?

An employee is also protected from adverse action because of their decision:

- To be, or not to be, a member or officer of a union
- To, or not to, engage in industrial activities.

CASE STUDY NO 4 - PROTECTION OF AN EMPLOYEE'S ABILITY TO MAKE AN INQUIRY OR COMPLAINT

Sasha is protected if she raises concerns with her employer about the safety of a ladder required to be used in her job as a store person.

Karl is protected if he makes a complaint to his union when he has not been paid overtime and shift penalties, and his employer ignores his request for an explanation.

Colin is protected if he makes a complaint to the Fair Work Ombudsman that he is not being paid the correct award rate.

Examples of an employee engaging in industrial activities include:

- Carrying out duties as a union delegate in the workplace
- Participating in lawful activities or discussions organised by a union
- Representing or advancing the views, claims or interests of a union
- Seeking to be represented by a union
- Taking part in protected industrial action.

Protection is also extended to prohibiting a person from:

- Organising or taking, or threatening to do so, any action against another person with the intent to coerce the other person, or a third person, to engage in industrial activity
- Knowingly or recklessly making a false or misleading representation about another person's obligation to either engage in industrial activity or to disclose whether or not the person, or a third party, is or was a member or officer of a union or is engaging or was engaged in industrial activity (noting a person will not breach this prohibition if the person to whom the representation is made could not be expected to rely on it).

DISCRIMINATION

An employer must not take adverse action against an employee or prospective employee because of the employee'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. The protection also covers prospective employees.

CASE STUDY NO 5 - ENGAGING IN INDUSTRIAL ACTIVITIES

Trevor is the union delegate at his workplace and, at the request of Shane (another employee and union member), provides support to Shane who is pursuing a grievance under the procedure set out in the collective agreement.

The number of shifts Trevor is rostered to work is reduced, which Trevor thinks is a result of the support he is providing to Shane in his role as the union delegate.

Trevor's union seeks an interim injunction in the Federal Court, alleging that the employer has taken adverse action against Trevor because of his role in supporting Shane. If the court is satisfied that the reason for the reduction in shifts is Trevor's engagement in industrial activities, it may issue the injunction. At a later stage in the proceeding, the employer may be ordered to pay a penalty or compensate Trevor for any loss suffered.

Specific exceptions to the prohibition are provided. Adverse action will not be taken if the employer's action is:

- Authorised by or under a state or territory anti-discrimination law (eg taken to protect the health and safety of people at the workplace)
- Taken because of the inherent requirements of the position
- Taken in good faith to avoid injury to the religious susceptibilities of adherents of a particular religion or creed.

The discrimination provisions in the general protections overlap with other Commonwealth, state and territory anti-discrimination laws.

ARE EMPLOYERS PROTECTED FROM ADVERSE ACTION?

An employer is protected against adverse action by an employee or employees if the employee or employees cease work or take industrial action against an employer because of the employer's workplace rights.

For example, an employer is protected if employees take unprotected industrial action if the employer refuses to negotiate with a union or refuses entry to a union official who has not complied with the requirements in the FW Act to enter the employer's premises to hold discussions with employees.

CASE STUDY NO 6 - MISREPRESENTATION RELATING TO INDUSTRIAL ACTIVITIES

Linda's employer tells her soon after she has started work that in order to remain employed, she must become a union member. This is false and breaches the general protections. Because the representation is made by her employer, Linda could be expected to rely on it.

An employer is also protected from discrimination. For example, a person must not discriminate against an employer because its employees are or are not covered by a particular type of workplace agreement or the agreement does not cover a particular union.

OTHER PROTECTIONS

The general protections also prohibit other conduct by an employer.

Coercion

An employer must not organise or take, or threaten to do so, any action with the intent of coercing an employee or another person to:

- Exercise, or not, a workplace right (noting that the prohibition does not apply to protected industrial action)
- Employ or engage, or not, a particular person as an employee or independent contractor
- Allocate or designate, or not, particular duties or responsibilities to a particular employee or independent contractor.

Coercion involves conduct that negates choice by unlawful, illegitimate or unconscionable means.

Undue influence or pressure

Exerting undue influence or pressure on an employee is also prohibited in prescribed situations.

For example, an employer must not exert undue influence or pressure on an employee to:

- Make or not make an agreement or arrangement under the National Employment Standards, or a term in a modern award or an enterprise agreement about their entitlements, such as cashing out their entitlement to annual leave
- Agree to an individual flexibility arrangement, a guarantee of annual earnings or to a deduction from wages.

Undue influence or pressure has a lower threshold than coercion and would cover conduct that is unjust, inappropriate or unsuitable.

Misrepresentation

An employer must not knowingly or recklessly make false or misleading representations about an employee’s workplace rights or how they are to be exercised. For example, an employer must not misrepresent whether or not an employee has an entitlement to leave. The prohibition does not apply if the employee to whom the representation was made would not be expected to rely on it.

Temporary absence - illness or injury

An employer must not dismiss an employee because they are temporarily absent from work through illness or injury.

Sham arrangements

There are also prohibitions on conduct relating to “sham” independent contracting arrangements.

COMPLIANCE AND REMEDIES

Two separate processes apply to dealing with contraventions of the general protections. The process to deal with a breach will depend on whether or not the breach has resulted in a dismissal of an employee. The chart below outlines the processes.

In general terms, if the breach of the general protections results in an employee’s dismissal, the application must first be dealt with by Fair Work Australia (FWA) in conference before the matter can be taken to court (unless the employee is seeking an interim injunction). However,

if the alleged breach does not result in a dismissal, the employee may apply to FWA to deal with the dispute, or may proceed immediately to court.

Q&A - COMPLIANCE AND REMEDIES

Who can bring a claim alleging breach of the general protections?

The affected employee, a union entitled to represent the affected employee or a Fair Work Inspector.

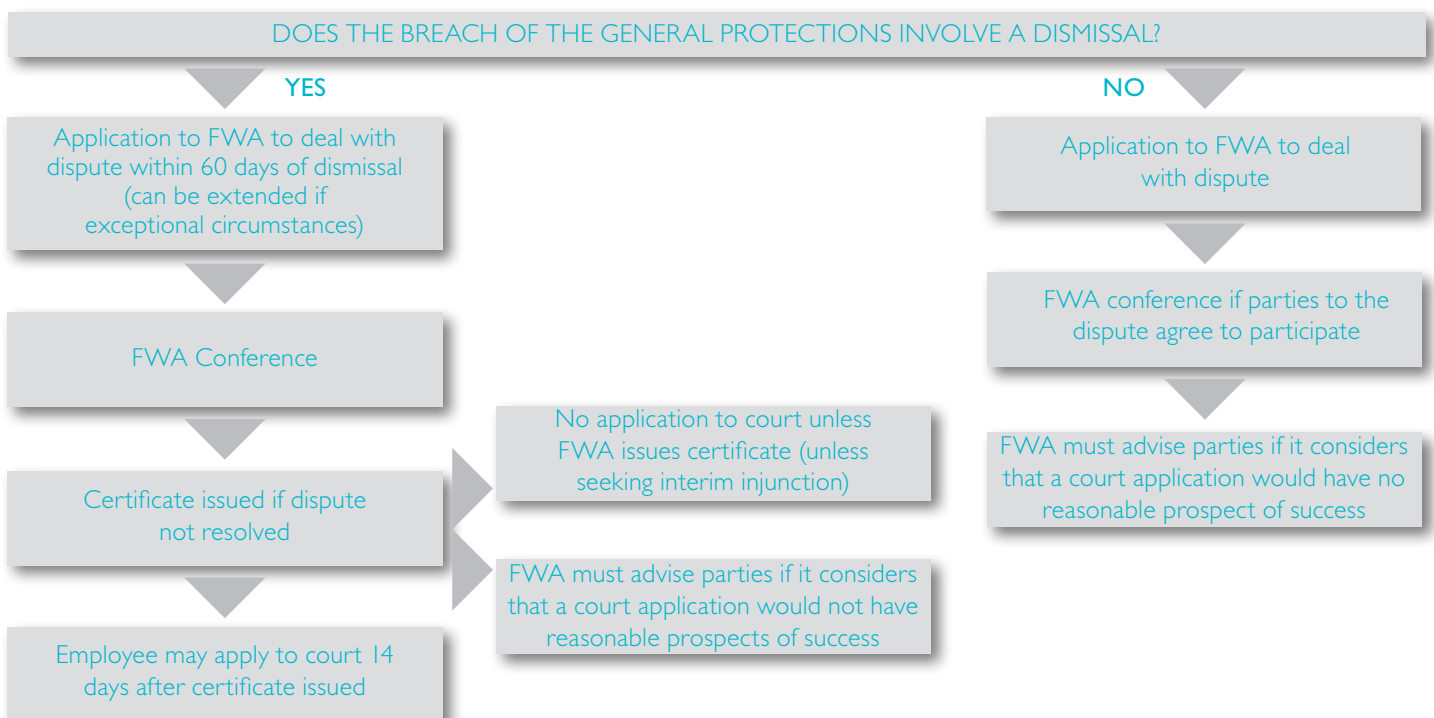
Which courts can deal with the claim?

The Federal Court or the Federal Magistrates Court.

What remedies are available?

A court may make any order it considers appropriate if it is satisfied the general protections have been breached. The orders a court may make include:

- An injunction, or interim injunction, to prevent, stop or remedy the effects of the breach
- Awarding compensation for the loss suffered because of the breach (noting that there is no cap on the amount of compensation that can be awarded)
- An order for reinstatement
- Imposing a maximum penalty for each breach of \$33,000 for an incorporated employer or \$6,600 for an unincorporated employer.



When could injunctions, including interim injunctions, be ordered?

Injunctions, including interim injunctions, could be used to delay or stop a performance management process if a court is satisfied that the process is not genuine and is motivated by reasons that contravene the general protections provisions.

An interim injunction could be used to prevent the pending termination of an employee's employment. The interim injunction could be granted if the employee can demonstrate that the pending decision breaches the general protections. The balance of convenience might favour the employee remaining in their employment as the court may be reluctant to allow the termination to take place in case the claim is successful at a later stage.

Who bears the onus of proving the allegations of breach?

A reverse onus of proof will apply in proceedings alleging breach of the general protections. What this means is that if an employee alleges that an employer's conduct was taken for a particular reason or intent in breach of the provisions, a court will presume that the conduct was taken for that reason or intent unless the employer satisfies the court, on the balance of probabilities, that the conduct was not taken for that reason or intent.

The reverse onus of proof will not apply if an employee is seeking an interim injunction.

Does the "sole or dominant" reason test still apply?

No. This test, which applied to some protections under the freedom of association provisions in the *Workplace Relations Act 1996* (Cth), does not apply to the general protections. In essence, an employer may be found to have taken action for a particular reason if the reasons for that action include that reason.

Determining the "real" reason

In *Board of Bendigo Regional Institute of TAFE v Barclay & Anor* [2012] HCA 32 the High Court held that the "reason" for taking the adverse action must be the "real" reason that motivated the decision-maker. The High Court rejected the notion that this "real" reason could be subconsciously held by the decision-maker. In other words, provided that it can be evidenced that no part of the "real" reason the decision-maker took action against the employee(s) is because of one of the proscribed reasons (eg the employee had exercised a workplace right), the employer will not be found to have taken adverse action.

Can a costs order be made?

In certain circumstances, yes.

In the ordinary course, a person must bear their own costs for a matter before a court or FWA.

However, a court may order a party to pay the other party's costs if satisfied that:

- A party instituted proceedings vexatiously or without reasonable cause
- The person's unreasonable act or omission caused the other person to incur the costs
- The party unreasonably refused to participate in a matter before FWA where the matter before the court arose from the same facts.

FWA may order a person to bear some or all of the costs of another person if satisfied that:

- The person made or responded to the application vexatiously, or without reasonable cause
- It should have been reasonably apparent to the person that their application or response had no reasonable prospects of success.

Additionally, if FWA has granted permission for a party to be represented in a conference by a lawyer or paid agent, FWA may make an order for costs against the lawyer or paid agent if satisfied that the lawyer or paid agent:

- Encouraged a person to make the application when it should have been reasonably apparent that the application had no reasonable prospects of success
- Caused the other party to incur costs by their unreasonable act or omission.

Are any groups or categories of employees excluded from the general protections?

No. The provisions apply to all employees, irrespective of the level of remuneration or employment status.

Can an employer or employee be represented by a lawyer or paid agent in a matter before FWA?

Yes. FWA may permit representation by a lawyer or paid agent, but only if such representation would enable the matter to be dealt with more efficiently (particularly if complex) or it would be unfair not to allow representation if the person is not capable of representing themselves.

Can an employee make a general protections claim at the same time they make an unfair dismissal or unlawful discrimination claim?

No. Specific provisions in the FWA prevent "double dipping".

In summary:

- If an employee has made an unfair dismissal claim, the employee cannot pursue another claim in relation to that dismissal unless the unfair dismissal claim has been withdrawn or failed for want of jurisdiction or failed because FWA was satisfied that the dismissal was a "genuine redundancy".

- If an employee has made a claim under Commonwealth, state or territory antidiscrimination legislation (eg to the Victorian Equal Opportunity & Human Rights Commission or VCAT), the employee can not pursue a general protections claim at the same time. The employee could make a claim under the general protections if the other application has been withdrawn or failed for want of jurisdiction.
 - If an application alleging breach of the general protections has been made to FWA or to a court, another claim can not be made for the same matter unless the general protections application has been withdrawn or failed for want of jurisdiction or FWA has issued a certificate if satisfied that all reasonable attempts to resolve a dispute have been unsuccessful.
 - If the alleged discriminatory conduct falls short of dismissal, then the person cannot bring a general protections application if they have already sought a remedy under another anti-discrimination law, unless the person has withdrawn that application or it has failed for want of jurisdiction.
 - A person cannot bring an application under another anti-discrimination law if they have already sought a remedy under general protections, unless the person has withdrawn the general protections application or it has failed for want of jurisdiction.
- When making recruitment decisions, ensure your processes take account of your obligations to prospective employees who now have protections for their workplace rights and protection from workplace discrimination.
 - Ensure your decision making processes take into account your organisation's obligations to employees and prospective employees.
 - Consider your reasons when affecting an employee or prospective employee's position and be able to explain your lawful reasons for your organisation's conduct.
 - When complaints or concerns are raised ensure your organisation treats them seriously and takes the appropriate action under your organisation's policies and procedures.

HOW CAN DLA PIPER ASSIST?

Our national team has many expert lawyers who can help you update your policies and procedures, conduct training to assist compliance and advise you when dealing with complaints.

We have extensive expertise dealing with freedom of association, coercion and discrimination claims and can also assist your organisation to respond to claims in Fair Work Australia, Federal Court or Federal Magistrates Court.

COMPLIANCE CHECKLIST

- Review your workplace behaviour policies and ensure that employees are informed of their rights and responsibilities. It is essential that you have in place a policy that explains to employees the equal opportunity laws and that your organisation appreciates how these laws have been expanded to include protection from workplace discrimination under the FW Act.
- Check your compliance training history and consider providing managers with updated education to ensure that your organisation complies with its obligations under the general protections to your employees and prospective employees.

For more information, please contact:

Andrew Ball, Partner
T +61 2 9286 8449
andrew.ball@dlapiper.com

Rick Catanzariti, Partner
T +61 3 9274 5810
rick.catanzariti@dlapiper.com

Allan Drake-Brockman, Partner
T +61 8 6467 6205
allan.drake-brockman@dlapiper.com

Murray Procter, Partner
T +61 7 3246 4062
murray.procter@dlapiper.com

Pattie Walsh, Partner
T +61 2 9286 8197
pattie.walsh@dlapiper.com

www.dlapiper.com

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