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# FACT SHEET

## General Protections

Under the *Fair Work Act 2009* (the 'Act'), national system employers and national system employees (as defined) have the ability to bring Adverse Action claims. The General Protections provisions under the Act stipulate a comprehensive range of protections for employees.

As employees, including prospective, existing and former employees have the ability to lodge general protections applications before the Fair Work Commission ('FWC') employers need to familiarise themselves with the General Protections concept and what can constitute Adverse Action.

It is also important for employers to understand that the General Protections provisions differ to the Unfair Dismissal ('UFD') provisions in the Act, and that the Minimum Employment Period exclusion as well as other UFD exclusions do not apply to a person's ability to lodge a General Protections application.

### GENERAL PROTECTIONS

Chapter 3 Part 3-1 of the Act details General Protections for employers and employees. These General Protections are designed to ensure fairness and representation at the workplace by recognising the right to freedom of association and preventing discrimination and other unfair treatment.

The objects of the Part are to:

- *"To protect a person's workplace rights;*
- *To protect a person's freedom of association by ensuring a person is:*
  - *free to be, or not be, a member of an industrial association;*
  - *free to be, or not be, represented by an industrial association; and*
  - *free to participate, or not participate in lawful industrial activities.*
- *To protect a person from workplace discrimination; and*
- *To provide a person with effective relief whether they have been discriminated against, victimised or otherwise adversely affected as a result of a contravention of Part 3-1".*

This includes:

- A right to freedom of association;
- Protection from workplace discrimination;
- Protection from sham contracting arrangements; and
- The ability to exercise, or to not exercise Workplace Rights.

As stated above, one of the objects of this Part of the Act is to provide relief for persons who have been adversely affected as a result of contraventions of this Part of the Act. The General Protections provisions provide a right to apply to the FWC if an employer or employee is subject to Adverse Action. More detail on this right is provided later in this Fact Sheet.

### ADVERSE ACTION

The following table, as reproduced from Section 342 of the Act, sets out circumstances where a person takes Adverse Action against another person. Adverse Action includes threatening to take action as well as organising such action as outlined in the table below:

	<b>Adverse Action is taken by ...</b>	<b>if ...</b>
1	an employer against an employee	the employer: (a) dismisses the employee; or (b) injures the employee in his or her employment; or (c) alters the position of the employee to the employee's prejudice; or (d) discriminates between the employee and other employees of the employer.
2	a prospective employer against a prospective employee	the prospective employer: (a) refuses to employ the prospective employee; or (b) discriminates against the prospective employee in the terms or conditions on which the prospective employer offers to employ the prospective employee.
3	a person (the principal) who has entered into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) terminates the contract; or (b) injures the independent contractor in relation to the terms and conditions of the contract; or (c) alters the position of the independent contractor to the independent contractor's prejudice; or (d) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (e) refuses to supply, or agree to supply, goods or services to the independent contractor.
4	a person (the principal) proposing to enter into a contract for services with an independent contractor against the independent contractor, or a person employed or engaged by the independent contractor	the principal: (a) refuses to engage the independent contractor; or (b) discriminates against the independent contractor in the terms or conditions on which the principal offers to engage the independent contractor; or (c) refuses to make use of, or agree to make use of, services offered by the independent contractor; or (d) refuses to supply, or agree to supply, goods or services to the independent contractor.
5	an employee against his or her employer	the employee: (a) ceases work in the service of the employer; or (b) takes industrial action against the employer.
6	an independent contractor against a person who has entered into a contract for services with the independent contractor	the independent contractor: (a) ceases work under the contract; or (b) takes industrial action against the person.
7	an industrial association, or an officer or member of an industrial association, against a person	the industrial association, or the officer or member of the industrial association: (a) organises or takes industrial action against the person; or (b) takes action that has the effect, directly or indirectly, of prejudicing the person in the person's employment or prospective employment; or (c) if the person is an independent contractor—takes action that has the effect, directly or indirectly, of prejudicing the independent contractor in relation to a contract for services; or  (d) if the person is a member of the association—imposes a penalty, forfeiture or disability of any kind on the member (other than in relation to money legally owed to the association by the member).

#### NOTE:

- *Industrial Action, as referred to at 5, 6 and 7 in the table is covered in Part 3-3 in the Act, which refers to protected industrial action.*
- *Please note that prospective employees are taken to have Workplace Rights (some exclusions apply).*

#### **WHAT ADVERSE ACTION IS NOT**

Adverse Action does not include action that is authorised by or under the Act or any other law of the Commonwealth or a law of a State or Territory prescribed by the regulations.

Adverse Action does not include an employer standing down an employee who is:

- Engaged in protected industrial action; and*
- Employed under a contract of employment that provides for the employer to stand down the employee in the circumstances.*

#### **WORKPLACE RIGHTS AND ADVERSE ACTION**

A person must not take Adverse Action against another person:

- Because the other person:*
  - Has a Workplace Right; or*
  - Has, or has not exercised a Workplace Right; or*
  - Proposes or does not propose to exercise a Workplace Right; or*
- To prevent the exercise of a Workplace Right by the other person.*

A person must not take Adverse Action against another person (the second person) because a third person has exercised or proposes to exercise a Workplace Right for the second person's benefit, or for the benefit of a class of persons to which the second person belongs.

In a practical sense, the right to protection from Adverse Action prevents one person discriminating against another because the second person has, or seeks to assert (or not assert) their Workplace Right.

Section 341 of the Act provides that a person has a Workplace Right if the person:

- Is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument or order made by an industrial body; or*
- Is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument; or*
- Is able to make a complaint or inquiry to a person or body who has the capacity under a workplace law to seek compliance with that law or workplace instrument, or to anyone regarding their own employment”.*

A Workplace Law is defined in section 12 of the Act as being:

1. *The Fair Work Act 2009; or*
2. *Schedule 1 to the (rescinded) workplace Relations Act 1996; or*
3. *The Independent contractor Act 2006; or*
4. *Any other Commonwealth, State or Territory law that regulates employer and employee relationships, including legislation that deals with workplace health and safety.*

As illustrated in the table on page 2, Workplace Rights also extend to prospective employees. This is because under the Act they are taken to have the Workplace Rights they would have had if they were employed in the prospective employment by the prospective employer, although two exceptions do apply.

They are where:

- A prospective employer makes an offer of employment conditional on the prospective employee accepting a guarantee of annual earnings; and*
- A prospective employer refuses to employ a prospective employee because the prospective employee would be entitled to the benefit of Part 2-8 of the Act which deals with transfer of business.*

## **REMEDIES**

### **GENERAL PROTECTIONS DISMISSAL APPLICATIONS**

If a person has been dismissed and they believe the dismissal was in breach of the General Protections provisions of the Act, they can apply to the FWC seeking the FWC deal with the dismissal.

The application to the FWC is called a *General Protections Application Involving Dismissal*, which must be lodged within 21 days of the dismissal taking effect. Upon receipt of the application the FWC must convene a private Conference to deal with the dismissal, and may deal with the dismissal by mediation or conciliation, or by making a recommendation or expressing an opinion, or by arbitration with consent of both parties.

If the FWC considers that such an application would not have a reasonable prospect of success it must advise the parties of this.

If the dismissal remains unresolved at the conclusion of the FWC Conference, the FWC must issue a certificate to that effect. The applicant can then make a General Protections court application to either the Federal Circuit Court or the Federal Court to deal with the matter. This must occur within 14 days of the certificate being issued.

### **GENERAL PROTECTIONS DISPUTE APPLICATION**

If a person has not been dismissed, but alleges that there has been some other breach of the General Protections provisions of the Act, they may make an application to the FWC to deal with the dispute. As listed in the table on page 2 in this Fact Sheet, this includes employees and prospective employees.

If the parties agree to participate, the FWC must convene a private Conference to deal with the dispute. The FWC may deal with the dispute by mediation or conciliation, or by making a recommendation or expressing an opinion. If the parties do not agree to participate the applicant can apply directly to either the Federal Circuit Court or the Federal Court as they do not need a certificate from the FWC. This differs to a General Protections court application in the case of a dismissal.

If the FWC considers that such an application would not have a reasonable prospect of success, it must advise the parties accordingly. If the dispute remains unresolved, the applicant can make an application to either the Federal Court or the Federal Magistrates Court to deal with the matter.

## **OTHER PROTECTIONS**

### **DISCRIMINATION**

The Act provides that an employer must not take Adverse Action against a person who is an employee, or prospective employee, of the employer because of the 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.

The above does not apply to action that is:

- not unlawful under any anti-discrimination law in force in the place where the action is taken; or
- taken because of the inherent requirements of the particular position concerned; or
- if the action is taken against a staff member of an institution conducted in accordance with the doctrines, tenets, beliefs or teachings of a particular religion or creed—taken:
  - in good faith; and
  - to avoid injury to the religious susceptibilities of adherents of that religion or creed

### **TEMPORARY ABSENCE DUE TO ILLNESS OR INJURY**

Section 352 of the Act provides that an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations.

However, an illness or injury is not considered to be a temporary absence for the purposes of Section 352 if either, the employee's absence extends for more than 3 months, or the total absences of the employee, within a 12 month period, have been more than 3 months (whether based on a single illness or injury or separate illnesses or injuries), AND the employee is not on paid personal/carer's leave for the duration of the absence.

### **OTHER GENERAL PROTECTIONS**

There are other General Protections including protection from coercion, undue influence or pressure or misrepresentation, each in respect of a person's Workplace Rights. In addition, there are also protections in respect of a person's participation or non-participation in industrial activity or coverage by an industrial instrument.

The action that is available where there is a breach of the other General Protections provisions is the same as the *General Protections Application Not Involving Dismissal* process, except where it involves a dismissal - then the applicant would apply for relief as provided for under the *General Protections Application Involving Dismissal* provisions.

### **ONUS OF PROOF**

The employer will have the onus of proving that the General Protection provisions, including Workplace Rights, was not part of any decision or action imposed upon the employee, or, in some cases the prospective employee.

### **LESSONS FOR EMPLOYERS**

In summary, the concept of a Workplace Right extends to prospective employees and provides protection against Adverse Action. Workplace Rights influence all aspects of engaging with employees and the scope of the Workplace Rights that employees have is significant for many employers.

In a practical sense, employers must ask themselves if and how any decision may impinge upon a Workplace Right, and the impact of the answer in light of the information provided in this Fact Sheet.

#### **Further Assistance**

Financial QHA members are encouraged to contact the QHA's Employment Relations Department (refer the contact details at the bottom of this page) for a confidential discussion about the information in this Fact Sheet, or to discuss any queries relating to specific workplace matters.

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