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Employment

Second Edition

Australia
Gilbert + Tobin

chambers.com

2019

Law and Practice

Contributed by Gilbert + Tobin

Contents

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1. Terms of Employment

1.1 Status of Employee

The expressions blue- and white-collar workers are used in Australia to describe workers who are trade qualified or perform manual labour and office-based workers or professionals, respectively. These expressions do not have any legal significance. A more useful distinction is that of: (i) employees whose employment is subject to a modern award or enterprise agreement and (ii) those employees who are not subject to either of these instruments.

Employees in certain industries and occupations are covered by modern awards. Modern awards are made by an industrial tribunal (known as the Fair Work Commission) and prescribe minimum terms and conditions of employment. Modern Awards do not apply to employees whose earnings exceed the high-income threshold (currently AUD148,700) and are subject to a guarantee of annual earnings.

An enterprise agreement is a collective labour agreement that is usually negotiated at an enterprise level and applies to one employer in respect of its employees. Like a modern award, enterprise agreements prescribe minimum terms and conditions of employment. Within Australia there are various types of employment arrangements which vary depending on the numbers of hours worked each week, the terms of engagement and the agreement between the parties. These include:

- Full-time employment – employees who work for 38 hours per week (plus reasonable additional hours) on an ongoing basis which can usually be terminable on notice by either party.
- Part-time employment – employees who work less than 38 hours per week (for example, 3 days a week on an ongoing basis) are usually terminable on notice by either party.
- Fixed or maximum term employment – employees who work for a temporary specified term (for example, 6 months) either on a full-time or a part-time basis. Termination of employment usually occurs at the end of the fixed or maximum term, but the parties may include provisions dealing with termination at any time on notice.
- Casual employment – employees who do not have regular or systematic hours of work and do not have an expectation of ongoing continuous work. These employees are viewed as being employed under a series of separate engagements.

1.2 Contractual Relationship

Ordinarily, the key terms of an employment contract will be set out in a written agreement between the parties. However, the terms may also be concluded by a verbal agreement or a combination of both. The key terms of employment will usually include the employee's position, title, location, employment status (ie, full-time, part-time, fixed term or casual), remuneration, incentive entitlements, obligations with respect of use and disclosure of confidential information, intellectual property rights, post-employment restraints of trade (if any, addressed in **2. Restrictive Covenants**), termination and redundancy.

Employment contracts may provide for ongoing employment or for a fixed or maximum term of employment (addressed above).

An employment contract cannot provide for less than the legal minimum requirements set out in the NES or collective instruments, such as modern awards or enterprise agreements.

The ten standards set out under the NES are:

- maximum weekly hours of work (38 plus reasonable additional hours);
- a right to request flexible work arrangements in certain circumstances;
- parental leave (up to 12 months unpaid leave and the right to request a further 12 months);
- annual leave (4 weeks per annum cumulative from year to year, or 5 weeks for some employees);
- personal/carer's leave (10 days paid plus 2 days of unpaid carer's leave), compassionate leave (2 days paid) and family and domestic violence leave (5 days unpaid);
- community service leave (unpaid leave for community service activities and jury duty (the first 10 days of jury duty is paid));
- long service leave (governed usually by State and Territory legislation);
- public holidays (a paid day off (unpaid for casuals), except where reasonably requested to work);
- notice of termination and redundancy pay (up to 5 weeks' notice of termination and up to 16 weeks redundancy pay, both based on length of service); and
- provision of a Fair Work Information Statement to employees (which provides information to employees on the minimum terms and conditions).

It is in the interest of all parties to have a written employment contract outlining the terms of the employment relationship so as to mitigate the risk of a dispute about the terms of employment.

1.3 Working Hours

The NES provides that the maximum hours per week are 38 hours for a full-time employee. The hours an employee works in a week are taken to include any hours of leave or absence (whether paid or unpaid) authorised by the employer under the terms of the employee's employment or by or under a law.

The NES provides that employers cannot require employees to work more than 38 hours unless the additional hours are reasonable. Under the NES, the following must be considered in determining whether additional hours are reasonable:

- any risk to employee health and safety;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for (or a level of remuneration that reflects an expectation of working additional hours;
- any notice given by the employer to work the additional hours);
- any notice given by the employee of his or her intention to refuse to work the additional hours;
- the usual patterns of work in the industry;
- the nature of the employee's role and the employee's level of responsibility;
- whether the additional hours are in accordance with averaging provisions included in an award or agreement that is applicable to the employee or an averaging arrangement agreed to by an employer and an award/agreement-free employee; and
- any other relevant matter.

The hours of work for employees not covered by a modern award or enterprise agreement may be averaged over a period of up to 26 weeks. Modern awards and enterprise agreements may provide that ordinary hours of work are averaged over a period greater than 26 weeks.

Not all employees are entitled to additional remuneration (known as overtime) or time off in lieu of overtime for working outside their ordinary hours or above their agreed number of hours. Employees are only entitled to overtime if it is a contractual entitlement (which is not common) or a modern award, enterprise agreement or other industrial instrument that provides for overtime.

1.4 Compensation

The Fair Work Commission (FWC) annually reviews and sets the minimum wage that must be received by employees in Australia. The FWC national minimum wage order comes into effect from the first pay period on or after July 1st each year.

For the 2019 financial year (1 July 2019 to 30 June 2020):

- the national minimum wage was set at AUD740.80 per week or AUD19.49 per hour based on a 38-hour week;
- minimum wage rates in modern awards were required to increase by 3%; and
- casual loading remains at 25% (which is compensation that casual employees are paid for not receiving certain entitlements, eg, leave that full-time and part-time employees receive).

1.5 Other Terms of Employment

Under the NES, permanent (ie full-time and part-time) employees are entitled to:

- four weeks paid annual leave per annum – this is also known as holiday pay. It accrues progressively during a year and is cumulative from year to year. Some shift workers are entitled to up to five weeks annual leave per annum;
- ten days paid personal/carer's leave and two days unpaid carer's leave – this allows employees to take time off when they are unwell or a family member who they are required to care for is unwell;
- two days paid compassionate leave – this is also known as bereavement leave and allows employees (including casual employees) to take leave when an immediate family member dies or contracts or develops a life-threatening illness or injury;
- five days unpaid family and domestic violence leave – this is available to allow employees (including casual employees) to deal with the impact of family and domestic violence;
- up to 12 months unpaid parental leave – this is available to employees (including casuals) who give birth or whose spouse or de facto partner gives birth or who adopts a child under 16 years of age. Casuals are eligible if they have been working on a regular and systematic basis for at least 12 months and there was a reasonable expectation of continuing work with the employer but for the birth or adoption of a child. Eligible employees can receive up to 18 weeks paid parental leave from the Australian government, which is paid at the national minimum wage level; and
- long service leave – this is paid leave provided to employees who have completed a specific period of continuous service with an employer (for example, employees in New South Wales are entitled to 8.67 weeks' long service leave after 10 years' service). Where the criteria for continuous periods service has been met, accrued and untaken, long service leave must be paid out to the employees on termination. Long service leave is governed by State and Territory legislation; therefore, long service leave may be available to casuals in some States and Territories.

2. Restrictive Covenants

2.1 Non-competition Clauses

Non-compete clauses and other restraints of trade are, as a general rule, contrary to public policy and void unless they are justified by special circumstances in a particular case.

Whether any of the restrictions are enforceable will depend on whether the employer is able to establish that it has a legitimate business interest to protect by way of a restraint and the restraint goes no further than is necessary to protect that legitimate business interest. Legitimate business interests in an employment context will either be the protection of confidential information or customer connections. An employer is not entitled to be protected against mere competition.

A basic requirement of any contract is that there is adequate consideration for the agreement reached. This principle also applies in restraint cases. However, there is no principle that employees must receive remuneration equivalent to the period of restraint for the restraint to be enforceable. Where an employee will suffer no financial loss in being restrained, this will be taken into account by the court and is persuasive.

In all states of Australia except New South Wales (NSW), unreasonable restraints will not be enforced. In NSW, the position is different because of the NSW Restraints of Trade Act (RTA). The RTA empowers the NSW Supreme Court to read down and effectively amend an unreasonable restraint in the context of an actual breach; for example, a court may find that an employee should be restrained for three months in NSW rather than six months throughout Australia. While there are numerous cases where the RTA has been used, the outcome of each case will turn on its particular facts.

2.2 Non-solicitation Clauses - Enforceability/ Standards

Australian courts have recognised that some customer relationships which an employee develops and/or maintains on behalf of their employer may be protected by a time limited post-employment restraint prohibiting the former employer from soliciting the employer's customers.

Not all customer relationships will justify the protection of a non-solicitation restraint. The courts will consider various factors, such as the nature of the employee's dealings with the employer (including their complexity and timeframe). A non-solicitation restraint is also more likely to be enforceable when the employee's dealings with the customer take place at the customer's premises.

In other words, the non-solicitation restraint is more likely to be enforced where the employee is seen by the customer as (according to one case) the "human face" of the business.

3. Data Privacy Law

3.1 General Overview

The Privacy Act 1988 (Cth) (Privacy Act) provides the governing framework for privacy in Australia and deals with the collection, use and disclosure of personal information.

The Privacy Act provides an exemption for employee records that are directly related to a current or former employment relationship in a private sector organisation.

For an employee record to be exempt from protection under the Privacy Act, three requirements must be satisfied:

- the private sector organisation must act in its capacity as a current or former employer of an individual;
- the act or practice must be directly related to a current or former employment relationship with the private sector organisation; and
- the act or practice must be directly related to an employee record (being a record of personal information relating to the employee) held by the employer organisation and relating to the individual.

This exemption does not extend to unsuccessful job applicants (since no employment relationship is formed) or contractors.

Workplace Surveillance Legislation

There is no uniform workplace surveillance legislation within Australia; only New South Wales (NSW) and the Australian Capital Territory (ACT) have specific workplace surveillance laws. Victoria has regulated workplace surveillance which is limited to certain circumstances as compared to the NSW and ACT legislation.

In NSW, the Workplace Surveillance Act 2005 (NSW) applies to optical surveillance, computer surveillance and tracking surveillance within the workplace. In the ACT, the Workplace Privacy Act 2011 (ACT) applies to optical devices, tracking devices and data surveillance devices, but not listening devices. Both acts require employers to provide notice to employees about workplace surveillance. Covert surveillance can generally only be conducted if the employer is so authorised by a court.

In Victoria, the legislation is narrower and the Surveillance Devices (Workplaces Privacy) Act 2006 (Vic) prohibits the use of listening or optical devices in toilets, washrooms, change rooms or lactation rooms at the workplace.

All other states and territories have general surveillance and privacy legislation which, while not specific to the workplace, would operate within the workplace to the same extent that it would apply more broadly.

Federal communication interception laws under the Telecommunications (Interception and Access) Act 1979 (Cth) apply in all Australian states and territories and prohibit the interception of a communication over a telecommunication system (including emails) without the knowledge of the person making the communication. Although not exclusive to workplaces, this also applies within the workplace.

Fair Work Act
The FW Act requires employers to make and keep for 7 years certain employee records in respect of basic employment details, pay, overtime hours, averaging arrangements, leave entitlements, superannuation contributions, termination of employment (where applicable), individual flexibility arrangements and guarantees of annual earnings.

4. Foreign Workers

4.1 Limitations on the Use of Foreign Workers

Employers and foreign workers (excluding New Zealand citizens) must meet strict requirements to be able to lawfully work full time in Australia. New Zealand citizens are able to work in Australia without a business sponsorship. Foreign employees seeking a short-term working period of up to three months can do so if supported by their employer and the activity is considered of value to the employer or an associated business in Australia.

Employers may sponsor foreign workers to obtain a visa to lawfully work in Australia for longer periods. With some exceptions, the worker must be on a list of skilled occupations. Relevant visas include Temporary Skill Shortage Visas (1 to 4 years duration with no geographical restrictions) and Regional Sponsored Migration Scheme Visas (at least 2 years' employment for work done in a regional area). In each instance, the worker must either have the skills to perform the occupation or undergo a skills assessment unless an exemption applies.

If the job is on the list of skilled occupations and the standard visa programmes are not available, it may be possible to enter into a labour agreement with the Australian government. Labour agreements are usually in effect for five years and provide for visas to be granted without the usual visa requirements being met. The visas available under a labour agreement are the Temporary Skill Shortage Visa and the Employer Nomination Scheme Visa.

The Employer Nomination Scheme Visa can be used for permanent residency sponsored by an Australian business either upon initial application or after three years working for the employer in Australia. A more limited skilled occupations list applies.

4.2 Registration Requirements

Registration may be required for some occupations, eg, doctors, nurses and lawyers. If registration is required, this will have to be obtained as part of the application process. Occupation skills assessments by a relevant nominated authority may be required for permanent residency applications.

5. Collective Relations

5.1 Status/Role of Unions

Trade unions, enterprise associations (an association of member employees performing work in the same enterprise) and employer associations are legally recognised entities which are required to be registered with the Registered Organisations Commission. This Commission and the FWC are responsible for the regulation of these unions and associations.

In addition to the unions' key roles of acting as the bargaining representatives for employees in relation to enterprise agreements, as set out below, trade unions and enterprise associations have broad rights to enter workplaces to:

- engage in discussion with workers who are entitled to be represented by that union and who are willing to meet with them; or
- investigate suspected breaches of modern awards, enterprise agreements or other workplace related laws (such as work, health and safety laws).

Unions commonly act as advocates for employees in disputes with their employer and often initiate proceedings on behalf of employees with respect to certain workplace related laws.

5.2 Employee Representative Bodies

There is no broad legislative framework for employee representative bodies or committees in Australia. There are, however, State and Territory laws relating to work health and safety which provide for the structure, rights and processes of health and safety committees and health and safety employee representatives. The main functions of such committees are to co-operate with the employer and other relevant parties in developing and carrying out measures to improve the safety of workers.

Enterprise agreements (addressed below) may also provide a framework for the structure and rights of employee representative committees, which are generally limited to matters of work health and safety.

5.3 Collective Bargaining Agreements

Employers and employees may negotiate collective agreements, referred to as 'enterprise bargaining agreements', based on terms and conditions that must be better overall when compared to the minimums under applicable modern awards. Modern awards set the minimum terms and conditions across the whole of industries and occupations in Australia. The mandatory terms that must be included in enterprise agreements relate to consultation, flexibility agreements and dispute resolution.

For genuinely new businesses, activities, projects or undertakings, employers and unions can bargain directly for a

'greenfields agreement', without employees being involved or employed by the new enterprise.

When bargaining for such an agreement, the employer and employees may nominate a bargaining representative. Unions are the default representative for its member employees unless revoked or another appointment is made by the employee. Bargaining must be in accordance with the prescribed good faith bargaining requirements.

Employees are able to take protected industrial action by striking or imposing partial work or overtime bans. However, protected industrial action may only be taken by employees when they are negotiating a new enterprise agreement subject to certain notice and procedural requirements being satisfied. Employers may take responsive protected industrial action by locking out employees.

Once an enterprise agreement is made by the employer and employees, it must be approved by the FWC. It will then operate for its nominated term for a maximum period of four years and will continue to apply to the employer and employees even after its nominated expiry date, unless it is replaced or terminated.

There are also certain circumstances involving the acquisition of a business and the transfer of employees where enterprise agreements can transfer to the new employer and thus continue to apply.

6. Termination of Employment

6.1 Grounds for Termination

An employer may dismiss an employee by giving him or her the required period of notice without having a reason or without notice for serious misconduct. Employees are able to challenge their termination in certain circumstances, as set out below.

Different procedures apply or are recommended depending on the reason for termination and the employee's ability to bring a claim. Where an employee is able to bring an unfair dismissal claim, the employer must have a valid reason for the termination and follow a fair process. Where the reason for the dismissal is the employee's capacity, conduct (other than serious misconduct) or performance this will generally involve a series of discussions with the employee and the giving of warnings.

Additional requirements apply where the termination is a redundancy termination (which arises where the employer no longer requires anyone to perform the position held by an employee). For employees who are covered by an award or enterprise agreement, consultation must take place in accordance with the consultation provisions of the award or enterprise agreement. To avoid an adverse unfair dismissal outcome, redeployment to an available and suitable role within the employer's business or the business of an associated entity must be considered.

Where 15 or more employees are to be made redundant, the employer has an additional obligation to notify the government employment agency.

6.2 Notice Periods/Severance

Unless termination without notice is justified, the FW Act requires that employers give employees a specified minimum period of notice for the termination to be effective. The required minimum notice is a sliding scale ranging from 1 week (for employees with up to 1 years' continuous service) up to 4 weeks (for employees with more than 5 years' continuous service). An additional 1 weeks' notice is required for employees who are over 45 years of age and have more than 2 years' continuous service.

Longer periods of notice can also be specified in enterprise agreements and contracts (which may link to policies that are legally binding). An employer should give the longest period of notice legally applicable.

Severance (or redundancy pay) is payable in addition to notice. The FW Act sets out a minimum redundancy payment scale based on years of service. To qualify for a payment, employees must have at least 1 years' continuous service. The minimum payment is 4 weeks' pay for employees with at least 1 years' service and the highest payment is 16 weeks' pay for employees with 9 years but less than 10 years' service. After 10 years' service, the required redundancy payment is 12 weeks' pay. "Pay" is calculated by reference to base pay for ordinary hours and excludes bonuses.

It is possible that an enterprise agreement, employment contract or a legally binding company policy may provide for more generous redundancy benefits.

Consultation obligations must be met with award and enterprise agreement employees. To avoid an adverse unfair dismissal outcome, redeployment to an available and suitable role within the employer's business or the business of an associated entity must also occur. If no suitable redeployment opportunities are available and the consultation obligations have been discharged, the employee's position may be made redundant and the employee is ineligible to make an unfair dismissal claim.

There is no requirement for external advice or authorisation.

6.3 Dismissal for (Serious) Cause (Summary Dismissal)

Termination without notice is permitted where the employee commits an act of serious misconduct. Serious misconduct is

a breach of contract by the employee that is serious enough to warrant immediate termination because it demonstrates an intention by the employee not to be bound by his or her employment contract. Employment contracts commonly include examples of when termination for serious misconduct will be justified. The Fair Work Regulations 2009 (Cth) also have a definition of serious misconduct which includes examples of theft, fraud, assault, being intoxicated at work and refusing to carry out a lawful and reasonable instruction.

For employees who are able to bring an unfair dismissal claim, they must be given details of the allegations against them, an opportunity to explain their conduct and be told the reason for termination. Procedurally, an unreasonable refusal by the employer to let the employee have a support person at any discussions related to the dismissal is a matter taken into account in an unfair dismissal claim context.

6.4 Termination Agreements

Deeds of release or settlement/termination of agreements are permitted in Australia. They can be used at the time of termination and are standard in the settlement of claims. They are most commonly in the form of a deed of release. The deed must be in writing, signed, witnessed (if executed by an individual outside Victoria) and stated to be a deed. It will only become effective on the date the parties indicate (by words and by the conduct and the circumstances surrounding the execution of the deed) they intend to be bound.

Releases are not able to cover statutory workers compensation claims (which relate to workplace injuries) or claims under superannuation legislation (which is compulsory retirement funding scheme).

6.5 Protected Employees

Employees who are covered by a modern award or enterprise agreement or whose earnings are less than the high-income threshold under the FW Act (currently AUD148,700) are able to bring an unfair dismissal claim. Earnings include base salary, salary sacrificed amounts and agreed value of non-monetary benefits. The high-income threshold is indexed annually.

The FW Act also contains prohibitions on termination for specified reasons. These include where the reason is connected to a workplace right (such as a right under the FW Act or a right to make a complaint or inquiry in relation to an employee's employment), discriminatory grounds (including race, sex, age), temporary absence through illness or injury and engaging in industrial action.

7. Employment Disputes

7.1 Wrongful Dismissal Claim

There are three primary avenues of redress for employees alleging wrongful dismissal; unfair dismissal, general protection or a breach of contract claim.

Eligible employees (addressed above) can commence an unfair dismissal claim in the FWC alleging there was no valid reason for termination and the termination was harsh, unjust or unreasonable.

Most employers consent to participate in the voluntary conciliation process facilitated by the FWC. If unresolved, the matter will proceed to a hearing before the FWC which will involve the filing of evidence and the attendance of the parties at a hearing. Remedies include reinstatement and compensation, which is capped at 6 months of the employee's pay or half of the high-income threshold (addressed above), whichever is lower.

General protection claims under the FW Act that involve dismissal are also commenced before the FWC. If they remain unresolved after a conciliation conference, an employee can elect to continue his or her claim before the Federal Court or the Federal Circuit Court of Australia or, if both parties consent, the FWC may also arbitrate the matter. This type of claim usually involves an allegation that an employer has taken adverse action against an employee, such as by dismissing him or her because the employee has a workplace right, has exercised that workplace right or proposes to exercise that workplace right. A 'workplace right' includes:

- complaints or inquiries about the employee's employment (eg, a bullying or harassment complaint about an employee's manager);
- the employee being able to participate in a proceeding under a workplace instrument or law (eg, making a request for flexible working arrangements); or
- the employee having the benefit and responsibility under a workplace law (eg, the role of a bargaining representative or a health and safety officer).

There is no minimum period of employment or income threshold that an employee needs to earn to bring a general protections claim. The remedies available include reinstatement and payment of compensation (which is not capped). Penalties can also be imposed by the court against the employer and individuals who were knowingly involved in the breach of the general protections provisions of the FW Act. The current maximum penalties are AUD63,000 per breach for corporations and AUD12,600 per breach for individuals.

A breach of contract claim is also available where an employee alleges a breach of an express or implied term of his or

her contract. Because of certain implications relating to the payment of all or part of the successful party's legal costs by the unsuccessful party, breach of contract claims will generally only be commenced where there is the potential for a relatively substantial monetary award of damages.

7.2 Anti-discrimination Issues

Australian Federal, State and Territory laws prohibit discrimination of employees based on certain grounds or attributes. These grounds and attributes include:

- race;
- sex, sexual orientation, gender identity or intersex status;
- marital or domestic status, family or carer's responsibilities or pregnancy;
- age;
- disability;
- religion;
- political opinion; and
- social origin.

These attributes vary across the Australian, Federal State and Territory anti-discrimination laws. The types of discrimination that apply to most of these protected attributes include:

- direct discrimination occurs when a person or group of people is treated less favourably than another person or group because of a protected attribute (listed above). Harassment is a type of discrimination that includes sexual harassment; and
- indirect discrimination occurs when there is an unreasonable rule or policy that is the same for everyone but has an unfair effect on people who share a particular protected attribute (listed above).

In Australia, the person alleging direct discrimination is generally required to establish all the elements of the offence on the balance of probabilities. However, some laws place the burden on the employer, including in some indirect discrimination claims where the employer has the burden of proving the reasonableness of the rule or policy. General protection claims under the FW Act (described above) also place the burden of proof on the employer to prove that the adverse action (such as dismissal or a demotion) was not taken because of the employee's protected attribute or the exercise of a 'workplace right'.

Damages available in discrimination proceedings generally include:

- economic loss – past and future income loss of the complainant;
- general damages – non-economic loss resulting from the complainant's pain, disability, loss of enjoyment of life, disfigurement or loss of expectation of life;
- pecuniary loss – the complainant's out-of-pocket expenses for medical and other treatment expenses, aids and appliances and domestic and personal care; and
- aggravated or exemplary damages – awarded where increased distress is suffered by the complainant because of the defendant's conduct or where the court intends to deter other potential wrongdoers.

Other relief in discrimination claims include declarations, injunctions, a variation of contract (in limited circumstances), apologies and retractions.

8. Dispute Resolution

8.1 Judicial Procedures

The FWC is a specialist employment tribunal which is responsible for conciliating and arbitrating collective and individual employment disputes.

As noted above, the FWC has jurisdiction to conciliate and arbitrate unfair dismissal claims. The conciliation of general protections claims are usually commenced in the FWC, which may arbitrate the claim if both parties consent.

Class actions or "representative proceedings" for employment law matters are becoming increasingly common in Australia. Class actions in the Federal Court may be commenced where seven or more people have a claim against the same person. The claims must: (i) be in respect of or arise out of the same, similar or related circumstances and (ii) give rise to a substantial common issue of law or fact, both being requirements which Australian courts have interpreted broadly to permit representative proceedings. Australian class actions generally operate on an "opt-out" system where all members within the relevant class are bound by the judgment (without needing to obtain their consent to be part of the group) unless they opt-out. The court can also order that proceedings should not continue on a representative basis if it is in the interests of justice to do so (for example, where the costs of individual actions would be less than the class action).

In court proceedings, a party is generally entitled to be represented by a legal practitioner. In some employment proceedings, a party is not entitled to be represented, such as claims for amounts under the FW Act or a modern award where the amount which may be awarded by the court is less than AUD20,000.

Similarly, a party is not entitled to be represented by a legal practitioner in proceedings before the FWC without the permission of the FWC.

8.2 Alternative Dispute Resolution

The parties are generally free to agree to have disputes arising between them determined through arbitration. This includes pre-dispute agreements including employment contracts. Where the parties have agreed to settle a particular dispute through arbitration and an action is nonetheless brought before a court, the court will generally stay those proceedings and instead refer the dispute to arbitration in accordance with that arbitration agreement.

8.3 Awarding Attorney's Fees

The FWC has a general power to order a party to pay the legal costs of another party where: (i) the applicant's claim (or the other party's response to the claim) was vexatious or without reasonable cause and (ii) it should have been reasonably apparent to the party that its position in the proceedings had no reasonable prospect of success.

The FWC has additional powers to award costs in respect of particular proceedings. For example, the FWC may award costs in respect of an unfair dismissal claim against a party if their unreasonable act of omission in relation to their conduct in the proceedings caused the other party to incur costs.

There are similar limitations on the court's power to award costs in matters arising under the FW Act (such as a general protections claim).

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