



Workplace Relations Amendment (Fair Termination) Act 2003

No. 104, 2003

An Act to amend the *Workplace Relations Act 1996* and the *Workplace Relations Regulations 1996*, and for related purposes

Note: An electronic version of this Act is available in SCALEplus
(<http://scaleplus.law.gov.au/html/comact/browse/TOCN.htm>)

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An Act to amend the *Workplace Relations Act 1996* and the *Workplace Relations Regulations 1996*, and for related purposes

[Assented to 16 October 2003]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Workplace Relations Amendment (Fair Termination) Act 2003*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, on the day or at the time specified in column 2 of the table.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent	16 October 2003
2. Schedule 1	A single day to be fixed by Proclamation, subject to subsection (3)	27 November 2003 (s 2(1); <i>Gazette</i> 2003, GN47)
3. Schedule 2	A single day to be fixed by Proclamation, subject to subsection (3)	27 November 2003 (s 2(1); <i>Gazette</i> 2003, GN47)

Note: This table relates only to the provisions of this Act as originally passed by the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table is for additional information that is not part of this Act. This information may be included in any published version of this Act.
- (3) If a provision covered by item 2 or 3 of the table does not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, it commences on the first day after the end of that period.

3 Schedule(s)

- (1) Each Act, and each set of regulations, that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

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- (2) The amendment of a set of regulations under subsection (1) does not prevent the regulations, as so amended, from being amended or repealed by the Governor-General.
 - (3) To avoid doubt, regulations amended under subsection (1) are taken still to be regulations.

Schedule 1—Exclusion of certain employees from termination provisions

Part 1—Amendments

Workplace Relations Act 1996

1 After section 170CB

Insert:

170CBA Exclusions

*Exclusions from Subdivisions B, D, E and F and sections 170CL
and 170CM*

- (1) The following kinds of employee are excluded from the operation of Subdivisions B, D, E and F and sections 170CL and 170CM:
 - (a) an employee engaged under a contract of employment for a specified period of time;
 - (b) an employee engaged under a contract of employment for a specified task;
 - (c) an employee serving a period of probation, if the duration of the period or the maximum duration of the period, as the case may be, is determined in advance and, either:
 - (i) the period, or the maximum duration, is 3 months or less; or
 - (ii) the period, or the maximum duration:
 - (A) is more than 3 months; and
 - (B) is reasonable, having regard to the nature and circumstances of the employment;
 - (d) a casual employee engaged for a short period, within the meaning of subsection (3);
 - (e) a trainee whose employment under a traineeship agreement or an approved traineeship:
 - (i) is for a specified period; or
 - (ii) is, for any other reason, limited to the duration of the agreement;
 - (f) an employee:

- (i) who is not employed under award conditions; and
- (ii) to whom subsection (5) or (6) applies.

Note 1: The expression *employee engaged under a contract of employment for a specified period of time* (used in paragraph (a)) has been addressed in a number of cases before the Industrial Relations Court of Australia, including, in particular, *Cooper v Darwin Rugby League Inc* (1994) 57 IR 238, *Andersen v Umbakumba Community Council* (1994) 126 ALR 121, *D'Lima v Board of Management, Princess Margaret Hospital for Children* (1995-1996) 64 IR 19 and *Fisher v Edith Cowan University* (unreported judgment of Madgwick J, 12 November 1996, No. WI 1061 of 1996).

Note 2: An employee who is excluded from the provisions of the Act specified in this subsection may still be eligible to apply for a remedy in relation to the termination of employment under a State law.

Note 3: The definitions in section 170CD apply for the purposes of this section.

- (2) Subsection (1) does not apply to an employee engaged under a contract of a kind mentioned in paragraph (1)(a) or (b) if a substantial purpose of the engagement of the employee under a contract of that kind is, or was at the time of the employee's engagement, to avoid the employer's obligations under Subdivision B, D or E or section 170CL or 170CM.
- (3) For the purpose of paragraph (1)(d), a casual employee is taken to be engaged for a short period unless:
 - (a) subject to subsection (3A)—the employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and
 - (b) the employee has, or but for a decision by the employer to terminate the employee's employment, would have had, a reasonable expectation of continuing employment by the employer.
- (3A) If:
 - (a) a casual employee was engaged by a particular employer on a regular and systematic basis for a sequence of periods during a period (the first period of employment) of less than 12 months; and
 - (b) at the end of the first period of employment, the casual employee ceased, on the employer's initiative, to be so engaged by the employer; and

Schedule 1 Exclusion of certain employees from termination provisions
Part 1 Amendments

- (c) the employer subsequently again engages the employee on a regular and systematic basis for a further sequence of periods during a period (the second period of employment) that starts not more than 3 months after the end of the first period of employment; and
 - (d) the total length of the first period of employment and the second period of employment is at least 12 months;
- paragraph (3)(a) is taken to be satisfied in relation to the employment of the employee.
- (4) For the purposes of subparagraph (1)(f)(i), an employee is taken not to be employed under award conditions unless the employer is bound, in relation to the employee's wages and conditions of employment, by an award, a certified agreement, an AWA or an old IR agreement.
 - (5) For the purposes of subparagraph (1)(f)(ii), this subsection applies to an employee if:
 - (a) the employee's remuneration immediately before the termination of employment was not wholly or partly determined on the basis of commission or piece rates; and
 - (b) the rate of remuneration applicable to the employee immediately before the termination exceeds a rate specified, or worked out in a manner specified, in the regulations (the *specified rate*).
 - (6) For the purposes of subparagraph (1)(f)(ii), this subsection applies to an employee if:
 - (a) the employee's remuneration immediately before the termination of employment was wholly or partly determined on the basis of commission or piece rates; and
 - (b) in accordance with the regulations, the rate of remuneration that is taken to be applicable to the employee immediately before the termination exceeds the specified rate.

Exclusions from sections 170CL and 170CM and Subdivisions D and E

- (7) The following kinds of employee are excluded from the operation of sections 170CL and 170CM and Subdivisions D and E:
 - (a) a casual employee, except a casual employee engaged for a short period within the meaning of subsection (3);

- (b) a daily hire employee:
 - (i) who is performing work in the building and construction industry (including work in, or in connection with, the erection, repair, renovation, maintenance, ornamentation or demolition of buildings or structures); or
 - (ii) who is performing work in the meat industry in, or in connection with, the slaughter of livestock;
- (c) a weekly hire employee who is performing work in, or in connection with, the meat industry and whose termination of employment is determined solely by seasonal factors.

Note 1: An employee who is excluded from the provisions of the Act specified in this subsection may still be eligible to apply for a remedy in relation to the termination of employment under a State law.

Note 2: The definitions in section 170CD apply for the purposes of this section.

Relationship between subsections (1) and (7)

- (8) If, but for this subsection, an employee would be covered by both subsections (1) and (7), the employee is taken only to be covered by subsection (1) (and so is subject to the broader range of exclusions provided for by that subsection).

2 Paragraphs 170CC(1)(a), (b) and (c)

Repeal the paragraphs.

Note: The heading to section 170CC is replaced by the heading “**Regulations may provide for additional exclusions**”.

3 Subsections 170CC(2), (3) and (4)

Repeal the subsections.

4 After section 170CC

Insert:

170CCA People’s rights, liabilities and obligations the same as if certain provisions of the regulations had been valid

- (1) In this section:

invalid provisions means paragraph 30B(1)(d), and subregulation 30B(3), of the Workplace Relations Regulations as purportedly amended by the relevant amending regulations.

relevant amending regulations means the Workplace Relations Regulations (Amendment), Statutory Rules 1996 No. 307.

- (2) Subject to subsection (3), the rights and liabilities of all persons are, by force of this section, declared to be, and always to have been, the same as if:
- (a) section 170CC of this Act, as in force during the period (the *validation period*):
 - (i) starting immediately before the time when the relevant amending regulations purported to commence; and
 - (ii) ending on the commencement of this section;had authorised the making of regulations containing the invalid provisions (in addition to what that section actually authorised to be dealt with in regulations); and
 - (b) a regulation in the same terms as regulation 30B of the Workplace Relations Regulations, as purportedly amended by the relevant amending regulations:
 - (i) had been made, and had commenced, immediately after the start of the validation period for the purposes of section 170CC as having effect as mentioned in paragraph (a); and
 - (ii) had been amended by regulations in the same terms as, and commencing at the same time as, the provisions of the Workplace Relations Regulations (Amendment), Statutory Rules 1997 No. 101, that purported to amend regulation 30B; and
 - (iii) had not subsequently been amended during the validation period.
- (3) This section does not affect rights or liabilities arising between parties to proceedings heard and finally determined by the Commission or a court at or before the commencement of this section, to the extent that those rights or liabilities arose from, or were affected by, the invalidity of the invalid provisions.

5 Subsection 170CD(1)

Insert:

daily hire employee means an employee:

- (a) whose employment:
 - (i) is regulated by an award, a certified agreement, an AWA, a State award, a State employment agreement or an old IR agreement; and
 - (ii) under the award, certified agreement, AWA, State award, State employment agreement or old IR agreement is, or is normally, apart from the application to the employee of this Division:
 - (A) terminated at the end of each day or shift; or
 - (B) able to be terminated by the employer giving to the employee not more than 1 day's notice; and
- (b) who is working in an industry or occupation which, on 16 November 1994, was subject to an award, State award, State employment agreement or old IR agreement which provided for the termination of an employee's employment in the circumstances referred to in sub-subparagraph (a)(ii)(A) or (B).

6 Subsection 170CD(1)

Insert:

relevant training award, in relation to an agreement, means:

- (a) if the agreement commenced before the commencement of this definition—the award known as the National Training Wage Interim Award 1994, as in force on 16 November 1994; or
- (b) if the agreement commences on or after the commencement of this definition—whichever of the following is in force when the agreement commences:
 - (i) the award known as the National Training Wage Award 2000; or
 - (ii) a later award that covers substantially the same subject matter as is covered by the award referred to in subparagraph (i).

7 Subsection 170CD(1)

Insert:

State or Territory training authority means a body authorised by a law or an award of a State or Territory for the purpose of overseeing arrangements for the training of employees.

8 Subsection 170CD(1)

Insert:

trainee means an employee (other than an apprentice) who is bound by a traineeship agreement.

9 Subsection 170CD(1)

Insert:

traineeship agreement means an agreement between an employer and an employee:

- (a) that is consistent with the relevant training award; and
- (b) that is registered:
 - (i) with the relevant State or Territory training authority; or
 - (ii) under a law of a State or Territory relating to the training of employees.

10 Subsection 170CD(2)

Omit “Subdivision C, D or E of this Division”, substitute “this Subdivision or Subdivision C, D or E”.

Workplace Relations Regulations 1996

11 Subregulation 30A(1) (definition of *daily hire employee*)

Repeal the definition.

12 Subregulation 30A(1) (definition of *NETTFORCE*)

Repeal the definition.

13 Subregulation 30A(1) (definition of *State or Territory training authority*)

Repeal the definition.

14 Subregulation 30A(1) (definition of *trainee*)

Repeal the definition.

15 Subregulation 30A(1) (definition of *traineeship agreement*)

Repeal the definition.

16 Regulation 30B

Repeal the regulation.

17 Regulation 30BA

Repeal the regulation.

18 Regulation 30BB

Omit “paragraphs 170CC(3)(b) and (4)(b)”, substitute “paragraphs 170CBA(5)(b) and (6)(b)”.

19 Regulation 30BC

Omit “paragraph 170CC(4)(b)”, substitute “paragraph 170CBA(6)(b)”.

Part 2—Application provision

20 Application of items 1 to 19 (other than item 4)

The amendments made by items 1 to 19, other than item 4, only apply in relation to terminations of employment that occur after the commencement of those items (whether the employment commenced before or after that commencement).

Schedule 2—Fees for lodging termination applications

Workplace Relations Act 1996

1 After section 170CE

Insert:

170CEAA Fees for lodging applications under section 170CE

Applications in respect of which a fee is payable

- (1) A fee is payable for the lodging of an application under subsection 170CE(1), (2), (3) or (4).

Note: This has effect subject to subsection (7) (which deals with hardship).

Amount of fee if application is lodged in first financial year

- (2) If the application is lodged at a time that is:
- (a) after the commencement of this section; and
 - (b) in the first financial year that ends after that commencement;
- the amount of the fee is \$50.

Amount of fee if application is lodged in later financial year

- (3) If the application is lodged in a later financial year (the ***year of lodgment***), the amount of the fee is to be worked out by:
- (a) taking the amount of the fee for an application lodged in the previous financial year; and
 - (b) multiplying that amount by the indexation factor for the year of lodgment (see subsection (4)); and
 - (c) rounding the result to the nearest multiple of 10 cents (rounding up if the result is exactly half-way in between).
- (4) For the purposes of subsection (3), the ***indexation factor*** for the year of lodgment is worked out using the following formula (then rounded under subsection (5)):

Schedule 2 Fees for lodging termination applications

$$\frac{\text{Sum of index numbers for quarters in most recent March year}}{\text{Sum of index numbers for quarters in previous March year}}$$

where:

index number, for a quarter, means the All Groups Consumer Price Index Number (being the weighted average of the 8 capital cities) published by the Australian Statistician for that quarter.

most recent March year means the period of 12 months ending on 31 March in the financial year that occurred immediately before the year of lodgment.

previous March year means the period of 12 months immediately preceding the most recent March year.

quarter means a period of 3 months ending on 31 March, 30 June, 30 September or 31 December.

- (5) The result under subsection (4) must be rounded up or down to 3 decimal places (rounding up if the result is exactly half-way in between).
- (6) Calculations under subsection (4):
- (a) are to be made using only the index numbers published in terms of the most recently published reference base for the Consumer Price Index; and
 - (b) are to be made disregarding index numbers that are published in substitution for previously published index numbers (unless the substituted numbers are published to take account of changes in the reference base).

Fee not payable in case of hardship

- (7) If a Registrar is satisfied that the person lodging the application will suffer serious hardship if the person is required to pay the fee, no fee is payable for lodging the application.

Refund of fee if application discontinued in certain circumstances

- (8) If:
- (a) the fee has been paid; and

(b) the application is subsequently discontinued as mentioned in subsection 170CE(9); and

(c) either:

(i) at the time the application is discontinued, the application has not yet been listed for attention by the Commission; or

(ii) if the application has, at or before that time, been listed for attention by the Commission on a specified date or dates—the discontinuance occurs at least 2 days before that date or the earlier of those dates;

an amount equal to the fee is to be repaid by the Commonwealth to the person who paid it.

*[Minister's second reading speech made in—
House of Representatives on 20 February 2002
Senate on 12 December 2002]*

(42/02)