

2002

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES

Presented and read a first time

**Workplace Relations Amendment
(Termination of Employment) Bill 2002**

No. , 2002

(Employment and Workplace Relations)

**A Bill for an Act to amend laws relating to
workplace relations, and for other purposes**

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1 **A Bill for an Act to amend laws relating to**
2 **workplace relations, and for other purposes**

3 The Parliament of Australia enacts:

4 **1 Short title**

5 This Act may be cited as the *Workplace Relations Amendment*
6 *(Termination of Employment) Act 2002*.

7 **2 Commencement**

8 (1) Each provision of this Act specified in column 1 of the table
9 commences, or is taken to have commenced, on the day or at the
10 time specified in column 2 of the table.
11

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	
2. Schedule 1, items 1 to 3	A single day to be fixed by Proclamation, subject to subsection (3)	
3. Schedule 1, item 4	The later of: (a) the commencement of items 1 to 3 of Schedule 1; and (b) immediately after the commencement of item 1 of Schedule 1 to the <i>Workplace Relations Amendment (Fair Termination) Act 2002</i>	
4. Schedule 1, items 5 to 12	At the same time as the provisions covered by item 2 of this table	
5. Schedule 1, item 13	At the same time as the provision covered by item 3 of this table	
6. Schedule 2	A single day to be fixed by Proclamation, subject to subsection (3)	
7. Schedule 3, item 1	A single day to be fixed by Proclamation, subject to subsection (3)	
8. Schedule 3, item 2	The later of: (a) immediately after the commencement of Schedule 2; and (b) immediately after the commencement of item 1 of Schedule 3	
9. Schedule 3, items 3 and 4	At the same time as the provision covered by item 7 of this table	
10. Schedule 3, items 5 to 7	At the same time as the provision covered by item 8 of this table	
11. Schedule 3, items 8 to 14	At the same time as the provision covered by item 7 of this table	
12. Schedule 3, item 15	At the same time as the provision covered by item 8 of this table	

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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.

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(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.

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(3) If a provision covered by item 2, 6 or 7 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.

11

3 Schedule(s)

12
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Each Act 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.

1
2 **Schedule 1—Covering the field of harsh,**
3 **unjust or unreasonable termination**

4 **Part 1—Amendments**

5 *Workplace Relations Act 1996*

6 **1 At the end of section 5**

7 Add:

- 8 (9) Subsections (6) and (8) are subject to section 170HA (which
9 provides that Division 3 of Part VIA is intended to apply to the
10 exclusion of some State laws that provide rights or remedies in
11 respect of harsh, unjust or unreasonable termination of
12 employment).

13 **2 At the end of section 152**

14 Add:

- 15 (6) This section is subject to section 170HA (which provides that
16 Division 3 of Part VIA is intended to apply to the exclusion of
17 some State laws, State awards and State employment agreements
18 that provide rights or remedies in respect of harsh, unjust or
19 unreasonable termination of employment).

20 **3 Paragraph 170CB(1)(c)**

21 Omit “a Federal award employee”, substitute “an employee”.

22 **4 Subsection 170CBA(4)**

23 Repeal the subsection, substitute:

- 24 (4) For the purposes of subparagraph (1)(f)(i), an employee is taken
25 not to be employed under award conditions unless the employer is
26 bound, in relation to the employee’s wages and conditions of
27 employment, by:
28 (a) an award, a certified agreement, an AWA or an old IR
29 agreement; or
30 (b) a State award or a State employment agreement.

1 **5 Subsection 170CD(3)**

2 Omit “or AWAs”, substitute “, AWAs, old IR agreements, State awards
3 or State employment agreements”.

4 **6 Subdivision F of Division 3 of Part VIA (heading)**

5 Repeal the heading, substitute:

6 **Subdivision F—Limitations on rights relating to termination of**
7 **employment**

8 **7 Section 170HA**

9 Repeal the section, substitute:

10 **170HA Relationship with State and Territory termination of**
11 **employment laws etc.**

12 *Intention to exclude State and Territory harsh etc. termination laws*

13 (1) It is the intention of the Parliament that this Division apply to the
14 exclusion of a provision (the *State or Territory provision*) of a law
15 of a State or Territory if:

16 (a) the main purpose of the State or Territory law is to regulate
17 workplace relations, employee relations or industrial
18 relations; and

19 (b) the State or Territory provision provides rights or remedies in
20 respect of harsh, unjust or unreasonable termination of
21 employment (however described); and

22 (c) the State or Territory provision applies to an employee
23 referred to in subsection 170CB(1).

24 However, this Division is only intended to exclude the State or
25 Territory provision to the extent that the provision provides rights
26 or remedies in respect of the harsh, unjust or unreasonable
27 termination of the employment of such an employee.

28 Note: A State or Territory law is not intended to be excluded in respect of
29 harsh, unjust or unreasonable termination:

30 (a) if the law has a main purpose other than regulating workplace
31 relations, employee relations or industrial relations (such as an
32 anti-discrimination law); or

Schedule 1 Covering the field of harsh, unjust or unreasonable termination
Part 1 Amendments

1 (b) to the extent that the law applies to an employee who is not
2 referred to in subsection 170CB(1).

3 (2) It is the intention of the Parliament that this Division apply to the
4 exclusion of a provision of a State award or a State employment
5 agreement if:

6 (a) the provision of the award or agreement provides rights or
7 remedies in respect of harsh, unjust or unreasonable
8 termination of employment (however described); and

9 (b) the provision of the award or agreement applies to an
10 employee referred to in subsection 170CB(1).

11 However, this Division is only intended to exclude the provision of
12 the award or agreement to the extent that the provision provides
13 rights or remedies in respect of the harsh, unjust or unreasonable
14 termination of the employment of such an employee.

15 (3) For the avoidance of doubt, subsections (1) and (2) apply in respect
16 of every employee referred to in subsection 170CB(1), including
17 employees who are excluded, by or under this Act, from applying
18 to the Commission under section 170CE.

19 *Regulations may identify provisions of State and Territory laws*
20 *etc.*

21 (4) If regulations made for the purposes of this subsection identify a
22 provision of a State or Territory law, then the provision is, or is
23 not, as specified in the regulations, taken to satisfy
24 paragraphs (1)(a) and (b).

25 (5) If regulations made for the purposes of this subsection identify a
26 provision of a State award or State employment agreement, then
27 the provision is, or is not, as specified in the regulations, taken to
28 satisfy paragraph (2)(a).

29 *No intention to exclude other State and Territory termination of*
30 *employment laws etc.*

31 (6) Other than as provided by this section, it is not the intention of the
32 Parliament that this Division apply to the exclusion of a State or
33 Territory law, a State award or a State employment agreement.

34 **8 Section 170HB**

1 Repeal the section, substitute:

2 **170HB Limitation on applications alleging unjust termination**

3 (1) An application alleging unjust termination of employment must not
4 be made if other termination proceedings have already been
5 commenced in respect of the termination of employment, unless
6 the other termination proceedings:

- 7 (a) have been discontinued by the party who began the
8 proceedings; or
9 (b) have failed for want of jurisdiction.

10 Note: Subsection (3) defines an *application alleging unjust termination* and
11 *other termination proceedings*.

12 (2) A person is not entitled to commence other termination
13 proceedings in respect of a termination of employment if an
14 application alleging unjust termination of the employment has
15 already been made, unless the application:

- 16 (a) has been discontinued by the applicant; or
17 (b) has failed for want of jurisdiction.

18 Note: However, a person who makes an application alleging unjust
19 termination that fails for want of jurisdiction because the person is
20 excluded, by or under this Act, from applying to the Commission,
21 would not be entitled to commence other termination proceedings
22 under a State or Territory law in respect of the termination because of
23 the operation of section 170HA.

24 (3) In this section:

25 *application alleging unjust termination* means an application
26 under section 170CE, in respect of a termination of employment:

- 27 (a) on the ground that the termination was harsh, unjust or
28 unreasonable; or
29 (b) on grounds that include that ground.

30 *other termination proceedings* means proceedings, in respect of a
31 termination of the employment of an employee:

- 32 (a) for a remedy in respect of the termination:
33 (i) under a provision of this Act other than section 170CE;
34 or
35 (ii) under another law of the Commonwealth; or
-

Schedule 1 Covering the field of harsh, unjust or unreasonable termination
Part 1 Amendments

- 1 (iii) under a law of a State or Territory (other than a law to
2 which section 170HA applies); and
3 (b) that allege that the termination was:
4 (i) harsh, unjust or unreasonable (however described); or
5 (ii) unlawful;
6 for any reason (other than a failure by the employer to
7 provide a benefit to which the employee was entitled on the
8 termination).

9 Note: Section 170HA provides that Division 3 of Part VIA is intended to
10 apply to the exclusion of some State or Territory laws that provide
11 rights or remedies in respect of harsh, unjust or unreasonable
12 termination of employment.

- 13 (4) For the avoidance of doubt, a proceeding seeking compensation, or
14 the imposition of a penalty, because an employer has failed, in
15 relation to a termination of employment, to meet an obligation:
16 (a) to give adequate notice of the termination; or
17 (b) to provide a severance payment as a result of the termination;
18 or
19 (c) to provide any other entitlement payable as a result of the
20 termination;
21 is taken to be a proceeding alleging that the termination was
22 unlawful because of a failure to provide a benefit to which the
23 employee was entitled on the termination.

24 **9 Section 170HC**

25 Repeal the section, substitute:

26 **170HC Limitation on applications alleging unlawful termination**

- 27 (1) An application alleging unlawful termination of employment must
28 not be made if other termination proceedings have already been
29 commenced in respect of the termination of employment, unless
30 the other termination proceedings:
31 (a) have been discontinued by the party who began the
32 proceedings; or
33 (b) have failed for want of jurisdiction.

34 Note: Subsection (3) defines an *application alleging unlawful termination*
35 and *other termination proceedings*.

- 1 (2) A person is not entitled to commence other termination
2 proceedings in respect of a termination of employment if an
3 application alleging unlawful termination of the employment has
4 already been made, unless the application:
5 (a) has been discontinued by the applicant; or
6 (b) has failed for want of jurisdiction.

- 7 (3) In this section:

8 *application alleging unlawful termination* means an application
9 under section 170CE, in respect of a termination of employment,
10 on the ground that the termination constitutes a contravention of
11 section 170CK because it was done for a reason set out in
12 subsection 170CK(2).

13 *other termination proceedings* means proceedings, in respect of a
14 termination of employment:

- 15 (a) for a remedy in respect of the termination:
16 (i) under a provision of this Act other than section 170CE;
17 or
18 (ii) under another law of the Commonwealth; or
19 (iii) under a law of a State or Territory (other than a law to
20 which section 170HA applies); and
21 (b) that allege that the termination was:
22 (i) harsh, unjust or unreasonable (however described); or
23 (ii) unlawful because it was done for a reason that is the
24 same as, or substantially similar to, a reason set out in
25 subsection 170CK(2).

26 Note: Section 170HA provides that Division 3 of Part VIA is intended to
27 apply, in respect of an employee referred to in subsection 170CB(1),
28 to the exclusion of some State or Territory laws that provide rights or
29 remedies in respect of harsh, unjust or unreasonable termination of
30 employment.

31 **10 At the end of subsection 170LZ(3)**

32 Add:

33 Note: The question of whether a State law provides protection for an
34 employee against harsh, unjust or unreasonable termination of
35 employment is affected by the operation of section 170HA.

36 **11 At the end of subsection 170VR(3)**

Schedule 1 Covering the field of harsh, unjust or unreasonable termination
Part 1 Amendments

1 Add:
2 Note: The question of whether a State law provides protection for an
3 employee against harsh, unjust or unreasonable termination of
4 employment is affected by the operation of section 170HA.

1

2 **Part 2—Application provisions**

3 **12 Application of items 1, 2, 3, 5, 6, 7, 8, 9, 10 and 11**

4 The amendments made by items 1, 2, 3, 5, 6, 7, 8, 9, 10 and 11 only
5 apply in relation to terminations of employment that occur after the
6 commencement of those items (whether the employment commenced
7 before or after that commencement).

8 **13 Application of item 4**

9 The amendment made by item 4 only applies in relation to terminations
10 of employment that occur after the commencement of that item
11 (whether the employment commenced before or after that
12 commencement).

1
2 **Schedule 2—Termination applications**
3 **affecting small business**

4 **Part 1—Amendments**

5 *Workplace Relations Act 1996*

6 **1 Subsection 170CD(1)**

7 Insert:

8 *relevant time*, in relation to a termination of employment, means
9 the earlier of the following times:

- 10 (a) the time when the employer gave the employee notice of the
11 termination;
12 (b) the time when the employer terminated the employee's
13 employment.

14 **2 Subsection 170CD(1)**

15 Insert:

16 *small business employer*, in relation to a termination of
17 employment, means an employer who employs less than 20 people,
18 including:

- 19 (a) the employee whose employment was terminated; and
20 (b) any casual employee who had been engaged on a regular and
21 systematic basis for a sequence of periods of employment of
22 at least 12 months;
23 but not including any other casual employee.

24 **3 Paragraph 170CE(5B)(a)**

25 Repeal the paragraph, substitute:

- 26 (a) either:
27 (i) 3 months (unless subparagraph (ii) applies); or
28 (ii) 6 months if, at the relevant time, the employer was a
29 small business employer; or

30 **4 Before section 170CF**

1 Insert:

2 **170CEC Dismissal of applications relating to small businesses**

3 (1) This section applies if:

- 4 (a) an application is made, or is purported to have been made,
5 under subsection 170CE(1):
6 (i) on the ground referred to in paragraph 170CE(1)(a); or
7 (ii) on grounds that include that ground; and
8 (b) at the relevant time, the employer was a small business
9 employer.

10 (2) If the Commission is satisfied that, because of another provision in
11 this Division, the application cannot be made under subsection
12 170CE(1) on the ground referred to in paragraph 170CE(1)(a), the
13 Commission must:

- 14 (a) if subparagraph (1)(a)(i) of this section applies—make an
15 order that the application is not a valid application; or
16 (b) if subparagraph (1)(a)(ii) of this section applies—make an
17 order that the application is not a valid application to the
18 extent that it is made on that ground.

19 Note: The Commission is not required to hold a hearing in relation to the
20 making of such an order: see subsection (4).

21 (3) If the Commission is satisfied that the application can be made
22 under subsection 170CE(1), but is frivolous, vexatious or lacking
23 in substance, in relation to the ground referred to in paragraph
24 170CE(1)(a), the Commission must:

- 25 (a) if subparagraph (1)(a)(i) of this section applies—make an
26 order dismissing the application; or
27 (b) if subparagraph (1)(a)(ii) of this section applies—make an
28 order dismissing the application to the extent that it is made
29 on that ground.

30 Note: The Commission is not required to hold a hearing in relation to the
31 making of such an order: see subsection (4).

32 (4) The Commission is not required to hold a hearing in relation to the
33 making of an order under this section. In deciding whether to hold
34 a hearing, the Commission must take into account the cost that
35 would be caused to the employer's business by requiring the
36 employer to attend a hearing.

- 1 (5) Before the Commission makes an order under this section in
2 relation to an application, the Commission:
- 3 (a) must, by notice in writing to the employee and the employer,
4 invite the employee and the employer to provide, by the time
5 specified in the notice, further information that relates to the
6 application and that is relevant to whether this section
7 requires the order to be made; and
- 8 (b) must take account of any such information so provided by the
9 employee or employer.

10 **5 After subsection 170CG(3)**

11 Insert:

- 12 (3A) If, at the relevant time, the employer was a small business
13 employer, the Commission must have regard to these matters, and
14 no other matters, in determining, for the purposes of the arbitration,
15 whether the termination was harsh, unjust or unreasonable:
- 16 (a) whether there was a valid reason for the termination related
17 to the capacity or conduct of the employee or to the
18 operational requirements of the employer's undertaking,
19 establishment or service; and
- 20 (b) whether the employee was notified of that reason; and
- 21 (c) whether the employee was given an opportunity to respond to
22 any reason related to the capacity or conduct of the
23 employee; and
- 24 (d) the degree to which the size of the employer's undertaking,
25 establishment or service would be likely to impact on the
26 procedures followed in effecting the termination; and
- 27 (e) the degree to which the absence of dedicated human resource
28 management specialists or expertise in the undertaking,
29 establishment or service would be likely to impact on the
30 procedures followed in effecting the termination.

31 **6 After paragraph 170CH(2)(a)**

32 Insert:

- 33 (aa) the size of the employer's undertaking, establishment or
34 service; and

35 **7 After paragraph 170CH(7)(a)**

1 Insert:

2 (aa) the size of the employer’s undertaking, establishment or
3 service; and

4 **8 Paragraph 170CH(8)(a)**

5 After “6 months”, insert “or, if subsection (8A) applies, 3 months,”.

6 **9 After subsection 170CH(8)**

7 Insert:

8 (8A) The period applicable under paragraph (8)(a) is 3 months if, at the
9 relevant time, the employer was a small business employer.

10 **10 Subsection 170CH(9)**

11 After “that exceeds”, insert “the lesser of the amount described in
12 paragraph (a), and the amount described in whichever of paragraphs (b)
13 and (c) applies”.

14 **11 Paragraph 170CH(9)(b)**

15 Before “the amount of”, insert “if the employer was not a small
16 business employer at the relevant time—”.

17 **12 After paragraph 170CH(9)(b)**

18 Insert:

19 or (c) if the employer was a small business employer at the relevant
20 time—half the indexed amount applicable under
21 paragraph (b);

22 **13 Subsection 170CH(9)**

23 Omit “whichever is the lower amount”.

24 **14 At the end of section 170HH**

25 Add:

26 (2) Without limiting paragraph (1)(a), if the application was dismissed
27 under subsection 170CEC(3) because it was frivolous, vexatious or
28 lacking in substance, the Court must have regard to the fact that the
29 application was dismissed for that reason.

1 **15 At the end of section 170JD**

2 Add:

- 3 (4) This section does not apply to an order under section 170CEC
4 (about dismissal of applications relating to small businesses).

5 **16 At the end of section 170JF**

6 Add:

- 7 (3) An appeal to a Full Bench under section 45 may not be made in
8 relation to an order under section 170CEC (about dismissal of
9 applications relating to small businesses).

1

2 **Part 2—Application provisions**

3 **17 Application of items 3, 8, 9, 10, 11, 12 and 13**

4 The amendments made by items 3, 8, 9, 10, 11, 12 and 13 only apply in
5 relation to an application under section 170CE of the *Workplace*
6 *Relations Act 1996* if the employment to which the application relates
7 commenced after the commencement of those items.

8 **18 Application of items 4, 5, 6, 7, 14, 15 and 16**

9 The amendments made by items 4, 5, 6, 7, 14, 15 and 16 only apply in
10 relation to terminations of employment that occur after the
11 commencement of those items (whether the employment commenced
12 before or after that commencement).

1
2 **Schedule 3—Other amendments relating to**
3 **termination of employment**

4 **Part 1—Amendments**

5 *Workplace Relations Act 1996*

6 **1 Subsection 170CG(3)**

7 Omit “In”, substitute “Unless subsection (4) applies, in”.

8 **2 Subsection 170CG(3)**

9 After “Unless subsection”, insert “(3A) or”.

10 **3 Paragraph 170CG(3)(a)**

11 Omit “the capacity or conduct of the employee”, substitute “the
12 employee’s capacity or conduct (including its effect on the safety and
13 welfare of other employees)”.

14 **4 Paragraph 170CG(3)(a)**

15 Omit “or to the operational requirements of the employer’s undertaking,
16 establishment or service”.

17 **5 Subsection 170CG(3A)**

18 Omit “If”, substitute “Unless subsection (4) applies, if”.

19 **6 Paragraph 170CG(3A)(a)**

20 Omit “the capacity or conduct of the employee”, substitute “the
21 employee’s capacity or conduct (including its effect on the safety and
22 welfare of other employees)”.

23 **7 Paragraph 170CG(3A)(a)**

24 Omit “or to the operational requirements of the employer’s undertaking,
25 establishment or service”.

26 **8 At the end of section 170CG**

27 Add:

1 (4) If the employment of a particular employee or group of employees
2 is terminated on the ground of the operational requirements of the
3 employer's undertaking, establishment or service, the termination
4 is not harsh, unjust or unreasonable, unless the circumstances are
5 exceptional.

6 **9 After subsection 170CH(2)**

7 Insert:

8 (2A) The Commission must not consider making an order requiring
9 payment of an amount in lieu of reinstatement (see subsection (6))
10 unless it has first considered whether reinstatement of the
11 employee is appropriate.

12 **10 Paragraph 170CH(4)(b)**

13 Omit "subsection (5)", substitute "subsections (4A) and (5)".

14 **11 After subsection 170CH(4)**

15 Insert:

16 (4A) In determining an amount for the purposes of an order under
17 paragraph (4)(b), the Commission must have regard to:
18 (a) the amount of any income earned by the employee from
19 employment or other work during the period between
20 termination and the Commission making the order for
21 reinstatement; and
22 (b) the amount of any income reasonably likely to be so earned
23 by the employee during the period between the Commission
24 making the order for reinstatement and actual reinstatement.

25 **12 Subsection 170CH(7)**

26 Omit "subsection (8)", substitute "subsections (7A), (8) and (9)".

27 **13 After subsection 170CH(7)**

28 Insert:

29 (7A) If the Commission is satisfied that misconduct of the employee
30 contributed to the employer's decision to terminate the employee's
31 employment, the Commission must reduce the amount it would

Schedule 3 Other amendments relating to termination of employment

Part 1 Amendments

1 otherwise fix under subsection (6) (as affected by subsection (7))
2 by an appropriate amount on account of that misconduct.

3 Note: After applying this subsection, the Commission must then apply
4 whichever of subsections (8) and (9) is relevant.

1

2 **Part 2—Application provisions**

3 **14 Application of items 1, 3, 4 and 8 to 13**

4 The amendments made by items 1, 3, 4 and 8 to 13 only apply in
5 relation to terminations of employment that occur after the
6 commencement of those items (whether the employment commenced
7 before or after that commencement).

8 **15 Application of items 2, 5, 6 and 7**

9 The amendments made by items 2, 5, 6 and 7 only apply in relation to
10 terminations of employment that occur after the commencement of
11 those items (whether the employment commenced before or after that
12 commencement).