Australian Government

Australian Small Business and Family Enterprise Ombudsman

Review of the Small Business Fair Dismissal Code

AUGUST 2019

Foreword

The Small Business Fair Dismissal Code (Code) was formed in recognition that small business owners do not have the time or expertise to navigate the complexity of the unfair dismissal system.

'*Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces*' (Forward with Fairness) released in April 2007 provides insight into the intent of the Code, stating:

> *The Code will be tailored to the needs of small business and will be reduced to a clear and concise reference to help these employers meet their obligations under Labor's simpler unfair dismissal system. Where a small business employer has genuinely complied with the Code, the dismissal will be considered a fair dismissal.*

Clearly, the intent of the Code was to enable the Fair Work Commission (Commission), where a small businesses employer dismissed an employee in compliance with the Code, to rule a dismissal fair without further investigation.

However since it came into effect in 2009, the interpretation of the Code has been challenged by lawyers and, on occasion, Members of the Commission. As a result, small business employers cannot be certain that following the Code will mean a dismissal will be deemed fair.

Subclause 388(1) of the *Fair Work Act 2009* (Cth)(FW Act) allows the Minister to declare a Small Business Fair Dismissal Code by legislative instrument. Accordingly, our recommendations seek changes to the Code, its supporting checklist (Checklist) and the forms and processes currently in place when making and responding to an unfair dismissal claim. Our recommendations also call for targeted resources to educate small business employers and raise their awareness of the Code.

Our recommendations aim to make the Code easier for small business employers to comply with and make it easier for the Commission to rely on the improved definitions and clarified requirements. We believe our recommendations will better enable the Code to achieve its original intent - that if small business employers comply with the Code when dismissing an employee, that dismissal will be deemed fair.

Background

In April 2018 the Australian Small Businesses and Family Enterprise Ombudsman (ASBFEO) released its report '*Workplace Relations – Simplification for Small Business'*. This report recommended the ASBFEO:

> *…lead a review of the Small Business Fair Dismissal Code and checklist, and re-invigorate it to ensure that it is in line with what was intended and binding.*

The Code came into effect on 1 July 2009. It is intended to assist both small business employers and the Commission and sets out steps for small business employers to follow to ensure that the dismissal of an employee is fair. Where the Code is followed, Members of the Commission will consider the dismissal fair and will not need to turn to the considerations in section 387 of the FW Act.

This report sets out the findings of the ASBFEO, having undertaken a review of the Code and Checklist to:

- assess whether the Code has met its intended functions and policy objectives since its introduction; and
- recommend improvements to the utility and application of the Code and Checklist.

Where gaps have been identified, this report contains recommendations in the following areas:

- amending the Code so it meets its intended functions and objectives, and provides certainty on what is required of small business employers in order to ensure a dismissal is fair for certain categories of dismissal. This includes removing areas open to interpretation so Members of the Commission can assess compliance with the Code;
- improving small business education and awareness in relation to the Code and checklists and encouraging utilisation to help them meet their obligations regarding fair dismissal; and
- simplifying the unfair dismissal claims process for small business employers and employees.

Introduction

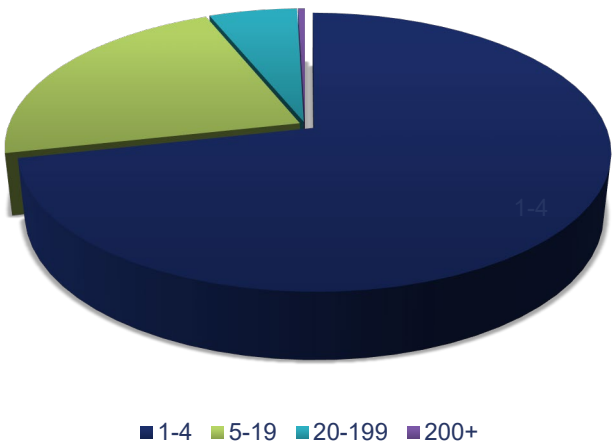
The unfair dismissal jurisdiction within Australia's workplace relations system is commonly identified as a regulatory 'pain point' for small businesses, which form the overwhelming majority of employing businesses.

While there is no universal measure of what constitutes a small business and definitions vary between policy contexts, by any measure, small businesses are a critical part of and make a significant contribution to the Australian economy, accounting for close to 44% of private sector employment.[1]

The Australian Bureau of Statistics (ABS) catalogue, *Counts of Australian Businesses, Including Entries and Exits*, historically provided information about the number of Australian businesses by business size. This data suggests that at the end of 2017-18 there were 2,313,291 actively trading businesses in the market sector in Australia, most (93.1% or 2,152,884) with an annual turnover of less than $2m. This data also shows that there were 877,744 (37.9%) employing businesses on 2017-18 and the overwhelming majority of these (71.5% or 627,932) employed between 1 and 4 people. Around 96% employed between 1-19 employees.

The data also suggests that businesses with fewer employees have the lowest survival rates.[2] They are also likely to feel the impacts of regulation more acutely.[3]

Employing businesses by number of employees



Source: ABS 2019, *Counts of Australian Businesses, including Entries and Exits, Jun 2014 to Jun 2018*, cat. no 8165.0

While the literature regarding the effect of unfair dismissal laws remains contested, it is widely acknowledged that small businesses face resourcing constraints and do not usually employ dedicated human resources personnel, creating unique challenges when confronted with issues such as employee underperformance and misconduct.

The Australian workplace relations framework has historically acknowledged this and provided some relief for small business employers in the context of dismissal rules and severance payments including:

- within various industrial awards in place between the 1980s and 2006; and
- between 2006 and 2009 under the *Workplace Relations Act 1996* (Cth)(WR Act), which exempted national system employers with fewer than 100 employees from unfair dismissal laws.

At the international level, the *Termination of Employment Convention, 1982* (No. 158) provides for categories of employed persons to be excluded from the application of the convention where problems of a substantial nature arise due to the 'size or nature of the undertaking'. Additionally, some nations have implemented exemptions from unfair dismissal laws on the basis of business size.[4]

Employer representatives often point to the cost of unfair dismissal laws for small business and this is a matter that is difficult to quantify. While direct costs may be incurred in the payment of what is commonly labelled 'go away money' or the time invested in managing litigation, indirect costs may arise due to the way a business responds to the regulation.[5]

Examples include the engagement of external labour at a higher cost due to the perceived risks of employing directly, or situations where the small business operator absorbs the additional workload themselves, which may have impacts for business performance, productivity and the well-being of small business operators.

Achieving balance

Australia's unfair dismissal laws have been subject to robust debate, with contention arising around whether the provisions strike the right balance between employees and employers. Workplace relations policy should aim to achieve a fair and balanced approach that takes into account business size. The objects of the FW Act reflect this, calling for both the protection against unfair treatment,[6] as well as acknowledgement of the special circumstances of small and medium businesses.[7]

Achieving balance also means looking beyond direct impacts for small businesses and ensuring laws do not give rise to perverse or unintended policy outcomes. While unfair dismissal laws are intended to be protective in nature, there is a risk of them acting to *reduce* fairness and equity.[8] Research by Harding suggests that recruitment and selection practices can be influenced by unfair dismissal laws with the strongest effect being a reluctance to hire certain types of job applicants, particularly those who had changed jobs multiple times, those who were unemployed (particularly the long term unemployed),[9] and those with lower levels of educational attainment.[10]

With small businesses represented across all regions of Australia and in sectors which provide valuable entry points to the labour market, there are compelling social policy grounds to ensure unfair dismissal laws strike the right balance between employers, employees and the broader community, including those who are vulnerable in the labour market. This aligns with the overarching objects of the FW Act, which call for social inclusion for all Australians.[11]

In approaching this review, it is also acknowledged that the ideological position of the employer being in a position of considerable power relative to employees does not translate to a small business environment. Research for the Commission found:

> *One of the key challenges for small business operators in the study was attracting and retaining good staff. Good employees were highly valued and these employers spoke of making a greater effort to keep good staff on board through flexible work practices.*
>
> *The small business operators in the study stated that staff represented a substantial risk, especially as employees were seen to be more aware of and assertive regarding their workplace rights. Hiring staff that didn't work out or becoming embroiled in staff conflict was viewed as a genuine business risk – one that could result in a substantial investment of time, money and effort…* [12]

This demonstrates that a key priority for small business employers is *retaining* employees and they go to considerable effort to do so. Decisions to end an employee's employment are not made lightly by small business employers. Furthermore, regardless of any changes made to the unfair dismissal system as it applies to small business employers, there remains in place a strong policy response to guard against termination on improper grounds, such as discriminatory reasons, via the state and federal anti-discrimination framework and general protections provisions in the FW Act.

The approach to reviewing the Code

In reviewing the Code, careful consideration has been given to the policy objectives underpinning it and the processes leading to its creation. These can be drawn from:

- the Australian Labor Party's (ALP) pre-election policy, '*Forward with Fairness: Labor's plan for fairer and more productive Australian workplaces'* (Forward with Fairness) released in April 2007, which stated '[w]here a small business employer has genuinely complied with the Code, the dismissal will be considered a fair dismissal';
- the report delivered by the Senate Standing Committee on Education, Employment and Workplace Relations on 27 February 2009, arising from its inquiry into the *Fair Work Bill 2008* (Cth)(FW Bill)*;*
- the Explanatory Memorandum to the FW Bill; and
- the Explanatory Statement to the Code itself which made reference to 'simple rules' and pointed to distinct expectations for differing dismissal grounds, stating:

> *The Code recognises the special circumstances of small business employers by providing separate, simple rules for small business employers to follow when dismissing an employee. If a small business employer complies with the Code when dismissing an employee, the dismissal will be considered fair. Small business employers who do not comply with the Code will be subject to the unfair dismissal provisions of the Fair Work Act 2009 as they apply generally…*
>
> *The Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud and violence.*
>
> *For under-performing employees, the Code simply requires the employer to give the employee a valid reason, based on the employee's conduct or capacity to do the job, why the employee is at risk of being dismissed and a reasonable chance to rectify the problem.*
>
> *The Code does not require multiple warnings. It is desirable, but not necessary, for a warning to be in writing. The Code also sets out some procedural matters, including evidentiary requirements.*

For the purposes of this review, these objectives have been condensed into a review framework to guide consideration of whether the Code and Checklist are:

1. providing clear and simple tools for a small business employer to apply to ensure a dismissal is fair;
2. delivering certainty of compliance for a small business employer;
3. providing a clear basis for the Commission to assess whether the Code has been complied with before considering the merits of an application;
4. reducing the legalism associated with the unfair dismissal claims process; and
5. driving fair dismissals, therefore reducing the number of unfair dismissal claims.

Giving effect to these policy intentions would not only provide small business employers with certainty about the processes they should follow to meet their obligations for a fair dismissal, but would also drive fairness in relation to dismissals if more small business employers were encouraged to approach dismissals in a manner consistent with the Code. Giving effect to these policy intentions would also make it easier for the Commission to assess whether a dismissal complies with the Code.

In assessing the Code's performance against these objectives, findings from and submissions made to previous reviews and inquiries in which the Code was considered have been taken into account. Additionally, the Commission's consideration of the Code in unfair dismissal matters that have come before it has been taken into account.

Overarching finding

This review of the Code and its accompanying Checklist against the identified policy objectives has established that it is not delivering what was intended.

When the Productivity Commission completed an inquiry into the workplace relations framework in 2015, it found that following the Code does not appear to provide clear and concise advice upon which a small business can rely as a safeguard to a claim and that there was still a need to meet legal tests and precedents arising from litigated cases.[13]

While the Code was subject to extensive consultation during its development and had initially enjoyed the support of many small business representatives, issues began to emerge as the Code became operational, tested via the processes of the Commission and subject to detailed consideration during inquiries and reviews of the FW Act and its machinery. A summary of industry concerns raised during the Productivity Commission's inquiry into the workplace relations framework is provided at Appendix C, with core themes including:

- Code compliance is open to challenge with the effect that compliance can only established via costly litigation.
- There is a need for a better 'vetting process' for applications before proceeding to conciliate.
- The Code demands a detailed assessment of criteria inherently similar to that set out in section 387 of the FW Act.
- Navigating the Code is potentially more onerous than navigating the unfair dismissal provisions that apply more generally.
- The Code fails to accurately reflect the steps required to ensure strict compliance with it.
- The Code does not provide businesses with the certainty they need and does not prevent the bringing of unfair dismissal claims.
- Terms such as 'reasonable grounds', 'valid reason' and 'reasonable chance' are matters that need to be interpreted and determined on the facts as discoverable in evidence during an arbitrated process.
- There is a lack of small business awareness of the Code and its requirements.

The Productivity Commission suggested it was not easy to see how amendments could remedy these issues and, instead of recommending amendments to the Code and Checklist, recommended an overarching set of reforms to the unfair dismissal laws more generally.

More recently, the Commission engaged Bruce Billson of Agile Advisory in 2017 to examine how it can better meet the needs of small business. In July 2018, following a consultation program with small businesses, a report entitled *'Working Better for Small Business'* was released which stated:

> *It was widely observed that the Small Business fair Dismissal Code (the Code) is serving no constructive purpose for small business and in the way it is being applied, it fails to fulfil the stated rationale and public policy purpose that accompanied its introduction. While a full re-examination or at least a refinement for micro-enterprises (less than 5 employees) was preferred, procedural changes were identified that would see the Code restored to something approaching its original intention and for it to recognise the particular nature and circumstances of smaller workplaces.*[14]

Amending the Code so that it better achieves (and indeed drives) fairness while delivering greater certainty regarding what is expected of small business employers is worth exploring.

Summary of recommendations

	Amendments to the Code and Checklist
1	Establish separate processes that would ensure a dismissal is fair when ending employment on the following specific grounds: • serious misconduct (according to a new definition based on the FW Regulations); • conduct (other than serious misconduct) and performance; and • redundancy.
2	Define serious misconduct based on the definition in the FW Regulations and, in particular, deem that serious misconduct includes: • wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment; • causing serious and imminent risk to the health or safety of the employee or others; • causing serious and imminent risk to the reputation, viability or profitability of the business; • theft; • fraud; • assault or violence; • intoxication at work; • the refusal or failure to carry out a lawful and reasonable instruction consistent with the employee's contract of employment.
3	Remove application of the Code in the case of dismissal on the grounds of capacity. The Department of Jobs and Small Business should support the development of guidance, in partnership with industry and employer representatives, to help small business employers navigate situations related to capacity.
4	Provide separate Checklists included in the Code for each of the covered grounds which can be applied to demonstrate that a dismissal is fair.
5	Remove qualifying language (i.e. references to 'reasonable belief' and 'reasonable chance') that is open to contest and interpretation. Prescribe clear steps that a small business employer can follow and therefore know with certainty whether they have complied with the Code.
6	Clearly explain the meaning of 'small business employer' in the Code so an employer can identify whether they are able to apply it.
7	Clarify that not following the Code will not in itself result in an unfair dismissal finding.
8	Explain how to calculate the minimum employment period.

	Education and awareness
9	Actively promote the Code via FWO and industry partnerships to increase small business understanding and awareness of it.
10	The FWO to establish and host a dedicated, consistent, shared small business resource centre that makes available information on the Code, its application and requirements in a user friendly form, in collaboration with the Commission. This resource centre should also link up to the Commission's website and use consistent language.
11	The Commission to establish a dedicated Small Business Dismissal Code 'handbook'.
12	The FWO to make its services available to businesses outside of existing operational hours and investigate the viability of a phone back service such as that made available to small businesses by the Australian Tax Office.
	Fair Work Commission processes
13	The Form F2 to identify whether the applicant (i.e. former employee) believes they were employed by an employer employing fewer than 15 employees at the time of the dismissal. These applications to be considered as relating to a small business and be referred to the Small Business Division of the Commission.
14	A dedicated Small Business Division of the Commission to be established to deal with claims made against small business employers. This division should appoint dedicated case managers, with appropriate experience, and establish a triage process for the management of these claims.
15	The Commission to publish data in relation to unfair dismissal claims made against small business employers, including: • the number of claims identifying the respondent (employer) as employing fewer than 15 employees; • the number of small business employer respondents relying on the Code as an objection to an application; • the outcome of those claims; • whether the parties were represented or unrepresented. This data should be made available in the Commission's annual report.

Recommendations in detail

Amendments to the Code and Checklist to better achieve certainty of compliance

Changes to the Code and accompanying Checklist are recommended to better align the Code with its original policy intent. These amendments can be found at Appendix A.

The material differences between the proposed amended Code and the general requirements for considering whether a claim is harsh, unjust or unreasonable pursuant to section 387 of the FW Act are summarised at Appendix C. It is worth noting that this analysis highlights the Code's focus on fair *process* rather than valid *reason*.

At face value it may be suggested the amendments proposed do not fully address concerns due to the inclusion of prescription regarding process, which may present as going beyond the requirements in section 387 of the FW Act. However the Commission's interpretation of the requirements in section 387 needs to be taken into account as expectations regarding process are not limited to those expressed in the provision. In other words, the requirements in section 387 need to be considered in conjunction with a large volume of case law that has developed as the Commission has interpreted these provisions.

A small business operator is unlikely to be in a position to extensively consider the common law to determine what might be expected of them to ensure a dismissal is fair. To add to the complexity, unfair dismissal laws in Part 3-2 of the FW Act are 'protective' in nature, providing for remedy in the event that a dismissal is unfair, and are not therefore expressed as employer obligations. Consequently, it is difficult for an employer to know with certainty whether the steps they have taken in dismissing an employee will be considered 'fair' or 'unfair'.

The Code and Checklist provide an opportunity to clearly set out expectations from the outset in a way that minimises the likelihood of a small business employer 'getting it wrong'. In doing so, the Code also has the potential to drive a fair process in relation to a dismissal, taking into account the business size.

The amendments recommended in this report are designed to achieve a greater degree of certainty through a 'deemed to comply approach'. However, it should be noted that to achieve this outcome, flexible wording has been replaced with more prescriptive wording. This has been necessary to more clearly describe the steps to be followed in the event of dismissal and address current wording in the Code that is open to contest and interpretation. This mitigates the risk of a small business employer proceeding with a dismissal that results in a need for formal hearing.

It should also be noted that not following the Code and checklists (as amended) would not automatically result in a dismissal being unfair. A failure to follow the Code would however mean that a small business employer could not rely on the Code as a jurisdictional bar to a claim and that the provisions of part 3-2 of the FW Act would apply.

The recommended amendments to the Code and Checklist are explained in detail below.

Of note, section 388 of the FW Act empowers the Minister to declare a Code by legislative instrument. The *Acts Interpretation Act 1901* provides that a reference to a Minister without identifying the actual Minister is 'the Minister or Ministers administering the provision on the relevant day in relation to the matter'. An Administrative Arrangements Order may be used to work out which Minister this is at the time.

Recommendation 1:

Establish separate processes that would ensure a dismissal is fair when ending employment on the following specific grounds:

- serious misconduct (according to a definition based on the FW Regulations);
- conduct (other than serious misconduct) and performance; and
- redundancy.

The Code currently seeks to set out what constitutes a 'fair dismissal' under the broad categories of 'Summary Dismissal' and 'Other Dismissal'. There are a number of problems with this approach.

A small business employer is unlikely to consult the complex principles established at common law to form a view on whether the reasons for the dismissal amount to a right to 'summarily dismiss' an employee. They will however know the reason why they want to dismiss the employee and it therefore seems appropriate to attach guidance to that identified reason. It is recommended that these reasons include serious misconduct, conduct (other than serious misconduct), performance and redundancy.

It is acknowledged that there will be a broader range of circumstances that may result in the dismissal of an employee which are not captured by the categories of dismissals identified in the amended Code. However, this does not mean that those dismissals will be unfair. It will just mean that the Code will not apply in these circumstances.

Confusion around the types of dismissals to which the 'Summary Dismissal' provisions of the Code applies

While a small business employer will know the reason or reasons why they want to dismiss an employee, 'summary dismissal' is a complex legal concept and (as noted above) small business employers are not likely to engage with the case law in their efforts to interpret when a summary dismissal may be warranted.

The 'Summary Dismissal' part of the Code also incorporates references to 'serious misconduct'. In reading the parts of the Code together a Full Bench of the Commission has found that the summary dismissal section of the Code applies to dismissals without notice on the ground of serious misconduct as defined in reg. 1.07 of the *Fair Work Regulations 2009* (Cth)(FW Regulations).[15] However the Code does not actually state this and many small businesses may apply a different interpretation. A different definition of serious misconduct appears in the Code, adding to the confusion. This is discussed in further detail below in relation to Recommendation 2.

Confusion regarding procedural requirements

The Code and Checklist do not provide clear and simple guidance to a small business about what procedural requirements they need to comply with to ensure a dismissal is fair and this should be clarified for each type of dismissal.

In particular, the Code contains the heading 'Procedural Matters' which states:

> *In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist…*

This is not expressed as a compliance obligation which would require an employer to expressly provide an employee with the opportunity to have a support person. Rather, it suggests that an employee has a right to a support person which they may or may not choose to exercise. However this expression has given rise to confusion and differing legal interpretations.[16]

The Code and Checklist were amended in 2011 with additional questions included in the Checklist asking the employer whether the employee made any request to have a support person present. However, these amendments have not resolved the differing interpretations of the Code – i.e. whether there needs to be an express offer of a support person or whether the provision is only relevant when an employee makes a request for one.

To add to the confusion, it is also unclear as to the circumstances in which the procedural requirements regarding support persons apply. The Checklist's preamble states:

> *Employers should read the Code before completing the Checklist, ensuring they understand their procedural obligations under the Code. Meeting these obligations is an important factor in complying with the Code.*

This could be interpreted to mean that the 'procedural matters' need to be met for all types of dismissals under the Code, yet the Checklist does not require an employer to answer questions 6 and 7, regarding an employee's ability to have a support person, if the dismissal is for 'serious misconduct'.

Even if the 'procedural matters' are only intended to apply to 'other dismissals' as distinct from 'summary dismissals' on account of serious misconduct (which appears to have been intended), the Productivity Commission identified a problem where an employer is dismissing an employee for grounds it perceives as serious misconduct, but the Commission has a different view. The Productivity Commission suggested that in these circumstances the failure to offer a support person may be decisive in the outcome of a case even though the employer thought they were following the Checklist and therefore doing the right thing.[17]

It is not obvious to a small business employer as to when the summary dismissal provisions of the Code apply to their dismissal. Furthermore, there is no prompt in the Code encouraging the employer to reflect on the reason for the dismissal in deciding whether or not they need to adopt the procedural requirements for their particular circumstances. This should be addressed by amending the Code.

Compliance requirements for 'other dismissals' are confusing

If an employer is not able to apply the 'summary dismissal' provisions of the Code, they would need to comply with the provisions for 'other dismissal' in order to rely on the Code.

The steps a small business employer is required to take to establish Code compliance in the event of 'other dismissals' is confusing not only for the employer but, at times, the Commission itself[18] and the process for 'other dismissal' seems an awkward fit for many circumstances.

When the Productivity Commission reviewed the workplace relations framework it found the Code:

> *…poses considerable risks to small businesses if a decision is contested, undermining its original goal. In a separate review, the Code was characterised in a similar fashion by the Reviewer as follows:*
>
> > *I do not favour the Small Business Dismissal Code… It seems a poor document to me. On the one hand it encourages employers to escalate certain types of misconduct into police matters as a matter of course. And on the other hand, it completely fails to deal with misconduct falling short of serious misconduct which might nevertheless justify termination on notice (as opposed to summary dismissal). The Small Business Fair Dismissal Code seems to suggest that such misconduct needs to be the subject of performance management as a matter of course, which is odd, to say the least, and bordering on the bizarre (Amendola 2009, p. 211).*[19]

The reasons giving rise to dismissal are wide ranging and the circumstances of a dismissal are unique to each case. This makes it very difficult to prescribe an approach that will cover all of these circumstances and the Code is giving rise to confusion in its attempts to do this.

While the reviewer referenced above suggests that applying a performance management approach to a conduct related dismissal seems a poor fit, applying such an approach in circumstances related to a person's capacity to perform a role (e.g. due to illness or injury that impacts their ability to fulfil the inherent requirements of the role) seems an even poorer fit. There is also a risk that doing so may expose a small business employer to a claim in another jurisdiction (i.e. a general protections or anti-discrimination claim).

Furthermore, there are common dismissal situations, e.g. where a person's role is no longer required, that are not addressed in the Code, but for a cursory reference within the preamble (discussed below).

Amendments to the Code and the creation of separate checklists reflecting distinct processes for different categories of dismissal may help address these concerns.

The Code does not clearly set out a process for redundancy

While the Code's preamble currently makes reference to the need for 'redundancy' to be genuine and directs the small business employer to section 389 of the FW Act, a 'compliant' approach for dismissal on the grounds of redundancy does not appear in the operative provisions of the Code.

Redundancy was not a key consideration in the original formulation of the Code and the preamble was updated to make reference to redundancy in 2011. The Checklist was also updated at that time. In particular, Question 3 of the Checklist appears to be intended to assist in determining whether the meaning of 'genuine redundancy' under section 389 of the FW Act has been satisfied.

However, the amendments are an imperfect fit and the additional questions are shackled onto a Checklist that appears to be trying to serve too many purposes. As such, amendments have been proposed to include a separate checklist to clearly set out what constitutes a 'fair dismissal' in the event of a small business employer making an employee redundant. Given the limitations in relation to a small business and that they are unlikely to have complex corporate structures in place, the redeployment requirements set out in section 389 of the FW Act have not been incorporated.

Recommendation 2:

Define serious misconduct based on the definition in the FW Regulations and in particular, deem that serious misconduct includes:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- causing serious and imminent risk to the health or safety of the employee or others;
- causing serious and imminent risk to the reputation, viability or profitability of the business;
- theft;
- fraud;
- assault or violence;
- intoxication at work;
- the refusal or failure to carry out a lawful and reasonable instruction consistent with the employee's contract of employment.

Despite the Commission's interpretation that the 'summary dismissal' section of the Code was intended to apply to 'dismissals without notice on the ground of serious misconduct as defined in reg 1.07' in the FW Regulations,[20] the Code sets out a different definition of 'serious misconduct'.

In particular, the Code defines serious misconduct as 'theft, fraud, violence and serious breaches of occupational health and safety procedures'. It is apparent that the definition of serious misconduct in the Code was not intended to be exhaustive[21] and question 5 of the Checklist enables the employer to nominate 'some other form of serious misconduct'. However the practical implication of this is that the user of the Code may need to evaluate whether that 'other' reason was indeed serious misconduct, which may require testing the facts in an arbitrated setting.

While the Code was aimed at achieving simplicity and clarity, it does not list some of the common types of serious misconduct that a small business employer may encounter and which are captured within the FW Regulations. Furthermore, the Code was intended as a stand-alone document and a small business employer will be unlikely to navigate the FW Act and FW Regulations concurrently with the Code to understand whether an employee's conduct meets the statutory definition of 'serious misconduct'.

Considering the small business need for simplicity and clarity, a definition of 'serious misconduct' has been identified for the purposes of applying the Code, which more closely reflects the definition adopted in the FW Regulations.

Amending the Code in this way recognises that a small business employer is not likely to navigate the Code, the FW Act and the FW Regulations to understand the meaning of this term. The need for formal hearings to test whether the 'reasons' for dismissals are sufficiently serious could be minimised by including a definition that describes a broader range of conduct that more closely resembles the definition in the FW Regulations.

The recommended amendments recognise that summary dismissal of an employee is a strong measure that ought to only be exercised in exceptional circumstances. If an employer wishes to dismiss an employer for conduct that does not fall under the categories of serious misconduct identified in the Code, an assessment will be required regarding whether the stipulated reason would constitute serious misconduct.

The proposed amendments to the Code are also intended to encourage the small business employer to keep in mind that there are other, lesser, types of misconduct that may be better responded to with a formal warning so the employee is put on notice that they need to improve and meet a higher standard, or else they may be dismissed.

Removing the reference to reporting serious misconduct to the police

Amendments to the Code have been recommended from a procedural standpoint to remove the reference to the making of a police report. The Code's provisions relating to summary dismissal currently state:

> *For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police.*

As noted earlier in this report, a previous reviewer of the Code has suggested that this provision 'encourages employers to report certain matters to the police as a matter of course' while failing to adequately deal with misconduct in other ways.[22]

The likelihood of a small business employer reporting conduct to the police that is not criminal in nature is low and the decision as to whether to report a matter to the police is not one that an employer would make lightly. Notwithstanding this, it is recommended that the reference to the making of a police report be removed to address the concern of the previous reviewer and the risk of any perverse or unintended consequences arising from the inclusion of this reference.

Recommendation 3:

Remove application of the Code in the case of dismissal on the grounds of capacity. The Department of Jobs and Small Business should support the development of guidance, in partnership with industry and employer representatives, to help small business employers navigate situations related to capacity.

While the broad category of 'other dismissal' may have been intended as a 'capture all' and intended to meet 'small business needs for flexibility', this approach creates difficulty. It attempts to prescribe compliance requirements for a wide range of dismissals in a consistent way, however its approach is a bad fit for some types of dismissals.

For example, the Code currently prescribes a performance management process in the lead up to a dismissal based on the employee's 'capacity to do the job'. This would seem a poor fit if 'capacity' relates to, for example, physical or mental health issues concerning an employee that may or may not impact their ability to undertake the inherent requirements of the role. Establishing this is also very difficult to reduce to a 'black and white' checklist. Other jurisdictions such as the workers compensation and anti-discrimination jurisdictions add additional layers of complexity.

Given the difficulty encountered in codifying an appropriate approach, and considering the inter-relationship with other jurisdictions, it is recommended that the Code be amended so that it does not have application in the case of dismissal on the grounds of capacity.

An inability to apply the Code in these circumstances does not mean that a dismissal on the grounds of capacity will automatically be considered unfair. Rather, a claim will need to be determined in accordance with the provisions of part 3-2 of the FW Act, taking into account the factors in section 387. This includes whether there was a valid reason for the dismissal related to the person's capacity (taking into account the effect on the safety and welfare of other employees)[23] and the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal.[24]

Given the complexity of situations where an employee may not be able to perform their job due to issues related to capacity, guidance could be developed for small business employers to support them in navigating these issues. This development of this guidance could be supported by the Department of Jobs and Small Business working in partnership with industry and employer representatives.

Recommendation 4:

Provide separate checklists for dismissal on each of the covered grounds which can be applied to demonstrate that a dismissal is fair.

Certainty of compliance is a clear policy objective that can be drawn from the pre-election policy leading to the Code's creation, the Explanatory Memorandum to the FW Bill and the Code's Explanatory Statement. It is therefore perplexing that the Checklist states that it 'is a tool to help small business employers comply with the Small Business Fair Dismissal Code' yet goes on to say '[c]ompleting the checklist does not mean that the Code has been complied with...'

Peculiarly, the Checklist also appears to suggest that it should be retained as evidence in the event of an unfair dismissal claim stating '[i]t is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim'.

Furthermore, the consequence of answering 'yes' or 'no' to a question or completing the free-form responses in the Checklist does not deliver any certainty to the small business employer regarding whether they have 'done the right thing'.

As previously noted, the confusion is compounded as it appears to be attempting to apply a universal set of questions to a broad range of termination circumstances when many of the questions are an awkward fit for certain types of dismissals. What would be regarded as a 'fair dismissal' for those dismissals that are not summary dismissals is particularly difficult to decipher from following the Checklist. Furthermore, the consequence of identifying 'other' reasons for the termination that are not expressed in the Checklist is unclear.

Given the wide range of circumstances that may give rise to dismissal and the differing approaches that may be required for each type of dismissal, it is apparent that the Checklist is trying to serve too many purposes and is giving rise to confusion in its attempts to do so.

Furthermore, there seems to be little utility in the Code including a Checklist intended to be used to achieve compliance if completing the steps within it and supporting this with evidence does not actually deliver this outcome.

Amendments have been recommended such that:

- a separate, tailored checklist is provided for certain types of dismissals that small business employers may commonly encounter (i.e. serious misconduct, conduct other than serious misconduct, performance and redundancy);
- the checklists are elevated to the status of a compliance tool so when the steps in the appropriate checklist have been taken, and this can be supported by evidence, the checklist can be used by the Commission in assessing compliance with the Code.

Recommendation 5:

Remove qualifying language (i.e. reference to 'reasonable belief' and 'reasonable chance') that is open to contest and interpretation. Prescribe clear steps that a small business employer can follow and therefore know with certainty whether they have complied with the Code.

The 'reasonableness' of a belief is open to challenge

In the case of summary dismissal, while it is not necessary for the Commission to determine whether the conduct the small business employer applying the Code puts forward as the reason for dismissal actually occurred[25] or that the small business employer was actually correct in the belief it held regarding the conduct,[26] it needs to establish whether the employer had a 'reasonable belief' that the conduct was serious enough to warrant immediate dismissal.[27]

For the Commission to be satisfied about the reasonableness of the belief, the employer must establish they did in fact hold the belief that:

- the conduct was by the employee;
- the conduct was serious; and
- the conduct justified immediate dismissal.[28]

The case law suggests some level of inquiry or investigation will be required to demonstrate a reasonable belief[29] however this is not expressly stated in the Code and what this needs to look like in practice has been subject to different interpretations. It is undesirable that a small business should be required to have this issue not only considered by a single Member of the Commission but determined through a complex and protracted process involving hearing by a Full Bench, as has been the case in some circumstances.

There is merit in clarifying this requirement in the Code. In doing so, it will be necessary to acknowledge that a small business employer should not be expected nor required to conduct a complex investigative process that might be carried out in a larger organisation given their comparatively limited resources.

Taking this into account, an attempt has been made to 'codify' what can be expected of a small business employer to form a 'reasonable belief' that serious misconduct has occurred. In some cases a small business would not need to take steps to investigate because they have formed a belief based on direct knowledge (i.e. witnessing the conduct themselves). In other cases it would be expected that they undertake basic investigative steps (e.g. making enquiries of others, considering relevant information or making inquiries of the employee directly).

Reasonable chance' is open to challenge

In the case of 'other dismissal' it is not obvious to a small business employer attempting to apply the Code whether the chance given to improve conduct or performance will be considered 'reasonable', as this is also open to challenge and interpretation.

The Code does not provide any definition or guidance around what might be understood to be reasonable, however the case law suggests this means some period for improvement must be given to the employee. It has been established that a period in which no work was performed does not constitute a 'reasonable chance to improve'.[30]

A small business has limited capacity to shoulder the burden of an employee who is not meeting expectations, however a situation that results in arbitration to determine what constitutes a 'reasonable chance' can also be a costly and resource intensive exercise and there is merit in exploring a compromise.

Given the small business need for simplicity and certainty of compliance, it is proposed that the Code be amended to deem compliance in circumstances where the employee has been provided with a chance to improve their conduct or performance within a minimum period. A period of two weeks has been recommended for this purpose.

Any shorter time frame would not in itself mean that a dismissal is unfair, however compliance with the Code could not be demonstrated as a jurisdictional bar to a claim and the dismissal would need to be considered in accordance with the general provisions in Part 3-2 of the FW Act.

Recommendation 6:

Clearly describe the meaning of 'small business employer' in the Code so an employer can identify whether they are able to apply it.

While the Code is applicable to small business employers, it does not provide clear guidance on the term 'small business employer' (as defined in section 23 of the FW Act). Amendments to the Code are recommended to address this.

Recommendation 7:

Clarify that not following the Code will not in itself result in a finding that a dismissal is unfair.

While the Code attempts to set out the circumstances in which a dismissal should be considered 'fair', it does not make clear that not following the Code will not in itself amount to a finding that the dismissal is unfair. Rather, where the Code does not apply or is not applied, the Commission is required to consider the matter in accordance with the provisions of Part 3-2 of the FW Act. Given amendments are recommended to the Code that will limit its application in some circumstances (e.g. by removing an ability to rely on the Code where an employee is dismissed on the grounds of capacity) this clarification is useful.

Recommendation 8:

Explain how to calculate the minimum employment period.

When responding to an unfair dismissal claim a small business employer will typically complete a response form (usually Form – F3) which will ask them to identify whether they object to the claim on jurisdictional grounds.

A key jurisdictional matter that may arise is whether the applicant has completed the 'minimum period of employment' (as defined in section 383 of the FW Act). Research for the Commission undertaken by the Cube Group suggested respondents to unfair dismissal claims were uncertain about the jurisdictional grounds on which they could object and when these were met. As such, there is merit in amending the Code and Checklist to provide greater clarity on how the minimum employment period is calculated.[31]

Improving small business understanding and awareness of the Code

The Code's policy objectives and fairer dismissals cannot be achieved if there is a low level of awareness about its existence and some employer representatives have reported that this is the case. Anecdotal evidence also suggests a small business employer will not engage with the Code until the dismissal has already occurred, which means it is not being used proactively as a compliance tool.

Recommendation 9:

Actively promote the Code via FWO and industry partnerships to increase small business understanding and awareness of it.

In conjunction with relevant employer and industry representatives, it is recommended that the FWO implement ongoing promotional activities to raise awareness about what can be expected of employers in ensuring dismissals are fair and consistent with the Code. Consistent with the recommendations in the earlier ASBFEO report, *Workplace Relations – simplification for small business*, these promotional activities should also aim to dispel common myths regarding dismissals (e.g. 'three strikes and you are out').

In order to encourage the proactive use of the Code to drive fair dismissals it is recommended that the FWO publish, in partnership with industry, information on managing performance and conduct and provide templates intended to help small business employers navigate the processes set out in the Code and checklists before moving to dismiss an employee. This information and guidance should help small business employers identify the records and evidence of Code compliance that should be retained before and at the time of dismissal.

A panel of employer representatives with particular expertise in the Code could also be formed and promoted by the FWO as a referral point for small businesses who need assistance in complying with the Code and navigating the steps in the checklist before dismissing an employee (e.g. assistance in the drafting of letters of warning and termination).

Recommendation 10:

The FWO to establish and host a dedicated, consistent, shared small business resource centre that makes available information on the Code, its application and requirements in a user friendly form, in collaboration with the Commission.

This resource centre should also link up to the Commission's website and use consistent language.

The FWO is the entity responsible for providing education and information about the workplace relations system while the focus of the Commission is on providing information to assist employers and employees in understanding the Commission's processes and procedures.

However as identified by Agile Advisory, small businesses often conflate the Commission and FWO, interchangeably labelling them 'Fair Work'.[32] Agile Advisory concluded that absent a change of name for either or both the Commission and FWO it would be desirable for them to collaborate in the provision of education and advice to small business, including in the provision of support to small businesses in relation to the procedural elements of ending employment.[33]

The Cube Group also found that '[c]onsolidating guides and other resources to reduce duplication and volume, developing a more streamlined website interface and better search functionality could improve user access to information'.[34]

Taking these findings into account, it is recommended that a dedicated online resource centre for small businesses be established to help them navigate dismissals and the processes leading up to them. This online resource centre could be hosted by the FWO while interfacing with the Commission's website.

This resource centre would present the Code and Checklists in an intuitive way, including setting out online workflows for dealing with serious misconduct, other misconduct, underperformance and redundancy that reflect the requirements in the Code and Checklist. This workflow should ask questions to establish an employer's eligibility to apply the Code up front before walking the user through the appropriate workflow, which would have the effect of populating the relevant checklist and enabling it to be saved and updated. In the event that the user's response to a question in the workflow means they would be unable to rely on the Code, the online workflow should terminate with an alert and explanation provided about why the user is unable to rely on the Code or establish Code compliance.

Prompts throughout this workflow could identify the type of evidence that would assist the user in establishing that each step in the workflow has been satisfied, encouraging the user to retain records of this information. It would be intended that moving through the online workflow would give rise to a document that could be saved and relied upon in the event of a claim. Templates that can be used in satisfying procedural elements (e.g. letters of warning and investigation tools) should also be located on this site as should a 'handbook' and case studies demonstrating the application of the Code (this is discussed below).

Recommendation 11:

The Commission to establish a dedicated Small Business Dismissal Code 'handbook'.

The Cube Group noted that some employers suggested that the Commission's Unfair Dismissals Benchbook (Benchbook) had great potential to be helpful to respondents but they were overwhelmed by the range of topics covered in the document and considered it could be made more useful if it were simplified or made easier to navigate.[35] While the Code is addressed at pages 99-102 of the Benchbook, the document is lengthy at 215 pages and not specifically targeted at small business. It is not therefore a resource that a small business would intuitively engage with, particularly prior to a dismissal or claim.

It is recommended that a specialist resource dealing with the Code be developed by the Commission and published on the shared small business resource centre. This should also deal with the common jurisdictional questions such as 'what is a small business employer?' and 'how do I calculate the minimum employment period?'

Consistent with the earlier recommendations in the ASBFEO report, *Workplace Relations – simplification for small business*, it should also serve as a tool for improving the predictability of decisions in relation to the Code by including case studies and determinations in plain language to provide a layperson's account and 'learnings' for small business employers and their representatives. It should be clearly decipherable from the cases referenced why either Code compliance was established or why it was not for each type of termination so these learnings are capable of practical application. This resource could be developed and maintained by a Small Business Division of the Commission (see Recommendation 14).

Recommendation 12:

The FWO to make its services available to businesses outside of existing operational hours and investigate the viability of a phone back service such as that made available to small businesses by the Australian Tax Office.

Small business employers often have limited time available to seek support and advice during the business' operational hours. This difficulty may be compounded where the small business employer's operational environment is not conducive to them seeking advice during work time (e.g. because the employee concerned is in close proximity).

Consistent with the earlier recommendations in the ASBFEO report, *Workplace Relations – simplification for small business*, in order to make it easier for a small business employer to seek the information and advice they need, it is recommended that the FWO explore the extension of the operation of its support line beyond the current hours (8am – 5.30pm) and investigate the viability of a phone back service such as that made available to small businesses by the Australian Tax Office between the hours of 6pm and 8pm (AEDT) Monday – Thursday. Alternatively, or as a complementary measure, investigation should be made regarding services offered by employer representatives after hours to determine whether it is possible for small business employers to be referred to these services or otherwise made aware of them via the FWO website.

The FWO website identifies unfair dismissal as a matter that it is unable to assist with. However this requires clarification as the FWO does provide resources about the Code and provides information and templates that are of utility in managing employees and ending employment.

While the FWO cannot represent a small business employer in defending against an unfair dismissal claim it can play a role in connecting a small business employer with information about dismissals and the Code. If the recommendations in this report are adopted the FWO's resources would be further evolved to help small business employers comply with the Code.

Improving the claims process

The President of the Commission has stated:

> *A key indicator of access to justice is whether small business and individual users are able to resolve disputes simply and quickly, without the need for paid representation. We will look at ways to provide more support for applicants and respondents in the early stages of unfair dismissal and general protections cases, including ensuring that the first contact with the Commission for an employee applicant or an employer respondent will be a telephone call from a trained staff member. Early, personalised support can help address the uncertainty and confusion many self-represented employees and employers feel at the start of a claim about dismissal.*[36]

The Commission is to be commended on the steps it has taken so far that align with these aims and the following recommendations have been made with a view to further developing the Commission's approach.

Recommendation 13:

The Form F2 to identify whether the applicant (i.e. former employee) believes they were employed by an employer employing fewer than 15 employees at the time of the dismissal. These applications to be considered relating to a small business and be referred to a Small Business Division of the Commission.

An unfair dismissal case is commenced when an employee lodges an application (Form F2). The Form F2 requires a number of details to be completed by the applicant, including answering questions such as:

- 'What date did you begin working for the employer?' and 'What date did your dismissal take effect'; and
- 'Are you making this application within 21 days of your dismissal taking effect', requiring a reason in the event of a 'no' response.

These questions are of assistance in identifying some jurisdictional bars to a claim. However the applicant is not required to identify in the Form F2 key information that may be of assistance in determining whether Code compliance may exist as a bar to an application progressing, such as whether the employee believes the employer is a small business employer and, if so, the process adopted in administering the dismissal. This makes it difficult for the Commission to reconcile the information in the employee's Form F2 application with the employer's response in the Form F3 (or Form F4) to form a view about Code compliance early on in the proceedings.

The Form F2 application should incorporate questions for an applicant requiring them to identify whether they believe they are employed by an employer employing fewer than 15 employees at the time of the dismissal (i.e. a small business employer). This will assist in identifying which claims should be directed to a dedicated Small Business Division of the Commission for case management (see Recommendation 14 below).

Recommendation 14:

A dedicated Small Business Division of the Commission should be established to deal with claims made against small business employers. This division should appoint dedicated case managers, with appropriate expertise, and establish a triage process for the management of these claims.

A dedicated Small Business Division of the Commission should be established to operate with a 'facilitative posture, support earlier resolution, low-cost and less-legalistic approaches' as recommended by Agile Advisory[37] and consistent with the earlier recommendations in the ASBFEO report, *Workplace Relations – simplification for small business*.

This should be comprised of a triage team, specialist conciliators with expertise in applying the Code and a panel of Commission Members with specialist expertise in determining matters involving small business employers and their employees.

While the FW Act does not state how the Commission is to go about its initial consideration of Code compliance in a practical sense, there is evidence that the process is not operating as intended. The Explanatory Memorandum[38] to the FW Bill demonstrates an intention that consideration of Code compliance would occur in an informal and inquisitorial manner:

> *r. 215. FWA will be able to consider matters such as whether the employee has completed the minimum qualifying period or whether the employer has complied with the Small Business Fair Dismissal Code in an informal and 'inquisitorial' manner. For example, FWA may gather information via telephone discussions with the parties, FWA may ask the parties for written information, or FWA may convene a face-to-face conference, either at the employer's premises or at FWA. Where there are contested facts between the parties, FWA will be required to either hold a conference or conduct a hearing.*
>
> *r. 216. Any face-to-face conference will be informal with formal written submissions or cross examination not necessarily required. Only matters that are considered appropriate by FWA will be referred to a full public hearing. In considering what is appropriate FWA must have regard to the views of the parties and whether a hearing would be the most effective and efficient way to resolve the matter.*

However in *Murray & Ors v Electric Light Hotel P/L t/as Electric Light Hotel Partnership* [2010] FWA 2613 the Senior Deputy President stated:

> *While the legislation clearly intended the Code to provide an expedited mechanism for the consideration of fairness in dismissal involving a small business, I have not found it possible to do this in any way other than a detailed assessment of the criteria addressed in the Code in a form which is inherently similar to that set out in s 387 of the Act.*

Where a small business employer's compliance with the Code is challenged or unable to be determined without a more detailed assessment of the evidence, a hearing by the Commission will usually be involved. Formal hearings can be complex, legalistic and result in considerable cost and time for the small business employer.

While the overwhelming majority of claims settle before arbitration, employer representatives have suggested this is attributable to the payment of 'go away' money. This is said to be driven by the practical reality that it is not commercially viable for a small business to defend a case to arbitration[39] even where an employer believes they had good reason to dismiss an employee. It is suggested that the time and cost associated with defending a claim and the uncertainty regarding the outcome of arbitration drives the payment of this 'go away' money.[40]

A Small Business Division of the Commission would help to deliver a tailored approach in the management of claims made against small business employers so they are less resource intensive, less costly and able to be navigated without having to seek out legal advice.

In recent times the Commission has conducted research into user experience with the Commission and unfair dismissal processes, with a particular emphasis on small businesses. The findings of this research provide some insights into how the Small Business Division of the Commission should function.

In particular, in July 2018, of Agile Advisory published the report '*Working for Small Business*', following a consultation process undertaken for the Commission. In March 2018 the Cube Group released a report arising from research for the Commission. Following the release of the reports, the Commission launched its '*What's Next?'* plan setting out the changes it will make in 2018-19.

In particular the Commission committed to:

- make available a Workplace Advice Service to provide self-represented individuals and small business employers with up to one hour of free legal advice and assistance in relation to unfair dismissal, general protections and anti-bullying matters. This program (commencing in Sydney and Melbourne) will expand across the country in 2018 and 2019;[41]
- *'ensure that the first contact with the Commission for an employee applicant or an employer respondent in an unfair dismissal or general protections dismissal is a phone call from a trained staff member'*;
- *'draw on the successful case management service the Commission provides to applicants and respondents in anti-bullying cases, on which both participants and other stakeholders have reported positively'* (although noting that the Commission receives 20 times more unfair dismissal and general protections dismissal applications than anti-bullying applications);
- *'conduct a major review to ensure that users are provided with the information they want, at the time they need it, in plain language and in the most useful form'.* This will include a review of the Commission's '*Rules, forms, correspondence, formal directions, notices and the guidance material on our website to ensure it is accessible, accurate and consistent'.*

These are welcome initiatives and the Commission's approach can be further developed, taking into account the high volume of unfair dismissal claims, the recommended amendments to the Code set out in this report, and the informal process that was intended for claims against small business as described in the Explanatory Memorandum.[42]

Small Business Division case manager and triage process

It is recommended that a case manager be appointed to manage claims referred to the Small Business Division. This case manager would apply a 'triage process' to collect information from the parties to identify whether an application confronts any jurisdictional bars, narrow the issues in dispute and enable an informed recommendation to be made about how the claim should be handled.

Step 1: Claim is referred to the Small Business Division of the Commission

An application for unfair dismissal remedy should be allocated to the Small Business Division of the Commission for management where an applicant (i.e. former employee) identifies in their application form (Form F2) that they believe the respondent employed fewer than 15 employees at the time of the dismissal. Amendments to the Form F2 to capture this information have already been recommended (see Recommendation 13).

Step 2: A case manager is appointed

When the Cube Group conducted research for the Commission it found that connecting applicants and small business employer respondents with a case manager at the beginning of the claims process could improve their experience with the Commission.[43] The Cube Group noted that:

> *Many respondents felt the Commission did not provide a sufficiently accessible support system because they were unsure whom they could call (e.g. case manager), and where to seek further information about the process they have been drawn into*.[44]

It is therefore recommended that once an application has been allocated to the Small Business Division, the parties be connected to a case manager who would act as a 'go to' person to help them understand procedural requirements as well as jurisdictional objections when making or confronted by a claim.

Step 3: A triage process is applied upon receipt of the Form F2

It is recommended that the case manager apply a triage process that would assist in collecting the information necessary to identify the best way to deal with an application and to elicit relevant information to better place a respondent to respond to it.This will help address concerns identified by the Cube Group when it conducted its research into user experience that:

> *Many respondents felt it was unfair the Commission would accept an application that was incomplete or confusing. Some respondents reported that the application form they received did not make a coherent argument that they could 'respond' to.*[45]

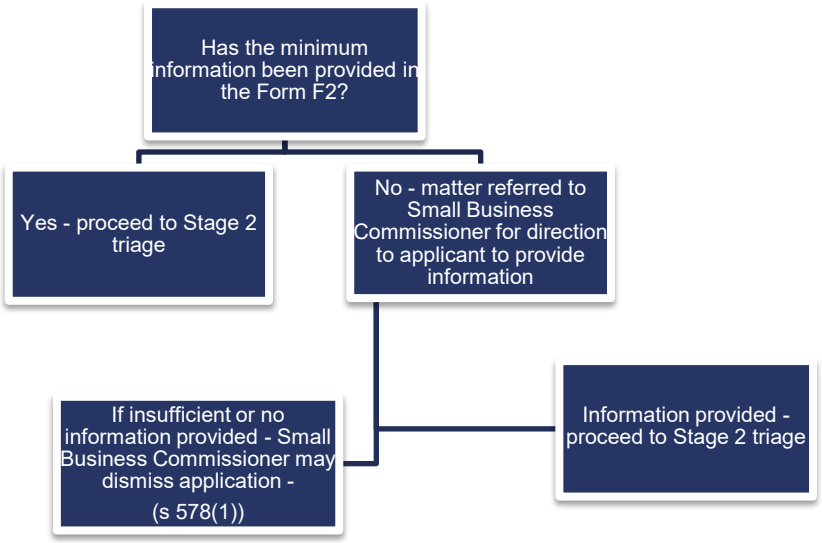
Relevantly, Agile Advisory suggested that a 'triage process should establish a minimum threshold of information to collect from applicants either in the application form or through follow-up activities on receipt of an application, before it is served on an employer' so an employer can respond in a 'meaningful way'.[46]

The triage process could include the following stages.

Stage 1 triage: Has the application been properly completed?

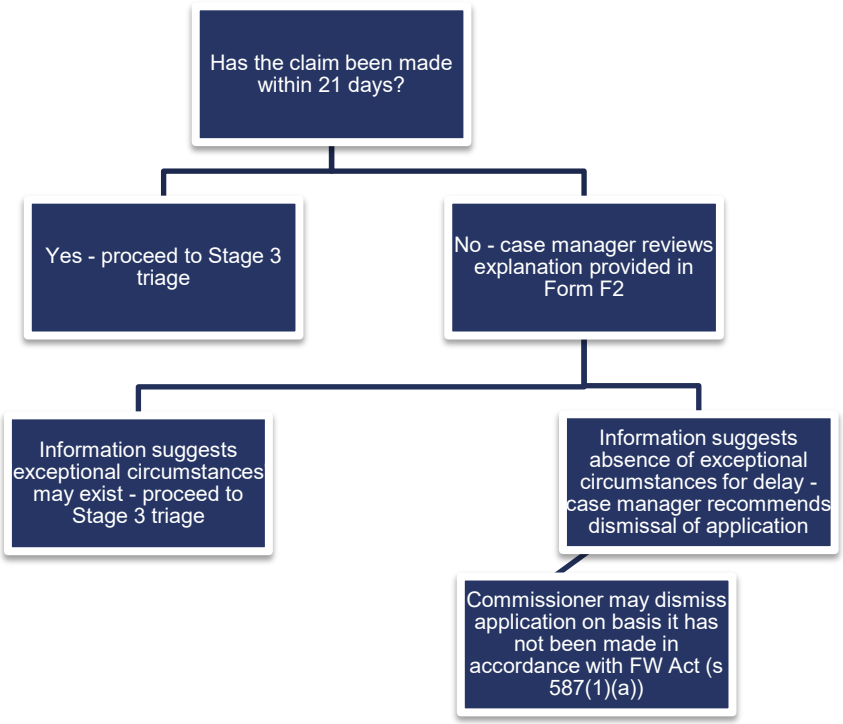
As an initial step, the case manager should review the Form F2 to see if the questions have been completed and contain a minimum threshold of information, for example:

- contact details for the parties;
- employment details – including start date, date of notification of dismissal and end date;
- the reasons given for dismissal (see question 3.1);
- the reasons why the applicant believes the dismissal was unfair (see question 3.2);
- the applicant's signature.



Stage 2 triage: Has the claim been made within 21 days?

The case manager should seek to establish whether an applicant has lodged the Form F2 within 21 days after the dismissal took effect. If an application is not made in accordance with the FW Act the Commission has the power to dismiss the application on its own motion, which means the application could be dismissed before it is served on the respondent.

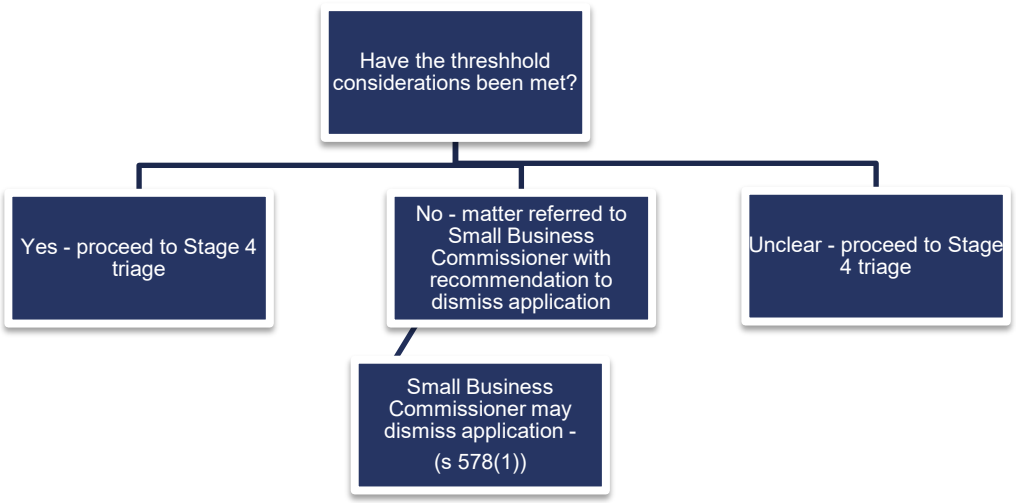


Stage 3 triage: Threshold considerations

The case manager should aim to gather information from the applicant to support an assessment of whether the applicant is protected from unfair dismissal. This should include reviewing the Form F2 information and seeking any additional information that might be missing. The quiz available on the Commission's website provides a useful starting point the development of a checklist that can be used by the case manager, with questions relevant to a consideration of:

- whether the applicant was an employee (section 380);
- whether the applicant was employed by a national system employer;
- whether the applicant was dismissed (section 386);
- whether the applicant was employed for the minimum employment period (section 383);
- whether the applicant was covered by an award, whether an enterprise agreement applied to them and whether they earned less than the high income threshold (section 382).

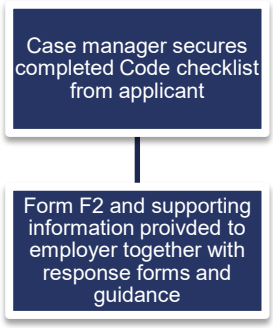
If the application appears to have run into a jurisdictional hurdle, consistent with the recommendation of Agile Advisory, the case manager should consider whether the matter should be referred to a Commission Member to see if it can be determined on the papers before the application is served on an employer.[47]



Stage 4 triage: Were the steps in the Code followed?

A further checklist could be developed to support the case manager in seeking information from the applicant about whether the dismissal was consistent with the Code, including questions about the process followed in effecting the dismissal from the perspective of the applicant.

If the case manager has gathered the necessary information from the applicant, they would then be in a position to contact the employer to provide them with the applicant's Form F2 and accompanying information.



Currently, when a respondent is notified of the application they are invited to respond, typically using the 'Employer's response to unfair dismissal form' (Form F3). There is also a separate Form F4 that a respondent can use to object to an application for unfair dismissal, which identifies compliance with the Code as a ground for objection, along with other jurisdictional grounds.

In providing the Form F2 and accompanying information to the respondent, it is recommended that guidance be provided on the jurisdictional grounds upon which the respondent could object and point to the matters raised identified in the applicant's information which raise questions around whether these grounds may exist. This is particularly important given Cube Group's finding that respondents demonstrated varying degrees of understanding of a 'jurisdictional objection', stating:

- *Specifically, the term 'jurisdictional objection' itself can make the concept inaccessible to some users, with some checking the box because they "objected" to the application rather than having grounds to challenge the eligibility of the applicant to seek a remedy.*
- *Respondents reported feeling unsure whether they had a right to object, not finding a clear, highly accessible description of when you can/cannot object and why.*[48]

Stage 5 triage: Comparison of the applicant and respondent's information and evidence

Once a respondent has lodged a Form F3 or Form F4 the triage process should be continued comparing the respondent's evidence and information against the applicant's Form F2 and accompanying evidence and information. This would include:

- the case manager conducting an assessment of whether the evidence and information suggests Code compliance has been established;
- identifying whether the respondent has raised a jurisdictional objection;
- identifying whether there are facts in dispute.

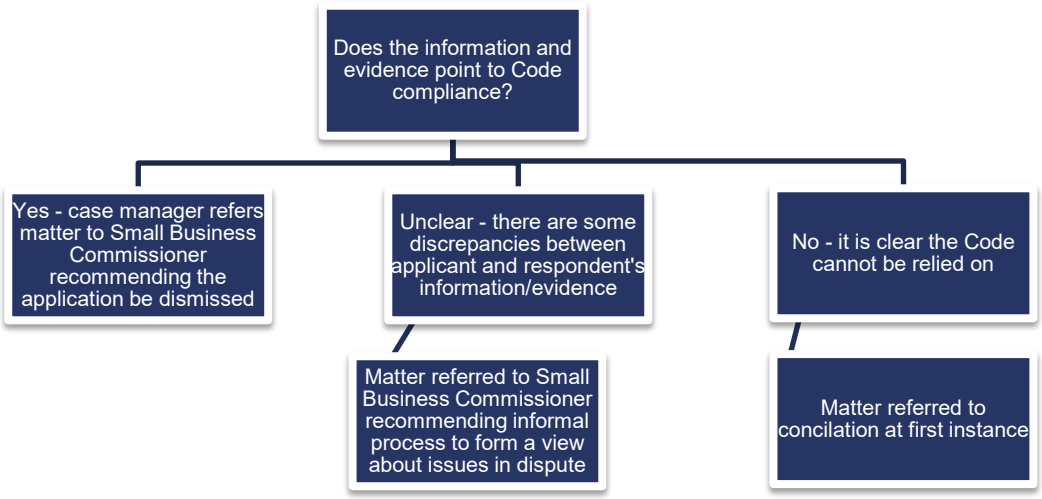
Step 5: The case manager recommends next steps

Once the relevant information is collected from both parties the case manager would be in a position to review the information and recommend a method of progressing a matter. For example, Agile Advisory recommended:

> *Where a smaller employer has raised a jurisdictional objection and can point to reasonable compliance with the Code, present evidence of abandonment of employment or other relevant objections, the next steps should focus on considering and testing that evidence rather than channelling smaller employers through a process that is focused on reaching a settlement (unless this is the path that both parties want to take).*[49]

Depending on the circumstances, it might be the case that a desktop assessment of the evidence and information put forward by the parties is sufficient to form a view about Code compliance and, where it appears compliance is established, the matter could be referred to a Small Business Commissioner with an accompanying recommendation that the application be dismissed.

On the other hand, if compliance with one of more aspects of the Code is disputed, the case manager may recommend that the Small Business Commissioner adopt an informal process, such as a telephone conference between the parties, to form a view in relation to compliance with those particular procedural requirements in dispute.



Recommendation 15

The Commission to publish data in relation to unfair dismissal claims made against small business employers, including:

- the number of claims identifying the respondent (former employer) as employing fewer than 15 employees;
- the number of small business employer respondents relying on the Code as an objection to an application;
- the outcome of those claims; and
- whether the parties were represented or unrepresented.

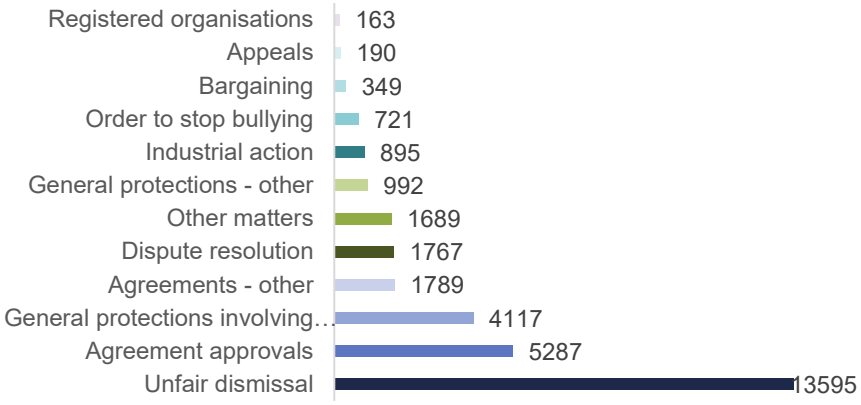
This data should be made available in the Commission's Annual Report.

Publication of data in relation to unfair dismissal claims made against small business employers would provide a firmer foundation upon which the effectiveness of the Code and recommendations made in this report could be reviewed.

Unfair dismissal claims are the most common form of application lodged in the Commission.[50] The Cube Group noted:

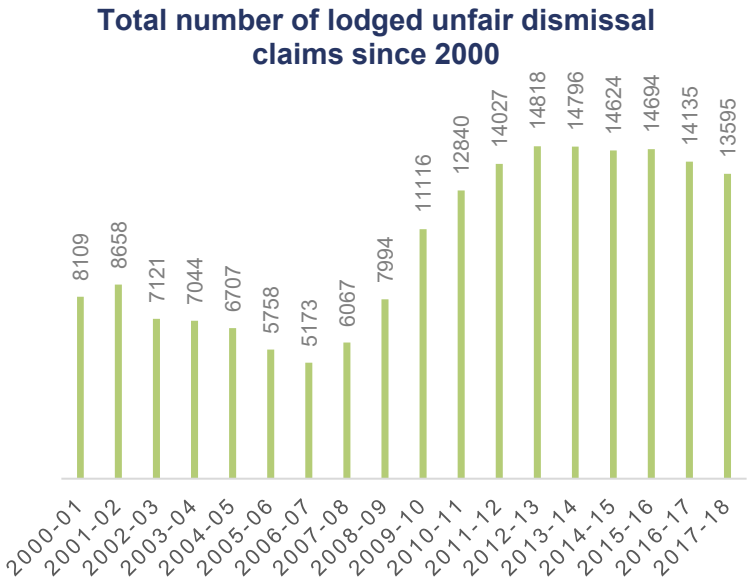
> *More than 40 per cent of applications made to the Fair Work Commission are related to claims of unfair dismissals. Sustained demand in this jurisdiction and changing characteristics of users has brought significant workload pressures for the Commission and its staff in recent years.*[51]

Unfair dismissal claims by claim type
FY17/18



Source: Fair Work Commission Annual Reports

In the FW Act's first year of operation, unfair dismissal claims increased substantially, as shown above. This is unsurprising given the removal of the 100 employee exemption. Despite a small reduction in 2017/2018, the unfair dismissal claims volume has remained consistently high since the FW Act came into operation. The steep increase in claims since the introduction of the FW Act supports a conclusion that a significant number of claims are made against employers with fewer than 100 employees.



Source: Fair Work Commission Annual Reports

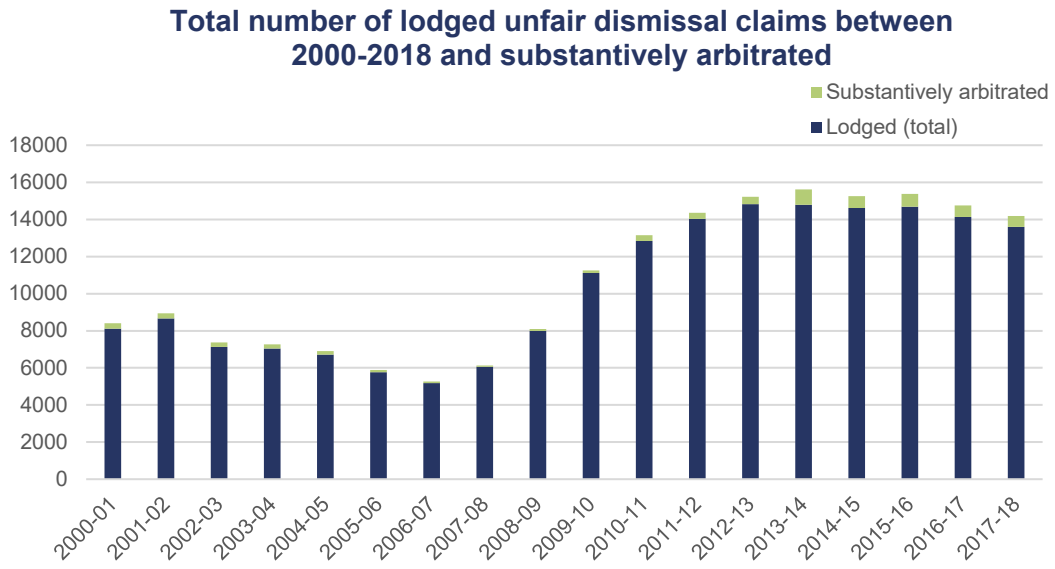
However, the Commission does not publish data that would enable identification of how many of the 13,595 unfair dismissal claims in 2017/18 were made against a small business employer.

The Commission's 2017-18 Annual Report identifies that the number of conciliations conducted in relation to a business of 1-14 employees was 2,098 and that the number of conciliations conducted in relation to a business for 15 – 99 employees was 2,830.[52] However this information is collected post-conciliation and information is not available for all applications lodged. This information is collected post-conciliation in part because there can be disputes about the number of employees and the conciliator will have the paperwork from both parties and may have been able to clarify where this number is in dispute.

However this would not prevent reporting of the number of applications that identify the respondent as having fewer than 15 employees at the time of dismissal earlier. The employer response form (Form F3) asks an employer to stipulate how many employees they employed at the time the applicant was dismissed (question 1.7) and as already noted the Form F2 could also be amended to ascertain whether the applicant believes they are employed by a small business employer. While this will not definitively identify whether the respondent is a small business employer, it provides two possible data points that could be drawn upon to capture the number of claims identifying the respondent as a small business employer.

It is difficult to form a definitive view about the role the Code plays in dismissals by small business. While the Commission's 2017-18 Annual Report identifies that 10 applications were dismissed on the basis that the termination was consistent with the Code[53] the majority of unfair dismissal applications will be settled, dismissed or withdrawn before they come before a Member of the Commission and there is limited visibility over the terms on which these matters were finalised. In 2017/18:

- 18 per cent were either resolved or discontinued before conciliation;
- 62 per cent were resolved at conciliation; and
- 14 per cent were resolved after conciliation but before formal hearing.[54]



Source: Fair Work Commission Annual Reports

While it may not be possible to capture all information about the reasons a claim does not proceed, data captured from the employer's response to an application will enable identification of the number of respondents pointing to Code compliance as an objection to an application and how many of these have legal representation.

The Small Business Division of the Commission could undertake this data collection and reporting for inclusion in the Annual Report. Over time, this will enable a better assessment of small business claims experience and whether the Code is operating as intended.

Concluding comments – reason v procedure

While the Code was intended to clearly and simply set out requirements that if followed would deem a dismissal fair, it has not operated this way in practice. Codes and checklists are by their nature intended to deliver a level of certainty and this will typically favour prescription over flexible principles that are 'open to interpretation'.

However, the current Code makes it difficult for a small business to determine which provisions of the Code apply to their circumstances. Aspects of the Code remain open to challenge and require legal interpretation (e.g. what constitutes a 'reasonable belief' or 'reasonable chance') and a small business operator is unlikely to be in a position to extensively consider the common law to determine what might be expected of them to meet these requirements or whether they should use the provisions of the Code relating to 'Summary Dismissals' or 'Other Dismissals'.

The Productivity Commission noted the common advice was for a small business to seek legal advice if ending an employee's employment and that if this was 'seen as the sensible course of action, the Code is failing its purpose'.[55] Amendments to the Code to minimise the grounds upon which compliance is open to interpretation and challenge together with simplification of the processes of the Commission in the management claims are needed so they are less resource intensive and costly and able to be navigated without having to seek out legal advice.

However, there is an inherent policy tension that arises when considering amendments to the Code. On the one hand, it seems sensible that under unfair dismissal laws the reason for the dismissal should be an more important consideration than the procedure following in effecting the dismissal. Yet on the other hand, absent the testing of facts and evidence, valid reason is difficult to establish based on an assessment of whether someone followed a checklist.

In this sense, the policy desire to help small businesses avoid costly litigation has resulted in a policy trade off such that the procedure followed by the small business employer (including how they formed a belief about whether an employee engaged in serious misconduct) is given primacy over a consideration of whether the employee actually did the thing that led to their dismissal.

This was acknowledged by Freyens who, in submissions made to the Productivity Commission, noted:

- *'the Code is fundamentally a procedural device and while it better informs small business owners about the procedural requirements of the law and is well meaning it does not make any major change in terms of dismissal dispute resolution'*;[56] and
- *'if small businesses are to be provided with any substantial relief from the costs of unfair dismissal laws then an exemption from unfair dismissal laws should be considered, initially for employers with less than 5 employees'*.[57]

The recommendations in this report have not departed from the original policy intent underpinning the Code and Checklist and have therefore been formulated on the basis that they exist as 'procedural devices'.

While the amendments are intended to better align the Code with its policy objectives, it is recommended that any amended version of the Code be subject to a further review within 12 months of operation and if problems persist, other policy solutions should be explored. This includes reforms that would elevate substance over procedure in the case of unfair dismissal and that would lower the compensation cap for small business as previously recommended by the ASBFEO.

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APPENDIX A: Amendments to the Code

Small Business Fair Dismissal Code

Commencement

The Small Business Fair Dismissal Code came into operation on [DATE TO BE NOMINATED].

Application

The Small Business Fair Dismissal Code (Code) applies to small business employers with fewer than 15 employees (calculated on a simple headcount of all employees including the dismissed employee and casual employees who were employed on a regular and systematic basis at the earliest of time of the dismissal or when the employee was given notice of termination). It does not apply to employers with 15 employees or more.

Employees of a small business employer cannot make a claim for unfair dismissal in the first 12 months of their employment. If a small business employer dismisses an employee after this period and has done so in a manner that is consistent with this Code, the dismissal will be deemed to be fair.

Further information on the application of the Code and unfair dismissal is available at www.fairwork.gov.au or by contacting the Fair Work Infoline on 13 13 94.

The Code

Dismissal on the grounds of serious misconduct

It is fair for an employer to dismiss an employee when:

- the employer believes the employee has engaged in serious misconduct; and
- the employer has formed that belief because they:
  - witnessed the serious misconduct; and/or
  - have taken steps to gather information or evidence that forms the basis of their belief that the serious misconduct occurred. These steps need not be formal or complex. They may, for example, involve making enquiries of the employee or others who have information about an allegation of serious misconduct or considering other available information.

The following reasons will be deemed as serious misconduct for the purposes of the Code:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the contract of employment;
- causing a serious work health and safety risk;
- causing serious risk to the reputation, viability or profitability of the business;
- theft;
- fraud;
- assault or violence;
- intoxication at work*;
- the refusal or failure to carry out a lawful instruction consistent with the employee's contract of employment.

**i.e. the employer believes the employee's faculties were, by reason of the employee being under the influence of intoxicating liquor or a drug (except a drug administered by, or taken in accordance with the directions of, a person lawfully authorised to administer the drug), so impaired that the employee was unfit to be entrusted with the employee's duties or with any duty that the employee may be called upon to perform.*

Dismissal on the grounds of conduct (other than serious misconduct) or performance

It is fair for an employer to dismiss an employee if the employer believes the employee's conduct or performance is not meeting the employer's expectations and prior to the dismissal:

- the employer has brought their concerns about the employee's conduct or performance to the employee's attention and explained to the employee what is expected of them to change their conduct or improve their performance; and
- the employer has informed the employee that if they do not change their conduct or improve their performance they are at risk of being dismissed; and
- the employer has given the employee an opportunity to respond to the employer about those concerns and to address them within a period of at least two (2) weeks; and
- the employee did not do what the employer expected of them in order to improve his or her conduct or performance; and
- if the employee requested to have another person present to support them in discussions and those discussions may result in the employee's dismissal, the employer has granted that request. The employer does not have to grant the request if the person the employee requests to be present to support them is a lawyer acting in a professional capacity.

Dismissal on the grounds of genuine redundancy

It is fair for an employer to dismiss an employee if the employer is dismissing the employee on account of genuine redundancy. Dismissing an employee so that another employee can be employed in their job is not a genuine redundancy.

A redundancy will be a genuine redundancy under this Code where:

- the employer's reason for the dismissal is that they no longer require the employee's job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- the employer has complied with any further obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy.

Further information about consultation requirements in modern awards is available at www.fairwork.gov.au or by contacting the Fair Work Infoline on 13 13 94.

Evidence

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to the Fair Work Commission. Evidence of having followed the Checklist relevant to the type of dismissal will constitute compliance.

While this Code sets out circumstances in which a dismissal is deemed 'fair', not following the Code will not in itself amount to a finding that a dismissal is unfair. In circumstances where the Code does not apply or is not applied, the Commission is required to consider the matter in accordance with the provisions of Part 3-2 of the *Fair Work Act 2009* (Cth).

APPENDIX B: Amendments to the Checklist

Small Business Fair Dismissal Code Checklists

The Checklists below are intended as tools to help a small business employer comply with the Small Business Fair Dismissal Code.

If an unfair dismissal claim is made by an employee and the employer can satisfy the Fair Work Commission that the steps in the Checklist appropriate to the type of dismissal have been complied with, then the dismissal will be considered fair.

Examples of the types of evidence that an employer may provide to establish compliance are provided below however these examples are not intended to be prescriptive or exhaustive.

Completing the Checklist appropriate to the type of dismissal will help small business employers assess and record their reasons for dismissing an employee and it is recommended that employers keep a record of the completed checklist and accompanying evidence in case of a future unfair dismissal claim.

Some tips are provided below to assist you in completing the Checklist:

When working out whether you are a 'small business employer' with fewer than 15 employees and can therefore apply the Code:

- count your employees from the earliest of:
  - when the employee is told their employment has been terminated; or
  - when the employee is given their notice of termination;
- include casual employees employed on a regular and systematic basis;
- include the dismissed employee and any other employee dismissed at the same time; and
- include employees of any associated entities of your business (if any).

When working out whether your former employee was employed for one year or more:

- Calculate the former employee's length of continuous service from their start date up until the earlier of when they were provided with notice of termination or immediately before the dismissal (see section 383 of the *Fair Work Act 2009* (Cth).
- Some absences are excluded when you are calculating this period including:
  - a period of unauthorised absence;
  - certain periods of unpaid leave or unpaid authorised absence (e.g. unpaid personal/carer's leave, unpaid parental leave).
- Some absences are included when you are calculating this period. This includes periods of community service leave (e.g. jury service) and certain stand-downs (see section 22 of the *Fair Work Act 2009* (Cth)).
- A period of service as a casual will not count unless:
  - the employment as a casual was on a regular and systematic basis; and
  - during the period of service as a casual employee, the former employee had a reasonable expectation of continuing employment with you on a regular and systematic basis (see section 384 of the *Fair Work Act 2009* (Cth)).

Checklist 1: Dismissal on the grounds of serious misconduct

1. How many employees were employed by the employer at earliest of the time the employee was dismissed or given notice of termination? *Note: Evidence may include a payroll record showing the number of people employed at the time.* *Payroll records showing working hours for casual employees may also be needed if there is a dispute about whether casual employees are employed on a regular and systematic basis.*	□ Under 15 □ 15 or more	If you answered '15 or more' the Small Business Dismissal Code and this Checklist does not apply. You are therefore not able to rely on the Small Dismissal Code to show that the dismissal was 'fair'.
2. Was the dismissed employee employed by the employer as a full-time, part-time or casual employee (employed on a regular and systematic basis) for one year or more? *Evidence may include a payroll record or statement of service showing when the when the employee's employment started and ended.* *If the employee was a casual employee, payroll records showing working hours may also be needed if there is a dispute about whether the casual employee was employed no a regular and systematic basis.*	□ Yes □ No	If you answered 'No' you can raise an objection to an unfair dismissal application as the employee may not be protected from unfair dismissal.
3. Did you dismiss the employee because you believed:		
a. They caused a serious work health and safety risk?	□ Yes □ No	If you answered 'Yes' to one or more of these questions, proceed to question 5. If you did not answer 'Yes' to any of these questions, please proceed to question 4.
b. They caused a serious risk to the reputation, viability or profitability of the business?	□ Yes □ No	
c. They were stealing money or goods from the business?	□ Yes □ No	
d. They committed fraud in relation to their work?	□ Yes □ No	
e. They threatened you or other employees, or clients, with assault or violence, or actually carried out assault or violence in the workplace?	□ Yes □ No	
f. They were intoxicated (with alcohol or drugs) at work?	□ Yes □ No	
g. They refused or failed to carry out a lawful instruction consistent with their contract of employment?	□ Yes □ No	

4. Did you dismiss the employee for some other form of serious misconduct?	□ Yes □ No	If you answered 'Yes' please describe the conduct below. Note that the Fair Work Commission will need to form a view regarding whether the reason you have nominated for the dismissal amounts to serious misconduct and this will determine your ability to apply the Code. If you answered 'No' you are unable to rely on Checklist 1 to show that the dismissal was fair.
Describe the serious misconduct:		
5. Please answer both questions 5(a) and 5(b) below:		
(a) Did you witness the serious misconduct?	□ Yes □ No	Please also answer question 5(b)
Date/s on which you witnessed the serious misconduct:		
(b) Did you take steps to collect information or evidence to form the belief that the serious misconduct occurred? *Note: This does not need to be a formal or complex process. It will involve taking steps to look into a matter proportionate the size and resources of your business. It may, for example, involve making enquiries of others who have information about an allegation of serious misconduct or considering other relevant information or records.* *Evidence may include witness statements and/or written records of meetings.*	□ Yes □ No	
Describe these steps and the dates on which you took them:		
You do not have to answer 'Yes' to *both* questions 5(a) or 5(b) to be able to rely on the Code. However If you did not answer 'Yes' to at least one of questions 5 (a) or 5(b) above you are unable to demonstrate that you properly formed the belief that the employee engaged in serious misconduct for the purposes of the Code. **If you cannot use Checklist 1 to show that dismissal was fair, you should check whether you complied with Checklist 2 and/or 3.**		

Checklist 2: Dismissal on the grounds of conduct other than 'serious misconduct' or on the grounds of performance

1.	**How many employees were employed in the business at earliest of the time the employee was dismissed or given notice of termination?** *Note: Evidence may include a payroll record showing the number of people employed at the time.* *Payroll records showing working hours for casual employees may also be needed if there is a dispute about whether casual employees are employed on a regular and systematic basis and therefore included.*	□ Under 15 □ 15 employees or more	If you answered '15 or more' the Small Business Fair Code and this Checklist does not apply to your business. You are therefore not able to rely on the Small Business Fair Code to show that the dismissal was 'fair'.
2.	**Was the dismissed employee employed by the employer as a full-time, part-time or casual employee (employed on a regular and systematic basis) for one year or more?** *Evidence may include a payroll record or statement of service showing when the when the employee's employment started and ended.* *If the employee was a casual employee, payroll records showing working hours may also be needed if there is a dispute about whether the casual employee was employed on a regular and systematic basis.*	□ Yes □ No	If you answered 'No' you can raise an objection to an unfair dismissal application as the employee may not be protected from unfair dismissal.
3.	**Did you dismiss the employee because you believed the employee's conduct or performance was not meeting your expectations?**	□ Yes □ No	If you answered 'No', you are unable to use Checklist 2 to demonstrate compliance with the Small Business Fair Dismissal Code.
4.	**Prior to the dismissal, did you bring your concerns about the employee's conduct or performance to the employee's attention and explain to the employee what is expected of them in order to change their conduct or improve their performance?** *Evidence may include copies of written warnings and/or records of meetings.*	□ Yes □ No	If you answered 'No', you are unable to use Checklist 2 to demonstrate compliance with the Small Business Fair Dismissal Code.
Date/s on which you did this:			

5. Prior to the dismissal, did you inform the employee that if they do not change their conduct or improve their performance they are at risk of being dismissed? *Evidence may include copies of written warnings and/or records of meetings or discussions.*	□ Yes □ No	If you answered 'No', you are unable to use Checklist 2 to demonstrate compliance with the Small Business Fair Dismissal Code.
Date/s on which you did this:		
6. Prior to the dismissal, did you give the employee an opportunity to respond to you about your concerns and give them at least two (2) weeks to address them? *Evidence may include copies of written warnings and/or records of meetings or discussions.*	□ Yes □ No	If you answered 'No', you are unable to use Checklist 2 to demonstrate compliance with the Small Business Fair Dismissal Code.
Date/s on which you did this:		
7. Did the employee improve their behaviour or conduct in a way that addressed your concerns?	□ Yes □ No	If you answered 'Yes', you are unable to use Checklist 2 to demonstrate compliance with the Small Business Fair Dismissal Code.
8. Did the employee request to have another person present to support them in discussions that may have result in their dismissal?	□ Yes □ No	If you answered 'No' you do not have to answer question 9. If you answered 'Yes' proceed to question 9.
9. If the employee communicated to you that the wanted a support person present in discussions that may have resulted in their dismissal did you agree to that request? *Note: The support person cannot be a lawyer acting in a professional capacity.*	□ Yes □ No	If you answered 'No', you are unable to use Checklist 2 to demonstrate compliance with the Small Business Fair Dismissal Code.

Checklist 3: Dismissal on the grounds of redundancy

1.	**How many employees were employed in the business at earliest of the time the employee was dismissed or given notice of termination?** *Note: Evidence may include a payroll record showing the number of people employed at the time.* *Payroll records showing working hours for casual employees may also be needed if there is a dispute about whether casual employees are employed on a regular and systematic basis and therefore included.*	□ Under 15 □ 15 or more	If you answered '15 or more' the Small Business Dismissal Code and this Checklist does not apply to your business. You are therefore not able to rely on the Small Business Dismissal Code to show that the dismissal was 'fair'.
2.	**Was the dismissed employee employed by the employer as a full-time, part-time or casual employee (employed on a regular and systematic basis) for one year or more?** *Evidence may include a payroll record or statement of service showing when the when the employee's employment started and ended.* *If the employee was a casual employee, payroll records showing working hours may also be needed if there is a dispute about whether the casual employee was employed on a regular and systematic basis.*	□ Yes □ No	If you answered 'No' you can raise an objection to an unfair dismissal application as the employee may not be protected from unfair dismissal.
3.	**Did you dismiss the employee because you no longer require the employee's job to be performed by anyone because of changes in the operational requirements of your enterprise?**	□ Yes □ No	If you answered 'No', you are unable to use this checklist to demonstrate that the employee was dismissed because of genuine redundancy. As such, you cannot use Checklist 3 to show that dismissal was 'fair'.
4.	**Have you complied with any obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy?**	□ Yes □ No	If you answered 'No', you are unable to use this checklist to demonstrate that the employee was dismissed because of genuine redundancy. As such, you cannot use Checklist 3 to show that dismissal was 'fair'.
Please identify your award/enterprise agreement and the dates on which you consulted:			

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APPENDIX C: Comparison of criteria in the Fair Work Act and amended Code and Checklist

Criteria for considering harshness etc. pursuant to s 387 of the FW Act	Is this a requirement in the amended code?
(a) whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)	In the case of dismissal for serious misconduct it is sufficient for the employer to have formed a belief about the conduct having taken basic steps to collection information or evidence to form that belief. In the case of dismissal for conduct more generally or performance it is sufficient if the employee believed the employee's conduct or performance was not meeting expectations and certain procedural steps are met. This is to be distinguished from the requirement in 387(a) which has been interpreted as a reason "being defensible or justifiable on an objective analysis of the facts"[58] as opposed to an employer acting on the *belief* that the termination was for a valid reason.
(b) whether the person was notified of that reason	There is no express requirement to notify the employee of the reason however in the case of dismissal on the grounds of conduct (other than 'serious misconduct') or performance the requirement to provide the employee with a warning ahead of dismissal will have the effect of alerting an employee to the employer's concern.
(c) whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person	Not for serious misconduct as defined in the Code Yes in the case of dismissal on the grounds of conduct (other than 'serious misconduct') or performance.
(d) any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal	Not in the case of serious dismissal as defined in the Code. Yes in the case of dismissal on the grounds of conduct (other than 'serious misconduct') or performance.

Criteria for considering harshness etc. pursuant to s 387 of the FW Act	Is this a requirement in the amended code?
(e) if the dismissal related to unsatisfactory performance by the person--whether the person had been warned about that unsatisfactory performance before the dismissal	Yes in the case of dismissal on the grounds of conduct (other than 'serious misconduct') or performance however this is set out in more prescriptive terms. Specifically, to demonstrate compliance with the Code the employer would need to have: • brought their concerns about the employee's conduct, behaviour or performance to the employee's attention; and • explain to the employee what is expected of them to change their behaviour or conduct or improve their performance; and • inform the employee that if they do not change their behaviour or conduct or improve their performance they are at risk of being dismissed; and • give the employee an opportunity to respond to those concerns and address them within a period of not less than two (2) weeks.
(f) the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal	The Code is intended to set out a 'deemed to comply' approach that takes this into account.
(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal	The Code is intended to set out a 'deemed to comply' approach that takes this into account.
(h) any other matters that the FWC considers relevant	Not applicable.

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APPENDIX D: Summary of Small Business Representative Submissions

Productivity Commission Inquiry into the Workplace Relations Framework

Stakeholder	Summary of submissions
Australian Chamber of Commerce and Industry (initial submission 161)	• The Code is of limited value to small business because reliance upon it is open to challenge.[59] While the reliance on the Code can be disputed this weakness will persist regardless of its content or any widening of its content or widening of its application.[60]
Hair and Beauty Australia (initial submission 47)	• Have seen applications that are not completely filled out and would like to see a vetting process implemented in the Commission requiring the employee to provide information and evidence regarding the claim and ensure all relevant information is outlined.[61] • Would like to see a better 'vetting' process before determining whether a claim should proceed to conciliation, particularly where there is a jurisdictional objection.[62]
Victorian Chamber of Commerce and Industry (initial submission 79)	• The 'Code is not simple and in some instances imposes higher requirements on small businesses than it does larger organisations'.[63] • In dismissals other than for serious misconduct the employer is required to provide a warning to the employee and allow them time to improve before the employee can be terminated. In contrast, section 387(e) of the FW Act only requires larger employers to have warned employees before terminating 'if the dismissal related to unsatisfactory performance by the person'.[64]
Restaurant and Catering Australia (RCA) (initial submission 97)	• Unfair dismissal applications are time consuming and costly.[65] • The Code has failed to operate as intended. The matter of *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nanakhom Trading Trust T/A Banana Tree café* [2010] FWA 7891 is put forward as an example. RCA noted that despite the employer winning the case and the tribunal ruling that they had complied with the Code, the matter involved the hearing of an application for unfair dismissal by an employee terminated for theft resulting in two days of hearing, multiple witnesses and legal costs RCA described as 'excessive'.[66]
Master Builders Australia (initial submission 157)	• Small businesses are exposed to high standards of procedural and substantive requirements. The consequences of a claim can include long mediation and Commission procedures with uncertain outcomes, especially with regard to compensation.[67] • The Code is a poor substitute for a genuine small business exemption.[68]

Stakeholder	Summary of submissions
Chamber of Commerce and Industry Western Australia (CCIWA) (initial submission 134)	• While the Code is designed to make the process simpler for small business, the Code itself has been subject to complex debate.[69] • The submission points to the matter of *N v The Bakery* [2010] FWA 3096 in which the Checklist was described as having "dubious value" in that it does not accurately reflect the steps required to ensure strict compliance with the Code when dismissing an employee.[70] • In the case of small businesses, concern over the unfair dismissal laws affects their preparedness to employ staff, or results in them seeking to limit their exposure to the provisions through the engagement of casual or labour hire employees. This is particularly the case amongst those businesses which have has to deal with an unfair dismissal application.[71]
National Retail Association (initial submission 144)	• A small business exemption from unfair dismissal laws needs to be restored. The Code does not go far enough to protect small business and further changes are needed.[72] • The submission pointed to the nominal cost of making an application and the growing trend of no-win no-fee practitioners in the jurisdiction resulting in a claim following termination being more likely, even where there was clearly a valid reason for dismissal and the Code was followed.[73] • The cost of defending claims was described as 'crippling' for small business, both in possible representation costs and time spent out of the business.[74] The practical reality is that it is not commercially viable for a small business to defend a case to arbitration.[75]
Australian Hotels Association & Accommodation Association of Australia (initial submission 164)	• There is a concern that the increase in administrative costs faced by business, especially small business, since the introduction of the new unfair dismissal system, may reach a level that jeopardises productivity growth and redeployment of labour.[76] • The respondent in unfair dismissal proceedings is at a considerable disadvantage in only having seven days to respond to the applicant's claim while the applicant has 21 days in which to lodge the unfair dismissal application from the date of dismissal.[77]
Business SA (initial submission 174)	• Many small businesses are not aware of the Code and its requirements.[78]
Australian Newsagents' Federation Ltd (initial submission 218)	• Resources, including case studies for associations to distribute to members on how to use the Code more effectively, would be beneficial.[79] • There should be more emphasis of small business owners about how to use the Code.[80] • Conciliators need to have a greater understanding about how the Code may affect a case.[81]

Stakeholder	Summary of submissions
Housing Industry Association (initial submission 169)	• Although small businesses are exempt from unfair dismissal claims if they can show they have complied with the Code, there is evidence that is not working.[82] • The Code does not provide businesses with the certainty they need and does not prevent the bringing of unfair dismissal claims. The matters subject of the Code are still subjective and capable of challenge.[83] • Terms such as 'reasonable grounds', 'valid reason' and 'reasonable chance' are all matters that need to be determined on the facts, as discoverable in evidence. The Code also sets out procedural requirements that, if not adhered to, will be fatal to an employer's ability to rely on the Code. While the Code may serve as helpful guidance for a small business, the reality is that the requirements of the Code are not dissimilar to the criteria set out in s.387 of the Act which is relevant to all businesses.[84] • Rather than provide an exemption for small businesses the unfair dismissal regime imposes further compliance requirements.[85] • The FW Act has the effect that a failure to meet technical procedural requirements may result in a claim for unfair dismissal, even in the case of a position genuinely being made redundant because the job is no longer required to be performed by anyone.[86] • Consultation provisions within modern awards are complex for an under resourced small business employer and do not change the fact that an employee's position is no longer available.[87]
Australian Federation of Employers and Industries (initial submission 219)	• The Small Business Fair Dismissal Code has not operated to protect employers with less than 15 employees from the requirements faced by larger employers. [88] • In practice the Code demands the same standard of compliance from small business employers as large employers.[89] • For small employers, assessment of their compliance with the Code will involve interpretation of what amounts to a 'reasonable opportunity to improve', the sufficiency of a verbal or written warning, and whether an employer had 'reasonable grounds' to decide that an instant dismissal is warranted. If the Commission finds the employer is non-compliant, the claim is treated as any other unfair dismissal claim.[90] In considering if the dismissal was harsh, unjust or unreasonable the small employer is subject to a detailed assessment of the criteria in the Code which is inherently similar to that set out in s.387 of the FW Act.[91]

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APPENDIX E: Current Code and Checklist

Small Business Fair Dismissal Code

Commencement

The Small Business Fair Dismissal Code came into operation on 1 July 2009.

Application

The Fair Dismissal Code applies to small business employers with fewer than 15 employees (calculated on a simple headcount of all employees including casual employees who are employed on a regular and systematic basis). Small business employees cannot make a claim for unfair dismissal in the first 12 months following their engagement. If an employee is dismissed after this period and the employer has followed the Code then the dismissal will be deemed to be fair.

Employees who have been dismissed because of a business downturn or their position is no longer needed cannot bring a claim for unfair dismissal. However, the redundancy needs to be genuine. Re-filling the position with a new employee is not a genuine redundancy. The requirements for determining whether a dismissal was a genuine redundancy are contained in section 389 of the Fair Work Act. The Small Business Fair Dismissal Code Checklist attached to this document can assist in determining whether a redundancy is a genuine redundancy.

Further information on the application of the Code, genuine redundancy and unfair dismissal is available at www.fairwork.gov.au or by contacting the Fair Work Infoline on 13 13 94.

The Code

Summary Dismissal

It is fair for an employer to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures. For a dismissal to be deemed fair it is sufficient, though not essential, that an allegation of theft, fraud or violence be reported to the police. Of course, the employer must have reasonable grounds for making the report.

Other Dismissal

In other cases, the small business employer must give the employee a reason why he or she is at risk of being dismissed. The reason must be a valid reason based on the employee's conduct or capacity to do the job.

The employee must be warned verbally or preferably in writing, that he or she risks being dismissed if there is no improvement.

The small business employer must provide the employee with an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural Matters

In discussions with an employee in circumstances where dismissal is possible, the employee can have another person present to assist. However, the other person cannot be a lawyer acting in a professional capacity.

A small business employer will be required to provide evidence of compliance with the Code if the employee makes a claim for unfair dismissal to Fair Work Australia, including evidence that a warning has been given (except in cases of summary dismissal). Evidence may include a completed checklist, copies of written warning(s), a statement of termination or signed witness statements.

Australian Government

Australian Small Business and Family Enterprise Ombudsman

Small Business Fair Dismissal Code Checklist

The Checklist is a tool to help small business employers comply with the Small Business Fair Dismissal Code. Completing the Checklist does not mean that the Code has been complied with, nor is it a requirement of the Code that the Checklist be completed. However, completing the Checklist will help small business employers assess and record their reasons for dismissing an employee. It is in the interests of the employer to complete this checklist at the time of dismissal and to keep it in case of a future unfair dismissal claim.

Employers should read the Code before completing the Checklist, ensuring they understand their procedural obligations under the Code. Meeting these obligations is an important factor in complying with the Code.

1. How many employees are employed in the business? (Include the dismissed employee and any other employee dismissed at the same time).

   ☐ Under 15 employees

   ☐ 15 employees or more

   [If under 15 employees, the Fair Dismissal Code applies.]

2. Has the employee been employed in this business as a full-time, part-time or regular casual employee for 12 months or more?

   ☐ Yes

   ☐ No

   [If No, the employee cannot make an unfair dismissal claim.]

3. Did you dismiss the employee because you didn't require the person's job to be done by anyone because of changes in the operational requirements of the business?

   ☐ Yes

   ☐ No

If Yes	YES	NO
a. Did you comply with any requirements to consult about the redundancy in the modern award, enterprise agreement or other industrial instrument that applied to the employment?	☐	☐
b. Did you consider if the employee could have been redeployed in your business or the business of an associated entity?	☐	☐

4. Do any of the following statements apply?

I dismissed the employee because I believed on reasonable grounds that:	YES	NO
a. The employee was stealing money or goods from the business.	☐	☐
b. The employee defrauded the business.	☐	☐
c. The employee threatened me or other employees, or clients, with violence, or actually carried out violence in the workplace.	☐	☐
d. The employee committed a serious breach of occupational health and safety procedures.	☐	☐

5. Did you dismiss the employee for some other form of serious misconduct?

   ☐ Yes

   ☐ No

   If Yes, what was the reason?

   _____

   _____

   _____

   _____

   If you answered Yes to any question in parts 3, 4 or 5, you are not required to answer the following questions.

6. In any discussion with the employee where dismissal was possible, did the employee request to have a support person present, who was not a lawyer acting in a professional capacity?

   ☐ Yes

   ☐ No

7. If Yes, did you agree to that request?

   ☐ Yes

   ☐ No

8. Did you dismiss the employee because of the employee's unsatisfactory conduct, performance or capacity to do the job?

   ☐ Yes

   ☐ No

If Yes	YES	NO
a. Did you clearly warn the employee (either verbally or in writing) that the employee was not doing the job properly and would have to improve his or her conduct or performance, or otherwise be dismissed?	☐	☐
b. Did you provide the employee with a reasonable amount of time to improve his or her performance or conduct? If yes, how much time was given?	☐	☐
c. Did you offer to provide the employee with any training or opportunity to develop his or her skills?	☐	☐
d. Did the employee subsequently improve his or her performance or conduct?	☐	☐
e. Before you dismissed the employee, did you tell the employee the reason for the dismissal and give him or her an opportunity to respond?	☐	☐
f. Did you keep any records of warning(s) made to the employee or of discussions on how his or her conduct or performance could be improved? Please attach any supporting documentation.	☐	☐

9. Did you dismiss the employee for some other reason?

   ☐ Yes

   ☐ No

   If Yes, what was the reason?

   _____

   _____

   _____

   _____

   _____

10. Did the employee voluntarily resign or abandon his or her employment?

    ☐ Yes

    ☐ No

    If Yes, please provide details

    _____

    _____

    _____

    _____

DECLARATION

I declare that I believe every statement or response in this checklist to be true.

Signature _____ Date _____

Updated 1 January 2011

APPENDIX F: Operation of the Code

What is the Small Business Fair Dismissal Code?

In the case of dismissal by a small business employer, a person has **not** been unfairly dismissed if the Commission is satisfied that the dismissal was consistent with the Small Business Fair Dismissal Code (the Code).

A person's dismissal is consistent with the Code if:

- immediately before the time of the dismissal or at the time the person was given notice of the dismissal (whichever happens first), the person's employer was a small business employer, and
- the employer complied with the Code in relation to the dismissal.

An employer is a small business employer if it employs fewer than 15 employees (by head count) at the relevant time. All employees employed by the employer at the time (including the dismissed employee, any other employees dismissed at the same time and those employed by associated entities), are to be counted. Casual employees are not counted, unless they are employed on a regular and systematic basis.

Summary Dismissal

The Code states that:

> *It is fair to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal.*

The Code defines serious misconduct as including 'theft, fraud, violence and serious breaches of occupational health and safety procedures'

The Commission does not have to make a finding, on the evidence, whether the conduct occurred. The Commission needs to find whether the employer had a reasonable belief that the conduct of the employee was serious enough to warrant immediate dismissal It is not necessary for the Commission to determine whether the employer was correct in the belief that it held.

For an employer to believe on reasonable grounds that the conduct of the employee was serious enough to justify immediate dismissal, the employer must establish that they did in fact hold the belief that:

- the conduct was by the employee
- the conduct was serious, and
- the conduct justified immediate dismissal.

The employer must establish that they had reasonable grounds to hold the belief, which could be established by providing evidence of inquiries or investigations the employer undertook to establish their belief.

Other dismissal

In non-summary dismissal cases, the employee must be warned that if there is no improvement to their conduct or capacity, they could be dismissed.

The employee must be given a reason as to why their employment is at risk and the reason must be a valid reason based on their conduct or capacity to do the job.

The employer must give the employee an opportunity to respond to the warning and give the employee a reasonable chance to rectify the problem, having regard to the employee's response. Rectifying the problem might involve the employer providing additional training and ensuring the employee knows the employer's job expectations.

Procedural matters

During discussions between the employer and employee about matters where dismissal is possible, the employer must allow the employee to have another person present to assist them. However, this person cannot be a lawyer acting in a professional capacity.

If an employee claims to the Commission that they have been unfairly dismissed, the employer will have to prove that they have complied with the Code

Source: Fair Work Commission, *Unfair Dismissal Benchbook*, 2 July 2018, p. 99.

APPENDIX G: Case Examples

Case example: Confusion as to when the summary dismissal provisions apply

In *Jeremy Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 5264 the Full Bench considered whether the dismissal was of a type to which the "Summary dismissal" section of the Code applied and noted:

> *…It is necessary to make the observation at the outset that this issue is not easy to resolve because the Code generally, and this section of the Code in particular, is very poorly drafted. Three different expressions are used to describe the class of dismissals dealt with in the section: "Summary dismissal" (in the section heading, as well as in an apparent cross-reference in the last paragraph of the Code), dismissals "without notice or warning", and "immediate dismissal". These expressions are not entirely synonymous. Further, and in a rather disjunctive way, the last three of the four sentences of this section of the Code are concerned with serious misconduct, which must be taken to be also indicative of its subject matter. These four aspects of the Code require some analysis.*[92]

The Full Bench noted that the expression 'summary dismissal' had a reasonably well understood meaning at law (whilst acknowledging that it has been described as one of a number of "confusing ambiguous terms" developed by employment lawyers) and that misconduct was not the only circumstance that may provide grounds for an employer to summarily dismiss an employee.[93] For example, it was noted that incompetence or negligence may also result in possible bases for summary dismissal.

It was also noted that while some parts of the Code deal with 'summary dismissal' others deal with 'serious misconduct' and the relationship between these various parts of the Code is not clear.[94] It was also noted that while the Code attempts to define the expression 'serious misconduct', it is not clear whether the effect of the sentence is to displace the definition of 'serious misconduct' in section 12 of the FW Act and reg. 1.07 of the FW Regulations.

In trying to resolve some of these difficulties the Full Bench found:

> *[36] It is frankly not possible to arrive at an interpretation of the "Summary dismissal" section of the Code which neatly resolves all these difficulties and inconsistencies. It is likely that the drafter(s) of the Code did not have a complete understanding of the terminology which they used to give expression to their intention. Accordingly the best we can do is to give effect to that intention so far as it may broadly be discerned from the Code as a whole. In that connection we consider that two things are apparent:*
>
> *(1) The "Summary dismissal" section of the Code is concerned with dismissals which have immediate effect, not dismissals on notice. That is the consistent element of the various expressions used to describe the relevant class of dismissals.*
>
> *(2) The section is likewise concerned with dismissals made on the basis of serious misconduct. The focus on "serious misconduct" must be taken as identifying the subject matter, notwithstanding that there is no explicit connection between the class of dismissal described and the matter of serious misconduct.*

[37] Notwithstanding that the Code, and its accompanying checklist, were apparently designed to be read as "stand alone" documents by small business employers, we prefer the view that the reference to "serious misconduct" is to be read as bearing the meaning in reg.1.07. The types of conduct expressly referred to in the Code as constituting serious misconduct are all encompassed by the reg.1.07 definition, so no direct inconsistency is apparent. The fact that the checklist invites inclusion of "some other form of serious misconduct" suggests that the identified types of conduct were not meant to be exhaustive, and it is otherwise difficult to conclude that they were meant to be exhaustive given that they do not include other types of behaviour which may well constitute misconduct justifying summary dismissal, such as sexual harassment, bullying or significant non-compliance with a lawful and reasonable direction. And, as earlier discussed, the lack of any recognised meaning at law of the expression "serious misconduct" means that the definition in reg.1.07 is necessary to give the expression a clear content.

[38] We therefore consider that the "Summary dismissal" section of the Code applies to dismissals without notice on the ground of serious misconduct as defined in reg.1.07.

Case example: Confusion regarding serious misconduct

In *McKenna v Home Theatre Group Pty Ltd T/A Home Theatre group* [2012] FWA 9309 a small business employer terminated the employment of an employee for conduct it characterised as 'serious misconduct'. In particular the employer alleged that the employee sent emails that disparaged the Managing Director to another staff member and a business contact of her employer.

Even though the conduct may not neatly fit into the categories of 'theft, fraud, violence and serious breaches of occupational health and safety procedures' as identified in the Code, it was found that there was a reasonable basis to conclude that the emails caused serious and imminent risk to the employer's reputation and that this amounted to serious misconduct. The employer was also found to have complied with the Code with the consequence that the dismissal was not unfair.

Case examples: Confusion regarding support persons

The matter of *Mr. N v The Bakery* [2010] FWA 3096 dealt with the earlier iteration of the Code and involved circumstances in which an employee was dismissed for submitting false timesheets after being shown evidence of CCTV footage. The small business employer had completed the checklist but failed to provide the employee with an opportunity to have a support person present during investigations. The earlier iteration of the Code required that section 387(d) of the FW Act be taken into account, i.e. 'any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal'. However the checklist did not reflect this requirement.

SDP O'Callaghan found the termination was 'harsh', despite finding that the misconduct was "marginally short of serious misconduct" and that the employee did not actually request a support person. SDP O'Callaghan stated:

> *There is nothing in the Checklist itself that would have alerted Ms O to the requirement in the Code for an employee to have another support person present to assist in circumstances where dismissal is possible. This deficiency, together with the extent to which the Checklist does not assist where there are disputed facts or an element of doubt about the reasonableness of the employer position means that I consider the checklist to be of dubious value as a determinant of whether the Code has been complied with.*[95]

In the matter of *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nankhon Trading Trust T/A Banana Tree Café* [2010] FWA 7891 a different interpretation of the requirements regarding support persons was adopted with the Deputy President stating:

> *[69] I am not persuaded by the submission that the Small Business Fair Dismissal Code requires that an employer must invite an employee to have a representative present. The relevant words in the Small Business Fair Dismissal Code that "… the employee can have another person present to assist" are permissive in nature and confer a right that the employee may choose to exercise. The obligation on the employer is to not frustrate that right if the employee chooses to exercise it. This begs the obvious question as how an employee of a small business is to know that such a right exists, but that is not a matter for consideration here.*[96]

Case example: Confusion regarding requirements for 'other dismissals'

The matter of *Puri v Sydney Strata Pty Limited* [2012] FWA 7317 involved a dismissal on the grounds of performance. Watson VP considered the Code's provisions relating to 'Other Dismissal' and stated:

> *[5] The terms relating to "Other Dismissal" are somewhat confusing. It is not clear to me whether the requirements of the Code include the existence of a valid reason for the dismissal, as distinct from a valid reason being given that there is a risk of being dismissed. If the meaning of the Code is that there must demonstrated to be a valid reason for the dismissal, it appears that the requirements of the Code are similar, and perhaps even more stringent in some respects, than the requirements relating to unfairness for other dismissals generally.*
>
> *[6] Nevertheless, in the circumstances of this case I am prepared to assume that the requirements of the Code involve the employer giving the employee a reason for the dismissal, and that the reason must be a valid reason based on the employee's conduct or capacity, that there must be a warning that the employee risks being dismissed if there is no improvement, that the employee must be given an opportunity to respond to the warning and the employee must be given a reasonable chance to rectify the problem articulated in the warning having regard to the employee's response.*
>
> *[7] In relation to procedure there is also a requirement of the Code which is relevant in this matter, and that is whether the employee can have another person present to assist in discussions where dismissal is possible*.

Watson VP found that these requirements had been satisfied.

Note: Specific consideration was also given to whether the period of less than three weeks was a reasonable chance to rectify the problem with Watson VP finding that it was in the circumstances of the case. The contestability of what is 'reasonable' is an issue explored further in this report.

Case example: 'Reasonable investigation' needed to establish 'reasonable belief'

The Full Bench *Pinawin v Domingo* [2012] FWAFB 1359 found that to have 'reasonable grounds' for a belief, an employer needs to have carried out a 'reasonable investigation':

> *[29]…First, there needs to be a consideration whether, at the time of the dismissal, the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal. Secondly it is necessary to consider whether that belief was based on reasonable grounds. The second element incorporates the concept that the employer has carried out a reasonable investigation into the matter. It is not necessary to determine whether the employer was correct in the belief that it held.*
>
> *[30] Acting reasonably does not require a single course of action. Different employers may approach the matter differently and from different conclusions, perhaps giving more benefit of any doubt, but still be acting reasonably. The legislation requires a consideration of whether the particular employer, in determining its course of action in relation to the employee at the time of dismissal, carried out a reasonable investigation, and reached a reasonable conclusion in all the circumstances. Those circumstances include the experience and resources of the small business employer concerned.* [97]

The Full Bench also cited with approval Senior Deputy President O'Callaghan's findings in *Harley v Rosecrest Asset PL* [2011] FWA 3922:

> *[8] For an employer to believe on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal, it is firstly necessary for the employer to establish that the employer did in fact hold the belief that as a matter of fact that (i) the conduct was by the employee; (ii) the conduct was serious; and (iii) that the conduct justified immediate dismissal. This is to be contrasted to the provisions of s.387(a) where FWA, in determining whether there was a valid reason for the dismissal, must find whether the conduct in fact occurred.*
>
> *[9] Secondly, it is necessary for the employer to establish that there are reasonable grounds for the employer holding the belief. It is thus necessary for the employer to establish a basis for the belief held which is reasonable. In this regard it would usually be necessary for the employer to establish what inquires or investigations were made to support a basis for holding the belief. It would also ordinarily be expected that the belief held be put to the employee, even though the grounds for holding it may not be. Failure to make sufficient inquiries or to put the accusation to the employee in many circumstances might lead to a view that there were no reasonable grounds for the belief to be held.* [98]

Case example: 'Reasonable belief' contested in Full Bench appeal proceedings

In the matter of *Kirsten Suttie v Lloyd & Co* [2015] FWC 4242 the Commissioner at first instance found "…the concept of reasonable grounds includes much more than the concept that the employer has carried out a reasonable investigation into the matter"[99] and that a belief held on reasonable grounds:

> *[28] …requires "the existence of facts which are sufficient to induce that state of mind in a reasonable person". Determining whether such facts exist requires the Commission to not only consider the concept that the employer has carried out a reasonable investigation into the matter, but also to apply an objective test in relation to the reasonable grounds. "The point of the objectivity of such a test, when it is necessary to consider whether a primary decision-maker had reasonable grounds for a given state of mind, is that the question is not whether the primary decision-maker thinks he or she has reasonable grounds."*

The Commissioner's decision at first instance was overturned by a Full Bench on appeal.

The Full Bench considered the actions of the employer in a situation where he had observed conduct and performance issues and learned from another employee that the employee had made comments to the effect that a good way to improve the business was to remove an owner of the business (Mr Lloyd) from it. This prompted a review of the employee's email account which enabled Mr Lloyd to form a belief about the conduct which was the ultimate trigger for the termination. This led the Full Bench to conclude:

> *[17] We agree with the submission of the employer that having formed this view there is no significance of the failure of Mr Lloyd to undertake an additional investigation. The enquiries he made, the final trigger of written communications by Ms Suttie and the reliance he placed on matters within his direct knowledge establish that Mr Lloyd's belief was on reasonable grounds. This is the test for the purposes of the Code. We do not consider that previous authorities establish any different test.*[100]

The requirement to conduct an investigation was also considered in the matter of *Steri-fow Filtration (Australia) Pty Ltd v Erskine* [2013] FWAFB 1943 which concerned a dismissal for serious misconduct with the employer alleging the employee had used the employer's property for its own benefit and was dishonest when the allegation was put to them.

The Commission found at first instance that the employer did not carry out a 'reasonable investigation' on the basis that certain facts (including an acrimonious relationship between the dismissed employee and the person making the allegations) warranted a "more substantial investigation" in order to substantiate the allegations. This led to the finding at first instance that the employer did not comply with the Code. However the decision was overturned on appeal to a Full Bench of the Commission which found that a reasonable investigation had been undertaken, the Code had been complied with and the dismissal was therefore not unfair.

Case example: 'Reasonable chance'

In *Miller v Urban Pedaler T/A Urban Pedaler* [2018] FWCFB 4166 the Full Bench considered the requirement in the Code to provide '*an opportunity to respond to the warning and give the employee a* ***reasonable chance*** *to rectify the problem, having regard to the employee's response'.*

This matter involved a workshop manager dismissed on performance grounds. Concerns about performance had been raised informally on multiple occasions and on 16 November 2017 the employee was provided with a letter advising him that his employment was at risk. The employee was suspended and his employment terminated on 20 November 2017 (four days later) in a meeting where he was given a letter referencing the concerns that had been raised in the letter of 16 November.

At first instance the Commissioner found that the employer had complied with the Code on the basis that he had been warned in writing about his performance and implications of a failure to perform at the required standard.

However on appeal the Full Bench found that the Code had not been complied with because the employer respondent failed to provide the applicant with a reasonable chance to improve, stating:

> *While the Appellant was clearly aware of the performance issues raised by the Respondent, he was not in fact told that his employment was at risk if he did not show improvement, prior to receiving the 16 November 2017 letter. Effectively, this meant that the Appellant only had 4 days to demonstrate improvements before the final meeting which took place on 20 November 2017. In our view, when work was not performed during this time by the Appellant, this did not provide the Appellant with a reasonable chance to rectify the performance issues raised in the 16 November 2017 letter.*[101]

References

[1] Australian Bureau of Statistics, 2018, *Australian Industry, 2016-17*, cat. no. 8155.0.
[2] Australian Bureau of Statistics, 2019, *Counts of Australian Businesses, Including Entries and Exits, Jun 2014 to Jun 2018*, cat. no. 8165.0.
[3] Justin Douglas and Amy Land Pejoska, *Regulation and small business,* Treasury Research Institute, June 2017, p.1.
[4] See for example Germany where enterprises employing 10 or fewer employees are exempt from employment protection legislation (noting however protection is still available with regard to discrimination).
[5] Harding D, *The effect of unfair dismissal laws on small and medium sized businesses,* Melbourne Institute of Applied Economic and Social Research, The University of Melbourne, 2002, p. v.
[6] *Fair Work Act 2009* (Cth), s 3(e).
[7] *Fair Work Act 2009* (Cth), s. 3(g).
[8]Harding D, above n 4, p. v.
[9] Ibid.
[10] Ibid. See also Productivity Commission, *Workplace Relations Framework,* December 2015, p. 574; Freyens, B. and Oslington, P. 2013, 'A first look at incidence and outcomes of unfair dismissal claims under Fair Work, WorkChoices and the Workplace Relations Act', *Australian Journal of Labour Economics*, vol. 16, no. 2, pp. 295–306.
[11] *Fair Work Act 2009* (Cth).
[12] Sweeney Research for the Fair Work Commission, *A Qualitative Research Report on: Citizen Co-Design with Small Business Owners*, August 2014, p. 12.
[13] Productivity Commission, *Workplace Relations Framework,* December 2015, p. 600.
[14] Bruce Billson of Agile Advisory, *Working Better for Small Business – Report from the Connect & Engage small business consultation program*, July 2018, p. 13.
[15] *Jeremy Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 5264.
[16] *Mr. N v The Bakery* [2010] FWA 3096; *Narong Khammaneechan v Nanakhon Pty Ltd ATF Nankhon Trading Trust T/A Banana Tree Café* [2010] FWA 7891.
[17] Productivity Commission, above n 13, p. 599.
[18] *Puri v Sydney Strata Pty Limited* [2012] FWA 7317 at [5].
[19] Productivity Commission, above n 13, p. 599.
[20] *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 5264 at [26].
[21] *McKenna v Home Theatre Group Pty Ltd T/A Home Theatre group* [2012] FWA 9309.
[22] Productivity Commission, above n 13, p. 599.
[23] *Fair Work Act 2009* (Cth), s 387(a).
[24] *Fair Work Act 2009* (Cth), s 387(g).
[25] *Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café* [2010] FWA 7981 at [60]; cited with approval in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359 and *Steri-Flow Filtration (Aust) Pty Ltd v Erskine* [2013] FWCFB 1943.
[26] *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359 at [29] – [30].
[27] *Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café* [2010] FWA 7981 at [60]; cited with approval in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB 1359 and *Steri-Flow Filtration (Aust) Pty Ltd v Erskine* [2013] FWCFB 1943.
[28] *Harley v Rosecrest Asset Pty Ltd T/A Can Do International* [2011] FWA 3922 at [8]; cited with approval in *Pinawin T/A RoseVi.Hair.Face.Body v Domingo* [2012] FWAFB at [28]–[29].
[29] *Pinawin v Domingo* [2012] FWAFB 1359.
[30] *Miller v Urban Pedaler T/A Urban Pedaler* [2018] FWCFB 4166.
[31] Cube Group, *Unfair dismissal – User-experience research,* March 2018, p. 25.
[32] Billson, n 14 above, p. 10.
[33] Ibid, p. 10.
[34] Cube Group, n 31 above, p. 4.
[35] Ibid, p. 24.
[36] Fair Work Commission, *Annual Report 2017-18, Access to Justice*, p. 19.
[37] Billson, n 14 above, p. 11.
[38] Explanatory Memorandum, *Fair Work Bill 2008* (Cth), p. xlvi.
[39] National Retail Association, *Inquiry into Australia's Workplace Relations Framework,* March 2015, p. 9.
[40] Productivity Commission, n 13 above, pp. 578 - 579.
[41] Fair Work Commission, n 36 above, p. 19.
[42] Explanatory Memorandum, *Fair Work Bill 2008* (Cth), p. xlvi.
[43] Cube Group, n 31 above, p. 4.
[44] Ibid, p. 24.
[45] Ibid, p. 24.
[46] Billson, n 13 above, p. 15.
[47] Ibid, p. 16.
[48] Cube Group, n 31 above, p. 25.
[49] Billson, n 13 above, p. 16.
[50] Fair Work Commission, n 36 above, p. 19.
[51] Ibid, p. 3.
[52] Fair Work Commission, n 36 above, p. 133.
[53] Ibid pp. 133-134.
[54] Ibid.

[55] Productivity Commission, n 13, p 600.
[56] Freyens B, *Submission to the Inquiry into the Workplace Relations Framework, Employee Protections – Unfair Dismissal,* March 2015, p.2.
[57] Ibid, p 3.
[58] *Rode v Burwood Mitsubishi,* Print R4471 (AIRCFB, Ross VP, Polites SDP, Foggo C, 11 May 1999) at para. 19.
[59] Australian Chamber of Commerce and Industry, *Productivity Commission Inquiry into the Workplace Relations Framework,* March 2015, p. 114.
[60] Ibid, p. 115.
[61] Hair and Beauty Australia, March 2015.
[62] Ibid.
[63] Victorian Chamber of Commerce and Industry, '*Not Balanced, Not Effective – VECCI Submission to the Productivity Commission Review of the Workplace Relations Framework',* March 2015, p. 77.
[64] Ibid.
[65] Restaurant and Catering Australia, *Productivity Commission Public Inquiry: Workplace Relations Framework,* March 2015, p. 33.
[66] Ibid.
[67] Master Builders Australia, *Submission to the Productivity Commission on the Review of the Workplace Relations Framework: Issues Papers 1-5,* March 2015, pp.44-45.
[68] Ibid, p. 45.
[69] Chamber of Commerce and Industry of Western Australia, *Productivity Commission Review into the Workplace Relations* Framework, March 2015, p. 56.
[70] Ibid.
[71] Ibid.
[72] National Retail Association, *Inquiry into Australia's Workplace Relations Framework,* March 2015, p. 9.
[73] Ibid.
[74] Ibid.
[75] Ibid.
[76] Australian Hotels Association and Accommodation Association of Australia, *Joint Submission to Workplace Relations Inquiry – Productivity Commission,* March 2015, p.18.
[77] Ibid, p. 20.
[78] Business SA, *Workplace Relations Framework,* March 2015, p. 17.
[79] Australian Newsagents' Federation Ltd, *Inquiry into the Workplace Relations Framework,* March 2015, pp. 13- 14.
[80] Ibid, p. 14.
[81] Australian Newsagents' Federation Ltd, n 112 above, p. 14.
[82] Ibid, p. 48.
[83] Ibid.
[84] Ibid, p. 49.
[85] Ibid.
[86] Ibid, p. 50.
[87] Ibid.
[88] Australian Federation of Employers and Industries, p. 2.
[89] Ibid, p. 65.
[90] Ibid, p. 66.
[91] Ibid.
[92] *Ryman v Thrash Pty Ltd t/a Wisharts Automotive Services* [2015] FWCFB 5264 at [26].
[93] Ibid at [27].
[94] Ibid at [34].
[95] *Mr. N v The Bakery* [2010] 3096 at
[96] *Khammaneechan v Nanakhon Pty Ltd ATF Nanakhon Trading Trust T/A Banana Tree Café* [2010] FWA 7981 at [69].
[97] [2012] FWAFB, at [59].
[98] *Harley v Rosecrest Assert Pty Ltd* [2001] FQA 997 at [9].
[99] *Kirsten Suttie v Lloyd & Co* [2015] FWC 4242 at [25].
[100] *Lloyd & Co Pty L:td T/A Lloyd & Co v Kirsten Suttie* [2016] FWCFB 144.
[101] *Miller v Urban Pedaler T/A Urban Pedaler* [2018] FWCFB 4166.