

## **Who can claim unfair dismissal under Fair Work Australia?**

From 1 January 2010 all states other than Western Australia have referred their Industrial Relations powers to the Commonwealth under Fair Work Australia (“FWA”).

Western Australia however has not referred its Industrial Relations powers. This means that two Industrial Relations systems will continue to operate in Western Australia – the state system (WAIRC) for some employees and employers and FWA for others. Employees whose employment is terminated and who wish to make a claim for unfair dismissal must consider which jurisdiction covers them.

In deciding whether an employee is eligible to bring an unfair dismissal claim under the *Fair Work Act*, the following 3 criteria must apply:

- 1 The employee must be covered by the *Fair Work Act*;
- 2 The employee must be eligible to bring an unfair dismissal claim; and
- 3 The employee must not fall within any exclusion categories.

### Employees covered by the *Fair Work Act*

Employees in the national system are those who are employed by a “constitutional corporation”.

### Eligible to bring a claim

Employees are only eligible to make a claim of unfair dismissal to FWA if;

- 1 they have completed the minimum employment period of 1 year for small businesses or 6 months for other employers;
- 2 they earn under the high income threshold of \$108,300.00 or are covered by a modern award or enterprise agreement;
- 3 the employment was terminated at the employer’s initiative or in circumstances of constructive dismissal.

### Exclusions

Finally there are certain employees who are excluded from making unfair dismissal claims. The exclusions include:

- 1 Employees of a small business who have been dismissed in accordance with the Small Business Fair Dismissal Code (a small business is one with fewer than 15 employees).
- 2 If the dismissal is a case of genuine redundancy. In relation to genuine redundancies, an employer can only rely on the genuine redundancy exclusion if the employer complied with any award or agreement consultation requirements in relation to the redundancy and it would not have been reasonable in the circumstances for the employee to be redeployed within either the employer’s enterprise or an associated

entity. The circumstances for bringing an unfair dismissal claim in a situation of redundancy are therefore broader under the *Fair Work Act* than they were under *Work Choices*.

3 If there is an application on foot for an alternative remedy in respect of the dismissal.

Unlike *Work Choices*, under the *Fair Work Act* casuals are eligible to bring an unfair dismissal claim if they have completed the minimum employment period and worked on a systematic basis during the employment. However employees engaged under a contract for a specified period or task whose employment is terminated at the end of the period or task cannot bring an unfair dismissal claim.

If you are unsure about whether the Fair Work Australia unfair dismissal provisions apply to you, contact Gibson & Gibson for advice.