

Guide to Redundancy Termination Entitlements



Illawarra Legal Centre Inc

7 Greene Street Warrawong NSW 2502
PO Box 139 Warrawong NSW 2502
Ph (02) 4276 1939 • Fax (02) 4276 1978
TTY NRS: 13 36 77
www.illawarralegalcentre.org.au
ABN 37 488 400 524



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Project Worker: Simon Howard LLB(Hons) LLM Solicitor

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Disclaimer

This guide is for general information only. This guide is not legal advice and is not a substitute for legal advice which should take into account the specific circumstances of an employee and a redundancy situation. The information in this guide is correct, to the best of the knowledge of the author and publisher, as at January 2011.

Guide to Redundancy Termination Entitlements

What this guide is about ?

This guide provides some general information about the legal entitlements that employees in most cases should receive where their employment is terminated by reason of redundancy.¹

Who is this guide for ?

This guide is for the information of employees.

This guide also contains more detailed information about the relevant law, mainly in the end notes. These notes may be of assistance to employees who would like to know more information about the law and for lawyers who may be assisting and advising employees in redundancy situations.

What is a redundancy ?

In simple circumstances a redundancy occurs where an employee's job is abolished. This then results in the employee's employment being terminated.

In more complex circumstances an employee's job may be divided up and then transferred to various other employees. This situation may occur where the employer implements a restructure in the work place. The result is that the employee, who no longer has any work to do, may have their employment terminated on the grounds of redundancy.² In practical terms there are no limitations on the type of restructures that may result in redundancies.³

A genuine redundancy should not occur because of an employee's performance or conduct.⁴

When dealing with redundancy pay entitlements it is now⁵ possible to refer to the definition of redundancy in the *Fair Work Act 2009 (Cth)* ("FWAct").⁶

The FWAct provides for redundancy pay: *"if the employee's employment is terminated:*

- *at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or*
- *because of the insolvency or bankruptcy of the employer".⁷*

Elsewhere in the FWAct a 'genuine redundancy' is defined in order to exempt redundancy situations from the application of unfair dismissal laws under the FWAct. In the applicable provision a genuine redundancy occurs if:

- *"the person's employer no longer required the person'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 obligation in a modern award or enterprise agreement that applied to the employment to consult about the redundancy".⁸*

Strictly speaking, the definition of 'redundancy' for the purpose of unfair dismissal laws is not relevant to redundancy pay requirements. This is so because of the specific FWAct definition of 'redundancy' for the purpose of redundancy pay.

However, where an employer insists that unfair dismissal laws do not apply, because the employee has been made redundant, then it stands to reason that the employer must pay to the employee redundancy pay as required under the FWAct, unless an exception applies.

If the termination of an employee is thought **not** to be a 'genuine redundancy' then consideration should be given to unfair dismissal rights and other protections under the FWAct.

Employees and their advisers should note that unfair dismissal proceedings under the FWAct must be commenced in Fair Work Australia **within 14 days** of the dismissal taking effect (in other words, the last day of employment).⁹

Fair Work Australia is the new Federal industrial tribunal that has replaced the previous Australian Industrial Relations Commission ("AIRC"). Fair Work Australia has new powers and has also taken on many of the old powers that were exercised by the AIRC.

Some important exceptions

Before considering redundancy entitlements it is necessary to consider some exceptions.

There are a number of circumstances where an employee whose position may have been made redundant will not be entitled to redundancy pay. In summary form, the circumstances where an exception exists are:¹⁰

- The employee resigns without an agreement in place with the employer to make a redundancy payment on termination.¹¹
- An employee is terminated for misconduct or other reasons related to the employee's own performance.¹²
- The employer obtains other acceptable employment for the employee.¹³
- The employee has been employed for less than 12 months.¹⁴
- The employee works for a small business. An employer will be a small business if the business employs fewer than 15 employees.¹⁵
- The employee was employed for a fixed term that has come to an end.¹⁶
- A casual employee whose casual service is no longer required.¹⁷
- In a transfer of employment situation where it is proposed to transfer the employee to employment with a new employer.¹⁸
- The employer's inability to pay. This exception can only apply where Fair Work Australia makes the necessary orders relieving the employer from redundancy pay obligations.¹⁹

It is important to note that although an employee may not be entitled to redundancy pay in the above circumstance, the employer in most cases will still have an obligation to give notice (provided that the employee has not resigned or been summarily terminated for serious misconduct). Notice entitlements are discussed below.

Notice and redundancy

The foremost entitlements an employee should be given when terminated in a redundancy situation are:

- Notice: **and**
- Redundancy pay

Notice: is the amount of time an employer is legally required to give to an employee between informing the employee of the termination and the last day of employment.²⁰

For example, if an employer is legally required to give an employee 4 weeks notice, then at least 4 weeks must pass between the date upon which notice is given and the last day of employment. The minimum notice required is set out in the applicable table in the FWAct.²¹

An employer in most circumstances is legally able to make a payment to the employee instead of giving actual notice. Using the same example, if an employer is to give 4 weeks notice, the employer may terminate the employee immediately. However, in such a case the employer must pay the employee 4 weeks wages or salary. This is referred to as a 'payment in lieu of notice'.²²

An employer may give an employee a combination of actual notice and a payment in lieu of notice. So using the example of 4 weeks notice, the employer may require the employee to work for 2 weeks and then conclude employment (after the 2 weeks) with a payment for a further 2 weeks in lieu of notice.

Redundancy pay: is sometimes referred to as 'severance pay'. It is the amount that an employer is legally required to pay when an employee is terminated for the reason of redundancy. Redundancy pay is calculated under the applicable table in the FWAct.²³ It is expressed in terms of 'weeks' of pay.

So, for example, it may be said that an employee is entitled to 5 weeks redundancy pay. This means that the employee is to be paid a lump sum amount equivalent to 5 weeks pay. The employer must pay this amount upon termination. The employer cannot require an employee to work for the equivalent period. In other words, when an employee is owed 5 weeks redundancy pay the employer cannot require the employee to undertake work for 5 weeks.

The calculation of notice entitlements

Notice entitlements are calculated in accordance with the Table 1 below, which is found in the FWAct.²⁴ The period of employment coincides with the entitlement.²⁵

Table 1

Period		
	Employee's period of continuous service with the employer at the end of the day the notice is given	Period*
1	Not more than 1 year	1 week
2	More than 1 year but not more than 3 years	2 weeks
3	More than 3 years but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

***IMPORTANT** – Where an employee is over 45 years of age **and** has completed at least 2 years of continuous service,²⁶ then the employee is to be given or paid 1 extra week of notice.²⁷

There are a number of matters to be aware of when using Table 1:

- When making a payment in lieu of notice, the employer must pay at least the amount that the employer would have been required to pay if the employee worked until the end of the notice period.²⁸
- This calculation must be based on full pay and must also be based on the hours the employee would have worked.²⁹
- In many cases where the employee worked regular overtime or shifts then the payment in lieu of notice should also include the overtime or shift amounts the employee would have earned.
- The entitlements in Table 1 are located in the part of the FWAct which sets out the 'National Employment Standards.' On this basis the notice entitlements apply as a minimum standard to all employees covered by the FWAct.³⁰
- An award, enterprise agreement,³¹ or contract of employment may set out a greater notice entitlement.³² If this is the case then the employer must pay the

greater amount. For example, an employee may have been employed for 2 years. The employee's notice entitlement will be 2 weeks notice if Table 1 is used. However, if the employee's contract states that the employer must give 4 weeks notice, then the employee's notice entitlement is 4 weeks.

- An employer and an employee may negotiate the employee's notice entitlement. The employer and employee may finally agree that a notice entitlement greater than Table 1 will be given.

The calculation of redundancy pay amounts

Redundancy pay is calculated in accordance with the Table 2 below, which is found in the FWAct.³³ The period of employment coincides with the entitlement.

Table 2

Redundancy pay period		
	Employee's period of continuous service with the employer on termination	Redundancy pay period³⁴
1	At least 1 year but less than 2 years	4 weeks
2	At least 2 years but less than 3 years	6 weeks
3	At least 3 years but less than 4 years	7 weeks
4	At least 4 years but less than 5 years	8 weeks
5	At least 5 years but less than 6 years	10 weeks
6	At least 6 years but less than 7 years	11 weeks
7	At least 7 years but less than 8 years	13 weeks
8	At least 8 years but less than 9 years	14 weeks
9	At least 9 years but less than 10 years	16 weeks
10	At least 10 years	12 weeks

There are a number of matters to be aware of when using Table 2:

- The FWAct indicates that when calculating the entitlement under Table 2, the employee's base rate of pay for ordinary hours of work is to be paid.³⁵ (This approach differs from the calculation of notice).

- Again, the entitlements in Table 2 are located in the part of the FWAct which sets out the '*National Employment Standards*'. On this basis the redundancy pay entitlements apply as a minimum standard to all employees covered by the FWAct.³⁶
- Again, an award, enterprise agreement,³⁷ or contract of employment may set out a greater redundancy entitlement. If this is the case then the employer must pay the greater amount.³⁸
- Again an employer and employee may negotiate a redundancy payment which is greater than the amounts in Table 2.

Example of a redundancy situation with a payout

This is an example of how Tables 1 and 2 are used to calculate a redundancy payout:³⁹

Robert is employed by Big Corp and is 46 years of age. Robert's employment with Big Corp has been continuous and he has been an employee for 5 years and 3 months. Robert's employment is not subject to an award or enterprise agreement.⁴⁰

Robert's contract of employment says:

"If your employment is terminated for reasons other than misconduct, Big Corp will provide you with notice in accordance with the requirements of the *Fair Work Act*".

Big Corp has performed poorly in financial terms over the last 6 months. For better or for worse, senior management at Big Corp have decided that Big Corp's wages bill must be reduced. Senior management will attempt to do this by reducing the number of employees and abolishing identified positions.

Big Corp has identified Robert's position as one that will be abolished. Shortly after this Robert's direct manager (Sally) meets with Robert on a Monday afternoon. Sally informs Robert that his employment will be terminated because his position has been abolished and in future no one will perform the actual job that Robert performs. Sally tells Robert that the tasks he performed in his work will now be split up and divided amongst 6 other workers in the department that Sally manages. Sally tells Robert that his performance in his job is not an issue. Sally also tells Robert that the reason for the redundancy is a cost saving restructure in the department that Sally manages. Sally informs Robert that Human Resources will meet with Robert on Friday.

From this scenario we can identify the relevant factors in Robert's situation:

- He is over 45 years of age.
- He has worked continuously for his employer for at least 5 years but less than 6 years.
- Robert's contract of employment provides for notice in accordance with the FWAct.
- There is no applicable Award or Enterprise Agreement that requires Big Corp to pay redundancy amounts greater than the FWAct.
- Robert's redundancy will result from the abolition of his job because of cost savings and a restructure. The redundancy is not related to Robert's performance or any misconduct. Therefore this situation is a genuine redundancy.
- Sally has discussed the redundancy with Robert and informed him of a meeting he will have with Human Resources. On this basis it is important to note that Robert has not been given notice of termination or the termination date yet. The giving of notice requires that Robert be told of the actual last date of his employment. (Notice will not be properly given if there is uncertainty about the actual last date of employment). Also, notice be given in writing.

Continuing with the example:

On Friday morning the Manager of Human Resources meets with Robert and informs Robert that his employment is to be terminated that day (Friday close of business). A letter to this effect is also handed to Robert at this time. The Human Resources Manager then informs Robert that he will be paid his legal entitlements.

We know from the facts in the example and the information in this guide that Robert's employment is to be terminated and will come to an end on Friday at the close of business.

We are now able to calculate Robert's final payment as follows:

1. 4 weeks pay in lieu of notice.
2. An additional week's pay in lieu of notice because Robert is over 45.
3. 10 weeks redundancy pay.
4. Other entitlements - Robert will also be entitled to be paid any unpaid wages up until the termination date, accrued untaken annual leave and long service leave on a pro rata basis.⁴¹

Notice may have been treated differently if the following facts applied.

The Human Resources Manager meets with Robert on Friday morning and tells Robert that his employment will be terminated by reason of redundancy and that his work will come to an end with Big Corp on Friday in 4 weeks time.

We now know that Robert has been given actual notice of 4 weeks, which he will work out. However Robert is over 45 and is therefore entitled to an additional weeks payment in lieu of notice. So Robert's final payment should be calculated as follows:

1. 1 further weeks pay in lieu of notice (because Robert is over 45).
2. 10 weeks redundancy pay.
3. Other entitlements (eg unpaid wages and accrued leave entitlements).

It should be remembered that Big Corp (through its Human Resources Department) may have decided to give Robert actual notice, or a payment in lieu of notice, or a combination of actual and payment and lieu of notice. By whatever method the full notice requirements must be satisfied.

Other entitlements on termination that could be relevant in circumstances of redundancy

When an employee is terminated because of redundancy the employee may have other entitlements that must be paid in addition to notice and redundancy pay.

The following is a summary of some other entitlements that should be paid on termination:

- Any outstanding wages (including overtime and shift allowances) that are owing at the time of termination.
- Any accrued untaken annual leave.⁴²
- Annual leave loading (on the accrued untaken annual leave amounts). This amount is to be paid if the employee receives this loading under an applicable award, enterprise agreement or contract.
- Any accrued untaken long service leave.⁴³
- Any commission or bonus amounts that have been earned in periods up until the termination date.⁴⁴

Negotiated outcomes

As mentioned briefly above, often in a redundancy situation negotiations may occur between the employer and employee. The outcome of these negotiations may be an agreement for the employer to pay amounts in addition to the employee's minimum legal entitlements. It is important in these circumstances for the employee to ensure that the agreement to pay additional amounts is legally binding. The employee should at least seek a written agreement with the employer setting out the additional amounts that will be paid. It is also advisable that employees seek some legal advice on the terms of the written agreement if possible.

Superannuation entitlements on termination:

Whether or not superannuation contributions must be made in connection with termination amounts is complex. In very general terms, super contributions should be made in relation to notice amounts, but not unused annual leave or long service leave amounts. The liability to contribute arises in relation to '*ordinary time earnings*'. On this basis super contributions are not required in relation to redundancy pay amounts.⁴⁵

Deeds of release

A deed of release in the area of employment law and redundancy is usually an agreement signed by the employee in exchange for settlement money from the employer. The employer will also sign the deed to conclude the agreement. Deeds are often required by an employer where there will be a payment of an amount in addition to the minimum legal entitlements. Often the deed may be used to formalise an agreement where a dispute has occurred in connection with termination.

The usual effect of the deed is that the employee gives up their right to sue the employer in exchange for the settlement money that will be paid. In this way a deed of release is a serious document in which the employee surrenders some legal rights. Some employers may seek release terms that go much further than simply releasing the employer from any further obligation to pay minimum termination amounts. If possible employees should obtain legal advice prior to signing a deed of release.

Employees should **not** agree in a deed to give up such rights as worker's compensation and personal injury claim rights in exchange for notice, redundancy pay and leave amounts. Some employers attempt to have the departing employee agree in a deed not to take up employment with the former employer's competitors. Employees should not agree to these type of terms only in exchange for legal entitlements.⁴⁶

Basically, it is not advisable that employees give away any right in a deed on termination unless the right:

- is specifically connected with payments that will be made in accordance with the deed; **and**
- the specific payments are in excess of the minimum amounts that the employer is legally obliged to pay.

Furthermore, courts and employment tribunals have often said that an employee **should not** be required to sign a deed of release where the employee is merely receiving their legal termination entitlements (in other words, the payments described in this document).

An example of an excess payment that may be made in exchange for a signed deed is a compensation payment, such as a compensation settlement for an unfair dismissal.⁴⁷

Taxation of termination payments on redundancy

The relevant taxation laws provide for a part (or the whole) of the redundancy termination payment to be treated as tax free. This treatment applies to a 'bona fide' redundancy payment, which in other words means a genuine redundancy payment.⁴⁸

The tax free formula is applied to the lump sum made up of the notice and redundancy pay amounts. The tax free amounts are indexed yearly.

For the financial year that will end on 30 June 2011 the following formula is to be applied:

The first **\$8,126** of the payment will be tax free. Also an additional **\$4,064** will be tax free for each year of completed service.

The following is an example of the application of the formula:

John is 40 years of age and has worked for his employer for 9 years and 6 months. At the time of termination John earned a wage of \$980 per week. On termination John is to be paid 4 weeks wages in lieu of notice and 16 weeks of redundancy pay. This is a total lump sum payment of \$19,600.

On the basis of the tax free treatment of bona fide redundancy payments, \$8,126 of the payment will be tax free. Also an additional \$4064 will be tax free for each year of completed service: $\$4064 \times 9 = \$36,579$. Therefore in John's case the whole lump sum payment of \$19,600 will be tax free.

Except in cases of very large payments, most redundancy lump sum payments will be tax free or largely tax free.

Taxation of other termination entitlements

The following is a summary of the taxation treatment usually applied to the other entitlements sometimes paid on a redundancy termination:⁴⁹

- Outstanding wages are taxed at the usual marginal rates of tax.
- Accrued untaken annual leave and accrued untaken long service leave should be taxed at 31.5% (which includes the Medicare Levy).
- Accrued annual leave loading (over \$320) should be taxed at 31.5% (which includes the Medicare Levy).
- Taxation of bonus amounts will depend on how the bonus is characterised. Often it will be taxed at marginal rates. If the employee is expecting a significant bonus payment or some other compensation then the employee should consider obtaining taxation advice if they are concerned about the taxation treatment.
- Where the employee's marginal rate of tax is less than 31.5% then the lower marginal rate of tax applies.

It is the employer's obligation to withhold from the payment the correct amount of tax and then send that amount to the Australian Taxation Office ("ATO"). If for some reason the employer fails to withhold the correct amount the employee can take the matter up with the employer and/or declare the termination payment to the ATO when lodging the relevant annual tax return. The ATO will then calculate the correct tax amount and refund to the employee or recover from the employee the appropriate amount.

Where employees can obtain further help

- The Federal Government maintains a comprehensive internet portal through which employees can access information about employment and industrial relations from various government agencies: **www.workplace.gov.au**
- The Fair Work Info Line is able to provide employees with information about employee entitlements and other related matters: **13 13 94**
- The Fair Work Ombudsman acts on complaints by employees about underpayment or non payment of entitlements or the denial of other workplace rights: **www.fairwork.gov.au**. When complaining to the Fair Work Ombudsman it is advisable that employees complete and lodge the complaint form:
www.fairwork.gov.au/complaints/making-a-complaint/pages/lodging-your-complaint.aspx
- Unions are able to assist and advise their members. More information about Unions can be obtained from Unions Australia:
www.unionsaustralia.com.au
- Law Access is able to give free advice over the telephone:
1300 888 529
The Law Access website also provides employment law related information: **www.lawaccess.nsw.gov.au**
- Community Legal Centres can provide some advice and assistance with employment law matters. Information about Community Legal Centres and the location of Community Legal Centres can be found at Community Legal Centres NSW website: **www.clcnsw.org.au**
- Legal Aid NSW can provide some advice about employment law matters. Information about Legal Aid and the location of Legal Aid offices can be found at the Legal Aid website: **www.legalaid.nsw.gov.au**

Endnotes

In these endnotes the following abbreviations are used:

- AIRC** - Australian Industrial Relations Commission
- FB** - the Full Bench of the cited court or tribunal
- FCA** - Federal Court of Australia
- FWAct** - Fair Work Act 2009 (Cth)
- FWA** - Fair Work Australia
- NSWCA** - NSW Court of Appeal
- QIRComm** - Queensland Industrial Relations Commission
- SASR** - South Australian State Reports

- 1 This guide deals only with redundancy termination entitlements. It is not a guide to all of the law in connection with the termination of employment, unfair dismissals or other rights, protections and remedies available under the law.
- 2 The Full Bench of FWA in *Ulan Coal Mines Pty Ltd v Howarth* [2010] FWA FB 3488 (*Ulan Coal Case No 1*) decided that “where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the job of that employee no longer exists” a genuine redundancy can still occur.
- 3 The geographic relocation of employees to another place of work can in some circumstances give rise to redundancies. See the following decisions: *National Union of Workers v Tontine Fibres – Mooroolbark Site Enterprise Partnership Agreement 2005* [2007] AIRC FB 1016; *Liu v NHP Electrical Engineering Products Pty Limited* [2004] AIRC 1227; *United Rubber (Australia) Pty Limited v National Union of Storeworkers, Packers, Rubber and Allied Workers* (1989) AIRC. However, it should be noted that these cases predate the redundancy definitions now found in the FWAct.
- 4 See *R v Industrial Commission of South Australia Ex parte AMSCOL* (1977) 16 SASR 6. However, the reality is that an employer who has decided on redundancies may target for termination employees whose performance is viewed as poor in comparison with other employees. Where a redundancy termination seems to have taken place on a performance basis it may be necessary to consider whether or not the redundancy is genuine. If not then consideration should be given to the unfair dismissal rights and other employment/industrial rights of the employee under the FWAct. See also *Encyclopaedia Britannica Australia Limited v Campbell* [2009] NSWCA 286 for an important development of the case law relevant to performance and misconduct in the context of a redundancy.
- 5 Prior to the FWAct, applicable legislation did not define the term ‘redundancy’. However, there is much case law prior to the FWAct which has considered ‘redundancy’. At the pinnacle of this case law is the *Redundancy Test Case* [2004] AIRC 287: www.austlii.edu.au/au/cases/cth/AIRC/2004/287.html
- 6 Sections 119 and 389 FWAct contain definitions of redundancy for the purpose of ‘National Employment Standards’ redundancy pay (s119) and for the purpose of exempting genuine redundancies from the circumstances in which employees can access unfair dismissal rights (s389).

- 7 Section 119 FWAct.
- 8 Section 389 FWAct. Some industrial Awards and Enterprise Agreements contain specific provisions requiring an employer to consult with employees prior to implementing redundancies. The consultation often involves discussions with the relevant Union. The discussions may include negotiation about the criteria for selecting redundant employees. In some cases the discussions are a prelude to a process whereby the employer calls for volunteers in the workplace who will agree to a redundancy termination. In such cases employees with considerable accrued entitlements may volunteer for redundancy with a view to an early retirement. Other volunteers may wish to exit with a payment and seek employment elsewhere. For a FWA decision about consultation obligations see the decision of the Full Bench of FWA in *Ulan Coal Mines Pty Ltd v Howarth* [2010] FWA FB 3488 (*Ulan Coal Case No 1*).
- 9 Section 394 FWAct. The website of Fair Work Australia is www.fwa.gov.au.
- 10 For more details see the provisions in Ch 2 Pt 2-2 Div 11 FWAct. Also note the anti-avoidance provisions in section 123(2) FWAct.
- 11 Where an employee is soon likely to be made redundant, there will not be a termination by reason of redundancy if the employee chooses to accept an offer of employment from a new employer and then resign their current employment. See the decision in *Finance Sector Union of Australia v Commonwealth Bank of Australia* [2004] FCA 187.
- 12 The NSW Court of Appeal gave an important decision on point in the case of *Encyclopaedia Britannica Australia Limited v Campbell* [2009] NSWCA 286.
- 13 Strictly, this exception is only available to an employer where an application is made to FWA and where FWA has then made orders under section 120 FWAct. Pursuant to section 120 FWAct FWA may reduce the amount of redundancy pay or relieve the employer entirely from the obligation to make a redundancy payment.
- 14 It may also be necessary to take into account service with a previous employer where a transfer of employment has taken place and where the new employer is required to recognise the period of employment with the former employer. Section 22 FWAct provides a definition of “continuous service” and “transfer of employment”.
- 15 See section 23 FWAct for the definition of a ‘small business’ and also note the grouping provisions for associated entities where generally the employees of all associated entities are to be counted together.
- 16 Section 123 FWAct: a specified period, a specified task, a specified season, a trainee employed under a training agreement for a specified period. There is some case law that is capable of supporting an argument that where an employee has worked pursuant to a continuing series of fixed term contracts and the employee had an expectation that the employment would be renewed, a redundancy payment should be paid if the contract is not renewed. See *Re Dismissal of Sinclair & Grainger* 1989 AIRL. Note that apprentices will be entitled to notice but not redundancy pay. By way of contrast see *John Van Hoof v Grancroft P/L t/a The Rainbow Inn* [1999] QIRComm 159.
- 17 Section 123 (1)(c) FWAct. A true casual will not be entitled to a redundancy payment when their employment as a casual comes to an end. It is important here to distinguish between a true casual and an employee merely called a casual by an employer who

hopes to avoid some obligation(s) to the employee. The definition of casual employment has been discussed in the case law but usually where it was necessary to interpret various usage of the term in changing industrial legislation over many years. There is no strict definition of casual employment applicable for all relevant current laws. An employee who has worked regular hours on regular days for a number of years is most likely not a casual employee. Generally, a true casual employee does not have regularity in their patterns of work. Also a true casual employee usually does not have realistic expectations of the continuance of regular work. It is often noted that a casual employee has no ongoing employment, so it is not necessary to terminate a casual employee’s employment. Rather the employee is not called upon to perform any further work when the employer no longer needs the service of the casual employee. It is not the correct approach to assume that an employee is casual by reason alone that the employer has denied the employee the benefits of permanent employment. (In such circumstances the denial of benefits and rights may actually be a breach of relevant industrial instruments and laws). Also it should be noted that a permanent part time employee is not a casual employee.

- 18 Section 122 FWAct: There may be no obligation to make a redundancy payment where the employee was offered employment by a new employer on: (1) substantially similar terms and conditions and, on an overall basis, no less favourable than the employment with the old employer; and (2) the new employer recognises the period of employment with the old employer regarding calculation of other entitlements. If FWA is satisfied that the transfer provisions operate unfairly, FWA may order the old employer to pay a redundancy amount.
- 19 In very rare circumstances where an employer is liable to make redundancy payments but cannot afford the payments, FWA may make an order reducing the amount of redundancy pay or relieving the employer from all liability to make redundancy payments. See section s120 FWAct.
- 20 Where it becomes necessary for technical or evidentiary reasons to ascertain the exact date of a redundancy, the case law indicates that the redundancy occurs on the expiry of any actual notice given. See *Leo & Green v CFMEU* [2000] FCA 830.
- 21 Section 117(3) FWAct.
- 22 Section 117(2)(b) FWAct.
- 23 Section 119(2) FWAct.
- 24 Section 117(3) FWAct.
- 25 Note that the entitlement amounts in Table 1 are not cumulative.
- 26 Continuous service is calculated up until the day that notice was given (not the last day of employment, unless notice is given with immediate effect). It may also be necessary to take into account service with a previous employer where a transfer of employment took place and where the new employer is required to recognise the period of employment with the former employer. Section 22 of the FWAct provides a definition of ‘continuous service’ and ‘transfer of employment’. Section 22 also describes periods of employment that do not count toward ‘continuous service’.
- 27 Section 117(3)(b) FWAct.

- 28 Section 117(2)(b) FWAct.
- 29 Section 117(2)(b) FWAct.
- 30 Effective on 1 January 2010, NSW has referred its industrial relations powers to the Commonwealth. As a result all non government sector employees in NSW are now covered by the FWAct. The referral does not affect NSW government employees, employees of NSW government agencies and employees of local government in NSW. State owned corporations are part of the referral and therefore employees of a state owned corporation are covered by the FWAct.
- 31 Section 118 FWAct.
- 32 Information about the content of awards and enterprise agreements can be obtained from the FWA website www.fwa.gov.au.
- 33 Section 119(2) FWAct.
- 34 Note that the entitlement amounts in Table 2 are not cumulative.
- 35 Section 20 FWAct is relevant here. In the case of employees whose employment is not covered by an award or enterprise agreement, 'ordinary hours' are determined on the basis of any pre existing agreement about ordinary hours of work. Where no agreement is in place ordinary hours are 38 hours per week. In the case of employees whose employment is covered by an award or enterprise agreement refer to the award or enterprise agreement in ascertaining the employee's ordinary hours.
- 36 See note 30 above.
- 37 See note 32 above.
- 38 There can be circumstances where an employer's internal policies may provide redundancy entitlements greater than the FWAct. It may be argued in some cases that the employee is entitled to the formula/amounts set out in the policy. This situation can present a number of complex legal issues including whether or not an employer's internal work place policies form part of the employee's contract of employment and whether or not the employer is legally bound by the policy in the case of the particular employee. It may be significant that the contract of employment generally refers to the existence and application of the employer's policies. It may also be significant that the employer customarily provides termination/redundancy entitlements in accordance with its policy.
- 39 This example does not include the calculation of other accrued entitlements such as annual leave and long service leave.
- 40 Employees who work for less than \$113,800 (currently the high income threshold in the FWAct) will mostly be covered by a modern award (and possibly an enterprise agreement) made in accordance with the FWAct. For the purpose of this example let us assume that if a modern award applies then the notice and redundancy provisions under the modern award are identical to the FWAct - which will often be the case. (The high income threshold is indexed annually).
- 41 Ch 2 Pt 2-2 Div 6 FWAct deals with annual leave, Ch 2 Pt 2-2 Div 9 FWAct deals with Long Service Leave. The FWAct does not exclude the operation of State long service leave laws. So in the case of a NSW employee, whose employment is not covered by an applicable award or enterprise agreement which contains long service leave provisions, the employee will be entitled to Long Service under the *Long Service Leave Act (NSW) 1955*. Under the provision of that Act, an employee who has at least 5 years service is entitled to be paid long service leave on a pro rata basis when terminated by reason of redundancy.
- 42 See note 41 above.
- 43 See note 41 above.
- 44 The liability of an employer to pay commissions or bonuses can be complex and can be dependant on contractual terms. Also the situation with discretionary bonuses can be very complex. This is a subject on which employees should get specific legal advice if possible.
- 45 Further information about superannuation contribution obligations can be obtained from the Australian Taxation Office and/or the relevant superannuation fund.
- 46 The area of post employment restraints on employment and the connected subject of confidential information protection can be complicated. There may in the case of very senior employees be a post employment restraint aimed at protecting confidential commercial information obtained during the course of employment. These restraints can be enforced in the right circumstances. But such obligations are usually accompanied by large termination payments well in excess of the minimum amounts under the FWAct. Arguably an employee covered by an award and/or enterprise agreement who earns less than the high income threshold (\$113,800) should not be subject to such restraints. If such restraints are imposed the old employer may encounter great difficulty in ultimately enforcing the restraint in the courts. (The high income threshold under the FWAct of \$113,800 is indexed annually).
- 47 But not a worker's compensation amount or personal injury compensation amount. Employees who have potential rights under worker's compensation or other personal injury laws should obtain advice as soon as possible from an experienced personal injury lawyer. Time limits and other procedural requirements apply to worker's compensation and personal injury claims. Delay in pursuing these rights may jeopardise the employee's claim.
- 48 Note that this taxation information is very general and is mostly relevant to redundancies. It may be necessary to consider the tax treatment of eligible termination payments, approved early retirement scheme payments, invalidity and disability payments, payments on death or personally injury of an employee, amongst other things. More detailed information is available at the Australian Taxation Office website: www.ato.gov.au. Employees may benefit from rollover options and other steps that will impact on the tax treatment of termination payments. Employees should seek tax and financial planning advice.
- 49 See note 48 above.