



Small Business Assistance & Advisory Service

Fair Work Act - Does the Fair Work Act 2009 Apply to my Business?

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The coverage of the Fair Work Act is not universal and will depend on several factors including state referred powers and organisation type.

It is more likely than not that the Fair Work Act will apply to your business, particularly if you are a private sector business. To help you determine this, please see the checklist below.

The coverage of the Fair Work Act is not universal; because the Commonwealth Parliament's powers are limited to legislating on matters that the Parliament has under the Constitution. The Fair Work Act has been enacted in such a way that it has as broad a degree of constitutional power as possible. It picks up most employers by using its "corporations' power" — that is, its power to regulate the activities of corporations. As most employers are corporations, the Fair Work Act applies to most employers.

Other kinds of employers are picked up by referrals of State legislative power, with all states other than Western Australia referring its legislative power to the Commonwealth, meaning the Fair Work Act applies to employers and employees in each State (subject to minor exceptions relating mainly to public service employers).

Employees in Territories (internal and two external Territories) are also covered by the Fair Work Act together with certain flight crew, maritime and waterside workers.

Even if an employer is not an employer mentioned above (known as a "national system employer") the Fair Work Act can still apply to an employer if the employer employs employees in Australia. It can only do so to a limited extent using the external affairs powers.

Checklist

The Fair Work Act is the primary piece of workplace relations legislation in Australia which establishes various rights and obligations on parties to an employment relationship and will apply differently depending on various business attributes.

The following questionnaire can assist in working out the extent to which the Fair Work Act 2009 (Cth) applies to your business.

If you are still having difficulty determining this after using the checklist below, [contact us](#).

WHAT KIND OF EMPLOYER ARE YOU?

What type of employer are you?

- 1) Are you a private sector employer (including a not-for-profit organisation, partnership and sole trader) employing employees in the Australian Capital Territory, New South Wales, Northern Territory, South Australia, Tasmania or Victoria?
 - a) If “yes”, **go to 8**
 - b) If “no” go to 2
- 2) Are you a trading or financial company incorporated under the Corporations Act 2001 (Cth) or another piece of legislation (i.e., a constitutional corporation) that employs employees in any State or Territory? (Usually Pty Ltd or Ltd companies **see note** below on Constitutional Corporations).
 - a) If “yes”, **go to 8**
 - b) If “no” go to 3
- 3) Are you a body incorporated in a Territory?
 - a) If “yes”, **go to 8**
 - b) If “no” go to 4
- 4) Are you an employer of employees who carry out activities in connection with a Territory of Australia (including Christmas Island and the Territory of Cocos (Keeling) Islands)?
 - a) If “yes”, **go to 8**
 - b) If “no” go to 5
- 5) Are you an employer of employees who are engaged in interstate trade or commerce as flight crew, maritime workers or waterside workers?
 - a) If “yes”, **go to 8**
 - b) If “no” go to 6
- 6) Are you a public sector employer in any State other than Western Australia?
 - a) If “yes”, **go to 9**
 - b) If “no” go to 7
- 7) Do you employ employees in Australia other than a type of employer mentioned above?
 - a) If “yes”, **go to 10**
 - b) If “no”, go to 11

Application of the Fair Work Act

- 8) You are a national system employer. **The Fair Work Act applies** to you and your employees.

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- 9) You are a national system employer provided you fall within the scope of referral of State power (subject to constitutional limitations). If you do not, then go to 10.
- 10) You are not a national system employer. However, the Fair Work Act does apply in relation to the following matters:
 - a) General protections applications (Part 3–1 of the Fair Work Act);
 - b) Right of entry provisions (Part 3–4 of the Fair Work Act);
 - c) National Employment Standards in relation to parental leave and notice of termination of employment (Part 6–3 of the Fair Work Act);
 - d) Unlawful termination (Part 6–4 of the Fair Work Act)
- 11) The Fair Work Act does not apply to your business.

Note: Constitutional Powers

Constitutional corporations are defined in [Section 12 of the Fair Work Act 2009 \(Cth\)](#) and in paragraph 51 (xx) of the Commonwealth Constitution, and they include:

- A business incorporated outside of Australia which conducts business inside Australia;
- A trading corporation formed in Australia; and
- A financial corporation formed in Australia.