

10



Australian Government

Fair Work
OMBUDSMAN

Best Practice Guide Effective dispute resolution

Working at best practice

Disputes can arise at any workplace. A dispute exists when one or more people disagree about something and matters remain unresolved. A fair and balanced dispute resolution process is important for the effective operation of any business.

This Best Practice Guide explains the:

- advantages of best practice dispute resolution

- requirement for a dispute resolution clause in modern awards and enterprise agreements, and the rules regarding overlap between these instruments

- benefits of a dispute resolution clause even where employees are not covered by awards or enterprise agreements

- features of a good dispute resolution clause, and

- rules regarding the powers of the Fair Work Commission or other independent persons in resolving a dispute.

Included also is a checklist on best practice dispute resolution.

This guide illustrates best practice when it comes to effective dispute resolution. For specific information regarding your minimum legal obligations and entitlements, contact the organisations listed under the 'For more information' section at the end of this guide.

Why work at best practice?

Effective dispute resolution can help employers to maintain good relationships with their employees by dealing with workplace issues at an early stage. Employees will likely be more cooperative and productive if they know that their grievances will be taken seriously by the employer and there is the opportunity for an independent party to assist in resolving the dispute if it cannot be resolved at the workplace.

A good dispute resolution process with a focus on effective resolution at the workplace level may help to avoid the costs of resolving a claim externally; for instance, via arbitration before the Fair Work Commission, or through litigation in the Federal Court of Australia.

- 01 Work & family
- 02 Consultation & cooperation in the workplace
- 03 Use of individual flexibility arrangements
- 04 A guide for young workers
- 05 An employer's guide to employing young workers
- 06 Gender pay equity
- 07 Small business & the Fair Work Act
- 08 Workplace privacy
- 09 Managing underperformance
- 10 **Effective dispute resolution**
- 11 Improving workplace productivity in bargaining
- 12 Parental leave

What is dispute resolution?

Dispute resolution refers to the processes by which disputes are brought to an end. This can occur through:

- a negotiated outcome, where the parties concerned sort out things themselves

- a mediated outcome, where the parties use the services of an independent mediator to help them arrive at their own agreement, or

- an arbitrated or adjudicated outcome, where an independent arbitrator or court determines how the dispute is to be resolved and makes a binding decision or order to this effect.

Dispute resolution in modern awards and enterprise agreements

Modern Awards

The *Fair Work Act 2009* (FW Act) requires that all modern awards include a term which sets out a procedure for resolving disputes between employers and employees about any matter arising under the modern award and the National Employment Standards (NES).

Every modern award contains a dispute resolution clause. Generally, the clause will provide for a process with the following stages:

- employee/s meet with their direct supervisor to discuss the grievance

- failing resolution, the matter is discussed further with more senior management

- failing resolution of the matter, the employer refers the dispute to a more senior level of management or more senior national officer within the organisation

- where the dispute remains unresolved, the parties may jointly or individually refer the matter to the Fair Work Commission, and

- the employer or employee may appoint another person, organisation or association to represent them during this process.

Employers should be aware of, and familiarise themselves with, any dispute resolution procedure that applies to their workplace.

Enterprise agreements

When making an enterprise agreement, the FW Act requires the parties to include a dispute resolution clause. Enterprise agreements lodged with the Fair Work Commission without such a clause will not be approved. The dispute resolution clauses in enterprise agreements must provide a process to resolve any disputes.

- arising under the agreement, or

- relating to the NES.

The FW Act requires that a dispute resolution clause in an enterprise agreement must:

- set out a procedure that requires or allows either the Fair Work Commission or some other independent person to settle the dispute, and

- allow for the representation of employees covered by the agreement when there is a dispute (for example by another employee or a union).

A 'model dispute resolution clause' is available in the *Fair Work Regulations 2009* and can be used to develop a dispute resolution term in an enterprise agreement. A link to the clause is available at the 'For more information' section at the end of this guide.

Which dispute resolution procedure applies to me or my business?

If a dispute involves employees covered by an enterprise agreement and relates to the NES or an enterprise agreement, the dispute resolution procedure in the enterprise agreement will apply and should be followed.

If there is no enterprise agreement in the workplace or an enterprise agreement does not cover the employees involved in the dispute, the procedure outlined in the modern award that applies to the employer and employee should be followed.

When neither an enterprise agreement nor a modern award applies to the employer and employee in relation to the dispute, the procedure in a contract of employment (if any) applies.

What if the employees are not covered by an award or enterprise agreement?

There are significant benefits to having a fair and transparent dispute resolution process in place.

Accordingly, even where no modern awards, enterprise agreements or other industrial instruments apply at a particular workplace, best practice employers will implement dispute resolution procedures in employees' contracts of employment or in company policy documents.

What are the features of a good dispute resolution process?

A best practice dispute resolution process should:

- be simple

- allow appropriate stages so that matters can, wherever possible, be resolved at the workplace

- encourage parties to agree on a process that suits them if the dispute reaches the Fair Work Commission, and

- provide the Fair Work Commission with the necessary discretion and power to ensure settlement of the dispute if the dispute remains unresolved after the early stages of the dispute resolution procedure have been attempted.

Best practice dispute resolution outcomes should be:

- quick – the issues should be resolved quickly rather than allowing them to escalate through inaction

- fair – all relevant parties should be consulted so that all sides of the story are taken into account

- handled sensitively – disputes should, where possible and appropriate, be resolved in a confidential context in order to minimise impact on employees not affected by the dispute, and

- transparent – the procedure should be made known to every employee.

Dispute resolution procedures should not interfere with the continued operation of the business where possible. Any dispute resolution clause in an agreement, contract

or policy should require that work is to continue normally during the dispute resolution process subject to any reasonable concerns about health and safety.

Generally, the FW Act does not authorise employees to stop performing work while a dispute is being resolved.

Can the Fair Work Commission help with a dispute?

Where a provision in an award, an enterprise agreement, a contract of employment or other written agreement refers a dispute to the Fair Work Commission:

- depending on the terms of the clause, the Fair Work Commission may settle a dispute via mediation, conciliation, or by making a recommendation or expressing an opinion, except in the circumstances where the parties have agreed to limit the powers of the Fair Work Commission, and

- the Fair Work Commission may, where agreed by the parties, deal with the matter by arbitration and make a binding decision regarding the dispute.

The Fair Work Commission may only deal with disputes if an application has been made to the Fair Work Commission by a party to the dispute.

However, the Fair Work Commission must not deal with a dispute if it is about:

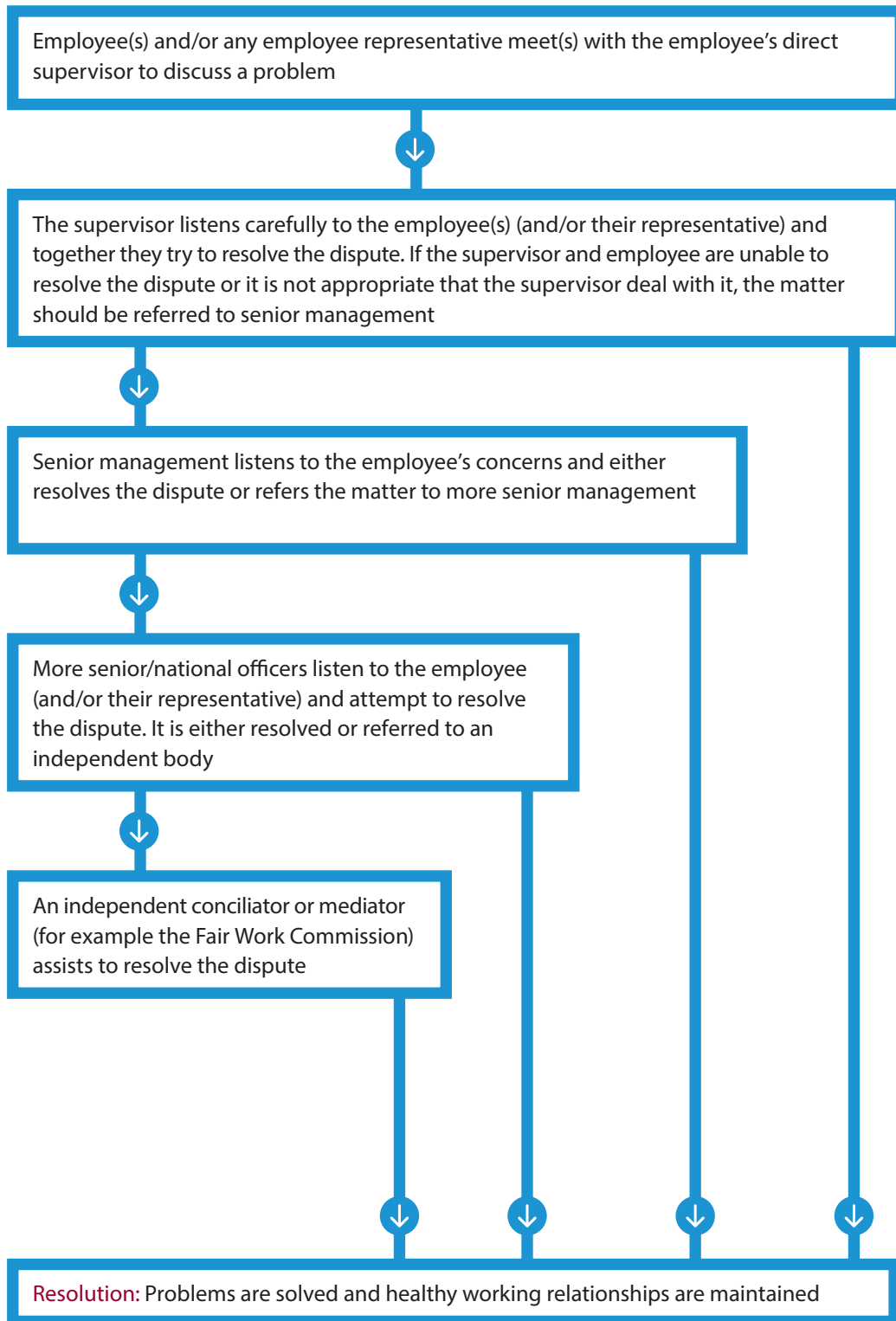
- an whether an employer had reasonable business grounds to refuse a request by an employee for flexible working arrangements, or

- an extension of unpaid parental leave beyond 12 months

Unless provided for in a contract of employment, enterprise agreement or some other kind of written agreement that allows the Fair Work Commission to deal with the dispute.

10

↓ The typical process explained



Can independent persons help with a dispute?

Where a term in an award, an enterprise agreement or a contract of employment or other written agreement refers a dispute to an independent person (other than the Fair Work Commission):

- the person may, where agreed to by the parties, deal with the dispute via arbitration and make a binding decision about the dispute

- the person must not deal with a dispute if it is about whether an employer had reasonable business grounds to refuse a request by an employee for flexible working arrangements or for an extension of unpaid parental leave beyond 12 months unless provided for in a contract of employment, enterprise agreement or some other kind of written agreement that allows them to deal with the dispute, and

- generally, an independent third party can only assist the parties to resolve their dispute in accordance with the powers that are expressly conferred by the relevant clause of the award, agreement, or other written agreement.

Checklist for dispute resolution best practice

Where a dispute has arisen, employers working at best practice will:

- ✓ ensure they have a simple, quick, fair, confidential and transparent dispute resolution procedure in place, whether it be included as part of a modern award, enterprise agreement, company policy, employment contract, or other industrial instrument

- ✓ ensure employees are made aware of the applicable dispute resolution procedures.

Where a dispute has arisen:

- ✓ work towards solving the problem and maintaining healthy working relationships

- ✓ determine which dispute resolution procedure applies

- ✓ comply with the correct procedure quickly and fairly

- ✓ use best efforts to resolve the dispute at the workplace, and

- ✓ where this is not possible, refer the dispute to an independent mediator or arbitrator such as the Fair Work Commission with the power to deal with the dispute.

For more information

Fair Work Ombudsman

13 13 94
www.fairwork.gov.au

Fair Work Commission

1300 799 675
www.fwc.gov.au

**Model term for dealing with
disputes for enterprise agreements**

Fair Work Regulations, Regulation 6.01

Acronyms used in this guide

FW Act *Fair Work Act 2009*

NES National Employment Standards

Disclaimer

The Fair Work Ombudsman is committed to providing you with advice that you can rely on.

The information contained in this Best Practice Guide is general in nature. If you are unsure about how it applies to your situation you can call our Infoline on 13 13 94 or speak with a union, industry association or a workplace relations professional.

Produced December 2013. FWOBPG10a.02.

© Commonwealth of Australia 2013