

Employment and small business

This chapter is for people who work for, or own, a small business that has been affected by the February 2009 Victorian bushfires. It explains employees rights and options and where to get help. There is information for small business owners, too, about contracts, refunds and where to go for assistance.

Small business employees

The section talks about 'minimum entitlements' under the:

- Australian Fair Pay and Conditions Standard ('the Standard')
- other entitlements in the *Federal Workplace Relations Act 1996* (the WR Act)
- other Victorian state acts.

A minimum entitlement means the least you are entitled to under certain rules. You can be paid more or get more leave, for example, than is set out in these rules.

You may also have entitlements under:

- other state or federal acts
- an award
- collective agreement
- Individual Transitional Employment Agreement
- Australian Workplace Agreement
- common law employment contract
- employer policy (if any).

You may get bigger entitlements under these rules. Get legal advice about your particular employment.

Important information: the information about employment in this chapter is correct at the time of publishing. However, from **1 July 2009** the WR Act will stop and the new Fair Work Australia industrial relations system

is scheduled to begin. Some of this information may change. You should check with JobWatch at www.jobwatch.org.au for changes.

I was absent from work due to the bushfires. Can my employer make me use holiday or sick leave that I've already got owing to me to cover my absence?

Sick/personal leave

Your employer cannot legally make you use the sick leave you already have (usually called personal leave) to cover your absence from work due to the bushfires.

Sick/personal leave can only be taken legally when you are absent from work due to illness or injury. If this is the case, get a medical certificate and give it to your employer within 24 hours or as soon as you are reasonably able to.

Annual leave

Under the Standard your employer can tell you to take some of your annual leave:

- if you already have more than eight weeks annual leave owing. Your employer may tell you to take an amount of leave which is less than or equal to a quarter of the amount of annual leave you have owing at the time. For example, if you have eight weeks annual leave owing, your employer can tell you to take two weeks annual leave
- if your employer shuts down its business or a part of its business where you work, for example, over the Christmas/new year break. When this happens you should be credited with at least the amount of leave your employer wishes you to take.

However, if you have already taken unpaid leave due to the bushfires, your employer cannot legally take off those leave days from the annual leave you have stocked up, without your agreement. Your employer does not have to pay you for days that you are absent from work because of the bushfires unless you were on paid sick/personal leave or annual leave. In most cases, this will mean that you and your employer will have to agree that you either took unpaid leave or annual leave.

Unpaid leave

There is no automatic right to unpaid leave in the Standard but you may still ask for unpaid leave from your employer.

Will I be paid for time off to fight fires?

There is no automatic right in the WR Act to be paid wages because you took time off to fight the bushfires.

Can I take leave for injuries?

Under the Standard, you can take sick/personal leave if you have enough sick/personal leave days and are absent from work due to illness or injury. You should get a medical certificate and give it to your employer within 24 hours or as soon as you are reasonably able to. If you do not have any sick leave owing, you may ask for unpaid leave or annual leave.

For further information about sick/personal leave and annual leave, contact the Workplace Infoline on 1300 363 264.

Will I still be paid if my employer has lost their business?

Stand down (being told not to come in to work temporarily)

Under the WR Act, if you cannot be usefully employed during a period for a particular reason, some employers can 'stand you down' for that period. You will not get paid for the stand down period. This includes periods where work stops for any reason that the employer is not reasonably responsible for. This could include where the business is affected by the bushfires.

Not all employers can stand you down without pay. If you are unlawfully stood down, you may be able to get lost wages and entitlements.

During the stand down period your 'continuity of service' (how long you have worked for the company) is not broken. The stand down period counts as service for all purposes. Other entitlements continue to build up during the stand down period, including annual leave, personal leave and long service leave.

A stand down period should only be temporary.

Redundancy and severance pay

If the employer no longer wishes the job you were doing to be done by anyone, for example, the business will not re-opened after the bushfires, then your job has probably been made redundant. If your job has been made redundant, you may be able to get severance pay.

This will depend on the rules about how you were employed, for example, your award or collective agreement. Your employment may also be governed by your contract of employment or any employer policies that may be in place that have to do with redundancy and severance pay.

As a general guide, many awards include the following severance pay provisions for businesses with 15 or more employees:

Period of continuous service	Severance pay (based on the ordinary time rate of pay)
Less than one year	Nil
One year and less than two years	Four weeks pay
Two years and less than three years	Six weeks pay
Three years and less than four years	Seven weeks pay
Four years and less than five years	Eight weeks pay
Five years and less than six years	10 weeks pay
Six years and less than seven years	11 weeks pay
Seven years and less than eight years	13 weeks pay
Eight years and less than nine years	14 weeks pay
Nine years and less than 10 years	16 weeks pay
10 years and over	12 weeks pay

For more information about redundancy and severance pay visit www.jobwatch.org.au

Notice of termination or pay in lieu of notice

If your employment is terminated (finished) due to redundancy or for other reasons, your employer must give you at least the minimum notice of termination to which you are entitled. They do not have to do this if you did something in your employment that was lawfully seen as serious misconduct. If they do not give you the minimum notice, they must give you pay 'in lieu' (instead of) to make up for this.

In the WR Act, the minimum notice of termination requirements are as follows:

Period of continuous service

Not more than one year

More than one year, but not more than three years

More than three years, but not more than five years

More than five years

Period of notice

At least one week unless a valid probation period applies

At least two weeks

At least three weeks

At least four weeks

Employees aged over 45 years and with two years continuous service get an extra week's pay.

If you are not needed to work during the notice period, your employer will have to pay you in lieu of notice.

If you do not get notice of termination or pay in lieu, you may be able to make an unlawful termination claim. You need to do this within 21 days of the dismissal taking effect. **See** the section below 'What if I don't have a job anymore?'. If you were able to get a notice of termination because of an award, collective agreement, Australian Workplace Agreement or Individual Transitional Employment Agreement, you may also file a claim with the Workplace Ombudsman.

For more information about unlawful termination (failure to give notice or pay in lieu) visit the JobWatch website at www.jobwatch.org.au, call JobWatch on 9662 1933 (Melbourne callers) or 1800 331 617 (country callers) or contact the Workplace Ombudsman on 1300 724 200.

My employer says they have lost their records. Is that a problem?

Your employer must make and keep certain records about their employees for seven years. These records must be in a form that a Workplace Ombudsman Inspector can readily look at. It is against the law not to do so. The Workplace Ombudsman can decide whether to prosecute. At this stage, it is unclear if the Ombudsman would take into account the fact that the bushfires may have meant your employer does not or was not able to keep records.

What if my workplace isn't safe?

Under the *Victorian Occupational Health and Safety Act 2004* you have the right to a healthy and safe workplace. This means you should not have to work in an unsafe building or with unsafe equipment. Your employer must make sure your workplace is safe. You have a responsibility too.

This means that you:

- must take care when you are working so that you do not hurt yourself or others
- should tell co-workers and management when the environment or equipment is unsafe
- should not do anything which may put yourself or someone else in danger.

Under the *Victorian Accident Compensation Act 1985*, you may be able to get compensation if you are injured at work.

You should notify your employer within 30 days of any injury. If you do not, your WorkCover claim may not be accepted. You can make a claim for compensation by filing a WorkCover 'Worker's Injury Claim' form. These forms are available from your employer or the post office. You also have to get regular WorkCover

Certificates of Capacity from your doctor and give them to your employer or its insurer. If you have any questions you should contact the WorkSafe Advisory Service on 1800 136 089. **See** the Victims of crime and other compensation chapter for more information.

I am a casual employee. What am I entitled to?

Casual employees are generally not entitled to sick/personal leave, annual leave, redundancy/severance pay, notice of termination or pay in lieu of notice. They are specifically excluded from these entitlements under the WR Act and awards.

What if I don't have a job anymore?

If you no longer have a job and you think that the termination of your employment was harsh, unjust or unreasonable you may be able to make an unfair dismissal claim or an unlawful termination claim.

Unfair dismissal – 21 days

You may be able to make an unfair dismissal claim. However, there are a number of exclusions that would mean you could not make a claim. These include:

- being employed by an employer with less than 101 employees
- being on a six-month qualifying period
- being dismissed for genuine operational reasons
- you are a casual and have not worked on a regular and systemic basis for your employer for more than 12 months.

There is also a 21-day time limit from the date that your dismissal took effect for lodging an unfair dismissal claim with the Australian Industrial Relations Commission. This time limit will go down to 14 days after 30 June 2009. For more information about unfair dismissal, visit the JobWatch website at www.jobwatch.org.au, call JobWatch on 9662 1933 (Melbourne callers) or 1800 331 617 (country callers) or contact the Australian Industrial Relations Commission on 1300 799 675.

Unlawful termination – 21 days

Unlawful termination is where you are dismissed for a 'prohibited' (not allowed) reason or where your employer did not give you the minimum notice of termination. It also includes where you were not paid in lieu of notice. **See** the previous section 'Will I still be paid if my employer has lost their business?'.

Prohibited reasons include:

- a temporary absence from work due to illness or injury (as set out in the WR Act regulations)
- temporary absence from work because of the carrying out of a voluntary emergency management activity
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

To make sure you are able to make a claim for a temporary absence from work due to illness or injury, you should get a medical certificate. Give it to your employer with 24 hours of the absence or as soon as you are reasonably able.

There is currently a 21-day time limit for lodging an unlawful termination claim with the Australian Industrial Relations Commission. This time limit is likely to change after 30 June 2009. For more information on unlawful termination, visit the JobWatch website at www.jobwatch.org.au, call JobWatch on 9662 1933 (Melbourne callers) or 1800 331 617 (country callers) or contact the Australian Industrial Relations Commission on 1300 799 675.

Can I get financial help for my lost wages?

Centrelink can provide immediate financial help to employees who lost income directly because of the bushfires. For more information see the 'Income Recovery Subsidy and Newstart Allowance' factsheet on the Centrelink website at www.centrelink.gov.au/internet/internet.nsf/publications/ah1874.htm or call Centrelink on 180 22 11.

Small business owners

If my business premises were physically destroyed or damaged by the fires, do I still have to perform my contracts for goods and services?

Generally, you do not have to 'perform' (continue) your obligations under a contract when an event or occurrence which is beyond your control (for example, the bushfires) occurs and you are unable to perform your obligations.

This is different from a situation where you are not able to perform your obligations under the contract for commercial reasons such as financing or increased costs.

My business premises were not physically affected but I am in an affected area. My business has gone down substantially after the bushfires. Do the other parties to my contracts for goods and services still have to honour them?

If the bushfires have made it impossible for the other party to perform the contract, then the other party will be 'excused' from performing their obligations under the contract. This means they do not have to go on with the contract.

If the other party's obligation is just to pay money, the bushfires alone may not make it impossible for that party to pay.

You should speak with the other party to see if the contract can be performed, and if not, if it can be varied to allow for performance to happen at a later time.

If you are unable to perform a contract because of the bushfires (your performance is 'excused'), and you received money from third parties, you need to return the money. Third parties also need to return any money you have given them.

Does a 'force majeure' clause in a contract that my business has with another party automatically relieve the other party of its liability under the contract?

Yes, depending on the terms of the 'force majeure' clause. A force majeure refers to natural acts beyond the control of a person, such as bushfires, as well as other outside forces.

Usually, the force majeure clause excuses a party from performing its obligations under the contract. If the force majeure event continues for a period of time, the clause usually allows for either party to terminate the contract.

I paid for goods for my small business but they were destroyed by the fires before I received them. Can I get my money returned?

If the goods have been destroyed by the bushfires before they could be delivered to you, and you cannot get similar substitute goods from the maker/seller, the maker/seller must return your money to you.

What happens if I am no longer able to meet my finance repayments because my business has been affected by the bushfires?

You still need to make repayments under your finance arrangements. If you are no longer able to meet your repayments, then you should contact your lender immediately to negotiate a different repayment plan.

If your loan arrangements are secured or guaranteed by another party, then your lender may try to get payment by selling any secured property or by making a demand on the guarantor.

See the 'Debt' chapter for more information on repayment options and financial and other help.

Insurance

Many business insurance policies include 'business interruption insurance'. This insurance may cover loss of your business premises, road closures or damage to the local area caused by the bushfires. If you are having trouble getting a payout for business interruption from your insurer, contact Bushfire Legal Helpline on 1800 113 432.

See the 'Insurance' chapter for more information on insurance claims, your rights and where to get help.

Cancellations

I am a tourism operator. Do I have to refund a customer's deposit if they cancelled because of the bushfires?

You will have to refund a customer's deposit if the customer cancelled their accommodation because your property was destroyed or the authorities would not allow people into the area (or advised people not to visit the area). You may keep a small amount of the deposit for any costs you accrued before the customer cancelled.

You do not have to refund a deposit if the customer cancelled because they did not want to visit anymore, for example, because of the bushfires or because of weather conditions generally. Your usual cancellation policy applies.

In both these situations it may be helpful to discuss the cancellation with your customer and see if you can come up with a solution that is good for the both of you, for example, holding the deposit to be used at a later time.

Note: if you make claims about your tourism accommodation or service generally that cannot be met, you have to return the deposit.

For information on cancellations for tourism operators, see *Customers who want to cancel – a guide for tourism businesses* available from the Consumer Affairs Victoria's website www.consumer.vic.gov.au (click on Shopping, Trading & Pricing > Forms and publications' and look under 'Publications and brochures').

This webpage also includes *Holiday Accommodation: A Guide for Providers and Booking agents*, which outlines your rights and responsibilities under the Victorian *Fair Trading Act 1999*.

Other small business help

Can I get a grant?

If you are a primary producer and small business owner, you may be able to get a 'Clean-up and Restoration Grant' from Rural Finance to re-establish your business. A grant does not have to be paid back. You may be able to get more money on top of this grant depending on your needs.

To qualify for the 'Clean-up and Restoration Grant' grant you must:

- have an ABN
- be directly impacted through damage or destruction of physical assets.

The grant is not meant to replace insurance and will not affect insurance payments. You must apply within six months of the bushfire. For more information contact Rural Finance on 1800 255 925.

What help can I get because my work tools were damaged or destroyed?

If you lost tools used in your business, you may be able to replace some of them with a 'Tools of the Trade Payment' from the Victorian Government. To get this grant you must be an employee of a registered business and apply by 31 December 2009. For information about this payment, see the Victorian Bushfire Appeal Fund at www.dhs.vic.gov.au/bushfireappeal/Fund-Payments/tools-of-trade-payment or call the Victorian Bushfire Appeal Fund on 1800 180 213.

Can I get a loan for my business?

If you are a primary producer or small business owner you may be able to get a low-cost loan from Rural Finance. Contact Rural Finance on 1800 255 925.

Where can I get business help?

Business Victoria is offering free business advice to businesses affected by the bushfires. The advisor will assess the damage the bushfires have caused to your business and help you deal with the situation. Contact Business Victoria on 132 215 for more information.

When is my Business Activity Statement (BAS) due?

If you are in a bushfire affected area, your BAS due date was extended until late May 2009. If you are able to get a refund, you can still ask the Australian Taxation Office that you do your BAS at the normal time. The Australian Taxation Office is also offering other help available for people affected by the bushfires. Call their Emergency Support Infoline on 1300 304 975 for more information.

Do I need to pay land tax?

If you usually pay land tax on properties in bushfire affected areas, these taxes have been put on hold. The government has not decided if you will need to pay these later. You can get further information from the State Revenue Office by calling 132 161.

Can I get financial help for my lost wages?

Centrelink provides immediate financial assistance to small business owners and farmers who have lost income directly because of the fires. For more information see the 'Income Recovery Subsidy and Newstart Allowance' factsheet on the Centrelink website at

www.centrelink.gov.au/internet/internet.nsf/publications/ah1874.htm or call Centrelink on 180 22 11.

Other useful Handbook chapters

See the 'Renting' chapter for information on retail tenancies.

See the 'Debt' chapter if you are having trouble with money and paying the bills.

See also the 'Insurance', 'Property', 'Relief' and 'Utilities' chapters.

DISCLAIMER

The information contained in this chapter of the Bushfire Legal Help Handbook is intended to provide general information on legal topics, current at the time of first publication. The contents do not constitute legal advice, are not intended as a substitute for legal advice and should not be relied on as such. You should get legal advice in relation to your individual circumstances and any particular matters you may have.

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