

Employing staff in the home building industry?

Know the rules – don't get caught out!



Industrial
Relations



Fair Work
OMBUDSMAN

Do you employ staff in the home building industry?

The rules have changed!

Employers need to keep up-to-date with the legal requirements that ensure both you and your employees get a fair go at work.

NSW Industrial Relations, in partnership with the Fair Work Ombudsman, has pulled together some of the important information to explain how the changes affect your business.


Find out more about:

- Modern awards
- National Employment Standards
- Calculating wages
- Keeping accurate records and pay slips
- Ending employment
- Unfair dismissal
- Sham contracting.

Make sure you know the deal – don't get caught out, it's not worth the risk.

For more information visit www.fairwork.gov.au or call the Fair Work Infoline on **13 13 94**

Need direct help to take action or resolve a problem?

Head to www.fairwork.gov.au and select the  Live Chat advisor.

On the Fair Work website you will also find easy-to-use tools and templates such as:

- **Payroll Check** – calculates the base rates of pay for multiple employees. It takes into account the modern award classification and the corresponding pre-modern award classification and automatically factors in changes resulting from Fair Work Australia's annual wage review
- **Pay Rates Calculator** – Helps business owners calculate base rates of pay and penalty rates under modern awards
- **Award Finder** – you can use this tool to search for the pre-modern award that covered you before 1 January 2010 and your modern award.

Employing staff

In the home building industry pay and conditions of employment are determined by whether employees are full-time, part-time or casual. You also need to be aware of provisions which apply to daily hire employees.

What award do my employees fall under?

A large number of employees in the home building industry are covered by the *Building and Construction General On-site Award 2010 (MA000020)*. There are also a number of other awards such as the:

- *Joinery and Building Trades Award 2010 (MA000029)*
- *Electrical, Electronic and Communications Contracting Award 2010 (MA000025)*
- *Manufacturing and Associated Industries and Occupations Award 2010 (MA000010)*
- *Plumbing and Fire Sprinklers Award 2010 (MA000036)*.

Read the coverage clause of the modern award to find out if it applies to your business. You can find your modern award by using the Fair Work Ombudsman's **Award Finder** tool at www.fairwork.gov.au

The **National Employment Standards** (NES) provide a safety net for all employees in the national workplace relations system, including all private sector employers in New South Wales. The NES outline ten minimum entitlements for employees such as leave, public holidays, and flexible work arrangements.

What's happening to the state awards?

State awards for sole traders and partnerships have been phased out and replaced by the modern awards in industry/occupational categories.

When do the modern awards come into effect?

Modern awards applied from **1 January 2010** for all incorporated employers and **1 February 2011** for sole traders and partnerships. There are transitional arrangements in place to help employers move into the national system.

Finding the right pay

The transitional arrangements in most modern awards allow for new minimum pay rates, loadings and penalties to be phased in over a period of five years. The full modern award rates will apply from **1 July 2014**. The details of phasing in transitional provisions can be found in *Schedule A* of your modern award.

The Fair Work Ombudsman has a number of tools available to help you figure out the correct pay – visit www.fairwork.gov.au or call the Fair Work Infoline on 13 13 94.

National Employment Standards

- **A maximum number of weekly hours of work** – 38 hours per week plus reasonable additional hours
- **Flexible working arrangements** – Parents and carers with children under school age or a child under 18 with a disability can ask their employer to change their work arrangements, such as start and finish times to help look after the child
- **Annual leave** – Employees are entitled to four weeks paid leave each year, plus an additional week for certain shift employees
- **Parental leave and related entitlements** – Up to 12 months unpaid leave for parents of a new born or newly adopted child, plus the right to request an additional 12 months unpaid leave, and other forms maternity, paternity and adoption-related leave
- **Personal/carer's leave and compassionate leave** – 10 days paid personal/carer's leave, two days compassionate leave as required
- **Community service leave** – Unpaid leave for certain voluntary emergency activities, as well as up to 10 days paid leave for jury service
- **Long service leave** – Most long service leave entitlements that applied before 1 January 2010 have been preserved pending development of a national long service leave standard
- **Public holidays** – Employees are entitled to paid time off on a public holiday for the hours they would have ordinarily worked. Employers may reasonably request an employee to work on a public holiday. Under many awards and agreements, an employee who works on a public holiday will receive a penalty rate or loading for the hours they work, or they may be provided with time off instead of payment of penalty rates. Check the award or agreement to see what entitlements apply
- **Notice of termination and redundancy pay** – Up to 4 weeks' notice of termination (5 weeks' dependent on age and period of continuous service) and up to 16 weeks' redundancy pay – both based on length of service.
- **The Fair Work Information Statement** – Employers must provide this statement to all new employees. It provides information about an employee's rights and entitlements – including where to go to get help. Visit www.fairwork.gov.au/fwis for further information and a copy of the Fair Work Information Statement.

Apprenticeships

All apprenticeships in the NSW home building industry require:

- a **training contract** which is signed by both the employer and apprentice and approved by State Training Services, a division of the Department of Education and Communities
- **paid employment** under an appropriate industrial arrangement (for example, an award or enterprise agreement)
- a **training plan** endorsed by a Registered Training Organisation (RTO) that meets the requirements of the relevant vocational training order for the apprenticeship and specifies the training required to achieve the appropriate nationally recognised qualification.

There is no limit to the number of apprentices who can be employed in any one workplace providing that the supervision arrangements comply with the relevant industrial award or agreement and adequate supervision and training for each apprentice is provided.

It is important to note that an employer who employs a person as an apprentice must apply to the Commissioner for Vocational Training to register the apprenticeship within 28 days from the start of employment.

*Thinking about taking on an apprentice?
Find out what you need to know from the
NSW Industrial Relations **home building
industry online employment guide**
at www.industrialrelations.nsw.gov.au*

Unpaid work trials

Unpaid work trials are illegal. All employees, including apprentices, need to be paid for all the work they do including meetings and training.

For information on apprenticeships and traineeships please contact State Training Services of the Department of Education and Communities on 13 28 11 or visit www.training.nsw.gov.au

If a junior employee is employed on trade work they must be employed as an apprentice or if they have completed their apprenticeship, they must be paid as a tradesperson as per the relevant modern award.

Many home building awards do not contain junior rates. If this is the case with your modern award, any juniors employed **who are not apprentices** must be paid the minimum rate for an adult as per the classification in the modern award.

Rostered days off

Under some modern awards, ordinary working hours can be worked over a 20 day, or four week cycle – Monday to Friday. To work a rostered day off cycle, an employee needs to work eight hours a day, accruing 0.4 of an hour each day worked. This means that two hours per week will go towards a paid rostered day off once per month. A rostered day off is generally taken on the fourth Monday in each four week cycle, except when it falls on a public holiday. In this instance the next working day will be taken instead.

Travel and fares

An employee required to commence their day at a construction site may be entitled to a paid travel allowance as set out in the modern award that applies to them. For example, if the construction site is outside a 50 kilometres radius of the post office or the principal post office in a regional town, then the employee may be entitled to payment for all time reasonably spent travelling to and from the site. An employee may also be entitled to reimbursement of expenses which have been reasonably incurred or payment of a kilometre rate if they use their own vehicle. Check the relevant modern award for details.

Overtime

An employee required to work outside the ordinary hours of work under the modern award may be entitled to extra pay for all hours worked. Employers can only ask an employee to work a reasonable amount of overtime and an employee can refuse to work any overtime if it is not reasonable for them to do so. Reasons include the occupational health and safety of the employee as well as personal circumstances and family responsibilities.

Modern awards often restrict employees under 18 years old from working overtime hours unless they agree. Part-time employees are usually entitled to overtime rates for all time worked in excess of their contracted hours. Check the relevant modern award to find out what applies to your business, including overtime penalty rates.

Is there an alternative to a rostered day off system?

Your options for arranging ordinary hours of work will depend on the modern award that applies to your business. Under some modern awards, an employer and employee can agree to alter the day on which a rostered day is to fall, or they can agree to banking of the rostered day off. The employer and employee can also agree that they will not work a rostered day off cycle. A business may choose to not work a rostered day off system due to the size and needs of the business.

Please check the relevant modern home building award at www.fairwork.gov.au

Annual leave loading

Under most modern awards an employee must receive a loading of 17.5 per cent while on annual leave. In many cases, the loading is calculated on the rates, loadings and allowances the employee would receive if working. This is payable on all annual leave taken during the year. Check your modern award for details.

Annual close down

Some modern awards provide for an annual close down. If an employer shuts the business over the Christmas/New Year period, employees may be directed to take paid annual leave for all days that are not covered by a public holiday. If an employee does not have sufficient leave accrued for the period of the shutdown, the employee may be required to take leave without pay for the balance of the shutdown period.

Sham contracting

Sham contracting is where an employer tries to misrepresent or disguise an employment relationship as an independent contracting arrangement. Employers sometimes do this to avoid having to give an employee their proper work entitlements, such as minimum rates of pay and leave entitlements. This is illegal and potentially results in significant penalties if identified and prosecuted.

For more information about sham contracting – call the Fair Work Infoline on 13 13 94.

Living away from home allowance

Some modern awards provide a living away from home allowance when an employee is required to work a distance from home that makes it reasonably necessary for them to live and sleep away from home. This allowance is usually paid per complete week or per day for part of the week. For further information please refer to the relevant modern award.

Employers may be required to provide up to two months notice of an annual close down period – check your modern award.

Inclement weather

Some modern awards in the home building industry contain provisions for inclement weather, which requires some employers to pay employees up to 32 hours each four week cycle, for time when they could not reasonably work because of unsafe weather conditions. Inclement weather is generally defined as the existence of rain or abnormal climatic conditions. This includes hail, extreme cold, high wind, severe dust storm, and extreme high temperatures. Extreme weather conditions result in the working conditions either being unsafe or unreasonable. Check your modern award to find out if this applies to you and for further details.

Good faith bargaining

Under the national workplace relations system, bargaining representatives must:

- recognise and bargain with the other bargaining representatives
- attend and participate in meetings at reasonable times
- disclose relevant information (other than confidential or commercially sensitive information) in good time
- respond to proposals made by other bargaining representatives in good time
- genuinely consider the proposals of other bargaining representatives and provide reasons for responses to those proposals
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining.

Please note that employers can't refuse to bargain with an employee's bargaining representative. For more information, go to the [Employment](#) section of www.fairwork.gov.au

Unions in the workplace

A union official can enter the workplace for a number of reasons. The official is able to talk to employees and interview anyone who agrees or is entitled to be represented by the union. The union official may also ask the employer or the person who occupies the premises to look at or copy any documents located on the premises, both in hardcopy or on computer, which relate to suspected breaches of an award or agreement or federal workplace relations law. For an official to enter a workplace, they must have a valid and current right-of-entry permit from Fair Work Australia.

For more information about unions, head to the [Employment](#) section of www.fairwork.gov.au

Industrial action

Industrial action can occur in a number of forms – including strikes, work bans and lock-outs. Industrial action is protected only if it is taken during a period of bargaining for an enterprise agreement, the existing enterprise agreement is beyond its nominal expiry date and a ballot has been held. Employers, employees and industrial associations who take unprotected industrial action can face significant consequences, including being litigated against by other persons for damages associated with any loss that their action causes, or by the Fair Work Ombudsman for penalties.

For information regarding both protected and unprotected industrial action check out the [Employment](#) section of www.fairwork.gov.au

Keeping the record straight

What records do I need to keep?

By law, there are a number of employee records that employers must keep. To help employers keep these records up-to-date, a suite of fact sheets and templates can be downloaded from www.fairwork.gov.au including:

- pay slip template
- timesheet and wages records
- employment records
- leave

What are the record-keeping obligations required by the *Fair Work Act 2009*?

Employers must keep a number of records for their employees and ensure that they are accessible, legible, in English and are not altered, false or misleading. These must be kept for seven years. Details of the records that employers need to keep are listed below:

General employment records

- the employer's name
- the employer's ABN (Australian Business Number if they have one)
- the employee's name
- the date the employee started work
- whether the employee is full-time, part-time, permanent, temporary or casual.

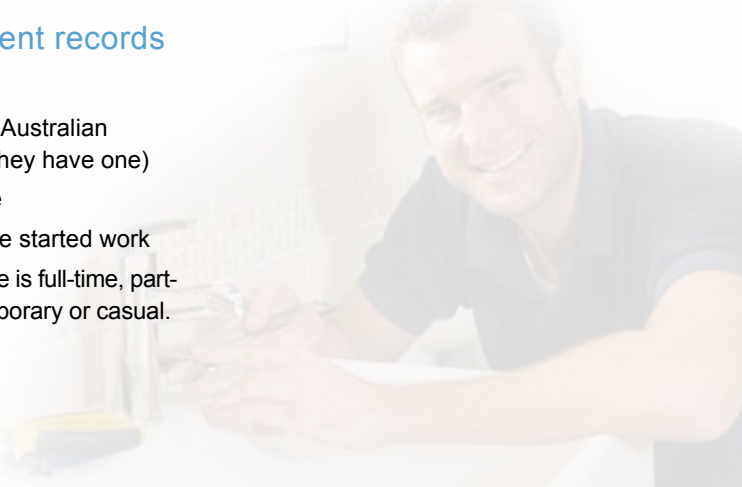
Changing business owners

When a business changes hands, the old employer must also give the new employer the employment records for all employees who have transferred from the old business.

These records must be kept for seven years in line with their record keeping obligations under the *Fair Work Act 2009*.

There are a number of issues you need to be aware of when a business has been transferred.

To find out more, please see the Fair Work Ombudsman Fact Sheet – Transfer of Business at www.fairwork.gov.au/resources or call the Fair Work Infoline on 13 13 94.



Pay records

- the rate of pay paid to the employee
- gross (before tax) and net (after tax) amounts paid to the employee
- any other deductions
- other entitlements such as incentives, bonuses, loadings, penalty rates or allowances.

Hours of work

- a record of the hours worked by casual and irregular part-time employees who are guaranteed a rate of pay set by reference to a period of time worked
- if the employee is entitled to a penalty rate or loading for overtime hours worked, the number of overtime hours worked on each day, or the starting and finishing times of the overtime
- a copy of the written agreement if an employer and employee have agreed to an averaging of the employee's work hours.

Leave

- any leave taken by an employee
- the balance of the employee's leave, which they have not yet taken
- If an employer and employee agree to cash out an accrued amount of leave as provided in the applicable modern award, the employer must keep a copy of the agreement to cash out the leave and a record of the amount and date of the payment.

Superannuation

- the amount of each contribution
- the date when each contribution was made
- the period that the contribution applies to
- the name of the fund which the contribution was paid into
- the basis on which the employer became liable to make the contribution, including a record of any election made by the employee (including the date) to have their superannuation contributions paid into a particular fund.

Individual flexibility arrangements

If an employer and an employee agree in writing to an individual flexibility arrangement in relation to a modern award or enterprise agreement, the employer must record:

- a copy of the agreement, setting out the contents of the mutually agreed arrangement
- a copy of the notice or agreement when the arrangement ends.

Pay slips

An employee must receive a pay slip every time they get paid.

By law, employers must issue a pay slip to each worker in their business:

- within one working day of pay day – even if the employee is on leave
- either electronically or on paper.

A pay slip must include the:

- name and ABN of the employer
- name of employee
- classification of the employee under their award or enterprise agreement – including full-time, part-time and casual status (recommended only)
- date when the payment was made
- period of employment to which the payment relates
- the amount of money paid before tax (gross amount) and the amount paid after tax (net amount)
- any loadings, penalty rates, monetary allowances, bonuses, incentive-based payments or other entitlements paid that can be singled out
- if the employee is paid an hourly rate – the ordinary hourly rate of pay, the number of hours worked at that rate and the amount of pay at that rate
- if the employee is paid an annual rate (salary) – the rate as at the last day in the pay period
- any deductions made from the pay, including the amount and details of each deduction
- any amount deducted for superannuation, including the amount of the contribution made during the period to which the pay slip relates, or the amounts that you are liable to make, and the name or the name and number of the superannuation fund into which the contribution will be made.

Termination

Under the *Fair Work Act 2009*, you must keep records of when an employee leaves the business, including the name of the person who terminated their employment and details of how the termination took place (by notice, summarily, or in some other manner). It is important to keep in mind that employee records are private and confidential. Generally, no one can access them other than the employee, their employer, relevant payroll staff or Fair Work Inspectors. Employers must make copies of an employee's records available at the request of an employee or former employee.

Ending employment

Employment ends for a whole range of reasons – make sure you go about this the right way!

Resignation

If resigning, an employee must give their employer notice. While an employee can resign from their job verbally, it is best for the employer to follow up by confirming the resignation in writing - clearly stating the date they will be leaving. This will help avoid any misunderstandings.

What notice is an employer required to give?

An employer must give an employee the right amount of notice as outlined in the modern award or under the NES. You can pay employees instead of requiring them to work through their notice period – so if they are entitled to 1 week’s notice you can pay them 1 week’s pay instead.

The NES excludes certain employees from notice of termination entitlements, including casual employees or an employee being terminated because of serious misconduct. Some modern awards also exclude daily hire employees.

Notice periods under National Employment Standards

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

An employer is required to give an additional week’s notice if the employee is over 45 and has at least two years of continuous service.

What notice is the employee required to give?

The period of notice an employee is required to give is outlined in the relevant modern award.

If an employee wants to quit, they are generally required to give notice. The period of notice that an employee has to give is usually the same as required by an employer as outlined above – although there is no requirement for an employee to give additional notice based on their age.

If an employee fails to give the required notice, an employer may be able to withhold an equivalent amount from the employee's final pay if this is allowed by the modern award.

For example, if an employee who has worked for you for two and a half years decides to quit, then they must give you two weeks' notice. If they don't, you can withhold an amount equivalent to what they would ordinarily earn in a 2 week period from their final pay.

What entitlements should be paid on termination?

An employee must receive the following entitlements in their final pay:

- outstanding wages
- any payments in lieu of notice
- accrued annual leave and long service entitlements
- redundancy or severance pay entitlements where applicable.

Long service leave in the home building industry is managed by the Long Service Corporation. Please call 13 14 41 or visit www.lspc.nsw.gov.au for further information.

It's best practice to make the final wage payment on the last day of work or within the pay run that includes that day. Redundancy needs to be paid under many home building awards even for employers with less than 15 staff. Please check your modern award for details.

Poor performance and warnings

An employee can be dismissed for poor performance. If you are unhappy with the performance of an employee, you should make them aware of your concerns and give them time to improve.

An employer does not have to give an employee three warnings before they are dismissed for poor performance. However, it is a good idea for businesses to have

Unfair dismissal – what is harsh, unjust or unreasonable?

An employer must have a valid reason for dismissing an employee. This includes poor performance, bad conduct or changes to the operations of the business.

A dismissal is unfair when it is harsh, unjust or unreasonable. Fair Work Australia will look at a number of factors to determine the fairness or otherwise of the dismissal, including whether or not:

- a valid reason was given for the dismissal
- the employee was given an opportunity to respond
- the employer unreasonably refused to allow the employee to have a support person present
- the employee was given any prior warnings about their actions
- the size of the business or lack of HR expertise had an impact on the processes followed by the employer.

What is unlawful termination?

It is illegal for an employer to dismiss an employee for a number of reasons, including:

- temporary absence from work because of illness or injury
- trade union membership or participation in trade union activities
- non-membership of a trade union
- seeking office or acting as a representative for employees
- filing a complaint or participating in proceedings against an employer
- a person's race, colour, sex, sexual preference, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- absence from work during parental leave
- reasonable temporary absence from work to volunteer for an emergency management activity such as working as a registered volunteer for the State Emergency Service (SES).

For more information on ending employment – call the Fair Work Infoline on 13 13 94 or visit www.fairwork.gov.au

policies in place that outline the number of written and verbal warnings that will be issued to an employee before they are dismissed. It is also a good idea to communicate these policies to your employees so that they understand the process and are aware of their rights and responsibilities.

An employee can also be dismissed for breaking company rules or policies – but only if the rules have been made clear and the employer is sure the employee understands the rules in the first place.

Termination due to serious misconduct

An employer can terminate an employee if the employer has reasonable grounds to believe an employee is guilty of serious or wilful misconduct. This includes **theft, fraud, violence or serious breaches of health and safety procedures**.

If dismissing an employee without notice, an employer should consider seeking legal advice. Templates and checklists can be found under the **Templates** section on **www.fairwork.gov.au/resources**

What role does Fair Work Australia have in unfair dismissal hearings?

Where possible, Fair Work Australia (FWA) tries to resolve unfair dismissal applications by agreement.

The key steps in the unfair dismissal application process are:

1. Employee lodges the application
2. The application is checked to ensure it is complete and valid
3. Employer is notified of the application
4. FWA conciliates and attempts to try to have the parties resolve the issue by themselves
5. Matters that are unresolved are determined by FWA.

Small Business Fair Dismissal Code

Under the national workplace system, there are specific unfair dismissal laws for small businesses and their employees. Where an employer with less than 15 employees complies with the **Small Business Fair Dismissal Code** when dismissing employees, the dismissal will not be found to be unfair. The code and a helpful checklist are available at www.fairwork.gov.au/termination

What happens if an employee claims they have been unfairly dismissed?

An employee can lodge an unfair dismissal claim with Fair Work Australia within 14 days of termination. The issue is first discussed via a telephone conference with the employer, employee and a mediator. If the matter is not resolved then it is referred to Fair Work Australia.

If it is decided that there is no basis for the claim, then the matter will be dismissed. Other options for settling the matter include giving the employee back their job or compensation.

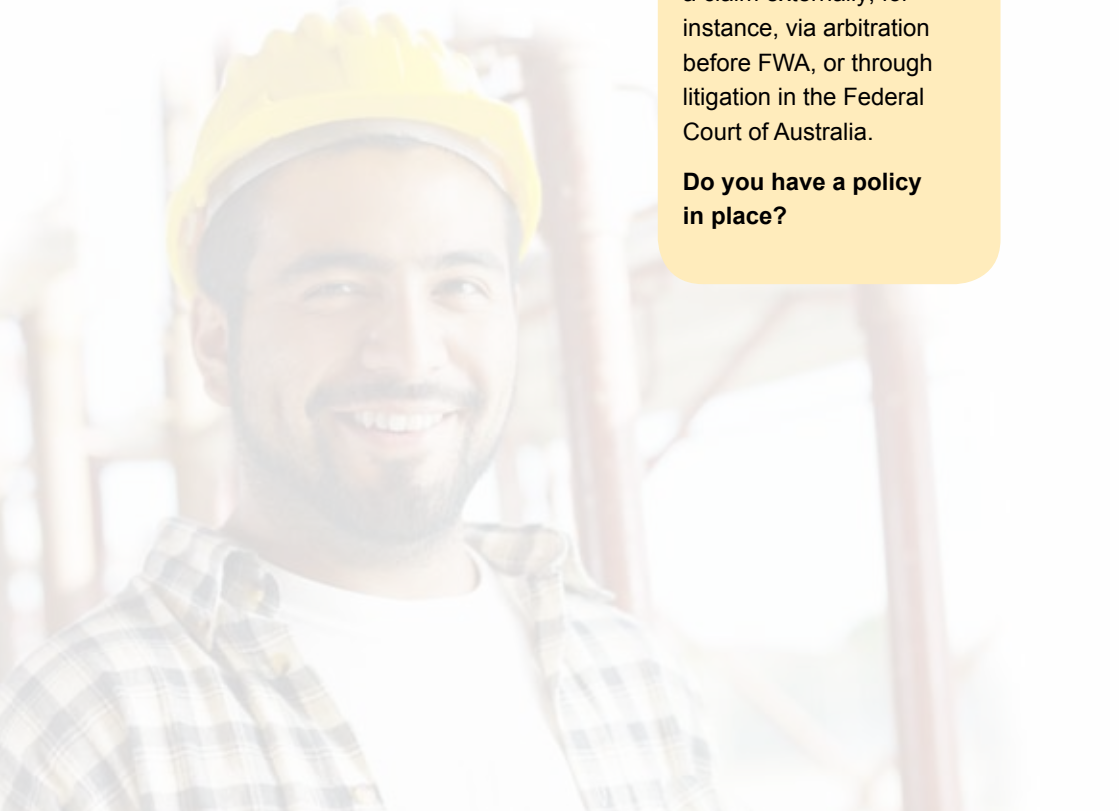
Disputes in the workplace

Effective dispute resolution can help employers to maintain good relationships with their employees by dealing with workplace issues at an early stage.

Employees need to know that their grievances will be taken seriously by an employer.

A good dispute resolution process may help to avoid the costs of resolving a claim externally; for instance, via arbitration before FWA, or through litigation in the Federal Court of Australia.

Do you have a policy in place?



Building better businesses in NSW

Assistance for home building business owners

There are a number of government agencies and industry organisations providing help and support to employers in the home building industry in NSW.



13 13 94

www.fairwork.gov.au

Fair Work Ombudsman

Works with businesses and employees, contractors and the community to promote harmonious, productive and cooperative workplaces. Investigates workplace complaints, enforces compliance with Australia's workplace laws and provides advice and assistance to employers and workers on their workplace rights and responsibilities.



13 14 41

www.lspc.nsw.gov.au

Long Service Corporation

Administers a portable long service scheme for the NSW building and construction industry. Helps businesses to understand and meet their obligations under the *Building and Construction Industry Long Service Payments Act 1986* and provides advice and assistance on long service payments.



13 32 20

www.fairtrading.nsw.gov.au

NSW Fair Trading

Provides a range of services to building and trade contractors, including a trader initiated dispute resolution service, free CPD seminars across the State, standard contracts and publications to download or you can subscribe to the quarterly Foundations e-newsletter.

13 28 11

www.training.nsw.gov.au

State Training Services

State Training Services, a division of the Department of Education and Communities, manages the vocational education and training market in NSW. State Training Services is responsible for coordinating and regulating the apprenticeship and traineeship system in NSW and can help employers looking to take on an apprentice in the home building industry.

13 10 50

www.workcover.nsw.gov.au

WorkCover

WorkCover NSW administers work health and safety, injury management, return to work and workers compensation laws and manages the workers compensation system.

WorkCover oversees:

- work health and safety
- licensing and registration of high risk activities
- workers compensation insurance
- workers compensation benefits
- sustainable return to employment for injured workers
- management of the Workers Compensation Insurance Fund.



1300 650 620
www.hia.com.au

Housing Industry Association

The HIA looks after the interests of builders, trade contractors, design professionals, kitchen and bathroom specialists, manufacturers and suppliers. HIA has a team of professionals available to assist members with a wide range of issues affecting their business including employment and industrial relations, enquiries about modern awards and transitional arrangements, minimum wages, workplace bargaining, union rights of entry, termination and performance management. HIA publishes guides and information sheets to help its members better understand their obligations.



1800 451 393
www.mbansw.asn.au

Master Builders Association of NSW

The MBA understands the importance of a strong building industry in NSW and has offices across the state to provide a support network of services to members. It is also focussed on developing policy on housing reforms and issues with government agencies and local councils. Specialist services such as training programmes, OHS, legal, industrial, apprenticeships, industry representation and regional divisional meetings all signify the range of services that are delivered to members.



02 8789 7000
www.masterplumbers.com.au

Master Plumber Association of NSW

The Master Plumbers Association of NSW is the lead organisation of the MPA Group, which is a co-operative of specialist organisations established to assist, service and protect the NSW plumbing industry. The Master Plumbers Association offers a range of services to help keep you up to date with evolving legislation, regulations, products and techniques in the plumbing industry.



9744 1099
<http://nsw.neca.asn.au>

National Electrical and Communications Association

NECA is the peak body representing the electrotechnology contracting industry in Australia. NECA NSW provides advice and assistance and training to electrical contractors involved in residential building, including advice on the operation of the *Home Building Act* in areas such as licensing, contracting with consumers, home warranty insurance and dispute resolution. NECA provides advice on industrial and employee relations issues, occupational health and safety and workers compensation.



13 26 96
www.nswbusinesschamber.com.au

NSW Business Chamber

NSW Business Chamber helps businesses of all sizes manage their people and growth more efficiently. NSW Business Chamber provides hands-on assistance in identifying workplace challenges such as OHS and industrial relations issues and also offers a range of compliance products and services to help drive growth at every stage of the business lifecycle.