

EXPLANATORY STATEMENT

Issued by authority of the
Minister for Employment and Workplace Relations

Fair Work Act 2009
Subsection 388(1)

Small Business Fair Dismissal Code

Subsection 388(1) of the *Fair Work Act 2009* provides that the Minister may, by legislative instrument, declare a Small Business Fair Dismissal Code (the Code).

A Code declared under subsection 388(1) of the *Fair Work Act 2009* is a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. The Code commences on 1 July 2009 being the same day as the commencement of subsection 388(1) of the *Fair Work Act 2009*.

The Government undertook extensive consultation in developing the Code. The Government consulted with peak union and employer bodies and State and Territory officials. In February 2008, the Government established several advisory groups to consider the proposed changes to the workplace relations system, including the Small Business Working Group (SBWG) to specifically consider the Code. The SBWG was chaired by the Hon Dr Craig Emerson MP, Minister for Small Business, Independent Contractors and the Service Economy, and comprised small business representatives. The SBWG met several times to provide input into the Code's development. The Code was also considered by the Business Advisory Group and the Union Working Group on Unfair Dismissal.

The Code recognises the special circumstances of small business employers by providing separate, simple rules for small business employers to follow when dismissing an employee. If a small business employer complies with the Code when dismissing an employee, the dismissal will be considered fair. Small business employers who do not comply with the Code will be subject to the unfair dismissal provisions of the *Fair Work Act 2009* as they apply generally. A small business employer is defined in section 23 of the *Fair Work Act 2009*, or in accordance with the *Fair Work (Transitional and Consequential Amendments) Act 2009* for dismissals that occur before 1 January 2011.

The Code sets out the circumstances in which a summary dismissal (a dismissal without notice or warning) is warranted, including cases of theft, fraud and violence. For under-performing employees, the Code simply requires the employer to give the employee a valid reason, based on the employee's conduct or capacity to do the job, why the employee is at risk of being dismissed and a reasonable chance to rectify the problem.

The Code does not require multiple warnings. It is desirable, but not necessary, for a warning to be in writing. The Code also sets out some procedural matters, including evidentiary requirements.