



EMPLOYMENT LAW OVERVIEW
AUSTRALIA 2021-2022

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I. GENERAL OVERVIEW

1. INTRODUCTION

The Australian Constitution (“the Constitution”) has had a major impact on labour regulation in Australia. For much of the 20th Century, there was a significant division of responsibility for labour matters between the Federal Government and the six States and two Territories. However, following the 2005 WorkChoices reforms, the responsibility for labour matters has shifted predominantly to Federal regulation.

The Fair Work Act 2009 (Cth) is the primary legislative source of employment regulation in Australia. The Act contains employment standards and conditions, union regulation, and anti-discrimination protection.

The Australian Government has recently also put in place model laws to harmonise work health and safety legislation across Australia. These laws aim to reduce the incidence of work-related death, injury and illness.

2. KEY POINTS

Employee rights in Australia are protected and regulated in the following ways:

- The most basic source of employment terms and conditions derives from the employment contract. The contract will contain express terms, and in Australia the courts have recognised some standard terms which will be implied into the contract of employment.
- The *Fair Work Act 2009 (Cth)* outlines minimum employment standards, including leave, maximum weekly hours, notice of termination and redundancy pay.
- Modern Awards set out the minimum conditions of employment for specific industries or occupations, such as rates of pay and allowances.
- Federal and State anti-discrimination legislation affords employees with rights against discrimination, harassment, vilification and victimisation.
- Federal and State work health and safety legislation applies to reduce the occurrence of work-related death, injury and illness.
- State based workers’ compensation legislation provides for compulsory basic insurance of employees who are injured at work.

- Superannuation Guarantee legislation requires employers to pay contributions to an approved superannuation fund for their employees.

3. LEGAL FRAMEWORK

Australia is a federation of States and Territories with a Federal Government. The Constitution permits the Commonwealth Parliament (that is the Federal Parliament) to pass legislation, which relates to certain specified matters, whereas State Parliaments have the power to pass legislation in relation to any matter pertaining to that state. Should a clash between State legislation and Commonwealth legislation arise, a valid Commonwealth law will prevail to the extent of any inconsistencies. The Constitution provides for the Federal Government to make laws in relation to industrial disputes extending beyond the boundary of more than one State (the “conciliation and arbitration power”). This formed the basis of the split between State and Federal power for a century, with the Commonwealth legislating for the conciliation and arbitration of industrial disputes crossing State boundaries, and the States legislating for other intra-state areas of industrial relations. In the 1980’s, the Federal Parliament began using the power given to it under the Constitution to make

laws with respect to corporations to encroach on areas of law making that were previously the domain of State Parliament. In the 1990's, this trend extended to the area of employment law and saw the Federal Parliament use its power to make laws with respect to corporations and in relation to employers and employees, instead of relying on the conciliation and arbitration power. The High Court of Australia upheld this approach to industrial relations, and it continues to be used by the current "Fair Work" legislation.

Key sources of employment law in Australia include the following:

- The Constitution;
- Common Law;
- Legislation, in particular, the *Fair Work Act 2009 (Cth)*;
- Contracts of employment and contracts for services;
- Awards and enterprise agreements; and
- International labour standards.

KEY INSTITUTIONS IN AUSTRALIAN EMPLOYMENT LAW

Key regulatory bodies and other institutions in Australian employment law include the following:

The Courts

The Constitution requires matters involving enforcement of Federal laws to be brought before the Federal Court of Australia and the Federal Circuit Court, rather than a non-judicial tribunal, for example, the Fair Work Commission. The State courts, including the Supreme Court, District Court and Local Court, adjudicate employment matters arising from breach of contract, other common law rights or state legislation.

The Fair Work Commission ("FWC")

The FWC is an independent national workplace relations tribunal. The FWC is responsible for providing for the national minimum wage; changes to, or creation of modern awards; hearing workplace related matters brought before it by an individual or organisation for conciliation or arbitration; and making decisions in relation to industrial action, transfer of business, unfair dismissal and enterprise bargaining.

The Fair Work Ombudsman ("FWO")

The FWO is an independent statutory agency, which is responsible for investigating suspected breaches of workplace rights; enforcing workplace laws before the courts; and providing an educative service to employees and employers concerning their rights and obligations in the workplace.

The Australian Human Rights Commission ("AHRC")

The AHRC is an independent statutory organisation that has a variety of responsibilities concerning the operation of federal discrimination laws, including the resolution (by investigation and conciliation) of complaints of breaches of human rights and discrimination under federal laws.

State and Territory Agencies

State and Territory agencies that hear matters relating to employment include, for example, the Civil and Administrative Tribunals in both New South Wales and Victoria. In New South Wales, complaints relating to breaches of anti-discrimination legislation are referred to the NSW Civil and Administrative Tribunal ("NCAT") by the President of the Anti-Discrimination Board ("ADB"). The equivalent body in Victoria is the Victorian Civil and Administrative Tribunal ("VCAT"), which as well as hearing civil and administrative matters also deals with matters relating to equal opportunity, racial and religious vilification and disability discrimination in its Human Rights Division.

Equivalent bodies in other states and territories include:

- the Australian Capital Territory Civil and Administrative Tribunal ("ACAT")
- the Queensland Civil and Administrative Tribunal ("QCAT")
- the South Australian Civil and Administrative Tribunal ("SACAT")
- the State Administrative Tribunal of Western Australia ("SAT")
- the Northern Territory Civil and Administrative Tribunal ("NTCAT").

As there is no single amalgamated Civil and Administrative Tribunal in the state of Tasmania, matters relating to breaches of anti-discrimination legislation are heard in the Tasmanian Anti-Discrimination Tribunal.

Trade Unions and Employer Associations

Historically, there have been a large number of trade unions in Australia. However, the number of unions has decreased over time. Between 1986 and 1996, the number of unions in Australia decreased by 194, with amalgamations being the main reason for the decline. Specifically, a policy of strategic unionism was adopted which saw the amalgamation of a large number of smaller unions into 20 “super unions”. Since 1992, trade union membership has declined. Between 1992 and 2011, union membership declined from 43% to 18% for male employees and 35% to 18% for female employees.

Employer associations primarily act as lobbyists and provide members with advisory services. The major employer associations in Australia are the Australian Industry Group and the Australian Chamber of Commerce and Industry.

The Fair Work Act, Modern Awards and Enterprise Agreements

The Fair Work Act 2009 (Cth)

The Fair Work Act 2009 (Cth) provides the primary statutory framework for employment law and industrial relations across Australia.

The Fair Work Act 2009 (Cth) applies to “national system employers” and “national system employees” (see paragraphs below for discussion of who is a national system employer and national system employee).

A “national system employee” is an individual in so far as he or she is employed, or usually employed by a national system employer, except on a vocational placement.

The *Fair Work Act 2009 (Cth)* defines a “national system employer” to mean any of the following entities, so far as they employ, or usually employ an individual:

- constitutional corporations;
- the Commonwealth and Commonwealth authorities;
- employers of flight crew officers;
- maritime or waterside workers who are engaged in “constitutional trade or commerce”;
- bodies corporate;
- other persons who carry on commercial,

government or other activities in the Territories; and

- other employers who are covered by the *Fair Work Act 2009 (Cth)* as a result of State legislation which refers powers over industrial matters to the Commonwealth. (All States and Territories have referred their powers to the Commonwealth in respect of their employees other than those set out in the paragraph below).

Employers which are not national system employers are not covered by the *Fair Work Act 2009 (Cth)* and instead remain covered by the relevant State legislation. Employers which are not national system employers include:

- in Tasmania: State public sector employers;
- in New South Wales, Queensland and South Australia: State public sector employers and local government employers;
- in Western Australia: State public sector employers, local government employers and private non-constitutional corporations.

The Fair Work Act 2009 (Cth) contains the following:

- the National Employment Standards;
- regulation of modern awards and enterprise agreements;
- a good faith bargaining obligation;
- minimum wages;
- regulation of transfers of business;
- rights and responsibilities of employees, employers, and organisations (that is, general protections, protection against unfair dismissal, and regulation of industrial activity).

Until 27 November 2015, when the *Fair Work Amendment Act 2015 (Cth)* came into force, there had been no significant amendments to the *Fair Work Act 2009 (Cth)* for a considerable period of time. *The Fair Work Amendment Act 2015 (Cth)* amended the *Fair Work Act 2009 (Cth)* in the following ways:

- when bargaining for a Greenfields Agreement (an agreement between a union and an employer that does not yet have employees), employers are able to make an application to the FWC for approval of a proposed Greenfields Agreement if a deal has not been reached between an employer(s) and a union(s) within a “negotiating period” of six months. This has limited the

- potential for unions to stall major new projects;
- if an employer makes an application to the FWC for approval of a proposed Greenfields Agreement, the FWC must approve that agreement if, in addition to the factors already set out in the *Fair Work Act 2009 (Cth)*, it is satisfied that the agreement, considered on an overall basis, provides for pay and conditions that are consistent with the prevailing pay and conditions within the relevant industry for equivalent work;
- a union will only be able to be a bargaining representative for a proposed Greenfields Agreement if an employer agrees to bargain with that particular union;
- parties may only be able to commence industrial action once bargaining for a new enterprise agreement has commenced. One of the effects of this is that unions will only be able to pressure employers to reach agreement on an enterprise agreement if a majority of the employees concerned support bargaining for an enterprise agreement, rather than a majority of those employees who are union members;
- an employer will only be able to refuse a request for an extension of parental leave if the employer has given the employee concerned a reasonable opportunity to discuss the request; and
- the FWO will now be required to pay interest on certain amounts of unclaimed monies.

- clarified that employers cannot unreasonably require their employees to make payments to the employer, or deduct from amounts owed to the employee, in circumstances where the payment or deduction would directly or indirectly benefit the employer or a party related to the employer;
- provided the FWO with stronger evidence-gathering powers; and
- prohibited the hindering or obstructing of the FWO or an inspector in the performance of his or her functions or powers, or the giving of false or misleading information or documents.

Domestic Violence Leave

The Fair Work Amendment (Family and Domestic Violence Leave) Act 2018 (Cth) came into effect on 12 December 2018. It inserted sections 106A – 106E into the *Fair Work Act 2009 (Cth)*, entitling employees to unpaid family and domestic violence leave. All industry and occupation awards have been able to provide for this leave since 1 August 2018, but this amendment has made it available to all employees regardless of whether the employee is covered by an award or enterprise agreement, including part-time and casual employees, under the National Employment Standards. All employees are now able to access 5 days of unpaid family and domestic violence leave in a 12-month period. Note that an employer may agree to an employee taking more than 5 days of unpaid leave.

4. NEW DEVELOPMENTS

Fair Work (Vulnerable Workers) Act 2017 (Cth)

In 2017, in response to a series of high-profile underpayment cases involving immigrant employees, Parliament passed the *Fair Work (Vulnerable Workers) Bill 2017 (Cth)*, which aimed to increase and clarify protections afforded to employees. In particular, the amendments:

- increased maximum civil penalties for certain serious contraventions of the *Fair Work Act 2009 (Cth)* to \$126,000 for an individual (previously \$12,600) and \$630,000 for a corporation (previously \$63,000);
- introduced provisions that made franchisors and holding companies responsible for certain contraventions of the *Fair Work Act 2009 (Cth)* by their franchisees or subsidiaries where they knew or ought reasonably to have known of the contraventions and failed to take reasonable steps to prevent them;

Changes to Sunday Penalty Rates

In Australia, employees covered by an Award, enterprise agreement or registered agreement have been entitled to a higher pay rate and additional allowances when working on weekends, public holidays, overtime, early in the morning and/or late at night since the post-war period. This has been seen as a vital form of compensation for those who had to work outside of normal business hours, particularly in industries such as hospitality and retail. However, a controversial cut to these rates was recommended in 2017 and passed in 2018. The following reductions to Sunday penalty rates apply from 1 July 2019:

- Hospitality industry award: for full-time and part-time employees, the Sunday Penalty Rate has dropped from 170% to 160%, casual employees remain at 175%;
- Retail industry award: for full-time and part-time employees, the Sunday Penalty Rate has dropped

from 195% to 180%, and for casual employees, it has dropped from 195% to 185%;

- Fast-food industry award: for full-time employees, the Sunday Penalty Rate has dropped from 145% to 135%, and for casual employees, it has dropped from 170% to 160%;
- Pharmacy industry award: for full-time employees, the Sunday Penalty Rate has dropped from 195% to 180%, and for casual employees, it has dropped from 220% to 205%.

Modern Slavery

In November 2018, the Australian Government passed a *Modern Slavery Act 2018 (Cth)*, which came into effect on January 1 2019. The Act requires businesses and other organisations above a certain size (consolidated revenue of A\$100 million, affecting over 3,000 Australian entities) to report annually on the risks of modern slavery in their operations and supply chains. Smaller businesses will be able to report voluntarily. Reporting entities will be required to publish annual Modern Slavery Statements detailing their actions to address modern slavery and the effectiveness of their actions. Although penalties and independent oversight were omitted from the Act, the nature of the public register for reports may result in 'naming and shaming' and consumer sanctions for businesses who do not comply sufficiently, or at all.

Wage Theft Legislation

Over the last year, two state legislatures have passed laws to criminalise wage theft. In June 2020, the Victorian Government passed the *Wage Theft Act 2020 (Vic)*, which establishes three new criminal offences to tackle wage theft. It is now an offence in Victoria to dishonestly withhold an employee entitlement, falsify an employee entitlement record with a view to obtain a financial advantage, or fail to keep an employee entitlement record with a view to obtain a financial advantage. Employers who are found guilty on any of the three offences face fines of up to \$198,264 for individuals, \$991,320 for companies and up to 10 years in jail. In September 2020, the Queensland Legislative Assembly passed the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020 (Qld)*. The Act amends the definition of stealing under the *Criminal Code Act 1899 (Qld)* to explicitly include failures to pay an employee in relation to the performance of work by the employee. Under the Queensland Act, employers are also liable for up to 10 years of imprisonment for wage theft. The

Australian Capital Territory has also passed similar wage theft legislation.

Comparable legislation has not yet been passed in other jurisdictions but appears to be on the cards. The Western Australian government introduced the Industrial Relations Legislation Amendment Bill 2020 (WA) on 25 June 2020 to create stronger compliance and enforcement provisions to address wage theft. Back in July 2019, Prime Minister Scott Morrison signalled that the Attorney-General was drafting legislation to deal with criminalising wage theft on the federal level. The Attorney-General released a discussion paper outlining a range of reform options in February 2020, but a Bill has yet to be tabled in Parliament. In 2019, the Legislative Council of South Australia formed a Select Committee on Wage Theft but has yet to take any legislative action.

II. HIRING PRACTICES

1. REQUIREMENT FOR FOREIGN EMPLOYEES TO WORK

In order to legally work in Australia, a foreign employee must have a permanent or valid long-stay visa to work. All foreign workers are guaranteed the conditions of the NES in their employment, and employers of foreign workers must abide by both workplace and immigration laws in their dealings.

There are a variety of ways in which Australian businesses can employ workers from non-Australian jurisdictions, but all require the employee to be the holder of one or other of a series of visas (there are exceptions for Australian Citizens, New Zealand citizens and Australian permanent residents, who have unlimited permission to work in Australia). Note that this area of law is complex and subject to regular change, and so while expert advice should always be sought, it is strongly suggested that any business contemplating employing non-Australian citizens in Australia should obtain current expert advice before taking any steps.

In very brief terms, an outside worker will require a valid visa. Visas come in a variety of forms, some permanent and some temporary. All have conditions, both for the worker and for the employer. There are penalties applying to employers who breach the immigration laws (including in relevant cases, imprisonment and substantial fines). Some visa forms include:

Occupation or skilled occupation list

- Subclass 189 - skilled, independent
- Subclass 190 - skilled, nominated by employers
- Subclass 485 - temporary graduate visa
- Subclass 489 - skilled, regional sponsored

Occupation or consolidated sponsored occupations list

- Subclass 186 - employer nomination scheme
- Subclass 457 - temporary work (skilled)
- Subclass 476 - skilled recognised graduate

Subclass 457 visas are the most common working visa acquired by foreign employees. Note that the employer has obligations regarding costs of compliance and obligations to check entitlement to work. The Government has an online checking system (VEVO, Visa Entitlement Verification Online) for visa holders to use. All employers should regularly review the entitlements of their workers to work in Australia, carry out a regular audit, and ensure they meet the training benchmark for its Australia employees.

2. DOES A FOREIGN EMPLOYER NEED TO ESTABLISH OR WORK THROUGH A LOCAL ENTITY TO HIRE AN EMPLOYEE?

It is not necessary for foreign employers to establish or work through a local entity in order to hire an Australian employee. However, under the Fair Work Act 2009 (Cth) a foreign corporation formed outside of Australia is a national system employer and is bound to observe the Fair Work Act 2009 (Cth) in relation to employees who perform work in Australia. As a result, they have a responsibility to comply with the Fair Work Act 2009 (Cth) in relation to their Australian employees. Foreign employers will also be required to provide the employee with a contract specifying their employment terms and conditions, as well as superannuation and “pay as you go” (PAYG) withholding tax payable to the Australian Taxation Office.

3. LIMITATIONS ON BACKGROUND CHECKS

In Australia, there is no express prohibition on an employer conducting pre-employment checks. There are, however, two broad qualifications to this general position:

- the first is that the employer will generally need the consent of the job candidate concerned to perform the relevant pre-employment checks. However, provided the purpose of the check is to objectively evaluate the candidate's qualifications and ability to perform the role, the candidate should provide his or her consent. If the candidate fails to do so, then in most circumstances he or she could be fairly excluded from the recruitment process. As part of pre-employment checks employers may seek to obtain criminal background checks. When relying on a criminal background check as a basis of not hiring someone or for termination, the employer or prospective employer will need to be able to draw a connection between their decision and the inherent requirements of the job.
- the second qualification is that the employer will need to be wary of how it uses the information acquired from the relevant pre-employment checks. This is because improper use of results could potentially constitute:
 - a breach of privacy laws;
 - a breach of State or Federal anti-discrimination laws; or
 - "adverse action" against a prospective employee, in breach of the General Protections provisions of the Fair Work Act 2009 (Cth).

There is express protection for employees who believe they have been discriminated against based on their criminal history in Tasmania and the Northern Territory.

4. RESTRICTIONS ON APPLICATION/INTERVIEW QUESTIONS

Under the Fair Work Act 2009 (Cth), Australian Human Rights Commission Act 1986 (Cth), and the State and Federal legislation dealing with sex, age, race and disability discrimination, recruiters and employers are prohibited from a range of discriminatory behaviour during the application and interview process, in relation to prospective employment.

Job descriptions and advertisements must avoid using discriminatory language and avoid references to personal characteristics – such as age, race or sex

– unless they are part of the genuine requirements of the job.

During an interview for prospective employment, an interviewer should avoid asking about the following matters:

- marital status;
- children, both current and future planned;
- nationality, race and ethnicity (aside from requiring proof of right to work);
- religion;
- political opinion;
- disability;
- sexual orientation or gender identity;
- whether English is the candidate's first language;
- age (unless relevant to an inherent requirement of the job);
- credit history (without consent to run a credit check and a legitimate reason relating to the inherent requirements of the job);
- medical history or problems (unless related to potential health risks associated with the job or ability to perform specific elements of the job).

If at any point during the advertisement, application, interview or intake process a prospective employee believes that they have encountered discrimination, they are able to make a complaint to the Australian Human Rights Commission, Fair Work Ombudsman or their State Anti-Discrimination Board to investigate.

III. EMPLOYMENT CONTRACTS

1. MINIMUM REQUIREMENTS

The most basic source of employment terms and conditions is the contract of employment. It can be in writing, for example, by letter of offer; it can be oral; or it can be evidenced by a course of conduct.

A contractual term may not be enforceable if the terms in the contract are less favourable to an employee than the terms prescribed by legislation, awards, or other industrial instruments.

Employment contracts in Australia are formed using the general principles of contract law:

- one party's offer of terms must correspond with the other's acceptance;
- the parties must intend to be legally bound by the contract;
- consideration must be provided for the contract;
- the terms need to be certain and complete;
- there needs to be no vitiating factor such as illegality or duress.

The question of whether a person who performs work for another is an employee as opposed to an independent contractor has significant implications for the nature of the obligations which exist between the parties. Australian courts have long struggled with the distinction between the two in difficult cases.

Courts will examine the entire relationship and have particular regard to the following indicia:

- regular remuneration and the mode of remuneration;
- the deduction of income tax;
- the provision of holidays;
- superannuation;

- the obligation to work;
- the provision and maintenance of equipment;
- the hours of work;
- the right to delegate work;
- the exclusive right to the services of the particular worker;
- the right to suspend or dismiss the person engaged;
- the right to dictate place of work, hours of work;
- the right to dictate the manner in which work is performed.

2. FIXED-TERM/OPEN-ENDED CONTRACTS

Employees employed under a fixed term or fixed task contract are not afforded all of the protections provided by the Fair Work Act 2009 (Cth). Although they are generally entitled to the same wages, penalties and leave as permanent employees, as employees who are employed "for a specified period of time" they are not entitled to notice periods and are generally, but not always, excluded from the unfair dismissal provisions of the Fair Work Act 2009 (Cth). For example, in *Saeid Khayam v Navitas English Pty Ltd t/a Navitas English* [2017] FWCFB 5162, a Full Bench of the FWC found that a teacher, who had been engaged under a series of fixed-term contracts for several years, was eligible for protection from unfair dismissal.

3. TRIAL PERIOD

The Fair Work Act 2009 (Cth) does not refer to probation periods. However, an employee must have worked for the employer for at least six months before he or she is entitled to make a claim for unfair dismissal, and 12 months if the employer is a small business. An employment contract can include a probation period exceeding this period,

provided it is reasonable. However, an extended probation period does not affect the employee's statutory entitlements to protections from unfair dismissal and the contract should clearly specify the period of probation and how and when performance is to be reviewed.

4. NOTICE PERIOD

The Fair Work Act 2009 (Cth) regulates the required minimum period of notice of termination which varies with the employee's length of service. If an employee's continuing service has been less than one year, one week of notice is sufficient. If the employee has worked between one and three years, two weeks' notice is required. Three weeks' notice is required if the employer has worked between three and five years, and four weeks is required if the employer has worked more than five years. If an employee is over 45 years of age and has completed at least two years' continuous service with the employer, an additional week of notice must be given.

Contractual notice periods in excess of the legislative requirements are very common in Australia, with four weeks being the most common notice period for ordinary workers.

Despite the minimum notice periods provided in the Fair Work Act 2009 (Cth), employees who have no notice period specified in their contract of employment may be entitled to what is called in Australia 'a reasonable period of notice'. This 'reasonable period of notice' may be well in excess of four weeks for employees with long periods of service and where equivalent jobs are in short supply.

Express and Implied Terms

Express terms of a contract are those terms that have been specifically agreed, either verbally or in writing, between the parties to the contract. The parties will be bound by the express terms of the contract, absent any contrary statutory obligation, industrial instrument or unconscionability.

Whether a term is an express term of the contract is determined by reference to the objective intentions of the parties. As a result, general information, for example, something mentioned in an interview, will

not necessarily amount to a contractual promise, which is sufficient to become an express term of the contract.

Implied terms of a contract are those terms that the parties have not specifically agreed to, but which still form part of the contract. The four main sources of implied terms are those implied by custom and practice, implied in fact, implied by common law and implied by statute.

On 10 September 2014, in *Commonwealth Bank of Australia v Barker* [204] HCA32, the High Court of Australia held that, under common law, employment contracts do not contain an implied term of mutual trust and confidence. It should be noted that representations made to prospective employees which induce them to take up employment may be actionable under the Competition and Consumer Act 2010 (Cth), if the representation is false or misleading and the employee suffers loss as a result. This is so even if the representation does not amount to a contractual term.

IV. WORKING CONDITIONS

1. MINIMUM WORKING CONDITIONS

Fair Work Act: The National Employment Standards (“the NES”)

The NES of the Fair Work Act 2009 (Cth) constitute a safety net for employees within the federal system. The NES are designed to complement the key industrial instruments under the Fair Work Act 2009 (Cth) – being modern awards and enterprise agreements.

As well as legislating minimum standards, the NES allow many issues to be addressed in awards and agreements. Modern awards provide for minimum wages, which explains their absence from the NES.

The NES establish minimum conditions in the following areas:

- maximum weekly hours of work;
- requests for flexible working arrangements;
- parental leave and related entitlements;
- unpaid family and domestic violence leave;
- annual leave;
- personal / carer’s leave and compassionate leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- the Fair Work Information Statement.

2. SALARY

The current national minimum wage in Australia is \$19.84 per hour or \$753.80 per 38-hour week, effective from 1 July 2020. Modern Award wages also increased by 1.75% from 1 July 2020 within certain industries, and will increase by 1.75% for all

other industries on either of 1 November 2020 or 1 February 2021.

All Australian employers must also pay superannuation under the Superannuation Guarantee (Administration) Act 1992 (Cth). Employers pay a percentage of the ordinary time earnings of their employees (including part-time and casual employees) who are aged over 18, and who are generally paid at least \$450 (before tax) a month, into a complying superannuation fund or retirement savings account.

The current Superannuation Guarantee rate is at 9.5% for the 2019/2020 financial year. Under current legislation the rate will remain at 9.5% until 30 June 2021, and will then increase to 10% from 1 July 2021, and then increase by 0.5% increments each year until it reaches 12% by 1 July 2025.

3. MAXIMUM WORKING WEEK

The NES provides that employees are entitled to a 38-hour week, subject to reasonable additional hours.

4. OVERTIME

Assessment of whether additional hours are “reasonable” involves factors which include the employee’s remuneration, patterns of work in the industry, and the nature of the employee’s role. As previously mentioned, all employees covered by an Award, enterprise agreement or registered agreement may also be entitled to a higher pay rate and additional allowances when working on weekends, public holidays, overtime, early in the morning and/or late at night or in difficult or unpleasant circumstances.

Request for Flexible Working Arrangements

Recent amendments to the NES expand the categories of employees who may request flexible work arrangements to include:

- employees who are parents, or have responsibility for the care of a child who is of school age or younger;
- employees who are parents, or have responsibility for the care of a child who is disabled;
- employees who are carers within the meaning of the Carers Recognition Act 2010 (Cth), such as carers of people with medical conditions, disabilities, mental illnesses or the elderly, with the exception of people who are acting as carers under contracts of service, as volunteers, or as part of an education requirement;
- employees who have a disability;
- employees who are aged 55 years or older; and
- employees who are experiencing domestic violence or providing care or support to another member of their family/household who are experiencing domestic violence.

An employee returning to work after a period of leave in relation to the birth or adoption of a child may also request to work part-time.

An employee is not entitled to make such requests unless — in the case of a full-time and part-time employee — they have completed at least 12 months of continuous service, or — in the case of a casual employee — they have been employed as a casual on a regular and systematic basis during a period of at least 12 months and have a reasonable expectation of continuing employment on that basis.

The employer may refuse the request only on “reasonable business grounds”. “Reasonable business grounds” include:

- the excessive cost of accommodating the request;
- the incapacity to rearrange the working arrangements of other employees in order to accommodate the request;
- the impracticality of reorganising the working arrangements of other employees or recruiting new employees in order to accommodate the request; and
- the adverse impact of accommodating the request on efficiency, productivity or customer service.

An employer must provide an employee with details of the reasons for refusing any request.

Whilst a court order cannot be made in relation to an employer’s refusal of a request for flexible working arrangements, the FWC may, upon application by a party, deal with the issue if the parties have agreed in a contract of employment, enterprise agreement or other written agreement that the FWC can do so.

Notice of Termination and Redundancy Pay

Notice must be given in writing, on a date before that of the termination. Though minimum periods of notice to be given by the employer are set out in legislation and modern awards, enterprise agreements and contracts of employment may also include terms specifying periods of notice to be given by the employer.

The NES confers a statutory entitlement to redundancy pay on employees. An employee is entitled to be paid redundancy pay by the employer if the employee’s employment is terminated:

- at the employer’s initiative, because the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour; or
- because of the insolvency or bankruptcy of the employer.

However, a person’s dismissal will not be considered to be a case of “genuine redundancy” if it would have been reasonable in all of the circumstances for the person to be redeployed within the employer’s enterprise or the enterprise of an associated entity of the employer. Whether redeployment of an employee is considered reasonable will depend on the circumstances that exist at the time of the dismissal, including the availability and nature of such a position, the qualifications required and the skills and qualifications of the employee, and the location of the job. The employee will be entitled to make an unfair dismissal claim if it is found on the balance of probabilities that it would have been reasonable in all the circumstances to redeploy the dismissed employee and the employee was made redundant instead.

The amount of redundancy pay is calculated using the employee's base rate of pay and is a product of the number of years of continuous service that the employee has rendered to the employer. Employees may also have redundancy entitlements arising from their contracts of employment or specific redundancy entitlements outlined in their award.

Small business employers (those with fewer than 15 employees) are exempt from redundancy pay obligations, and a modern award may include terms specifying other exemptions.

Fair Work Information Statement

The NES requires employers to provide their employees with the "Fair Work Information Statement" prepared by the FWO. The Statement includes information on such matters as right of union entry, termination of employment and the NES themselves.

Modern Awards and Enterprise Agreements

An award is a legal instrument that operates with the force of legislation and imposes obligations on employers in relation to minimum wages and conditions of employment for employees in an industry or occupation. Awards cover conditions, which include rates of pay, penalty rates, overtime and allowances. Awards apply in addition to the NES (see paragraphs below).

In recent years, the award system in Australia has undergone a process of award modernisation. This resulted in the replacement of thousands of awards in Australia by a system of 122 modern awards, which came into effect on 1 January 2010.

Modern awards apply to most employees and employers in the federal workplace relations system. Each modern award covers an industry and/or occupation. Most employees, other than senior employees, who work in an award covered industry or occupation will be covered by that award.

In accordance with s 156 of the Fair Work Act 2009 (Cth), the FWC was required to review all modern awards every four years. In 2014, the FWC commenced its first review of modern awards. This review remains on foot, however, the FWC has already made some decisions, including on issues

with respect to annual leave and, in particular, on terms dealing with (i) cashing out of annual leave; (ii) electronic funds transfer and paid annual leave; (iii) granting annual leave in advance; and (iv) excessive annual leave.

The FWC was due to commence its second review of modern awards in January 2018, however Parliament passed the Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017, providing for the repeal of the requirement for the Commission to conduct 4 yearly reviews of modern awards. The Commission released a statement on 2 January 2018 confirming that it will not commence until the current review has been completed and parties have been given an opportunity to consider how the recently reviewed modern awards are operating in practice.

Enterprise agreements provide for the employment conditions between an employee or group of employees and an employer. Whereas modern awards provide for minimum conditions for an industry or occupation, enterprise agreements provide for specific conditions for one workplace, and are negotiated by the employer and its employees or union representatives directly. Once approved by the Commission, enterprise agreements are legally enforceable.

Where an enterprise agreement applies, it will override any otherwise applicable modern award. The enterprise agreement cannot, however, provide for a pay rate that is less than the pay rate in the applicable modern award.

5. HEALTH AND SAFETY IN THE WORKPLACE

A. EMPLOYER'S OBLIGATION TO PROVIDE A HEALTHY AND SAFE WORKPLACE

Historically, occupational, health and safety laws have largely been a matter for each State and Territory. This split created difficulties for governments, businesses and individuals who operated in more than one state or territory.

Accordingly, there has been a move towards the national harmonisation of occupational health and

safety laws. The harmonisation scheme comprises template legislation agreed to in consultation between adopting states (the Model Work Health and Safety Act (“Model Laws”)), regulations (the Model Work Health and Safety Regulations (“Model Regulations”)) and the Model Codes of Practice (“Codes”). It is intended that each jurisdiction adopt the Model Act, Model Regulations and Codes. With the exception of Victoria and Western Australia, the Commonwealth and all other states and territories have adopted the scheme.

Unfortunately, a number of the enacting states have departed from the original templates such that although the legislation operating in the different states and territories is similar, it is not uniform.

For example, in June 2020, the state of Queensland introduced the new criminal offence of “industrial manslaughter” into its version of the legislation. Such offences do not appear in the Model Laws and do not exist in New South Wales, South Australia, Western Australia, Tasmania, the Northern Territory and the Australian Capital Territory.

The scheme provides scope for some differences between jurisdictions. For example, under the scheme, each jurisdiction is responsible for enforcement and has its own occupational health and safety regulatory body.

The harmonised laws impose a primary duty of care on persons conducting a business or undertaking, in relation to the work being performed in that business or undertaking. This obligation reaches beyond employers, to a wider group of legal entities and individuals. The obligation also extends beyond employees to any person performing work.

The primary duty is to ensure, so far as is reasonably practicable, the health and safety of workers while the workers are at work in the business or undertaking. The primary duty is also to ensure, so far as is reasonably practicable, that the health and safety of other persons is not put at risk from work carried out as part of the conduct of the business or undertaking. The primary duty of care also contains some expressly listed key obligations, for example, the provision and maintenance of a work environment that is without risks to health and safety.

The harmonised laws also impose health and safety duties on officers, workers and other persons at the workplace. Officers have a duty to exercise due diligence to ensure that the person conducting the business or undertaking complies with its duties or obligations. Workers and other persons at the workplace have the duty to take reasonable care for their own health and safety and the health and safety of others from their own actions, and to cooperate with persons conducting the business or undertaking to comply with the laws.

B. COMPLAINT PROCEDURES

To begin with, all workplace incidents must be recorded in a register of injuries and investigated within the workplace. The internal investigation, including the outcome, all work changes or risk controls put in place as a result, and communications to workers should be documented.

If confronted with a workplace health or safety issue or incident that is not effectively resolved within the workplace, a report should be made to the state WH&S body to assess the issue and commence an investigation, if need be.

If a serious incident occurs, the WH&S body should be contacted immediately, or penalties will apply under the Model Laws.

When a serious incident has occurred, the WH&S body may send inspectors to carry out investigations to determine exactly what caused the incident, the lessons learnt to improve workplace safety and prevent injuries and what action may be warranted. Under the Model Laws, the state WH&S body has the ability to undertake regular site inspections of a workplace, implement improvements, and enforce prohibitions, penalty notices and enforceable undertakings to ensure the health and safety of workers. Inspectors also have both general and specific powers to enter workplaces and require production of documents to inspect and examine, at any time.

WH&S bodies can also commence prosecutions under the Model Laws and the relevant state Criminal legislation against individuals, employers or businesses who have breached WHS laws. A person can specifically request a prosecution if they believe a serious offence under the Model Laws has

occurred, and a prosecution has not yet occurred in the six months (but no later than 12 months) following the incident.

C. PROTECTION FROM RETALIATION

The Model Laws provide for protection from 'discriminatory conduct', for 'prohibited reasons' in the workplace. 'Discriminatory conduct' covers actions such as dismissal, termination, causing detriment to a worker, and treating the worker less favourably than another worker. The 'prohibited reasons' include that the worker is or is proposed to be a health and safety representative in their workplace, exercises a power or function under the Model Laws, or raises an issue or concern about work health and safety. In addition, it is prohibited for a person to request, instruct, induce, encourage, authorise or assist another person to engage in discriminatory conduct, and to organise or take action against another person with intent to coerce or induce them to take such action against another person.

The penalty for engaging in discriminatory conduct for a prohibited reason under the Model Laws is \$100,000 for an individual and \$500,000 for a body corporate. Both civil and criminal proceedings are available, and the court may make orders for compensation in criminal proceedings if a person is convicted or found guilty of an offence under this part of the Model Laws.

V. ANTI-DISCRIMINATION LAWS

1. BRIEF DESCRIPTION OF ANTI-DISCRIMINATION LAWS

Discrimination is broadly defined as the treatment of an individual or group more favourably or less favourably than another individual or group, on the basis of a specified attribute.

Discrimination

Anti-discrimination legislation makes it unlawful to discriminate on the basis of particular attributes. The attributes specified in the legislation in each jurisdiction differ slightly. However, in general they include the following:

- race, colour, nationality, descent and ethnic, ethno-religious and national origin;
- sex (which extends to pregnancy);
- marital status;
- disability;
- homosexuality;
- transgender status;
- carers responsibilities; and
- age.

The legislation requires that the act of discrimination occur “on the ground of” or “by reason of” a person’s status, such as their sex or race. The aggrieved person must show that other persons in the same or similar circumstances were not subject to the less favourable treatment and that the reason for the less favourable treatment was the aggrieved person’s sex, race or other attribute.

The legislation only renders discriminatory conduct unlawful if it occurs in specified contexts, one of which is employment.

Certain types of behaviour may be classified as direct discrimination. This will occur in circumstances

where a person who has a particular attribute (for example, is of a particular sex or race, or has a disability) is treated less favourably because of that attribute.

Other types of behaviour may be classified as indirect discrimination. Indirect discrimination is concerned with conditions or practices that may have a discriminatory effect upon particular groups of people as compared to others. For example, requiring all employees to be a certain height may have a discriminatory effect on employees of a particular race.

Harassment

The Commonwealth, State and Territory legislation dealing with harassment are all similarly expressed. Under the Anti-Discrimination Act 1977 (NSW), one person sexually harasses another where there is:

- an unwelcome sexual advance; or
- an unwelcome request for sexual favours; or
- other unwelcome conduct of a sexual nature; and
- the above conduct occurs in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated, or intimidated.

Victimisation

Equal opportunity legislation prohibits, in general, victimisation of complainants for the reason that they have, among other prohibited grounds:

- brought a complaint or intend to bring a complaint; or
- made allegations that the perpetrator has engaged in unlawful conduct of a kind prohibited by the legislation.

Central to the concept of victimisation is the requirement that the complainant establish that he or she suffered a “detriment” and that the

perpetrator had “subjected” the complainant to the “detriment” by reason of him or her asserting his or her rights under the legislation (or other prohibited reasons).

In addition, the Corporations Act 2001 (Cth) specifically prohibits victimisation of a whistleblower, being someone who has made a ‘protected disclosure’. The Corporations Act 2001 (Cth) also provides that if a whistleblower suffers damage because of such victimisation, the whistleblower can independently claim compensation for that damage from the offender.

Federal Anti-Discrimination Laws

In the Federal jurisdiction, each ground of discrimination is contained in a separate Act:

- Racial Discrimination Act 1975 (Cth)
- Age Discrimination Act 2004 (Cth)
- Disability Discrimination Act 1992 (Cth)
- Racial Discrimination Act 1975 (Cth)
- Sex Discrimination Act 1984 (Cth)
- Australian Human Rights Commission Act 1986 (Cth).

Whereas in the State jurisdictions, the various forms of unlawful conduct are generally set out in one centralised Act:

- Australian Capital Territory – Discrimination Act 1991
- New South Wales – Anti-Discrimination Act 1977
- Northern Territory – Anti-Discrimination Act 1996
- Queensland – Anti-Discrimination Act 1991
- South Australia – Equal Opportunity Act 1984
- Tasmania – Anti-Discrimination Act 1998
- Victoria – Equal Opportunity Act 2010
- Western Australia – Equal Opportunity Act 1984.

Behaviour prohibited by equal opportunity laws comprise four broad concepts:

- discrimination
- harassment
- vilification
- victimisation.

2. EXTENT OF PROTECTION

Fair Work Act: General Protections (“Adverse Action” Provisions)

The General Protections provisions under the Fair Work Act 2009 (Cth) regulate the conduct of employers and employees and a range of other persons in terms, which are broadly expressed, but only where the conduct is connected to an Australian constitutional head of power. These provisions apply to all National System Employers and their employees.

Whether an employer is a national system employer depends on the location of the employment relationship (state or territory) and, in some cases, the legal status and business of the employer:

- in the Northern Territory, Victoria and the Australian Capital Territory, all employees are covered by the national system (with limited exceptions for law enforcement officers in the Northern Territory and Victoria, and executives in the public sector in Victoria);
- in New South Wales, Queensland and South Australia, all employees, except most state government and local government employees, are covered by the national system; and
- in Western Australia, all employees, except state government employees and employees of non-constitutional corporations, are covered by the national system.

Foreign corporations will be bound by the Fair Work Act 2009 (Cth) where they engage employees within Australia (*Jones v QinetiQ Pty Ltd t/a QinetiQ Australia* [2013] FWC 3302).

The general protections provisions in the in the Fair Work Act 2009 (Cth) proscribe certain “adverse action” being taken by one person against another for a prohibited reason. The adverse action protection primarily applies in three areas:

- in relation to a person’s “workplace rights” - workplace rights are a specified range of employment entitlements and the freedom to exercise and enforce those entitlements. A person is not only protected from adverse action because they have a workplace right, but also because they exercise (or do not exercise) this workplace right;
- in relation to industrial activities - the protections are in relation to a person’s industrial activities, which encompass the freedom to be or not be a member of or officer of an industrial association and to participate in activities of industrial

associations. The industrial activity provisions protect being or not being a member or officer of an industrial association; participation, or lack of participation, in lawful industrial activities; and non-participation in unlawful industrial activity; and

- in relation to discrimination - the protection prohibits an employer taking adverse action against an employee or a prospective employee on the basis of a proscribed discriminatory ground, including race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

Fair Work Act: The Anti-Bullying Regime

The FWC's anti-bullying regime came into effect on 1 January 2014. Under this regime, any "worker" at a constitutionally covered business who reasonably believes that he or she has been bullied at work may apply to the FWC to stop the bullying. "Bullying" for the purpose of these provisions is defined as when a person or a group of people repeatedly behaves unreasonably towards a worker or a group of workers at work and the behaviour creates a risk to health and safety. A "worker", for the purposes of the regime, is defined broadly, and includes employees, contractors, subcontractors, outworkers, apprentices, trainees, volunteers and work experience students.

Importantly, however, the worker must be working at a "constitutionally-covered business", which does not include State Governments or unincorporated bodies (which include partnerships, sole traders, not-for profit associations, volunteer associations and other corporations not engaged in trading or financial activities).

The FWC must deal with an application for an anti-bullying order within 14 days of the application being made. The FWC must be convinced that a worker has been bullied at work, and that there is a risk that the bullying will continue. The mechanism is designed to stop workplace bullying and does not apply to workers whose employment has already ended.

The FWC may make any order that it considers appropriate to stop the bullying, except for an order for the payment of a pecuniary amount. Orders are not limited to the employer but could also apply to

other parties such as co-workers or visitors to the workplace.

3. PROTECTIONS AGAINST HARASSMENT

Both Federal and State discrimination legislation provide for a process by which complaints of harassment are made to an administrative body which will investigate the complaint and attempt to achieve a settlement between the parties. If the matter does not resolve the complainant may seek to have the complaint heard by a tribunal or court.

In the state systems, the matter is typically handled by a board that specialises in dealing with equal opportunity matters (such as the Anti-Discrimination Board of NSW). As a first step, the board will conduct an investigation into the complaint. The complainant's written complaint is given to the respondent to allow the respondent to prepare a response. Both parties may be asked to provide further information.

If the board considers that there appears to have been unlawful conduct and that the matter may be best resolved by the parties discussing the matter face-to-face, the next step is usually a conciliation conference. If the conciliation conference fails to resolve the matter, the complainant usually has the right to refer the complaint to a Tribunal (such as the NSW Civil and Administrative Tribunal in NSW) for a hearing and decision.

In the Federal system, complaints are made initially to the Australian Human Rights and Equal Opportunity Commission which will attempt a conciliation between the parties. If this is unsuccessful, the complainant may have the right to make an application to the Federal Court or the Federal Circuit Court.

4. EMPLOYER'S OBLIGATION TO PROVIDE REASONABLE ACCOMMODATIONS

Under equal opportunity legislation there is an obligation on employers to provide reasonable

adjustments (or reasonable accommodation) for employees with disability.

Under the Disability Discrimination Act 1992 (Cth), an adjustment is taken to be reasonable unless the employer establishes that it would impose “unjustifiable hardship”. In determining whether a hardship would be an unjustifiable hardship, all relevant circumstances of the particular case must be taken into account, including the following:

- the nature of the benefit or detriment likely to accrue to, or to be suffered by, any person concerned;
- the effect of the disability of any person concerned;
- the financial circumstances, and the estimated amount of expenditure required to be made, by the first person; and
- the availability of financial and other assistance to the first person.

Similar adjustments are available under Victorian legislation. Under the Equal Opportunity Act 2010 (Vic), s 20 states that “the employer must make reasonable adjustments unless the person or employee could not or cannot adequately perform the genuine and reasonable requirements of the employment even after the adjustments are made”.

Although not expressly stated as an obligation to provide reasonable accommodations, the effect of prohibition on indirect discrimination is to require employers to consider whether conditions and requirements or practices in the workplace which impact adversely on particular employees are reasonable in the circumstances.

5. REMEDIES

Courts and tribunals have the discretion to award a range of different remedies if they are satisfied that an employer has contravened the equal opportunity legislation. The most common remedies are a declaration to the effect that unlawful discrimination has occurred and an award of damages to compensate the aggrieved person for the loss they have suffered as a result of the unlawful discrimination.

Courts also have the power to grant injunctive relief (i.e. an order compelling or prohibiting certain conduct), order an apology, order that an employee be reinstated to their former position, order a retraction and vary the terms of an employment contract. It is unsettled whether the courts have the power to award exemplary or punitive damages that go beyond mere compensation. The present state of authority suggests that exemplary or punitive damages are not available.

VI. PAY EQUITY LAWS

1. EXTENT OF PROTECTION

Discrimination in compensation or benefits is prohibited under federal, state and territory legislation. For example, under the *Sex Discrimination Act 1984 (Cth)*, it is unlawful for an employer to discriminate on the grounds of sex relating to the terms and conditions of employment provided to employees, which relevantly includes, but is not limited to, employees' pay and related benefits in their employment.

Furthermore, the Workplace Gender Equality Agency ("WGEA") is a statutory agency within the Department of Prime Minister and Cabinet that collects mandatory reporting data from all non-public sector employers with 100 or more employees in their corporate structure. Relevantly, the WGEA collects information regarding identified "gender equality indicators" that relate to:

- gender composition of the workforce;
- gender composition of governing bodies of relevant employers;
- equal remuneration between women and men;
- availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; and
- consultation with employees on issues concerning gender equality in the workplace.

The Fair Work Commission is empowered to make equal remuneration orders requiring that certain employees be provided equal remuneration for work of equal or comparable value. An application for an equal remuneration order can be made by an affected employee, an employee organisation or union that is entitled to represent an affected employee, or the Sex Discrimination Commissioner. Once an equal remuneration order has been made, it will take precedence over any modern award, enterprise agreement, FWC order or other industrial instrument that is less favourable than the equal remuneration order.

2. REMEDIES

Employees covered by workplace and anti-discrimination laws are entitled to lodge complaints with the relevant body in respect of any unlawful discrimination to which they are subjected. Should the relevant body fail to resolve the complaint by investigation or conciliation, the employee will, then, generally be entitled to proceed to have their complaint determined, either in court or in a tribunal.

Should the Court or tribunal find that the employer has engaged in unlawful discrimination, the Court or tribunal may generally make "such orders as it thinks fit" including, for example:

- an order declaring the employer has committed unlawful discrimination and directing the employer not to repeat or continue such unlawful discrimination;
- an order requiring the employer to perform any reasonable act to redress any loss suffered by an applicant, which can include an apology and undertaking to train the workforce on gender equality; and
- an order requiring the employer to pay damages, including damages for past economic loss, future economic loss, and damages for "hurt, distress and humiliation" suffered by the employee.

3. ENFORCEMENT/ LITIGATION

Predecessor bodies of the FWC have decided several landmark cases regarding the legal concept of "equal pay for equal work". Such cases include:

- the First Equal Pay Case of *Australasian Meat Industry Employees Union v Meat and Allied Trades Federation of Australia* (1969) 127 CAR 1142, which established the principle of "equal pay for equal work", but, notably, did not apply to work that was "essentially or usually performed by

females but is work upon which male employees may also be employed”; and

- the Second Equal Pay Case of National Wage and Equal Pay Case 1972 (1972) 147 CAR 172, which extended the earlier principle established in the First Equal Pay Case to “equal pay for work of equal value”.

The legal concepts established in these cases continue to have significance in the making of equal remuneration orders by the FWC. For example, in the Equal Remuneration Case [2012] FWAFB 1000, a majority of the FWC relied upon the “equal pay for work of equal value” principle when it made an equal remuneration order that significantly increased pay rates in the women-dominated social, community and disability services sector.

4. OTHER REQUIREMENTS

The Workplace Gender Equality Act 2012 (Cth) requires non-public sector employers with 100 or more employees in Australia to lodge reports in relation to the various gender equality targets to the WGEA, as indicated above. In addition, employers must meet minimum standards under the Workplace Gender Equality (Minimum Standards) Instrument 2014 (Cth). Under this instrument, employers must put in place policies or strategies to support one or more of the following gender equality indicators:

- gender composition of the workforce;
- equal remuneration between women and men;
- availability and utility of employment terms, conditions and practices relating to flexible working arrangements for employees and to working arrangements supporting employees with family or caring responsibilities; and
- sex-based harassment and discrimination.

While the legislation places positive obligations on organisations to report, employers are not required to improve gender equality within their workplaces other than the minimum requirement to have policies or strategies in place to support only one of the gender equality indicators.

If a relevant employer fails to comply with the Act, the WGEA has the power to name the employer publicly. Employers who fail to comply with the Act, may also not be eligible to compete for contracts under the Commonwealth procurement framework and may not be eligible for Commonwealth grants or other financial assistance.

VII. SOCIAL MEDIA AND DATA PRIVACY

1. RESTRICTIONS IN THE WORKPLACE

The obligations of employers with respect to privacy are found within various federal, state and territory laws. In some respects, the law differs between the states and territories.

A. CAN THE EMPLOYER MONITOR, ACCESS, REVIEW THE EMPLOYEE'S ELECTRONIC COMMUNICATIONS?

The general position is that an employer can monitor its employees' usage of work computers (in some states legislation requires specific notices and warnings to employees before allowing computer monitoring) and restrict the use of the Internet and social media during work hours. In certain circumstances, an employer may also be able to monitor its employees' conduct on social media outside of work hours and rely on that conduct when considering appropriate disciplinary action. However, it is important for employers to implement a thorough and clear Internet and Social Media Policy if it intends to monitor, restrict, access and review employee usage.

2. EMPLOYEE'S USE OF SOCIAL MEDIA TO DISPARAGE THE EMPLOYER OR DIVULGE CONFIDENTIAL INFORMATION

The ability of an employer to take disciplinary action based on Internet usage and conduct on social media is typically addressed in the contract of employment, however, it is best for an employer to also have a detailed policy which deals with these matters so that employees are made aware of the employer's expectations. This should include the employer's expectations around internet and social media use, both during and outside of work hours. This becomes particularly important if an employee uses the Internet or social media to disparage the employer, or divulge its confidential information, and the employer wishes to rely on that conduct in taking disciplinary action. There are, however, limitations on the extent to which an employee's conduct on social media could provide a valid reason for their termination. This will depend, in part, on the nature of the comments and statements made and the width of their publication.

VIII. TERMINATION OF EMPLOYMENT CONTRACTS

1. GROUNDS FOR TERMINATION

The grounds for and process of termination in Australia are dealt with by the Fair Work Act 2009 (Cth), provided that the employee in question is covered by the Fair Work Act 2009 (Cth) and is not subject to the exemptions which apply in relation to dismissals.

The Fair Work Act 2009 (Cth) provides that the grounds for dismissal can include capacity, performance, misconduct (including serious misconduct) and redundancy. In addition to a valid reason for dismissal, the dismissal must be fair, in that it is not “harsh, unjust or unreasonable”. The Fair Work Act 2009 (Cth) also provides that employees must not be dismissed on the basis of a protected attribute or as retaliation for exercising a workplace right.

Employer obligations in relation to termination of employment may also be contained in awards, enterprise agreements and contracts of employment.

Finally, collective dismissals are not applicable in Australia.

2. INDIVIDUAL DISMISSALS

A. IS SEVERANCE PAY REQUIRED?

Severance pay may be required if the employee has been made redundant and has an entitlement under the Fair Work Act 2009 (Cth), an award, enterprise agreement or contract of employment.

Dismissal with Notice

A performance related dismissal requires the giving of notice, or payment in lieu of notice if the payment in lieu is allowed by the contract itself. “Notice” refers to the period of time between notifying the employee that the employer wishes to dismiss him or her and the time when the contract comes to an end.

Where payment is made in lieu of notice, the date of termination is the date on which the notice is given, and the moneys are paid to the employee.

Where the employer gives notice to an employee, but puts the employee on “garden leave”, wages are paid in the usual manner throughout the notice period and the employment does not end until the expiry of that period.

Notice will be payable (or must be worked out) in all cases unless the employee is guilty of serious or gross misconduct.

Statutory minimum periods of notice are specified in the Fair Work Act 2009 (Cth). As noted above, the employment contract often provides an entitlement that is more generous than the statutory minimum period of notice. Where the contract does not specify a period of notice the employee may be entitled to a period of “reasonable notice” which, for longstanding employees may be more generous than the statutory minimum.

Summary Dismissal

Not all acts of misconduct will justify summary dismissal (that is, to dismiss the employee immediately, without notice). It is a question of degree, taking into account whether the misconduct exhibits an intention by the employee to no longer be bound by the employment contract.

In order to summarily dismiss an employee, the employee's misconduct must be willful and demonstrate that the employee has disregarded an essential condition of the contract of employment.

In *Laws v London Chronicle (Indicator Newspapers) Ltd* [1959] 1 WLR 698 at 700, it was noted: "One act of disobedience or misconduct can justify dismissal only if it is of a nature that goes to show (in effect) that the servant is repudiating the contract, or one of the essential conditions ...the disobedience must at least have the quality that it is 'willful'. It does (in other words) denote a deliberate flouting of the essential contractual conditions."

In many circumstances, however, one act of misconduct will not justify summary dismissal.

Remedies for Unfair Contracts

Whilst the above protections operate in respect of employees, independent contractors are not without protections.

The Independent Contractors Act 2006 (Cth) applies to a contract for services which has the "requisite constitutional connection" and therefore relates to performance of work where:

- at least one party to the contract is a constitutional corporation; or the Commonwealth or a Commonwealth authority; or a body corporate incorporated in a territory in Australia; or
- the contract has some connection to a territory in Australia, for example, the work concerned is wholly or principally to be performed in a territory of Australia.

A party to an applicable contract for services may apply to the Federal Court or the Federal Circuit Court to determine whether the contract is "unfair" or "harsh". The court has the power to vary or set aside the contract, or provisions within the contract, but does not specifically have the power to award compensation.

3. SEPARATION AGREEMENTS

A. IS A SEPARATION AGREEMENT REQUIRED OR CONSIDERED BEST PRACTICE?

Where an employee, whose employment has terminated (for whatever reason), receives a payment, which is higher than the employee's minimum legal entitlements, it is almost always advisable to seek that a separation agreement (commonly known as a deed of release in Australia) be executed by the employee in exchange for that additional payment.

The execution of the separation agreement will reduce (but not entirely remove) the overall degree of exposure of the employer from adverse legal consequences arising from the termination of employment, including from the causes of action below.

B. WHAT ARE THE STANDARD PROVISIONS OF A SEPARATION AGREEMENT?

A properly drafted Separation Agreement (which includes a release) will ensure that:

- the employee acknowledges that their termination package is in full satisfaction of any claims they may have against the employer; and
- the employee releases the employer from liability under any such claims.

The following terms are standard in a separation agreement:

- release and indemnity;
- non-disparagement obligations; and
- confidentiality obligations.

Each of the above terms can be can drafted such that they are in favour of a particular party, or they can be mutual.

C. DOES THE AGE OF THE EMPLOYEE MAKE A DIFFERENCE?

The age of an employee does not affect Separation Agreements in Australia. It is however necessary to consider the employee's capacity to understand the effect of entering into a deed of release. Employees who are very young, very old or subject to some disabling factor may lack capacity to enter into the deed. In such circumstances the deed may be voidable.

D. ARE THERE ADDITIONAL PROVISIONS TO CONSIDER?

There are various other terms which are required, and others which are advisable, including with respect to how a separation agreement must be executed (this depends on the applicable state or territory) and who may execute the document on behalf of a company.

An employer may wish to include provisions dealing with return of company property, disclosure of confidential information, future competition with the employer's business and future entitlement to revenue bonuses or share schemes.

4. REMEDIES FOR EMPLOYEE SEEKING TO CHALLENGE WRONGFUL TERMINATION

Wrongful Dismissal

The common law action of "wrongful dismissal" is available to all employees. However, due to the cost of pursuing a claim in the civil courts, it is not often pursued. Those employees who are eligible to pursue a claim of "unfair dismissal" through the Fair Work Commission will generally choose that option, as it is a much cheaper and quicker course of action.

Damages for wrongful dismissal can in some circumstances be limited to the amount of notice provided in the employee's contract of employment or, if no period of notice is specified, "reasonable

notice". There are some exceptions, which allow for greater damages to be awarded, depending on the circumstances. This is particularly so where under the contract the employee had a reasonable expectation of employment for a long period of time.

A number of factors are taken into account in determining what amounts to "reasonable notice" in the circumstances, for example:

- evidence of industry practice or custom;
- the status or importance of the position;
- the size of the salary;
- the nature of the employment;
- the length of the employee's service in that position;
- the employee's age and educational qualifications
- the professional standing of the employee;
- the employee's degree of job mobility;
- the expected length of time it would take the employee to find alternative employment;
- the likely period the employee would have continued, but for the dismissal, in the employment;
- whether the employee had given up a secure job to take up the position with the present employer;
- the employee's eligibility for superannuation benefits.

Whether the notice is reasonable is determined at the time the notice is given, and not at the time the contract is made.

The Fair Work Act 2009 (Cth): Unfair Dismissal

Under s 390 of the Fair Work Act 2009 (Cth), a dismissed employee may apply to the FWC for relief on the basis that his or her dismissal was "harsh, unjust or unreasonable". This is commonly known as an unfair dismissal claim. The legislative intention underlying the unfair dismissal provisions, as set out in s 381 of the Fair Work Act 2009 (Cth), is to provide employers and employees with a "fair go all round".

The federal unfair dismissal regime is the primary statutory remedy available to dismissed Australian employees. State industrial legislation also includes unfair dismissal provisions. However, following the broad exclusion of state laws introduced by the

Work Choices reforms and maintained by the Fair Work reforms, most Australian employees can no longer access these provisions.

An employee who has been dismissed may have grounds to bring an unfair dismissal claim under the Fair Work Act 2009 (Cth) provided that:

- there is no valid reason for the termination that relates to the employee's performance or conduct;
- the employee has completed the minimum employment period;
- the employee earns less than \$ \$153,600 per year; and
- the termination was not as a result of a genuine redundancy.

The Fair Work Act 2009 (Cth) contains a specific definition of "genuine redundancy" for the purposes of excluding certain employees from the unfair dismissal protections, namely, a dismissal will be a genuine redundancy if each of the following criteria are satisfied:

- the employer no longer required the employee's job to be performed by anyone because of changes in the operational requirements of its enterprise;
- the employer complied with any award or agreement consultation requirements; and
- it would not have been reasonable in the circumstances for the employee to be redeployed within either the employer's enterprise or an associated entity.

The FWC states that the key steps in the unfair dismissal process are as follows:

- the employee lodges an application;
- the application is checked to ensure it is complete and valid;
- the employer is notified of the application;
- the FWC conciliates the application to try to resolve the dispute;
- an application that cannot be resolved at conciliation is then determined by the FWC at conference or hearing.

5. WHISTLEBLOWER LAWS

Whistleblowers currently have protections under three legislative instruments at the Federal level:

- the Corporations Act 2001 (Cth);
- the Public Interest Disclosure Act 2013 (Cth) (disclosures in respect of the Australian Public Service, statutory agencies, Commonwealth authorities, the Defence Force and contractors); and
- the Fair Work (Registered Organisations) Act 2009 (Cth) (disclosures about corruption or misconduct in unions and employer organisations).

Whistleblowers can also rely on safeguards under the general protection provisions of the Fair Work Act 2009, if their disclosure pertains to a complaint or inquiry related to their employment, and the protections against 'discriminatory conduct' for a 'prohibited reason' under the Work Health and Safety Model Laws.

To address criticisms that the existing laws, in particular the private sector whistleblower protections, are insufficiently broad to fully enable whistleblowers to come forward, in December 2017 the government introduced the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 to the Senate.

In addition to far-reaching categories of wrongdoing, strengthened privacy protections for the whistleblowers and harsher penalties, the Bill also aims to harmonise the existing Federal legislation. The Bill further imposes an obligation on certain corporations (dependent on size and purpose) to have a whistleblower policy. On 12 March 2019, the Bill was enacted into law. To date, there have been no case decisions that have considered or applied these new whistleblower protections.

IX. RESTRICTIVE COVENANTS

1. DEFINITION OF RESTRICTIVE COVENANTS

Restraints of trade are common clauses found in most senior employee employment contracts. The relevant common law principles applicable to restraints of trade imposed on employees in Australia are that:

- an employer is not entitled to be protected against mere competition, but may constrain the future activities of former employees in order to protect proprietary interests of the employer: See *Cactus Imaging Pty Ltd v Glenn Peters* [2006] NSWSC 717 (“Cactus Imaging”);
- commonly accepted proprietary interests, the protection of which will justify some measure of restraint of trade, include customer connections, a stable workforce and confidential information;
- at common law, a restraint of trade clause will only be upheld to the extent that it goes no further than is reasonably required to protect such a proprietary interest of the covenantee: See *Stacks Taree Pty Ltd v Marshall* [2010] NSWSC 77 (“Stacks”) at [39];
- the onus of showing that a contract in restraint of trade is reasonable as between the parties lies on the party alleging that this is so: See *Stacks Taree Pty Ltd v Marshall* at [41];
- the employer’s proprietary interest in its confidential information may provide a legitimate interest justifying a restraint on competitive activity by the employee on the basis that it is the only practical method of protecting confidential information: See *Littlewoods Organisation v Harris* [1977] 1 WLR 1472 at 1479; and
- the employer should be able to identify the confidential information with some specificity and not merely in global terms. The requirement for specificity is no less where a contractual obligation is sought to be enforced: See *Cactus Imaging*.

New South Wales also has particular rules dealing with restraint of trade clauses, in the Restraints of Trade Act 1976 (NSW). Notably, a restraint of trade clause will need to be reasonable, determined by factors such as the period of time and geographical area. Also, invalid restraint of trade clauses can be ‘read down’ by the Supreme Court of New South Wales, if the Court concludes that the clause is against public policy.

2. TYPES OF RESTRICTIVE COVENANTS

Generally, there are four categories of activities sought to be restrained in post-employment restraint clauses in Australia:

- undertaking / carrying on / being engaged in a business similar to the employer’s business;
- soliciting customers or clients of the employer;
- soliciting employees of the employer; and
- using or disclosing confidential information of the employer (note that courts have upheld significant periods of restraint, where the restraint is specifically designed to protect confidential information rather than protect competition).

A. NON-COMPETE CLAUSES

An employer is not entitled to protection against mere competition. However, an employer is entitled to protection against the use by the employee of knowledge of the employer’s affairs obtained by virtue of employment. This is so particularly where the information is confidential or where the employer has expended particular time and effort building up the particular knowledge.

B. NON-SOLICITATION OF CUSTOMERS

Courts will not generally protect an employer against mere competition by a former employee. However, the courts will allow an employer to be protected against unfair competition where the employee has established customer connections as a result of their employment and allow a period of protection following the termination of the employee by the employer.

That said, courts will not uphold a restraint that covers clients for which the employee had no connection with or influence over. Also, the fact that a client of a previous employer makes the first approach in requesting services does not mean that “solicitation” has not occurred. While this is the classic position, there has been at least one case which has held that the concept of soliciting means that the approach must be from the restrained entity and not from the client or customer. Finally, in some circumstances a “no dealing” provision might be permissible.

C. NON-SOLICITATION OF EMPLOYEES

Restraint of trade clauses that prevent an employee attempting to recruit former colleagues are often considered reasonable on the basis that the employer has a legitimate interest in maintaining a stable workforce.

In *Wilson HTM Investment Group Limited v Pagliaro, Bergin CJ in Eq* held that Wilson had “a legitimate commercial interest to protect their business from an exodus of its workforce by reason of competitors stealing a march on it by use of its confidential information”, and accordingly restrained Ord Minnett from using Wilson’s confidential information to approach its employees and entice them to leave their employment.

3. ENFORCEMENT OF RESTRICTIVE COVENANTS – PROCESS AND REMEDIES

The courts are willing to enforce appropriate restraint of trade clauses, provided those clauses comply with the common law principles (in New South Wales, the Restraints of Trade Act 1976 (NSW) makes a restraint valid as long as it is not against public interest, thus making it easier to enforce restraints than it may be in other jurisdictions).

An injunction provides the primary remedy for seeking to enforce a restraint of trade. An injunction may restrain the employee from certain action, which may include taking up employment with a competitor, using particular information of the employer, from contacting clients of the employer or from performing particular work.

4. USE AND LIMITATIONS OF GARDEN LEAVE

Where the employer gives notice to an employee, but puts the employee on “garden leave” (which involves giving them no work to perform and effectively requiring them to stay at home or perform duties other than their normal duties), wages are paid in the usual manner throughout the notice period and the employment does not end until the expiry of that period.

The advantage of garden leave to an employer is that it removes a potentially damaging employee from the workplace but, unlike regular pay in lieu, prevents the employee from immediately going to work for a competitor because the employment contract remains on foot.

The ability to put an employee on garden leave will, however, need to be provided in the contract of employment (see also ‘Dismissal with Notice’ under ‘Individual Dismissals’ in section VIII. above).

X. TRANSFER OF UNDERTAKINGS

1. EMPLOYEES' RIGHTS IN CASE OF A TRANSFER OF UNDERTAKING

The Fair Work Act 2009 (Cth) sets out a range of provisions that deal with the rights of employees where their employment changes as a result of a transfer of business.

These provisions govern situations where a business is transferred from one employer (e.g. a company) to another. Typically, a transfer of business takes place when an employer buys or sells a business, and not merely when there is a sale of the shares in the business.

Section 22(5) of the Fair Work Act 2009 (Cth) states that where a transfer of employment occurs, the transferred employee's service with their original employer will be counted as continuous service with their new employer. As such, any benefits acquired under the NES (such as annual leave) will be retained through the transfer of business and the employee's service will remain continuous in the eyes of the law (even in circumstances where there has been a substantial period of inactivity).

However, should the new employer fail to recognise these accrued rights, s 91 of the Fair Work Act 2009 (Cth) holds that the original employer must pay out all entitlements accrued under the NES. This may only occur in the case of non-associated entities. The same entitlements exist in relation to redundancy in s 122.

In addition to the above, Part 2-8 of the Fair Work Act 2009 (Cth) outlines the rules for transfers of business in scenarios where the original employees were covered by a modern award or enterprise agreement. Should the employees perform largely

the same work following the transfer, and the businesses have sufficient connection to each other as outlined by section 311(3)-(6), then the workplace instrument that covered them will be transferred to the new employer.

It is worth noting that there are a number of complexities to this process. However, the underlying notion is to preserve the rights held under a bargained award or agreement where the work done is largely the same as it was under the previous employer. On this basis, the instrument is also transferred so as to cover the new employer as well.

2. REQUIREMENTS FOR PREDECESSOR AND SUCCESSOR PARTIES

For the entitlements to successfully transfer with the employee, the employee must have their employment first terminated with the old employer. Then, within three months following the termination, the employee is reemployed by the incoming business owner.

The usual practice is for the new employer to issue, at the time of purchasing the business, a list that sets out those persons whom the business intends to reemploy.

It is also a requirement that the work performed by the transferring employee is the same or substantially the same as the work previously performed.

XI. TRADE UNIONS AND EMPLOYERS ASSOCIATIONS

1. BRIEF DESCRIPTION OF EMPLOYEES' AND EMPLOYERS' ASSOCIATIONS

Trade unions form the mainstay of employee representation in Australia. However, their influence and membership has significantly declined over the last two decades. With that said, under the *Fair Work Act 2009 (Cth)* the unions enjoy a powerful role in relation to workplace bargaining even if their capacity to organise strikes has been diminished. The preeminent trade union body in Australia is the Australian Council of Trade Unions (“ACTU”), which represents the interests of many unions that have membership in the ACTU.

There are several other significant union bodies in Australia and unionism has long been an important issue in workplace law. Australia’s major political parties take a diametrically opposed approach to unions. The Labour party is seen as pro-union and is inclined to often legislate in favour of union influence, while the Liberal party regularly seek to undermine their role in the workplace.¹

Recent proposed changes by the Coalition Government primarily concern a reduction in union influence — which is indicative of the ongoing struggle between unions and business in modern Australia. In 2017, the Coalition Government set up the Registered Organisations Commission to oversee union compliance with legislation applicable to them.

Firmly pitted against the union movement is an array of employer associations, such as the Business Council of Australia and the Australian Chamber of Commerce and Industry. In the same way that unions have influenced Labour party policy, these bodies often play a prominent part in the formulation of Liberal party policy, and typically favour the interests of business over workers’ rights.²

2. RIGHTS AND IMPORTANCE OF TRADE UNIONS

Unions currently play a crucial role in Australian employment law. This primarily manifests in the process of enterprise bargaining where an employer will come together with its employees and their chosen union in order to negotiate conditions of employment specific to their company or industry. This can be a somewhat costly process, and unions provide financial backing and often legal services to the body of employees so as to obtain the best possible deal. However, enterprise bargaining is voluntary and depends to a large extent on the level of unionisation in a particular industry and the attitude of a given employer.

Unions also have the capacity to apply to the FWC to undertake strike action in relation to a grievance at the workplace. Unions may not, however, organise and initiate strike action without first following the appropriate procedure set out in the industrial legislation. Unions also have right of entry into

¹ Jeff Borland, ‘Trade Unions in Australia’ (2008) Australian Economic Review, Vol. 22, No. 4 at p. 70.

² Ibid.

workplaces where they have members, and may use this right to examine working conditions and consult with members.

Unions play a vital role in the discourse regarding employment law in Australia. The campaign by the ACTU against the Liberal party's "WorkChoices" laws is a prime example. During the lead up to the 2007 Federal election, the ACTU ran an advertising campaign against the policy, which arguably became a deciding factor in ousting the Liberal party from government.³ Unions remain a watchdog with regards to the ability of an incumbent government to modify laws governing industrial relations.

As noted, their influence is gradually receding due to rapidly declining membership and reduced public approval. Public approval of unions has been damaged in recent years as a consequence of a number of scandals involving the misuse of members funds by union officials. However, in June 2020 the Federal Government announced five 'working groups' tasked with finding ways to urgently stimulate the economy and regrow jobs as a result of the COVID-19 pandemic, each comprising of a balance of employer organisations and unions.

3. TYPES OF REPRESENTATION

A union is a body that represents the interests of workers in a particular industry or occupation. In order to be able to represent members in the Commission, conduct elections of officers through the Australian Electoral Commission, become a body corporate or a legal entity, all unions, employee or enterprise associations are required to register under the Fair Work (Registered Organisations) Act 2009 (Cth).

The Fair Work (Registered Organisations) Act 2009 (Cth) dictates that all federally registered organisations have rules, and that various matters that must be included in the rules, including but not limited to: the purpose or the organisation,

membership eligibility, resignation and termination of membership, powers and duties of officers, keeping of minutes and auditing process, and the process for changing rules.

All employees and independent contractors are free to choose to join or not join a union. Under the Fair Work Act 2009 (Cth), a union will engage in various key roles, including being able to resolve workplace issues on behalf of the employees and acting as a bargaining representative during bargaining negotiations for an enterprise agreement.

Other key features of unions include:

- working with management to help resolve workplace issues;
- being an advocate for employees;
- ensuring employers are meeting their minimum obligations; and
- looking into suspected breaches of:
 - workplace laws;
 - discrimination laws; and
 - workplace safety laws.

A. NUMBER OF REPRESENTATIVES

The number of elected officials and union delegates depends on the size of the union membership and industry.

B. APPOINTMENT OF REPRESENTATIVES

Union officers and officials are elected democratically by their members. The union's rules will specify how this is to be done. Delegates and representatives are usually active members who volunteer for the position or are approached by a branch member to consider taking on the role. To be considered, a delegate will often need to have the support and respect of their union colleagues in the workplace.

³ Ibid.

4. TASKS AND OBLIGATIONS OF REPRESENTATIVES

The elected Officer of a Union must perform their duties as required in the prescribed role, and generally advance and protect the interests of the Union and the wages, conditions and welfare of its members.

The job of a Union Delegate is to act as an Officer of a Union, but specifically in the particular workplace or area. This includes duties such as:

- promoting the union, its activities and the benefits of membership;
- enrolling persons into the union at the workplace;
- providing assistance to any member of the union requiring it, including assisting in the resolution of disputes;
- promoting and campaigning for improved conditions of employment in the workplace and/or industry;
- negotiating or assisting in negotiating enterprise agreements;
- dealing with work health and safety issues, including instances of any unguarded or dangerous machinery or hazardous working conditions at the workplace; and
- dealing with other breaches and industrial action in the workplace.

5. EMPLOYEES' REPRESENTATION IN MANAGEMENT

There is no legal requirement for employee representation at any level of management. However, if an organisation wishes to negotiate an agreement with its employees, it must inform employees of their right to be represented by the union.

6. OTHER TYPES OF EMPLOYEE REPRESENTATIVE BODIES

Unions form the primary source of employee representation in Australia. However, given their rapidly declining membership base, isolated but significant examples of alternative employee representation are emerging.

Suncorp Group, which employs over 16,000 individuals with only 4% union membership, is an exponent of a newer approach. Within the organisation is a body called Suncorp Group Employee Council, to which employees elect 25 councilors. These individuals then lobby management for employee rights issues. While its role is limited with regard to decision making within the Group, it has been effective in increasing employee voice and maintaining a more cooperative relationship between employees and management.⁴

Australian medical manufacturer Cochlear has employed a similar model. After disagreements with the Australian Manufacturing Workers Union over enterprise bargaining agreements, the primary form of representation for workers became the internal Employee Consultative Committee, which occupied a similar role to the Suncorp Group Employee Council. The body has had limited influence over management and has rather focused on social aspects of life at the company.⁵

7. HEALTH AND SAFETY REPRESENTATIVES UNDER WORK HEALTH AND SAFETY LAWS

Under the Work Health and Safety Model Laws, Health and Safety Representatives are elected to represent all workers for three-year terms and have

⁴ Paul Gollan, 'The evolution of non-union employee representation in Australia', HC Online, 17 October 2013 (accessed at <http://www.hcamag.com/opinion/the-evolution-of-nonunion-employee-representation-in-australia-180572.aspx>).

⁵ Ibid.

significant powers and responsibilities under the Model Laws.

Health and Safety Representatives gather information about what the health and safety issues are for their work group, work out ways to resolve issues in consultation with workers and management, and can direct a worker in the work group to stop unsafe work, if they reasonably believe workers would be exposed to a serious risk to their health and safety. This 'stop-work direction' can only be given if the Representative has undertaken the necessary training, and the issue has not been resolved by prior consultation, or if the risk is so serious and immediate or imminent that it is unreasonable to consult first.

A representative can also issue a 'Provisional Improvement Notice' if they reasonably believe that there is a contravention of the Model Laws.

An employer must support the Health and Safety Representatives in their workplace by:

- giving them time off at normal pay, and any necessary facilities and assistance, to enable them to fulfil their role;
- talking with them about health and safety issues;
- giving them access to all information regarding hazards and risks affecting the work group;
- allowing them to attend interviews about work health and safety, if the worker consents;
- allowing a person assisting the Representative to enter the workplace, if that assistance is necessary;
- permitting them to accompany an inspector on an inspection of areas where the workers they represent work; and
- giving them five days of training and a one-day annual refresher course, if requested.

A Health and Safety Representative can be disqualified if they exercise a power or perform a function for an improper purpose, or use or disclose any information acquired that is not connected with their role.

XII. EMPLOYEE BENEFITS

1. SOCIAL SECURITY

Social security refers to welfare payments provided by the Australian Federal Government. These payments generally fall under one of four pieces of legislation:

- Social Security Act 1991 (Cth) (“the SSA”) provides for payment, to eligible people, certain pensions, benefits and allowances, such as the age pension, unemployment, carer allowance and payment, and disability pension.
- A New Tax System (Family Assistance) Act 1999 (Cth) provides for family tax benefits, maternity allowances and childcare benefits.
- Student Assistance Act 1973 (Cth) provides for allowances and benefits for eligible groups of students and apprentices.
- Paid Parental Leave Act 2010 (Cth) provides financial support to eligible working parents of newborn or recently adopted children.

The responsibility for these payments falls on the Commonwealth Government rather than an employer. Payments under the Paid Parental Leave Scheme do not affect employer-funded paid parental leave, and complement the entitlements under the Fair Work Act 2009 (Cth).

A. SUPERANNUATION

Superannuation in Australia is mandated by the Superannuation Guarantee (Administration) Act 1992 (Cth). Minimum contributions are compulsory for employers, being a percentage of the ordinary time earnings of their employees (including part-time and casual employees) who are aged over 18, and who are paid \$450 (before tax) a month.

The current Superannuation Guarantee rate is at 9.5% for the 2019/2020 financial year. Under current legislation the rate will remain at 9.5% until 30 June 2021, and will then increase to 10% from 1 July 2021, and then increase by 0.5% increments each year until it reaches 12% by 1 July 2025.

Employees can only withdraw funds out of a superannuation fund when the employee meets one of the conditions of release contained in Schedule 1 of the Superannuation Industry (Supervision) Regulations 1994. For example, an employee can have their superannuation released if they have a terminal medical condition or face severe financial hardship.

Employees can choose to make extra voluntary contributions to their superannuation funds and receive tax benefits for doing so. There is a cap on the amount of voluntary contributions an employee can make, after which there are tax disincentives.

If individuals contribute more than the cap, they must pay the superannuation excess concessional contributions tax, which is set at 31.5%.

2. HEALTHCARE AND INSURANCES

Employers are not obliged to provide health insurance for employees in Australia.

3. REQUIRED LEAVE

A. HOLIDAYS AND ANNUAL LEAVE

The NES entitles employees to be absent on certain public holidays. The NES preserves the right of an employer to make a reasonable request that an employee work on a holiday, as well as the employee’s right to refuse upon reasonable grounds. Under the NES, employees who would usually work on the day on which the public holiday falls are entitled to their base rate of pay for the hours ordinarily worked on that day or part of that day while not at work.

Under the NES, full-time employees are entitled to four weeks of paid annual leave (calculated by reference to the employee’s base rate of pay)

and part-time employees to a pro-rata amount. Certain shift workers are entitled to five weeks of paid annual leave. Annual leave accrues over a year according to the employee's ordinary hours of work (i.e. the hours set out in the relevant modern award or enterprise agreement).

The NES allows modern awards and enterprise agreements to vary the way in which employees take annual leave. This may include requirements that employees take paid annual leave in certain circumstances, subject to such requirements being "reasonable". Modern awards and enterprise agreements may also permit the cashing out of annual leave, but any cashing out arrangement (which must be contained in a separate, written agreement) must leave the employee with a minimum balance of four weeks accrued paid annual leave. In the four-yearly review of modern awards, the FWC made decisions with respect to award provisions regarding: (i) cashing out of annual leave (ii) electronic funds transfer and paid annual leave (iii) granting annual leave in advance and (iv) excessive annual leave.

The NES also clarifies that if the period during which an employee takes annual leave includes a public holiday, a period of another kind of leave (including sick leave, personal leave or community service leave, but not unpaid parental leave), that holiday or period of other leave is not counted as annual leave. This means that if an employee falls ill during a period of annual leave, for the period that the employee qualifies for sick leave, the employee will have that amount of annual leave credited, and sick leave debited.

B. MATERNITY AND PARENTAL LEAVE AND RELATED ENTITLEMENTS

The Fair Work Act 2009 (Cth) provides for unpaid leave for parents who are giving birth to, or are adopting, a child. In essence, the Act provides for up to 12 months' unpaid leave (or 24 months with the employer's consent) for employees with a minimum of 12 months continuous service.

While the legislative provisions under the Fair Work Act 2009 (Cth) are for unpaid leave, there are two circumstances in which leave can be paid:

Firstly, some employers will have their own paid leave scheme, where longer serving employees will be granted paid leave for a period (usually, this is for a short period and not for the entire period of leave). Anecdotal evidence suggests that while this trend is growing (it is seen as a way of retaining good employees) it would still be a minority of employers who would offer such schemes. This type of entitlement is purely contractual: in the absence of any agreement, there is no right to such leave.

Secondly, there are limited entitlements to government funded leave. There is a Paid Parental Leave Scheme ("the PPL Scheme") under the Paid Parental Leave Act 2010 (Cth), which complements the Fair Work Act 2009 (Cth). The scheme provides financial support to eligible working parents of newborn or recently adopted children. Paid parental leave is paid to the child's primary carer for up to 18 weeks of pay based on the rate of the national minimum wage. Eligible working fathers and partners (including same-sex partners) also get 2 weeks leave paid at the national minimum wage.

Employers can also provide for paid parental leave in registered agreements, employment contracts and workplace policies. The amount of leave and pay entitlements depends on the relevant registered agreement, contract or policy. Employer-funded paid parental leave does not affect an employee's eligibility for the Australian Government's Paid Parental Leave Scheme. An employee can be paid both.

An employee is not entitled to parental leave under the NES unless they have 12 months of continuous service or are a "long term casual employee" (being a casual employee who has been employed on a regular and systematic basis during a period of at least 12 months).

The NES allows both parents to take separate periods of 12 months' parental leave, including up to eight weeks of leave taken concurrently. Parents may choose when they take the concurrent leave in the first twelve months after the birth or adoption of their child, and any concurrent leave can be taken in separate periods of at least two weeks' duration (unless otherwise agreed by the employer). Alternatively, one parent can request an extension of up to 12 months in addition to the

initial 12-month period. An employer will only be able to refuse such a request once the employer has given the employee a reasonable opportunity to discuss the request and, as with requests for flexible working arrangements, employers may refuse extensions only on “reasonable business grounds”.

The NES extends the parental leave provisions to apply to same-sex couples.

Under the NES, an employer may — during the six-week period before the expected date of the birth of the child — ask a pregnant employee who is entitled to take unpaid parental leave to give the employer a medical certificate as to their fitness for work. The employer may require the employee to take unpaid parental leave if no certificate is provided within seven days of the request, or if the certificate states that the employee is not fit for work. If the medical certificate states that the employee is fit for work, but that it is inadvisable for the employee to continue in her present position, the employee is entitled to be transferred to a safe job, or to be paid “no safe job leave”.

The Fair Work Act 2009 (Cth) addresses the issue of changes occurring during an employee’s period of parental leave. Specifically, the employer must take “all reasonable steps” to consult with an employee whose pre-parental leave status, pay or location are significantly affected by any decision that the employer takes during the employee’s leave period. Furthermore, the continuity of service of any employee who is transferred to a new employer during his or her period of leave continues with the new employer.

Whilst a court order cannot be made in relation to an employer’s refusal of a request for an extension of the period of unpaid parental leave, the FWC may, upon application by a party, deal with the issue if the parties have agreed in a contract of employment, enterprise agreement or other written agreement that Fair Work Australia can do so.

An employer also has an obligation to advise any employee who is engaged to replace an employee who is on parental leave of the rights of the employee on leave to return to their employment at the end of their period of parental leave, and of other rights of the employee who is on parental

leave to bring the leave to an end sooner if the birth does not result in a living child, if the child dies, or the person on leave ceases to be the primary carer of the child.

C. SICKNESS AND DISABILITY LEAVE

The NES entitles permanent employees to accrue 10 days of paid personal/carer’s leave per year, and 2 days of compassionate leave per year. The term ‘personal/carer’s leave’ effectively covers both sick leave and carer’s leave. Meanwhile, disability leave is not applicable in Australia.

An employee’s entitlement to this leave accrues over each year of employment according to the number of ordinary hours worked; continues to accrue when an employee takes leave; and accumulates from year to year.

In *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [2020] HCA 29, the High Court of Australia (by majority) clarified how personal/carer’s leave accrues to permanent part-time employees who worked irregular and longer hours. Relevantly, the High Court explained that a person employed to work 36 hours per week, over three 12-hour shifts, would accrue 72 hours of personal/carer’s leave over the course of a single year (being the product of 36 hours and 52 weeks, divided by 26), and rejected the proposition that such a person would be able to accrue 120 hours of personal/carer’s leave over the course of a single year (being the product of 12 hours and 10 days).

An employee may take paid personal/carer’s leave if they are unfit for work because of their own personal illness or injury or to provide care or support to a member of their immediate family or household. An employee is also entitled to two days of unpaid carer’s leave per year.

Employees are entitled to 2 days of compassionate leave to spend time with a member of their immediate family or household who has sustained a life-threatening illness or injury, or after a death of a member of the employee’s immediate family or household.

For all periods of personal/carer’s leave or compassionate leave, an employee must give his

or her employer notice. The employer is entitled to request evidence to prove the reason for the leave, and a failure to provide this, if requested, means the employee is not entitled to the leave. Awards or agreements may include terms relating to proof or evidence of the reason for the leave.

Under s 352 of the Fair Work Act 2009 (Cth), an employer must not dismiss an employee because the employee is temporarily absent from work because of illness or injury of a kind prescribed by the regulations, unless the absence extends for longer than 3 months, or the total absences have been longer than 3 months in a 12 month period and the employee is not on paid personal/carer's leave.

As with parental leave, paid personal and carer's leave provisions stipulate that awards and agreements may include terms relating to the cashing out of such leave. In this instance, any cashing out terms in an award or agreement must require that the employee be left with a balance of at least 15 days' accrued leave after the cashing out. As with annual leave, the cashing out arrangement must be included in a separate written agreement

The NES also entitles casual employees to 2 days of unpaid carer's leave and 2 days of unpaid compassionate leave, but not personal or sick leave.

D. ANY OTHER REQUIRED OR TYPICALLY PROVIDED LEAVE(S)

Community Service Leave

The NES stipulates that employees are entitled to be absent from work for three main reasons (termed "eligible community service activities"):

- jury service;
- "voluntary emergency management activity"; and
- any other activity in the nature of community service that the regulations prescribe.

The leave period includes reasonable travel and rest time prior to, and following, the eligible activity. As is to be expected, the employee must provide the employer with notice "as soon as practicable," though this may not necessarily be at a time before

the absence has begun. Furthermore, upon request from the employer, the employee must provide evidence of his or her engagement in the eligible community service activity.

Long Service Leave

The NES does not specifically provide for a long service leave entitlement. The NES merely provides that an employee is entitled to long service leave as stipulated in the applicable, pre-modernised award. In cases where there is no such applicable award, an employee's entitlement will be derived from state and territory legislation, except where an industrial instrument modifies or excludes the legislative provisions. Each state and territory in Australia provides an entitlement for employees to have long service leave. These basic entitlements are as follows:

- New South Wales: two months' leave after 10 years of service, with one month's leave for each subsequent period of five years of service;
- Victoria: employees are entitled to take their long service leave after at least seven years' continuous employment with one employer, which accrues at a rate of one week for every 60 weeks of continuous employment;
- Queensland: eight and two-thirds weeks' leave after 10 years' of continuous service, with further leave of four and one-third week's leave to be provided after each additional five years of continuous service;
- South Australia: 13 weeks' leave after the first 10 years of service, with 1.3 weeks' leave for each subsequent year of service;
- Western Australia: eight and two-thirds weeks' leave after 10 years of continuous service, with four and one-thirds weeks' leave for each subsequent period of five years of continuous service;
- Tasmania: eight and two-thirds weeks' leave after 10 years of continuous service, with four and one-third's weeks' leave for each additional five years of continuous service;
- Northern Territory: 13 weeks' leave after 10 years of continuous service, with a further six and a half weeks' leave after each additional five years of continuous service; and
- The Australian Capital Territory: one-fifth of a month's leave for each year of service after seven years of continuous service.

Domestic Violence Leave

All employees, including part-time and casual, who are experiencing family domestic violence, or who are providing care or support to another member of their family/household who is experiencing domestic family violence are now entitled to domestic violence leave under the NES. This includes 5 days of unpaid family and domestic violence leave in a 12-month period (employers may agree to employees taking more than 5 days of unpaid leave).

4. PENSIONS: MANDATORY AND TYPICALLY PROVIDED

Age Pension

Under the Social Security Act 1991 (Cth) a pension is paid to residents of Australia who have reached pension age and are assessed as not having adequate levels of income or assets that can be used to support themselves. From 1 July 2017 the qualifying age increased to 65 years and 6 months, to continue increasing by six months every two years for the following six years, reaching 67 years by 1 July 2023. The maximum rate paid for an individual is \$916.30 per fortnight and \$690.70 for a couple. Unlike pension payments of many other countries, in Australia, workers do not contribute to a pension or insurance within Australia, and the payment is available subject to means testing.

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HARMERS WORKPLACE LAWYERS

AUSTRALIA

Harmers Workplace Lawyers focuses on innovative, high quality problem solving and a preventive approach to law across all areas of employment and industrial law. Harmers is unique among Australian employment practices in that, whilst having an emphasis on corporate Australia and its senior executives, the firm seeks to implement workplace fairness for all, and will represent employers, employees and their representative organisations as needed. Harmers has represented many of Australia's leading corporations, senior executives and media personalities as well as having run some of Australia's leading cases in the areas of employment and discrimination law.

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This memorandum has been provided by:

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