HERBERT
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EMPLOYMENT & WORKPLACE RELATIONS IN AUSTRALIA

LEGAL GUIDE

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HERBERT SMITH FREEHILLS GUIDE TO EMPLOYMENT & WORKPLACE RELATIONS IN AUSTRALIA 2021

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1 Introduction

Overview

Steve Bell

2020 challenged business and societies in many ways – not the least of which was to test, stretch and often enhance the relationship between employers and their staff as workplaces moved at pace to a new era of flexibility. Teams embraced working from home in droves globally, on-site workforces had to be adaptive and flexible and management needed to understand the often complex intersection of safety, employment and industrial relations issues in novel ways.

The role of the HR, IR, legal and safety professionals was never more central to corporate survival.

The national economic damage feared from the COVID-19 pandemic jolted the Federal Government to confront urgent change to Australia's industrial relations system. Longer term reform is also being considered, and this will be a key issue for the federal Parliament in 2021.

Pandemics aside, a major issue in 2020 remained the unfolding story of underpayment investigations and prosecutions, including the vigor displayed by the regulator, the Fair Work Ombudsman. Our team has the leading practice in Australia dealing with these complex matters.

2020 also saw the #MeToo movement in Australia continue to gain prominence – although the unavoidable consequence of this was to place many high profile businesses and leaders on notice that tolerance for misconduct has all but disappeared. The Australian Human Rights Commission's inquiry into Sexual Harassment in Australian Workplaces, released in March 2020, made that clear. Our leading workplace investigations practice has grown significantly over recent years to meet these emerging needs.

Overall, we were proud to help support our clients through the much-labelled unprecedented times in 2020.

It is in this context, I am very proud to introduce our 2021 Guide to Employment and Workplace Relations in Australia. The Guide is written with the needs of you, our clients, in mind. It is a reference tool for in house counsel, IR, HR and safety practitioners.

This Guide is a feature of the unique place held by Herbert Smith Freehills in the field of Australian employment law, industrial relations and workplace safety. Our firm has constantly been the leader in this field over many decades. We hear this from our valued client feedback, and from the ratings of independent sources like Chambers, Doyles and Asia Pacific 500. The investment we make in our clients and the development of our lawyers across our Australian offices is hopefully apparent from the breadth of content in our 2021 Guide.

On behalf of all of our team, we thank you, as ever, for your ongoing support.

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2 An overview of employment regulation in Australia

Overview

Employment and workplace relations matters in Australia are governed by a range of state and federal laws. These cover areas such as minimum terms and conditions of employment, work health and safety (WHS), privacy, discrimination, superannuation, public holidays and various types of leave.

The terms and conditions of employment and industrial relations obligations of most employers are regulated at the federal level under the system established by the *Fair Work Act 2009* (Cth) (FW Act). However, certain employment-related matters continue to be regulated at the state and territory level.

This introductory chapter provides a general overview of employment regulation in Australia.

State and federal systems of regulation

Although the FW Act is the primary legislation governing employment in Australia, employers need to be aware of certain matters that are still the responsibility of each state and territory, and understand how the two levels of regulation interact.

The FW Act generally 'covers the field' and overrides state and territory laws that deal with the same subject matter.

However, certain matters are specifically excluded from the scope of the FW Act. These matters include:

- workers' compensation
- WHS
- long service leave (other than for a limited number of employees who have a preserved award – or agreement-derived long service leave entitlement), and
- equal opportunity and discrimination.

Most, but not all employers are covered by the federal system.

Employers who are not 'constitutional corporations' (trading, financial and foreign corporations) or certain federal and state government bodies will not necessarily be covered by the substantive provisions of the FW Act. A corporation will be considered a trading corporation if it engages in 'substantial or significant' trading activities. State and territory industrial laws regulate employers not covered by the FW Act.

COVID-19 temporary measures

A number of temporary changes to employment regulations were made in response to COVID-19. Most significantly, the FW Act was amended on 9 April 2020 to support the implementation of the Federal Government's JobKeeper scheme and give employers increased flexibility during COVID-19.

The amended provisions allow employers who qualify for JobKeeper to make directions to stand down employees or alter their usual duties, location and days of work. These employers can also make agreements with eligible employees to change their days and times of work. These provisions will apply until 29 March 2021.

National Employment Standards

The National Employment Standards (NES) are 10 minimum conditions of employment which apply to all employees covered by the FW Act.

The 10 minimum conditions of employment that comprise the NES are:

STANDARD	GENERAL EXPLANATION
Hours of work	maximum 38 'ordinary' hours each week plus 'reasonable' additional hours
Annual leave	4 weeks a year, with an extra week for continuous shift workers
Personal/carer's leave Compassionate leave, and Family and domestic violence leave	10 days of paid personal (sick/carer's) leave per year plus 2 days of unpaid carer's leave (per occasion required) 2 days of paid compassionate leave (per occasion required) 5 days of unpaid family and domestic violence leave per year if the employee is experiencing family and domestic violence (also applies to part-time and casual employees)
Parental leave	up to 52 weeks of unpaid parental/adoption leave and related entitlements, with the ability to request a further 52 weeks' unpaid leave
Public holidays	the right to be absent from work on public holidays and the right to refuse to work on a public holiday on reasonable grounds
Flexible working arrangements	can be requested by employees who are parents, carers, have a disability, are aged 55 or older, are experiencing domestic violence or provide care or support to a family member who is experiencing domestic violence
Community service leave	to engage in eligible community service activities (eg jury service and voluntary emergency management activity such as fire-fighting)

STANDARD	GENERAL EXPLANATION
Long service leave	entitlements in state and territory long service leave legislation retained (subject to preserved award and agreement entitlements, which apply in limited circumstances)
Fair Work Information Statement	must be issued to all new employees to provide information about conditions of employment
Notice of termination and redundancy pay	dependent on length of service, up to 5 weeks' notice of termination and up to 16 weeks' redundancy pay

Some NES entitlements are tied to employment status (ie whether the employee is engaged on a permanent or casual basis) or length of service (eg parental leave, notice of termination and redundancy pay).

The NES also include rules about how these entitlements apply in practice (eg when annual leave can be taken, what documentation is required for personal leave, whether the leave is paid or unpaid etc). Further information about the NES and these rules can be found in Chapter 3, 'National Employment Standards'.

All enterprise agreements must comply with the NES, and all modern awards are underpinned by the terms of the NES. Common law contracts of employment are also subject to the NES. As the provisions of the NES are statutory minimum terms of employment, they cannot be traded off or bargained away. However, employers and employees are free to negotiate other terms and conditions of employment not covered by the NES or that are more generous than the NES.

Minimum wages

How are minimum wages set?

Minimum wages, including casual loadings, are set and adjusted by the Expert Panel of the Fair Work Commission (FWC) on an annual basis.

The 2020 wage review

Effective 1 July 2020, the Expert Panel:

- increased the National Minimum Wage for adults by 1.75% to $753.80 per week (based on a 38 hour week) or $19.84 per hour, and
- maintained the casual loading for award/agreement-free employees at 25%.

This increase is staggered for different awards and commences:

- on 1 July 2020 for Group 1 Awards,
- on 1 November 2020 for Group 2 Awards, and
- on 1 February 2021 for Group 3 Awards.

For further information on award-specific minimum wage increases refer to Chapter 4, 'Modern Awards'. Employers should consult the wages provisions of any applicable modern award to determine the minimum wages for their employees.

The role of awards

What are awards?

Modern awards are industry or occupation-based instruments which establish a safety net of terms and conditions of employment that supplement the 10 minimum conditions of employment set out in the NES. Modern award terms are limited to the 10 matters covered by the NES, plus a further 10 terms and conditions of employment.

While awards were once the main source of regulation of employee terms and conditions, since the early 1990s, Australia's industrial relations landscape has been progressively reformed to make enterprise agreements the main focus. Since that time, awards have been intended to be a minimum safety net only, with enterprise bargaining being the primary means of determining actual terms and conditions of employment.

That being the case, awards do not apply to employers or employees who are covered by an enterprise agreement. Importantly, an enterprise agreement must be at least as favourable overall to all employees covered by it as the relevant modern or enterprise award.

Minimum wages and modern awards

Each modern award includes terms dealing with minimum wages and skills-based pay scales for employees covered by the award. The minimum wages in modern awards are adjusted each year following annual wage reviews conducted by the Expert Panel of the FWC.

For further information refer to Chapter 4, 'Modern Awards'.

Enterprise agreements

An introduction

Enterprise agreements are collective agreements made by employers and their employees under the FW Act. In most cases, employees are represented by unions which are allotted legal status as 'bargaining representatives'.

All enterprise agreements can operate alongside common law contracts of employment, however a contract of employment can only supplement (not undercut) enterprise agreement terms and conditions.

Are there benefits in using enterprise agreements?

There may be benefits in using enterprise agreements, although this will depend on the particular workplace and the terms and conditions that currently apply to employees.

Potential benefits include:

- implementing workplace arrangements that are adapted and suitable for a specific business
- the ability to exclude or modify award conditions that might otherwise apply to the employees. Excluding or modifying these award conditions may provide more flexibility, although a 'better off overall test' (BOOT) must be satisfied
- ensuring employees receive adequate compensation for excluded or modified conditions, and
- protecting against industrial action, which will be unlawful during the nominal life of an enterprise agreement.

Better off overall test

To be approved by the FWC, all new enterprise agreements must pass the BOOT. Under the BOOT, each employee covered by an enterprise agreement must, on balance, be better off overall than he/she would be under the applicable modern award.

The BOOT allows award conditions (but not NES conditions) to be traded off or modified as long as the total remuneration and/or benefits received by the employee under the proposed enterprise agreement leaves them better off overall than if the relevant award applied. The test is applied strictly by the FWC.

For further information refer to Chapter 11, 'Enterprise Bargaining'.

Industrial action

When can employees take lawful industrial action?

Employees can only take lawful industrial action where certain procedural requirements are met. These requirements include that:

- they are genuinely trying to reach agreement about permitted matters
- the nominal expiry date of any existing agreement has passed
- the industrial action has been authorised by a protected action ballot, and
- the required written notice of the action has been given to the employer.

What can employers do if employees take unlawful industrial action?

Where employees take or threaten unlawful industrial action, their employer can seek an order from the FWC that the industrial action stop, not occur or not be organised.

In certain circumstances, action may also be available in the Federal Court of Australia or state/territory courts.

Can employers pay employees who take industrial action?

No. In almost all cases it remains unlawful for an employer to pay employees who take industrial action, whether or not the industrial action is lawful. Special rules apply to the payment of employees who participate in lawful partial work bans.

If employees engage in any type of 'unprotected' industrial action, the employer must deduct a minimum of 4 hours' pay from participating employees. This applies even if the length of the industrial action is shorter than 4 hours. Complications as to the amount of strike pay that must be withheld may arise where the unprotected industrial action takes the form of bans on working overtime.

For further information refer to Chapter 12, 'Responding to Industrial Action'.

Bullying

The federal anti-bullying jurisdiction commenced on 1 January 2014. The jurisdiction empowers a 'worker' who reasonably believes that he or she has been bullied at work to apply to the FWC for an order that bullying stop.

The definition of 'worker' is not limited to employees. It includes an individual who performs work in any capacity, including as a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience, or a volunteer.

A person is 'bullied at work' if an individual repeatedly behaves unreasonably towards the worker, and that behaviour creates a risk to the worker's health and safety. The legislation makes it clear that reasonable management action carried out in a reasonable manner is not taken to be bullying behaviour.

Although the FWC does not have the power to impose a financial penalty on an employer, the types of orders it can make to prevent the bullying from occurring are extremely broad. A failure to comply with a bullying order can attract civil penalties.

The FWC is required to start dealing with a bullying application within 14 days of it being made. The tight statutory timeframe is at odds with the often lengthy timeline for investigation and prosecution of bullying complaints, which remains within the realm of federal, state and territory safety regulators. Indeed, the overlap between the bullying jurisdiction and WHS laws (which can expose employers and individuals to criminal sanction) is a point of great conjecture.

For further information refer to Chapter 10, 'Bullying'.

Transfer of business

The FW Act regulates what happens when an employee takes up employment with a new employer as part of a 'transfer of business'. The focus of the transfer of business rules is on a transfer of employment. These rules are broad and have been designed to maintain employees' terms and conditions of employment when the employee and their work are transferred to another entity.

The key consequence of a transfer of business under the FW Act is that any applicable industrial instruments will transfer to the new employer and apply to the transferring employees, unless the new employer obtains an order from the FWC that this not occur. A transfer of business also has implications with respect to the new employer's recognition of a transferring employee's prior service and leave entitlements with the old employer.

What is a transfer of business?

The transfer of business rules under the FW Act will only be triggered if:

- one or more employees of one employer (the old employer) cease employment with the old employer and, within 3 months, commence employment with another employer (the new employer)
- the transferring employees perform the same or substantially the same work for the new employer as they performed for the old employer, and
- there is a relevant connection between the old employer and the new employer.

A relevant connection will exist where:

- there is a transfer of assets from the old employer to the new employer
- the old employer outsources work to the new employer
- the new employer insources work from the old employer that was previously outsourced, or
- the old employer and the new employer are associated entities.

Further information can be found in Chapter 15, 'Transfer of Business in Australia'.

Right of entry

What rights do unions have to enter a workplace?

Union officials may gain entry to a workplace:

- to hold discussions with employees whose industrial interests the union is entitled to represent (ie who fall within the scope of the union's rules)
- pursuant to state or territory WHS laws, or
- to investigate a suspected breach of the FW Act or an industrial instrument that applies or applied to a member of the union.

There are certain conditions that must be met before a union can exercise rights of entry. For example, a union official must hold a valid entry permit.

Can unions do anything they like once they enter the workplace?

No. Depending on the reason for entry, unions are limited in what they can do.

For instance, where a union is conducting discussions with employees, it can only hold discussions with employees whose industrial interests it is entitled to represent. Where a union is entering to investigate a suspected breach, it can only inspect work and interview employees for the purposes of investigating the breach, and generally can only view records of employees who are members of the union.

For further information refer to Chapter 13, 'Union Regulation and Right of Entry'.

Termination of employment

Several claims are available to employees who are dismissed from their employment. Depending on the circumstances, employees can claim:

- under the common law for breach of contract
- unfair dismissal under the FW Act
- general protections under the FW Act, or
- discrimination under state or federal equal opportunity legislation.

Who can bring an unfair dismissal claim?

Only an employee whose employment has been terminated at the initiative of their employer, or who has been 'constructively dismissed' can bring an unfair dismissal claim. The unfair dismissal jurisdiction provides a remedy to employees if their dismissal was 'harsh, unjust or unreasonable'.

The following employees are excluded from bringing claims:

- employees who have not completed the minimum employment period of 6 months (in the case of employers with 15 or more employees) or one year (in the case of employers with fewer than 15 employees)
- an employee for whom the dismissal was a case of genuine redundancy, where the employer has complied with its redeployment and consultation obligations
- an employee not covered by an industrial instrument and paid more than the statutory limit (currently $153,600 per annum), and

- an employee who is pursuing other termination of employment proceedings.

Unfair dismissal and other claims relevant to termination of employment are dealt with in greater detail in Chapter 6, 'Termination of Employment'.

General protections and workplace rights

Under the FW Act, employees cannot be dismissed or subjected to other detrimental action because they have certain rights, entitlements or attributes.

For example, an employer cannot:

- take adverse action against an employee because of the employee's workplace rights or industrial activities (including freedom of association)
- engage in behaviour intended to coerce an employee to exercise, or not exercise, his or her workplace rights
- take adverse action against an employee because of a particular attribute (eg their race, colour, sex, age, disability, etc), or
- knowingly or recklessly make false and misleading statements about a person's workplace rights.

The general protections provisions also apply to (and protect) employers, independent contractors, unions and prospective employees in certain circumstances.

The implications of the general protections rights are dealt with in greater detail in Chapter 9, 'Discrimination, Sexual Harassment, Diversity and Workplace Rights'.

Discrimination

Discrimination is regulated at both state and federal levels by legislation in all jurisdictions. Under this legislation, employers must not directly or indirectly discriminate against employees for a prohibited reason, which includes:

- sex
- marital status
- pregnancy or potential pregnancy
- breastfeeding
- family responsibilities
- sexual preference or orientation
- race or nationality
- religion
- physical features
- disability
- age
- political opinion or membership
- trade union membership or activities, and
- a specified medical history.

In most jurisdictions, it is a defence to a discrimination claim that the discrimination related to a characteristic that prevented the employee (or prospective employee) from fulfilling the inherent requirements of their position or employment.

In many cases employers will be subject to concurrent state and federal legislation, though the general obligations that these Acts impose are similar. Employees may bring claims in either jurisdiction, though generally bringing a claim in one jurisdiction will preclude a claim in another.

See Chapter 9, 'Discrimination, Sexual Harassment, Diversity and Workplace Rights' for further information.

Work health and safety and workers' compensation

WHS and workers' compensation continue to be regulated primarily by each state and territory. This has created inconsistency between jurisdictions, especially because of the different rules affecting WHS compliance.

The federal *Model Workplace Health and Safety Act* was released in May 2010 with the intention of harmonising the disparate WHS laws around Australia. However, the Act has not been adopted by all states and territories and so some differences remain between the jurisdictions.

Regardless of whether the harmonised laws or existing state or territory laws apply, the fundamental tenets of Australian WHS law are that employers have an obligation to maintain a safe workplace and ensure the health, safety and welfare of their workers and other persons affected by the way they conduct their business.

WHS is a highly regulated regime, with state and federal regulatory bodies empowered to investigate, enforce and prosecute breaches of WHS laws.

Substantial penalties apply for failure to comply with the relevant legislation and both companies and their employees or officers involved in contraventions can be exposed to criminal prosecution.

Industry-specific (eg mining and petroleum) and task-specific (eg electrical safety and dangerous goods) safety laws also exist in each jurisdiction.

This topic is dealt with in greater detail in Chapter 19, 'Health and Safety, Workers' Compensation and Personal Injury'.

Long service leave

Long service leave is unique to Australia and provides additional paid leave for employees with lengthy uninterrupted service. It remains primarily regulated by state and territory legislation. The NES preserve, or allow for the preservation of, long service leave entitlements provided by industrial instruments that were in operation on 31 December 2009 in certain limited circumstances.

Otherwise, enterprise agreements made under the FW Act are subject to state and territory laws dealing with long service leave.

Most state schemes provide for an entitlement of 3 months' long service leave after 15 years' service, with some states allowing this entitlement to be accessed or paid out on termination of employment after a shorter period of time, such as 7 or 10 years.

Further information can be found in Chapter 3, 'National Employment Standards'.

Superannuation

Under the *Superannuation Guarantee (Administration) Act 1992* (Cth) employers must contribute a minimum of 9.5% of an employee's ordinary time earnings to that employee's approved superannuation fund. The minimum contribution is expected to incrementally increase to 12% by 2025. In some circumstances, employers must provide a choice of superannuation fund for employees. See Chapter 17, 'Superannuation', for more information.

Privacy and workplace surveillance

The *Privacy Act 1988* (Cth) sets out the Australian Privacy Principles, which govern the collection, use, disclosure and transfer of personal and sensitive information in Australia's private sector. In addition, some states and territories have enacted health records and/or specific workplace privacy legislation.

State and territory-specific legislation also exists which governs the use of electronic surveillance and monitoring of employees.

See Chapter 16, 'Privacy and Workplace Surveillance', for more information.

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