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EMPLOYMENT LAW IN AUSTRALIA

OVERVIEW

Although, like many other countries, labour law in Australia has its origins in the common law, the employer and employee relationship is also regulated by a complex statutory and regulatory framework, including legislation, regulations and industrial instruments such as modern awards and enterprise agreements.

There have been numerous significant changes to both the state and federal regulatory frameworks, particularly over the past 20 years. Various reforms have meant regulatory bodies have been established, made redundant or their roles altered, and the statutory minimum requirements employers must provide to employees have changed significantly, both in terms of the number of matters regulated and the specific prescribed entitlements.

Despite these changes, comparatively, labour laws in Australia remain relatively protective of employee rights and impose significant legal obligations on employers. Trade unions in Australia remain quite active, despite a significant decrease in membership and arguably, influence, over the past 20 years.

This guide provides a brief overview of employment law and industrial relations within Australia, as it stands at October 2013.

PRINCIPAL LEGISLATION

Both Commonwealth and state laws govern employment conditions in Australia. The Commonwealth Fair Work Act 2009 (FW Act) is the principal statute regulating employment relationships in Australia. The FW Act applies to most corporate entity employers in Australia and contains detailed entitlements and protections for employees.

Failure to comply with the FW Act in certain circumstances can attract penalties of up to AUD51,000 per breach. Any disputes regarding employment matters regulated by the FW Act are heard in Commonwealth courts and tribunals including the Fair Work Commission, the Federal Court of Australia and the Federal Circuit Court of Australia.

In addition to the FW Act, a number of state and Commonwealth statutes regulate other matters relevant to employment relationships in Australia such as anti-discrimination, long service leave, compulsory workers compensation insurance, superannuation and work health and safety. Disputes regarding these matters are heard in state and territory courts and tribunals.

TYPES OF EMPLOYMENT

Employees in Australia are generally employed on one of the following bases:

(a) full time, being 38 hours or more per week plus reasonable additional hours
(b) part time, being regular and systematic hours of less than 38 hours per week
(c) casual, being irregular and non-systematic hours, generally with no expectation of continuing employment or
(d) fixed task or fixed term, being employment for a specified time period or for a particular task only.

While not a form of employment relationship, independent contractor arrangements are also a common legal structure used in Australia for workers. However, this overview does not cover the issues surrounding the use of independent contractors.
“Trade unions in Australia remain quite active, despite a significant decrease in membership and arguably, influence, over the past 20 years.”
MINIMUM CONDITIONS OF EMPLOYMENT

The FW Act puts in place a comprehensive statutory ‘safety net’ for employees providing minimum conditions of employment that must be provided to all employees in Australia (with some exceptions for casual employees). The statutory ‘safety net’ comprises the National Employment Standards (NES), Awards and Enterprise Agreements. In addition, employers and employees may enter into common law contracts of employment that regulate the employment relationship.

<table>
<thead>
<tr>
<th>ENTITLEMENT</th>
<th>DESCRIPTION</th>
<th>note:</th>
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<tbody>
<tr>
<td>Maximum hours of work</td>
<td>Employees must not be required to work more than 38 hours per week plus reasonable additional hours.</td>
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<tr>
<td>Annual leave</td>
<td>Permanent employees are entitled to four weeks paid annual leave (pro-rata for part-time employees) per year of service and five weeks per year of service for shift workers.</td>
<td>Note: casual employees are generally not entitled to annual leave.</td>
</tr>
<tr>
<td>Personal leave</td>
<td>Permanent employees are entitled to 10 days personal leave (pro-rata for part-time employees).</td>
<td>Note: casual employees are generally not entitled to personal leave.</td>
</tr>
<tr>
<td>Parental leave</td>
<td>Eligible employees are entitled to 12 months unpaid parental leave with an additional entitlement to a further 12 months unpaid parental leave which may only be refused by employers on reasonable business grounds.</td>
<td>Note: casual employees are generally not entitled to parental leave.</td>
</tr>
<tr>
<td>Community service leave</td>
<td>Employees may take unpaid leave for eligible community service activity. For example, fire-fighting and civil defence.</td>
<td></td>
</tr>
<tr>
<td>Long service leave</td>
<td>Employees are entitled to long service leave in accordance with applicable state and territory legislation, awards and enterprise agreements.</td>
<td></td>
</tr>
<tr>
<td>Flexible work arrangements</td>
<td>Certain categories of employees are entitled to request flexible work arrangements to assist them in caring for their child, themselves or another person.</td>
<td>These provisions apply to parents and carers of children under school age, parents and carers of children under 18 years with a disability, certain carers of disabled and elderly people, employees with a disability, employees over the age of 55 and victims of domestic violence. Requests for such arrangements can only be refused on reasonable business grounds.</td>
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<tr>
<td>Public holidays</td>
<td>Employees are entitled to be absent from work on public holidays. Employers are allowed to request an employee to work on a public holiday if the request is reasonable.</td>
<td>Note: the precise timing and number of public holidays varies in each state and territory. However, on average, there are approximately 10 to 12 public holidays per year.</td>
</tr>
<tr>
<td>Notice and redundancy</td>
<td>Employees are entitled to minimum notice periods (or payment in lieu of notice) for termination of employment. Employers with 15 employees or more may also be required to make a severance payment to employees on termination of employment due to redundancy (see Termination of Employment on page 10).</td>
<td></td>
</tr>
<tr>
<td>Fair Work Information Statement</td>
<td>Employers are required to provide all new employees with a Fair Work Information Statement as soon as practicable after commencement of employment.</td>
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NATIONAL EMPLOYMENT STANDARDS

The NES provide employees with guaranteed minimum conditions of employment. Employers must comply with the NES in respect of all employees (although some entitlements do not apply to casual employees), regardless of any other agreement or statutory instrument in place regulating the employment relationship. The NES cannot be displaced by Awards, common law contracts or statutory enterprise agreements (including by agreement), except where specifically provided for by the FW Act.

Failure to comply with the NES is a breach of the FW Act and can attract penalties of up to AUD51,000 per breach and may also result in orders for back payment of any unpaid entitlements.

A summary of the NES entitlements is set out in the below table.
AWARDS

In addition to the NES, on 1 January 2010, new awards known as “modern awards” came into operation replacing all awards which previously applied. Modern awards are legally binding instruments which operate with the force of legislation and provide for additional minimum terms and conditions of employment for particular industries or occupations. Employers must comply with any applicable awards in addition to the NES.

Modern awards generally contain terms dealing with, amongst other things, minimum wages, casual loading, overtime, penalty rates, allowances, annual leave loading, hours of work, dispute resolution procedures, and requirements to consult with employees and/or trade unions. Employers must ensure that they are complying with all applicable modern awards as noncompliance may result in prosecution by the Fair Work Ombudsman and fines of up to AUD$51,000 per breach (inadvertent or otherwise). Prosecution may also result in orders for the payment of wages and other monetary entitlements to current and former employees.

ENTERPRISE AGREEMENTS

Employers and employees have the option of bargaining collectively for an enterprise agreement. That is, employers may agree with a group of employees (or their representative) to create an agreement that provides for terms and conditions in excess of the minimum terms and conditions of employment. An enterprise agreement will apply to all employees in a particular class or category. For example, an enterprise agreement may apply to all employees of a company, or alternatively, to groups of employees based on geographical or trade classifications. The group of employees subject to an enterprise agreement must be “fairly chosen” (that is, they cannot be selected for an improper or illegal reason).

Employers may initiate bargaining or may be required to bargain collectively if a majority of employees wish to bargain. Employees have a legal right to be represented by a trade union in bargaining. Employees can also lawfully take industrial action during bargaining (for example, strikes and pickets). Collective bargaining is common in many industries such as manufacturing, construction and shipping but less common in some other industries such as professional services.

For genuinely new enterprises where employees will be employed who have not been employed by the employer previously, there is also the option to create what is known as a “greenfields agreement”. The terms and conditions of employment for all employees to be covered by a “greenfields agreement” are negotiated between the employer and any relevant trade union(s) prior to the new enterprise commencing and prior to employees being employed.

EMPLOYMENT CONTRACTS

Employment contracts in Australia can either be in the form of a written document or entirely oral. In practice, they generally take the form of a letter of offer or letter of appointment. Employers in Australia often enter into employment contracts with employees that provide for benefits in excess of the minimum terms and conditions of employment, or which impose additional obligations on employees including in relation to matters such as confidential information, intellectual property and post-employment restraints.

The terms of any employment contract must not provide for any terms or conditions of employment that are inferior to the minimum entitlements contained in the NES and any applicable award (some limited exceptions may apply via the use of an ‘offset clause’).

“The FW Act puts in place a comprehensive statutory ‘safety net’ for employees providing minimum conditions of employment that must be provided to all employees in Australia.”
The rates of pay received by employees for work are determined by a range of different sources. The minimum wage will most commonly be contained in an applicable modern award. If not, the National Minimum Wage applies. The National Minimum Wages and minimum wages under Awards are increased annually, effective 1 July each year.

**REQUIREMENTS AND REGULATIONS**

As at 1 July 2013, the National Minimum Wage is AUD622.20 per week (before tax), or AUD16.37 (before tax) per hour. The National Minimum Wage is reviewed and generally increased on 1 July each year. Failure to comply with the National Minimum Wage or any minimum wages provided for in a modern award or an enterprise agreement may result in prosecution by the Fair Work Ombudsman and fines of up to AUD51,000 per breach and may also result in orders for the payment of wages and other monetary entitlements to current and former employees.

**BONUSES AND OVERTIME**

The NES set the maximum ordinary hours of work as 38 hours per week and “reasonable additional hours”. If a request to work overtime is reasonable, the employee will generally be required to work such overtime.

Overtime requirements are generally regulated by a combination of the employment contract, any applicable award or agreement and legislation in some industries. Workplace flexibility means that the reward received in return for working overtime will vary. Examples include higher annual salaries, time off in lieu, and payment via premium hourly rates.

**WORKING HOURS AND HOLIDAYS**

Public holiday entitlements vary between the states in Australia although, in most cases, approximately 10 paid days per year are declared public holidays. As businesses (particularly retail and hospitality businesses) often open for trading on public holidays, employers may be required to pay workers a premium in exchange for giving up the day.

The NES set the minimum entitlements in respect of annual leave, personal leave, and parental leave as outlined in the above table. Employees, with the exception of casual employees, are entitled to four weeks’ (20 days) paid annual leave (pro-rata for part-time employees). This is increased to five weeks for eligible shift workers.

Employees also are entitled to 10 days’ paid personal leave per year (pro-rata for part-time employees), which includes sick leave and carer’s leave.

All employees who have completed at least 12 months of service before the expected date of the birth or adoption of a child are entitled to unpaid parental leave (maternity, paternity, or adoption leave). If the NES are more favourable to an employee, they prevail over agreements or contracts of employment. Casual employees are generally not entitled to unpaid parental leave unless they can establish they have been employed for a period of at least 12 months on a regular and systematic basis and have a reasonable expectation of ongoing employment with their employer.

Employees may also be entitled to paid parental leave on top of their unpaid leave entitlements. Paid parental leave entitlements may arise from employer-funded schemes and/or government-funded schemes.

The Australian Government's paid parental leave scheme has applied since 2011 and provides a maximum of 18 weeks pay at the National Minimum Wage (see above). This applies to eligible primary carers of newborn or adopted children. The payments are made by the Government to the employer, which then pays it to the employee.

As outlined in the table above, the NES also provide compulsory community service leave, an entitlement to request flexible working arrangements, as well an entitlement to request up to a further 12 months’ unpaid parental leave which may only be refused on “reasonable business grounds”. Parental leave is also extended to same sex couples and following the adoption of a child.

**OTHER BENEFITS**

In addition to monetary reward for performance, an employee may receive what are described as fringe benefits. This is a benefit which is provided to an employee. A benefit is widely defined to include any right (including any property right), privilege, service, or facility. Common fringe benefits received include the provision of a motor vehicle, a laptop computer, or a mobile telephone. Such benefits are generally included when calculating the total remuneration of an employee. Fringe Benefits Tax may be payable on such fringe benefits in certain circumstances.

Another way of rewarding employees and encouraging productivity is through an employee share scheme. The type of scheme can vary and the options available to an individual will often depend on the seniority of the employee. In all instances, the intention is to ensure that the employees have a stake in the outcome of the business and are hence motivated to increase productivity.
There are a number of obligations, many of them compulsory, which fall on employers, such as obligations in accordance with work, health and safety legislation, workers compensation legislation and taxation.

**WORK HEALTH AND SAFETY**

All persons involved in a workplace in Australia (including companies, workers and senior officers of companies) are required to take all reasonably practicable steps to ensure workplaces are safe and without risk to health for workers and others at the workplace.

The statutory obligations are strictly enforced in Australia, and fall within the criminal jurisdiction of each state’s judicial system. If the relevant regulatory body forms the view that a company or individual has not complied with their statutory obligations, the company or individual is likely to be prosecuted and charged with one or more criminal offences. In the event an individual worker or officer of a company is prosecuted, that individual may be subject to significant personal criminal penalties that generally can not be insured against. In a number of jurisdictions, there is also potential for imprisonment in the most serious cases.

Maximum penalties applicable to corporate entities in Australia vary depending on the state in which the offence occurred but are as high as AUD3,000,000 per offence. The maximum penalty applicable to an individual who is found to contravene work health and safety legislation in Australia is AUD600,000 or five years imprisonment.

In all jurisdictions, the general obligations in relation to work health and safety are found in one primary piece of legislation that is then supported by more specific obligations contained in regulations, codes of practice and other documents such as Australian Standards. For example, in New South Wales, the *Work Health and Safety Act 2011* is the primary statute which is supported by the Work Health and Safety Regulation 2011.

While work health and safety legislation currently varies from state to state, a process of work health and safety law harmonisation is currently underway with the ultimate goal that model legislation be adopted in each state and territory. However, it remains to be seen if all states and territories will adopt the model legislation.

Ensuring the health and safety of workers and others and complying with the obligations contained in work health and safety legislation can often be a complex and time consuming process for companies. In addition, the consequences of noncompliance are severe, potentially resulting in injury or death to a worker, significant penalties, reputational damage and criminal convictions which may impact on the profitability of a company.

**WORKERS COMPENSATION**

Each Australian state and territory has a compulsory statutory workers’ compensation scheme in respect of injuries suffered by workers in the course of their employment. Through the workers compensation system, injured workers may be entitled to either regular or lump sum payments for permanent or temporary impairment, the payment of medical bills and assistance with rehabilitation expenses. It is compulsory in all Australian states and territories for employers to have a workers compensation insurance policy, with some limited exceptions.

**TAXATION**

Employers are also responsible for the calculation and payment of a number of taxes in respect of employees. Payroll tax, which is a state tax, applies to employers whose total wages exceed a stipulated amount. Employers must also register with the Australian Taxation Office for Pay As You Go (PAYG) Withholding Tax to enable taxation on wages to be collected and remitted to the Federal Government. It is compulsory to provide a payslip to employees.

“Statutory obligations are strictly enforced in Australia, and fall within the criminal jurisdiction of each state’s judicial system.”
Termination of employment is a heavily regulated area of law in Australia. There are a number of legal claims that may be available to employees on termination of employment, including:

(a) unfair dismissal (this jurisdiction is only available to employees who have completed a minimum employment period of six months (or 12 months for small businesses) and who earn less than the high income threshold - which is increased on 1 July each year - or employees who are covered by an Award or Enterprise Agreement)

(b) discrimination / general protections action (that is, the termination was for an unlawful reason such as age, sex, race, trade union membership etc or because the employee exercised a workplace right)

(c) breach of any applicable employment contract.

Compensation, damages or reinstatement to employment may be ordered in the event of a successful legal challenge from an employee.

When considering termination of employment, it is necessary to evaluate all rights, obligations, and entitlements as they may arise under the contract of employment, applicable awards, or enterprise agreements and applicable legislation.

**REQUISITE PERIOD OF NOTICE**

In order to lawfully terminate employment, an employee must receive a period of notice or payment of wages in lieu of notice. Ordinarily, an employee’s contract of employment will prescribe the period of notice of termination of employment. It also will often provide that a payment can be made in lieu of notice. The NES prescribes minimum periods of notice, or payment in lieu of notice, which employers must provide to employees on termination of their employment.

The period will vary depending on the length of service of the employee and the employee’s age. The following table details the minimum periods of notice prescribed in the FW Act:

<table>
<thead>
<tr>
<th>PERIOD OF CONTINUOUS SERVICE</th>
<th>NOTICE PERIOD*</th>
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<tbody>
<tr>
<td>Not more than 1 year</td>
<td>1 week</td>
</tr>
<tr>
<td>More than 1 year, but not more than 3 years</td>
<td>2 weeks</td>
</tr>
<tr>
<td>More than 3 years, but not more than 5 years</td>
<td>3 weeks</td>
</tr>
<tr>
<td>More than 5 years, 4 weeks</td>
<td>4 weeks</td>
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* employees over the age of 45 years who have completed at least two years of continuous services with the employer are entitled to an additional weeks notice.

If there is no express provision for notice in the contract of employment, there is no written contract of employment or the contract of employment is no longer current, and no modern award or enterprise agreement applies to the employee, the employee may be entitled to “reasonable notice”. In calculating reasonable notice, reference will be made to all the relevant circumstances, including an employee’s age, length of service, status and seniority, the size of the company and its operations, and the difficulty in obtaining comparable employment. Reasonable notice can be anywhere between one month to 18 months, depending on the circumstances in each instance.
**REDUNDANCY PAY**

The NES provides an automatic right to severance pay upon redundancy to most employees in Australia. There are a number of exclusions from this entitlement, including those who:

(a) are employed in workplaces with fewer than 15 employees (on a simple head count basis including casual employees who are employed on a regular and systematic basis)

(b) are fixed term employees

(c) are casual employees or

(d) have less than 12 months’ service with an employer.

Even where an exception applies, the employer may be required to pay severance pay to an employee as a result of an applicable modern award, enterprise agreement or employment contract.

The amount of severance pay payable under the NES ranges from four to 16 weeks’ salary depending upon the employee’s period of service with the employer, as set out in the table below:

<table>
<thead>
<tr>
<th>EMPLOYEE’S PERIOD OF CONTINUOUS SERVICE ON TERMINATION</th>
<th>SEVERANCE PAY</th>
</tr>
</thead>
<tbody>
<tr>
<td>At least but less than 1 year</td>
<td>4 weeks</td>
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<tr>
<td>1 year</td>
<td>2 years</td>
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<tr>
<td>2 years</td>
<td>3 years</td>
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<td>10 years</td>
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* The entitlement to severance pay reduces after 10 years because at this stage, employees become entitled to long service leave.

Service prior to 1 January 2010 will not count for employees who did not have a redundancy entitlement prior to 1 January 2010. An employer who obtains other acceptable employment for an employee whose position is redundant, or who, as a result of genuine financial difficulties cannot pay the severance pay, may make an application to the Fair Work Commission for the amount to be reduced.

“Compensation, damages or reinstatement to employment may be ordered in the event of a successful legal challenge from an employee.”
UNFAIR DISMISSAL

Employees may apply to the Fair Work Commission seeking either reinstatement to their employment or compensation, if they believe their dismissal was harsh, unjust, or unreasonable.

Under the FW Act, an employee will be able to access the unfair dismissal jurisdiction if, at the time of their dismissal, the employee:

(a) had completed a “minimum employment period”. The minimum employment period is 12 months for a small business employer (an employer with fewer than 15 employees on a simple head count basis including casual employees who are employed on a regular and systematic basis) or six months for an employer who is not a small business employer

(b) is covered by a modern award, an enterprise agreement applies to that employee, or the employee was earning remuneration less than the high income threshold (indexed annually)

(c) is not a specified task, specified period, or seasonal employee

(d) is not a true casual (that is, an employee without regular and systematic employment and who does not have an expectation of continuing employment).

In considering whether a dismissal was harsh, unjust, or unreasonable, the FW Act requires the Fair Work Commission to give consideration to certain matters, namely:

(a) whether there was a valid reason relating to the person’s capacity or conduct

(b) whether the person was notified of that reason

(c) whether the person was given an opportunity to respond to any reason related to capacity or conduct of the person

(d) whether there was any unreasonable refusal by the employer to have a support person present to assist at any discussions relating to dismissal

(e) if the dismissal related to unsatisfactory performance by the person, whether the person had been warned about the their unsatisfactory performance, before the dismissal

(f) the degree to which the size of the employer’s enterprise would be likely to impact on the procedures that followed in effecting the dismissal

(g) the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal

(h) any other matters that the Fair Work Commission considers relevant.

To comply with the unfair dismissal provisions, small businesses (businesses with fewer than 15 employees calculated on a simple head count basis including casual employees who are employed on a regular and systematic basis) are required to comply with the Small Business Fair Dismissal Code. The Small Business Fair Dismissal Code provides a simplified approach for dismissals, taking into account the size of the business.

In relation to redundancies and the unfair dismissal provisions, the FW Act broadened the jurisdiction and significantly tightened the circumstances in which a redundancy will be considered lawful. As well as abolishing the 100 employee exemption which existed under the former legislation, the FW Act replaced the broad exemption of “genuine operational requirements” with a more limited exemption in respect of “genuine redundancies”.

The FW Act provides that a redundancy will be genuine if:

(a) the employer no longer requires the employee’s job to be performed by anyone because of changes in the operational requirements

(b) the employer has complied with redundancy obligations under a modern award or enterprise agreement that applied to the employment

(c) it would not have been reasonable in the circumstances for the person to be redeployed within the employer’s enterprise or the enterprise of an associated entity of the employer.
GENERAL PROTECTIONS

In addition to unfair dismissal protections, the FW Act contains general protections provisions which protect certain persons from “adverse action” related to:

(a) workplace rights - A person has a “workplace right” if:
   (i) is entitled to the benefit of, or has a role or responsibility under, a workplace law, workplace instrument, or order made by an industrial body
   (ii) is able to initiate, or participate in, a process or proceedings under a workplace law or workplace instrument or
   (iii) is able to make a complaint or enquiry

(b) industrial activities

(c) listed characteristics, including a person’s race, colour, sex, sexual preference, age, and physical disabilities

(d) dismissal for temporary absence from work

(e) other matters, including coercion.

Generally, the general protections provisions will apply to employees, prospective employees and in some cases, independent contractors. “Adverse action” is defined broadly, and in respect of employees, can involve termination of employment, investigation, disciplinary action, restructuring as well as overlooking for promotions and demotions.

Claims in this area are initially handled by the Fair Work Commission and if unable to be resolved, are then determined by the Federal Court of Australia or the Federal Circuit Court of Australia. Employers should be aware of the operation of the general protections provisions as they have broad application and there are substantial remedies available to aggrieved parties including injunctions, uncapped monetary damages, and penalties of up to AUD51,000 per contravention.

SUMMARY DISMISSAL

An employer has the right to dismiss an employee summarily (that is, without notice), in certain situations. However, the conduct of the employee must be serious and wilful, such that notice of termination would be inappropriate.

Serious misconduct is generally understood to mean conduct of such a nature that it would be unreasonable to require the employer to continue the employment relationship during the notice period. Dismissal without notice is a very serious step for an employer to take and carries with it significant legal risk.
In Australia, there are a number of different statutes at both the federal and state level which prohibit discrimination across a range of areas, including discrimination in the workplace. At the federal level, these statutes include the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*. In addition, different state based statutes operate throughout Australia.

For example, in Victoria, the *Equal Opportunity Act 2010* prohibits discrimination on the grounds of:

- age
- carer status, family responsibilities, parental status
- disability (including physical, sensory and intellectual disability, work related injury, medical conditions, mental, psychological and learning disabilities)
- employment activity
- gender identity, lawful sexual activity, sexual orientation
- industrial activity
- marital status
- physical features
- political belief or activity
- pregnancy/breastfeeding
- race (including colour, nationality, ethnicity and ethnic origin)
- religious belief or activity
- sex
- personal association with someone who has, or is assumed to have, one of the above personal characteristics.

Many of the anti-discrimination statutes in Australia also make sexual harassment and victimisation unlawful. Similar provisions are contained in other statutes in each state and territory.

Failure to comply with the relevant legislation may result in damages payable for loss of earnings, pain and suffering, humiliation and loss of dignity.

An employer can be held legally responsible for acts of discrimination or sexual harassment by their employees or agents that occur in the workplace or in connection with a person’s employment. This concept is known as vicarious liability. There is a limited exception to vicarious liability where an employer can establish that it took reasonable steps to prevent a contravention of the applicable legislation.

In addition, an individual who sexually harasses, discriminates against or victimises another person in the workplace will be held responsible, and therefore legally liable, for their behaviour.

In both state and Federal legislation, both direct and indirect discrimination is prohibited. While the definitions of both concepts vary depending on the applicable legislation, the general concepts can be described as follows:

- **Direct discrimination**: where a person is subjected to less favourable treatment because of an attribute in circumstances that were not materially different to another who was not discriminated against

- **Indirect discrimination**: where a person in a protected category is required but unable to meet a condition that others are likely to meet, and in the circumstances this requirement is unreasonable.
Currently there is no Australian legislation that specifically prohibits workplace bullying or provides a clear definition of the concept. Therefore, depending on the type of bullying alleged, workers have been forced to seek recourse under other laws such as work health and safety laws, workers’ compensation laws, anti-discrimination laws and the general protection provisions of the FW Act, and in some cases, common law claims.

Workplace bullying has received substantial attention from various governments and the media in Australia in the past decade. The most serious cases of bullying which give rise to a risk to the health and safety of employees or others at workplace and may be considered to constitute a criminal offence are subject to investigations and in some limited cases, prosecutions, by state work health and safety regulators. A small number of these prosecutions have resulted in the imposition of criminal convictions and fines against companies and individuals.

However, from 1 January 2014, the Fair Work Commission will be granted jurisdiction to hear complaints from employees in respect of bullying in the workplace. The Fair Work Commission will be granted jurisdiction to conduct conciliation conferences and hearings and to make any order it considers appropriate regarding workplace bullying if substantiated, other than for the imposition of penalties or monetary compensation.

The new provisions apply to workers and specify that a worker is bullied at work if an individual or a group of individuals repeatedly behave unreasonably towards that worker, or a group of workers which the worker is a member, and that behaviour creates a risk to health and safety. Importantly, the changes will clarify that bullying does not include reasonable management action, including performance management conducted in an appropriate and reasonable manner.
All employees have a legal right to be members of a trade union and to be represented by a trade union in relation to workplace issues and disputes. Trade unions have a right to enter workplaces in some circumstances. In some circumstances, employers must consult with trade unions in relation to restructures, redundancies and other matters. Penalties apply to employers who discriminate against employees as a result of trade union membership or involvement.

The right of entry provisions in the FW Act enable permit holders to enter an employer’s premises to:

- investigate a suspected contravention of the FW Act (including a suspected contravention of the terms of an Enterprise Agreement or Award) or
- hold discussions with employees whose industrial interests they are representing, provided the employees wish to participate in the discussions.

In relation to entry by a permit holder for the purposes of investigating a suspected contravention:

(a) the permit holder must have reasonable grounds for suspecting a contravention has occurred or is still occurring
(b) the suspected contravention must relate to or affect at least one member of the permit holder’s organisation
(c) the permit holder’s organisation must be entitled to represent the industrial interests of that member
(d) the member must perform work on the premises.

The rights of entry under the FW Act can only be exercised by a person who holds a permit issued under the FW Act and entry must be carried out in accordance with the limitations set out in the FW Act, including requirements that the permit holder:

(a) give at least 24 hours’ notice of entry (unless exemption certificate applies)
(b) produce appropriate permit documentation upon request
(c) enter the premises only during working hours
(d) hold discussions with employees only during meal time or other breaks
(e) comply with any work health and safety requirements
(f) comply with a reasonable request to hold discussion in a particular room or area of the premises.

State based work health and safety legislation also provides for union delegate right of entry to workplaces in certain circumstances, including to inquire into a suspected contravention of work health and safety legislation, to inspect employee records in respect of a suspected contravention, and to consult and advise workers on work health and safety matters.

“Penalties apply to employers who discriminate against employees as a result of trade union membership or involvement.”
When an employee’s employment is terminated by an employer and the employee is subsequently offered employment by a new employer as part of a commercial transaction (ie in a sale of business, outsourcing or other corporate restructure), there are legal requirements as to the transfer of employment entitlements (ie accrued leave) and industrial instruments (enterprise agreements).

For example, in a sale of business transaction, the purchaser of the business may be required to assume liability for employment entitlements and terms and conditions of employment set out in an enterprise agreement.

The test for when the transfer of business provisions will operate is whether the employees transferring from the old employer to the new employer will perform the same or substantially similar work, and whether there is a particular ‘connection’ between the two employers. The transfer must take place within three months of the employment being terminated.

Failure to comply with the transfer of business provisions may result in prosecution and fines of up to AUD51,000.

“Failure to comply with the transfer of business provisions may result in prosecution and fines of up to AUD51,000.”
This diagram demonstrates our full service approach to employment and safety law. Our practice covers three broad areas; individual workplace issues, collective workplace issues and safety.

We adopt a proactive approach in each area by training and advising our clients to ensure they are well informed of the relevant legislation and implement employment and safety strategies required to prevent or minimise workplace incidents and employment disputes.

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