Employees in Australia have their rights and obligations relating to their employment governed by a range of laws, covering areas such as minimum terms and conditions, work health and safety, discrimination and superannuation. The primary source of regulation derives from the Fair Work Act 2009 (Cth) (FW Act). It is therefore vital for any person looking to do business and employ people in Australia to have a solid understanding of Australia’s employment framework in order to minimise any risk to the ultimate success of their business.

Hierarchy of employment

The FW Act establishes a hierarchy of terms and conditions that apply to a person’s employment.

National Employment Standards (NES)

The NES provide the base 10 minimum mandatory conditions of employment for all employees covered by the FW Act. Some key conditions include:

- maximum ordinary hours of work (namely, 38 hours per week plus ‘reasonable’ additional hours);
- paid annual leave of 20 days per year for full time employees (with additional leave for shift workers);
- paid personal leave (sick or carer’s leave) of 10 days per year, unpaid carer’s leave of two days per year and unpaid family and domestic violence leave;
- unpaid parental leave of up to 12 months, with a right to apply for an additional 12 months;
- the right to refuse to work on a public holiday on reasonable grounds; and
- depending on length of service, up to 5 weeks’ notice of termination and up to 16 weeks’ redundancy pay.
Modern awards

Modern awards are industry and occupation based instruments that establish a minimum safety net of terms and conditions that supplement the NES. Modern awards deal with:

- pay conditions (including minimum wages, superannuation, penalty rates and overtime);
- types of work (for example, full-time, part-time or casual);
- consultation, representation and dispute settling;
- hours, rostering and rest breaks; and
- leave and leave loadings.

Enterprise agreements

Enterprise agreements are collective agreements made between employers and their employees under the FW Act, with employees often represented by unions as ‘bargaining representatives’. In negotiating an enterprise agreement (known as ‘bargaining’), all parties must act in good faith to reach an agreement. An enterprise agreement must pass the ‘better off overall test’ such that, on balance, employees covered by the enterprise agreement are better off overall than they would be under the applicable modern award. Once approved by the Fair Work Commission (FWC), the enterprise agreement applies to covered employees until its nominal expiry date, after which the agreement continues to apply but bargaining for a new agreement may commence and protected industrial action may be taken (subject to procedural requirements being met).

Enterprise agreements cannot exclude or undercut the minimum conditions of employment set out in the NES. A contract of employment for specific employees can operate alongside enterprise agreements, but can only supplement (not undercut) the terms and conditions of an enterprise agreement.

Employment law in Australia

Establishing a new business

Organisations seeking to set up a new business in Australia that are likely to engage employees who would be covered by a modern award may enter into a ‘Greenfields’ enterprise agreement with a relevant union representing the employees who would be covered by the agreement.
Greenfields agreements are often attractive to employers as they provide certainty for the commencement of a new business – they lock in prospective employees’ terms and conditions of employment before their employment commences. This enables a new business to proceed without a (potentially) costly and lengthy bargaining process, or facing protected industrial action.

**Acquiring an existing business**

Alternatively, a company may purchase a pre-existing business in Australia and seek to transfer employees to a new entity. This scenario may trigger the ‘transfer of business’ provisions of the FW Act if the following criteria are met:

- an employee’s employment with the old employer is terminated;
- the employee is re-employed with a new employer within three months to do substantially similar work; and
- there is a relevant connection between the two employers (such as a transfer of assets, or an outsourcing or insourcing of work).

The key consequence of a transfer of business is that an enterprise agreement that applied to the employees of the old employer is transferred to the new employer, unless the new employer obtains an order from the FWC that this not occur.

**Industrial action**

Employees are able to take lawful industrial action in the context of bargaining to support claims for an enterprise agreement (protected action). In order for the industrial action to be lawful, it must be demonstrated that:

- the nominal expiry date of any existing enterprise agreement has passed;
- the employees are genuinely trying to reach an agreement with the employer;
- the FWC has authorised a protected action ballot (a secret vote) to occur, with the majority of employees eligible to vote in the ballot voting in favour of undertaking the industrial action; and
- the employer has been given the required written notice of the proposed action.
In almost all cases, it remains unlawful for an employer to pay employees who take lawful or unlawful industrial action.

If employees take unlawful industrial action, the employer can seek an order from the FWC that the industrial action stop, not occur or not be organised, and must deduct a minimum of four hours’ pay for each day unlawful industrial action is taken. Orders can also be sought from the courts.

Termination of employment

Several claims are available to employees who are dismissed from their employment. This includes breach of contract, unfair dismissal, general protections, or discrimination under equal opportunity legislation. Potential remedies include reinstatement or compensation.

Unfair dismissal

Under the FW Act, employees who have been dismissed from their employment and:

- have worked for the employer for at least six months (in the case of employers with 15 or more employees) or 12 months (for employers with fewer than 15 employees);

- have not been dismissed as a result of a genuine redundancy; and

- are covered by a modern award, an applicable enterprise agreement or earn under a salary cap (currently A$145,400 per annum), can apply to the FWC on the basis that their dismissal was ‘harsh, unjust or unreasonable’.

General protections and workplace rights

Under the FW Act, employees cannot be dismissed or subjected to detrimental conduct (such as a demotion) because they have certain rights, entitlements or attributes. For example, an employer cannot terminate an employee because that employee has made a complaint or inquiry in relation to their employment.

Discrimination

Employers must not discriminate against employees for a prohibited reason. This broadly includes sex, marital status, sexual orientation, race, political opinion, national origin, disability, pregnancy, family responsibilities, age and religion. Such discrimination may be direct, such as
where a person treats another person less favourably, or indirect, such as where a person imposes an unreasonable condition, requirement or practice across a group of persons which has the effect of disadvantaging certain persons within the group.

In most cases, it can be a defence to a discrimination claim that the discrimination related to a characteristic that prevented the employee from fulfilling the 'inherent requirements' of their position or employment.

**Bullying**

The FW Act also contains anti-bullying laws which allow a worker who has been bullied at work to apply to the FWC for an order that the bullying stop where there is a risk that the worker will continue to be bullied at work. 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. However, it excludes reasonable management actions carried out in a reasonable manner. Whilst the FWC cannot impose a financial penalty, it is otherwise empowered to make any order that it deems fit and contravention of a stop bullying order can be subject to financial penalty (via the courts).

**Work health and safety**

Work health and safety (WHS) laws vary between the separate states and territories of Australia. The Australian Government sought to harmonise WHS laws by developing the *Work Health and Safety Act 2011* (Cth) (**WHS Act**), however not all states and territories have adopted this approach.

Regardless of which WHS law applies, 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 individuals involved in breaches can be exposed to criminal prosecution and imprisonment.

**Workers compensation**

Similarly, laws governing workers compensation arising out of work-related accidents continue to be regulated by states and territories. However, a federal workers compensation scheme
does exist whereby some employers can 'opt in' to the one system and avoid the duplication and costs of complying with the different state laws governing workers compensation. This is a benefit for businesses because it reduces set-up costs.

**Superannuation**

Australian superannuation laws require employers to contribute a minimum of 9.5% of an employee’s ‘ordinary time earnings’ to their superannuation fund, though this is expected to incrementally increase to 12% by 2025. Choice-of-fund legislation has given employees the right to elect which superannuation fund they would like employers to contribute to. Employees who do not elect a fund will automatically default to the employer’s fund.

**Long service leave**

Employees are entitled to long service leave entitlements under state and territory laws. Most schemes provide for an entitlement of 3 months’ long service leave after 15 years’ service, with some allowing this entitlement to be accessed or paid out on termination of employment after a shorter period of time. There is potential that the Australian Government will ultimately legislate federally to introduce a single national long service leave standard and eliminate state inconsistencies.

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**Key contacts**