



HERBERT  
SMITH  
FREEHILLS

# ASIA PACIFIC EMPLOYMENT LAW

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LEGAL GUIDE  
2019



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# Introduction

Welcome to the 2019 edition of Herbert Smith Freehills' Asia Employment Law Guide, which contains an updated summary of the key employment laws that businesses need to know about as they operate across the Asia Pacific region.

Since our last publication, the employment law landscape across the region has changed significantly. Managing employee misconduct, especially where the conduct has the potential to cause damage to the reputation of the business, has become a key focus for clients, and is taking up an increasing proportion of management time and resources. Investigations have become more sophisticated, and as the number of complaints increases, the need to protect privilege and manage the risk of litigation becomes more apparent. Complaints arising from historic conduct also pose their own challenges; often the relevant employees have left employment and there are no records or documents to refer to yet these complaints often raise important issues that lie at the heart of the company's culture. Our team across the region has been working with clients to resolve these complicated issues, leveraging our global disputes and regulatory investigations expertise. We can provide end-to-end support as clients work through the complaint, the investigation, the outcomes and the subsequent impact.

There has also been an increased focus on labour conditions, in particular working hours and overtime. This, coupled with continued scrutiny on the use of outsourced, fixed term and dispatch labour, has meant that employment compliance remains a key priority for businesses. Employment 'health checks' are now a routine part of many companies' internal processes, with reviews of employment contracts, handbooks, work rules and policies becoming an integral part of HR processes and not limited to where there is a proposed merger or acquisition. We have worked with clients across sectors and industries to make sure that they understand the local employment law obligations and restrictions, and are in compliance. Where there is M&A activity, we also support clients through the post-acquisition integration phase, which often includes harmonising terms and conditions and undertaking redundancy exercises.

We hope our Guide will assist you as you navigate some of these complex scenarios. The Guide provides a detailed overview of the laws of 21 jurisdictions around the region, answering the most commonly asked questions, including those relating to minimum terms and conditions, disciplinary procedures, termination of employment, discrimination and harassment, whistleblowing, occupational health and safety, data protection, out-sourcing and industrial relations. Like many of those who reach to this Guide, our team deals with HR and employment law matters across multiple jurisdictions. Providing local expertise with a regional context, the hub for our Asia Employment, Pensions and Incentives practice is Singapore, with employment lawyers on the ground in Singapore, Hong Kong, Japan, the People's Republic of China, Thailand, Indonesia and Australia. Together, our team can help clients navigate the myriad of employment issues that arise across the region. Where HSF does not have a physical presence, or has regulatory restrictions, we have developed strong relationships with trusted local firms; those firms have kindly assisted in the preparation of this Guide.

Although the information contained in this Guide is not legal advice, it should give you a steer in the right direction. The contact details of our on-the-ground employment lawyers can be found at the back of the Guide; please do reach out to your local contact for further information about the Asia practice or to answer any questions that you may have.

We look forward to working with your business across the region.



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# Australia

## Minimum terms

### What are the key sources of minimum terms of employment?

The key employment law statute is the federal *Fair Work Act 2009* (Cth) (**FW Act**).

The FW Act gives legally binding effect to industrial instruments which play a significant role in establishing employment terms and conditions in Australia, in particular:

- modern awards, which set minimum terms and conditions for employees in particular industries or occupations; and
- enterprise agreements, discussed further under “Industrial Relations” below.

Most employers are covered by the federal system, including employers who are “constitutional corporations” (eg trading, financial and foreign corporations) and Australian federal government bodies. However, some employers are not covered by the FW Act and will be regulated by State and Territory laws. This chapter deals mainly with entitlements which arise under the FW Act.

Other major pieces of employment related legislation include the following:

- *Privacy Act 1988* (Cth);
- *Sex Discrimination Act 1984* (Cth), *Racial Discrimination Act 1975* (Cth), *Disability Discrimination Act 1992* (Cth), and the *Age Discrimination Act 2004* (Cth);
- *Workplace Gender Equality Act 2012* (Cth); and
- *Superannuation Guarantee (Administration) Act 1992* (Cth).

### Are employers required to establish work rules?

No, there is no legal requirement for employers to establish work rules. However, it is common practice for employers to have company policies and employee handbooks.

### What different forms of employment exist?

Both continuous and fixed/limited term employment contracts are recognised. Employees may also be employed on a full time, part time or casual basis.

There is no statutory definition of a part time employee, but it is generally understood they work, on average, fewer than 38 hours per week. Part time employees generally have the same employment rights as full time employees. From 1 October 2018, all modern awards now contain a “casual conversion” clause allowing for employees to request conversion to permanent employment if they meet the relevant criteria. The *Fair Work Amendment (Right To Request Casual Conversion) Bill 2019* which proposes to include casual conversion rights in the National Employment Standards (thereby making the right to request conversion to permanent employment available to all casual employees not covered by a modern award) is before parliament at the time of writing.

### Does the employment contract need to be in writing and, if so, must it be in any specific language?

No, an employment contract does not need to be in writing and can be wholly or partly oral or implied by conduct. However, all new employees must be issued a Fair Work Information Statement to provide them with information about the conditions of employment.

There is no legal requirement for an employment contract to be in a particular language. However, having a written contract in English is likely to assist in efficient resolution of a dispute.

### Can employees be subject to a probationary period?

It is common for contracts to provide for an initial probationary period of three to six months, however statutory minimum notice periods will still apply. The provisions of the FW Act will generally apply during any probationary period with some exceptions.

An industrial instrument binding on an employer may contain restrictions with respect to probationary periods.

### Is there a minimum wage payable to employees?

Minimum wages in Australia, including casual loadings, are set and adjusted by the Minimum Wage Panel of the Fair Work Commission (**FWC**).

- the National Minimum Wage is AUD719.20 per week (based on a 38-hour week) or AUD18.93 per hour; and
- the casual loading for award/agreement-free employees is 25%.

The minimum wage is reviewed by the Minimum Wage Panel annually, with any adjustments taking effect from the first pay period on or after 1 July each year. The Minimum Wage Panel is known as the “Expert Panel”.

### What is the structure of remuneration?

Remuneration will consist of a base salary and may also include additional payments regulated by statute or payments in accordance with the terms of the employment contract or other contractual arrangement.

Additional payments may include:

- penalty rates when working weekends, public holidays, overtime, and late night or early morning shifts;
- allowances such as for uniforms, tools or equipment; and
- bonuses or incentives.

### How and when must wages be paid?

If an employee is covered by an industrial instrument or employment contract that provides how often wages must be paid, the employee must be paid accordingly. For employees covered by the FW Act, the pay period must be at least monthly and can be paid by one, or a combination of, the following:

- cash;
- cheque, money order or postal order, payable to the employee; and
- electronic funds transfer (ie EFT or bank transfer).

In relation to senior executive employees, the *Corporations Act 2001* (Cth) (**Corporations Act**) contains various provisions which relate to remuneration, including the termination benefits provisions discussed under “Are severance payments payable” below.

### Can employers deduct amounts from an employee’s pay?

Deductions from an employee’s pay are only permitted when authorised by the employee for the employee’s benefit, or otherwise under the provisions of a relevant enterprise agreement, modern award, FWC or court order, or statute.

### Are there restrictions on working hours?

#### Hours of work

Under the FW Act, an employer must not request or require an employee to work more than:

- 38 hours per week (for a full time employee); or
- the lesser of 38 hours and the employee’s ordinary hours of work in a week (for an employee who is not full time), plus “reasonable additional” hours.

#### Overtime

An employer may request an employee to work “reasonable additional” hours. Whether any additional hours will be reasonable depends on a range of factors, including:

- risk to health and safety;
- the employee’s personal circumstances and family responsibilities;
- the needs of the workplace;

- whether overtime is payable;
- any notice given by the employer;
- any notice given by the employee of an intention to refuse;
- the usual pattern of work in the industry;
- the nature of the employee’s role;
- whether the hours are in accordance with an averaging arrangement; and
- any other relevant matters.

Industrial instruments may also contain terms averaging hours over a specified period, with many industrial instruments specifying overtime rates that employees are entitled to be paid when they work more than the maximum weekly hours.

Employees not covered by an award or enterprise agreement may enter into an averaging of hours arrangement with their employer in writing for a specified period of up to 26 weeks.

#### Rest periods

Rules relating to rest periods may be set out in the employment contract or an applicable industrial instrument. Employers also have obligations under workplace health and safety legislation to ensure sufficient rest periods.

### Are employees entitled to any public holidays? If so, what are they?

Employees are entitled to be absent with pay on the public holidays specified in the FW Act.

An employer can still request an employee to work on a public holiday but the employee is entitled to refuse if:

- the request is not reasonable; or
- the refusal is reasonable.

The national public holidays for 2019 are as follows:

HOLIDAY	DATE
New Year’s Day	1 January
Australia Day (observed)	28 January
Good Friday	19 April
Easter Monday	22 April
ANZAC Day	25 April
Queen’s Birthday holiday	The date differs in each State and Territory
Christmas Day	25 December
Boxing Day	26 December

The FW Act also recognises days that States or Territories prescribe as a public holiday. Each State and Territory typically has two to three public holidays in addition to those specified in the FW Act.

### Are employees entitled to paid annual leave?

Under the FW Act, full time employees are entitled to four weeks' paid annual leave per year, or five weeks for continuous shift workers. Part time employees are entitled to receive paid annual leave on a pro-rata basis.

Annual leave accrues progressively throughout the year based on the employee's ordinary hours of work, and accumulates from year to year. An employer can require award/enterprise agreement-free employees to take annual leave if the requirement is reasonable. Similarly, an award or enterprise agreement may include terms requiring an employee, or allowing for an employee to be required, to take annual leave as long as the requirement is reasonable.

If an employee has an accrued annual leave entitlement of more than four weeks, and the modern award or enterprise agreement allows for it, that leave may be cashed out so long as the employee retains at least four weeks of annual leave. A provision to this effect may also be included in a modern award or enterprise agreement. An employer may direct an employee to take annual leave if the employee has accrued an excessive amount of leave (more than eight weeks) if such a requirement is reasonable.

Upon termination of employment, the employer must pay out all accrued but untaken annual leave to the employee.

### Are employees entitled to any other types of leave?

#### Sick leave and carer's leave

The FW Act provides that full time employees are entitled to up to ten days' paid personal/carer's leave per year. Personal/carer's leave can be used by all employees (except casuals) when the employee is sick or injured or when the employee needs to care for an immediate family or household member who is sick, injured or has an unexpected emergency. Personal/carer's leave accrues progressively throughout the year, and accumulates from year to year, according to the employee's ordinary hours of work. There is no cap on the amount of accrued personal leave that may be taken as carer's leave.

Upon termination of employment, any accrued but untaken paid personal/carer's leave is generally not required to be paid out.

Employees are also entitled to access two days of unpaid carer's leave, provided that the employee has exhausted their entitlement to paid carer's leave.

An employee may be required to satisfy notice and evidentiary requirements to take paid personal/carer's leave.

#### Compassionate leave

Employees are also entitled to access two days of paid compassionate leave for each permissible occasion. A permissible occasion for compassionate leave includes when an immediate family or household member gets an injury or illness that threatens their life, or if that person dies.

Notice and evidentiary requirements may apply to unpaid carer's leave and compassionate leave.

#### Parental leave

Under the FW Act, an employee who has completed at least 12 months' continuous service with an employer (or is a long-term casual employee as defined by the FW Act) is entitled to take 12 months' unpaid parental leave (for birth or adoption).

Eligible employees are entitled to apply for an extension for an additional 12 months' leave, up to a total of 24 months from the birth or placement of the child, which an employer may only refuse on reasonable business grounds. Further, the employer must not refuse the request without giving the employee a reasonable opportunity to discuss the request.

An employee is entitled to return to their former position or, if the position no longer exists, an available position for which the employee is qualified and suited and which is nearest in status and pay to the pre-parental leave position.

Eligible parents who are primary carers are entitled to 18 weeks' paid parental leave at the rate of the National Minimum Wage. This scheme is government-funded but employer-administered.

"Dad and partner pay" allows non-primary carers to up to 2 weeks' paid parental leave at the rate of the National Minimum Wage. This scheme is government-funded and administered.

#### Community service leave

The FW Act provides that an employee is entitled to be absent from work during a period of "eligible community service activity"—including associated reasonable travel and rest time—which is currently defined to mean jury service and "voluntary emergency management activity".

The employee must satisfy the notice and evidentiary requirements to access community service leave and, other than for jury service leave, the absence must be "reasonable in all the circumstances".

#### Long service leave

Each State and Territory has legislation providing leave for employees who reach certain service milestones. Entitlement to long service leave is triggered where an employee reaches the requisite amount of service to be able to take a period of long service leave or, alternatively, where employment is terminated and the employee meets the relevant State or Territory's eligibility requirements to be paid out the long service leave entitlements. More generous long service leave provisions in an applicable industrial instrument will override any State or Territory legislation.

#### Family and domestic violence leave

All employees (including part time and casual employees) are entitled to five days of unpaid family and domestic violence leave per year of employment. Unpaid family and domestic leave may be taken if the employee is experiencing violent, threatening, or other abusive behaviour by a close relative that seeks to coerce or control them, or causes them harm or fear. The leave is intended for use by the employee to deal with the impact of the family and domestic violence on themselves or a close relative where it is impractical to do so outside of their ordinary hours of work.

### Do employers and/or employees make pension and/or social security contributions?

Employers must contribute a minimum of 9.5% of an employee's ordinary time earnings to that employee's approved superannuation fund. The contribution rate is currently legislated to increase in small increments until it reaches a permanent 12% in 2025. However, the rate is not expected to increase again until 1 July 2021.

Employers are only required to contribute 9.5% of any individual employee's earnings base up to a maximum superannuation contribution base. For the 2018-19 income year, the maximum superannuation contribution base is AUD\$54,030 per quarter.

An employer is also required to provide eligible employees with a choice of superannuation fund. An employer and employee are free, subject to the terms of any applicable industrial instrument, to structure remuneration as salary plus superannuation or to take a "total employment cost" approach.

Superannuation may have to be paid on behalf of independent contractors in certain circumstances.

### Disciplinary procedures

#### What are the legal requirements regarding disciplinary procedures?

There are no legal procedures that an employer must follow when disciplining an employee. However, the Fair Work Ombudsman has published "best practice" guides on how to manage underperformance and dismissal.

#### Can an employee be suspended pending a disciplinary outcome?

An employer does not have a general right to suspend an employee without pay in the context of a disciplinary investigation. However, such a right may be provided for under the applicable employment contract or industrial instrument.

An employment contract or applicable industrial instrument may also provide a right to suspend an employee with pay. Absent any such express right, whether an employer has a right to suspend an employee with pay in the context of a disciplinary investigation will depend on all of the circumstances.

### Termination of employment

#### What are the legal requirements regarding termination of an employment contract?

Termination of employment in Australia involves termination of an employment contract. The starting point therefore is that the terms of the individual employee's employment contract must be observed.

The employment contract applies mutually so where the termination is at the initiative of the employee—ie a resignation—the employee also has an obligation to ensure compliance with the employment contract.

At common law, subject to the terms of the contract itself, there is no restriction on the reasons for which an employee may be dismissed, and indeed an employer need not have any reason at all.

However, there are a number of ways in which grounds for dismissal may be challenged under applicable legislation, including:

- that the grounds for dismissal were unfair for the purposes of the "unfair dismissal" provisions of the FW Act (subject to the employee meeting the eligibility criteria to access "unfair dismissal protections");
- that the grounds fall under the prohibited reasons for termination found in the FW Act (ie, unlawful termination); or
- that the grounds related to the employee's exercise of a "workplace right", or engagement in "industrial activity", or were unlawful discrimination in contravention of the general protection provisions of the FW Act.

An employee could also challenge a termination of employment on the basis that it was directly or indirectly discriminatory, in contravention of applicable anti-discrimination legislation (see "Discrimination and Harassment" below).

#### Is there a requirement to give notice?

Where an employee is to be dismissed with notice, the length of their notice period is the greater of:

- the notice period provided for in their employment contract or, where there is no express term, then "reasonable notice";
- any notice period provided for in an industrial instrument applicable to the employee; and
- if applicable, the appropriate minimum notice period in accordance with the National Employment Standards within the FW Act.

Minimum notice provisions do not apply to all employees covered by the FW Act. The provisions do not apply to employees employed for a specified period for a specified task or season, casual employees, trainee employees (other than apprentices) employed for a specified period, or employees prescribed in the *Fair Work Regulations 2009* (Cth). For employees who are covered by the notice provisions, the minimum requirements are as follows:

PERIOD OF CONTINUOUS SERVICE	NOTICE REQUIRED
Not more than one year	At least one week
More than one year but not more than three years	At least two weeks
More than three years but not more than five years	At least three weeks
More than five years	At least four weeks

Under the FW Act, the notice period must be increased by one week if the employee is over 45 years old and has completed at least two years' continuous service with the employer.

The FW Act permits payment in lieu of notice.

Under the FW Act and under the common law, notice of termination is not required to be given where the reason for

termination is the employee's serious misconduct. Serious misconduct can include:

- wilful or deliberate behaviour by an employee that is inconsistent with the continuation of the employment contract; or
- conduct that causes serious and imminent risk to the health or safety of a person or the reputation, viability or profitability of the employer's business.

Serious misconduct may also include the employee, in the course of the employee's employment, engaging in:

- theft;
- fraud;
- assault;
- being intoxicated at work; or
- a refusal to carry out a lawful and reasonable instruction that is consistent with the employee's employment contract.

### Are there any restrictions on the ability to terminate an employment contract?

As explained under "What are the legal requirements regarding termination of an employment contract?" above, there are certain restrictions on the ability to terminate an employment contract.

### What employment law remedies are available to employees?

There are a number of ways in which an employee can challenge the reasons for which they were dismissed from their employment.

#### Wrongful dismissal (common law)

The general rule at common law is that a court will not enforce an employment contract (ie it will not order reinstatement). Accordingly, the primary remedy in a common law wrongful dismissal claim is damages to compensate for the loss arising out of the breach of contract.

#### Unfair dismissal

The main remedies for unfair dismissal under the FW Act are reinstatement, often with back pay, and monetary compensation. Compensation must not be awarded unless the FWC is satisfied that reinstatement is inappropriate. The maximum amount of compensation that can be awarded is capped at the lesser of six months of the employee's pay prior to their dismissal or half the high income threshold (being AUD72,700 from 1 July 2018). An unfair dismissal application must be lodged within 21 days of the dismissal coming into effect.

#### Unlawful termination

Remedies available in a successful unlawful termination claim are the same as those available for an unfair dismissal claim. In addition, the court can order an employer to pay a penalty of up to AUD63,000. An unlawful termination application must be lodged within 21 days of the date of dismissal.

#### General protections

There are remedies available to an employee if there is a contravention of the general protections provisions of the FW Act.

All of the prohibitions in relation to general protections are civil remedy provisions.

A person found to have breached the provisions may be liable to a pecuniary penalty of up to AUD12,600 for an individual and AUD63,000 for a corporation and may be subject to other orders, such as an order to reinstate the employee or pay compensation (which is not subject to any cap).

### Are severance payments payable?

If the reason for the termination of employment is redundancy, most employees are entitled to receive a minimum redundancy payment in accordance with a scale in the FW Act (see below, "Are there any specific requirements applicable to redundancy?").

Employment contracts, particularly with senior executives, often provide for severance pay and termination benefits on the termination of the employment relationship. The Corporations Act impacts such contracts, and imposes requirements relating to the provision of termination benefits to directors and senior executives. Among other things, the relevant legislative provisions (which were significantly amended in 2009) generally require public and private companies to obtain prior shareholder approval before they can lawfully pay termination benefits valued in excess of 12 months of the average base salary of the employee (for the prior three years).

### Are there any specific requirements applicable to redundancy?

A termination on account of redundancy occurs where 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.

Where a redundancy is genuine, the employee is not entitled to bring an unfair dismissal claim. In order for a redundancy to be considered genuine, the employer must have complied with any obligations to consult with the employee about the proposed redundancy, and must have considered redeployment opportunities for any employee whose position has become redundant. The search for suitable positions must be conducted across all of the employer's associated entities and is not limited to the employing entity.

In the event of termination due to redundancy, eligible employees are entitled to receive the minimum redundancy payment as set out in the FW Act:

EMPLOYEE'S PERIOD OF CONTINUOUS SERVICE	REDUNDANCY PAY PERIOD
Less than one year	nil
At least one year but less than two years	Four weeks
At least two years but less than three years	Six weeks
At least three years but less than four years	Seven weeks
At least four years but less than five years	Eight weeks
At least five years but less than six years	Ten weeks

EMPLOYEE'S PERIOD OF CONTINUOUS SERVICE	REDUNDANCY PAY PERIOD
At least six years but less than seven years	11 weeks
At least seven years but less than eight years	13 weeks
At least eight years but less than nine years	14 weeks
At least nine years but less than ten years.	16 weeks
At least ten years.	12 weeks

No redundancy payments are required under the FW Act where the employer employs fewer than 15 employees or the relevant employee has less than one year's service with the employer.

A contract of employment or industrial instrument may provide for more beneficial redundancy entitlements.

#### Is an employer obliged to provide a reference?

There is no legal obligation for an employer to provide a reference to a former employee. Employers ordinarily provide a certificate of service with relevant information such as the employee's start date, cessation date, and the position they held with the employer.

If an employer does provide a reference and it is incorrect or misleading, such an action could result in liability for defamation, misleading or deceptive conduct or other losses caused by the incorrect or misleading statement.

### Discrimination and harassment

#### Are employees protected against discrimination and harassment?

Under State, Territory and federal legislation, it is unlawful for an employer to discriminate against employees or potential employees based on certain prohibited grounds. Although these grounds vary from jurisdiction to jurisdiction, they generally include:

- sex;
- marital status;
- pregnancy or potential pregnancy;
- race;
- religious belief or activity;
- political belief or activity;
- disability or impairment (physical or intellectual);
- trade union membership or industrial activity;
- employment activity;
- sexual orientation and lawful sexual activity;
- gender history, gender identity, transgender or transsexual status;
- parental or carer status or family responsibilities;

- physical features;
- breastfeeding;
- age;
- irrelevant criminal or medical record; and
- association with persons with one of the above characteristics.

Under the legislation, two types of discrimination are prohibited:

- **direct discrimination** – where a person is treated less favourably based on a prohibited ground of discrimination.
- **indirect discrimination** – where a condition, policy or requirement is imposed that a person with a specific attribute cannot comply with, but with which a substantially higher proportion of people without the attribute can comply. Exceptions may exist where the otherwise discriminatory condition, policy or requirement is an inherent requirement of the role. Harassment is considered to be a form of unlawful discrimination—when it is based on one of the unlawful grounds above—because it amounts to “less favourable treatment” or “unfavourable treatment” (depending on the jurisdiction) on that unlawful ground.

Sexual harassment is separately prohibited and defined in similar terms under State or federal equal opportunity legislation. Sexual harassment occurs when a person behaves towards another person in one of the following ways, and a reasonable person, having regard to all the circumstances, would have anticipated that the other person would be offended, humiliated or intimidated:

- makes an unwelcome sexual advance;
- makes an unwelcome request for sexual favours; or
- engages in any other unwelcome conduct of a sexual nature.

The legislation also deals with:

- **victimisation** – where an employee is treated less favourably or subjected to detriment because they have made a complaint of discrimination or harassment, or provided any information or evidence in connection with a complaint of discrimination or harassment.
- **vilification** – a public act which incites hatred towards, serious contempt for, or severe ridicule of a person or group on any ground covered by equal opportunity legislation.

An individual may be held personally liable for their unlawful conduct in relation to discrimination and harassment. However, an employer can also be found to be vicariously liable for the unlawful conduct of its employees or agents. The legislation does provide a defence to vicarious liability—if an employer has taken reasonable precautions to prevent unlawful conduct by their employees.

In Victoria, the *Equal Opportunity Act 2010* (Vic) imposes a positive duty on employers to take “reasonable and proportionate measures to eliminate discrimination, sexual harassment and victimisation as far as possible”. This duty is unique to the Victorian legislation and means that employers need to proactively and regularly assess their organisation's compliance with the legislation and institute measures to ensure ongoing compliance and improvement.

The FW Act prohibits adverse action against an employee or prospective employee because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer responsibilities, pregnancy, religion, political opinion, national extraction or social origin. There are a number of exceptions to this prohibition, including where a particular action is taken because of the inherent requirements of the position or where the action would not be unlawful under State or federal equal opportunity legislation.

## Whistle-blowing

### Are "whistle-blowers" protected?

Some disclosures of information are protected by the Corporations Act, where:

- the discloser is an officer, employee, supplier or employee of a supplier of a company;
- the disclosure is made to the Australian Securities and Investments Commission (ASIC), the company's audit team, an officer of the company or a person authorised to receive a disclosure;
- the discloser informs the person to whom the disclosure is made of their name;
- the discloser has reasonable grounds to suspect that the information indicates that the company, or an employee or officer of the company, has or may have contravened a provision of the Corporations Act, the Australian Securities and Investments Commission Act 2001 (Cth) or other relevant legislation; and
- the discloser makes the disclosure in good faith.

If the above criteria apply, the whistle-blower is protected from proceedings (including for breach of their employment contract) brought against them by reason of the disclosure. A court may order the reinstatement of an employee dismissed due to their disclosure. The whistle-blower is also protected from "victimisation" (threatening, or actually causing, a detriment to them or another person), and may be compensated for any damage suffered due to the victimisation.

The *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* was passed by both houses of Parliament on 19 February 2019. It is intended to come into effect by 1 July 2019. The law significantly changes the Corporations Act to consolidate and broaden the existing protections and remedies for corporate and financial sector whistle-blowers to include injunctions, an apology, reinstatement, exemplary damages or any other order the Court thinks appropriate. Under the new regime, the range of protected disclosures, persons to whom a disclosure can be made, and persons eligible for whistleblower protection have all been broadened. The changes also allow for eligible whistleblowers to remain anonymous, as well as imposing more stringent confidentiality obligations to protect the identity of any named whistleblower. The amendments significantly increased penalties in line with the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Bill 2018*.

Each State and Territory also provides for standalone protection for an employee (generally a public officer) who whistle-blowing against their employer or other employees. This protection is usually qualified in the way information is disclosed, who

discloses the information, what type of information is disclosed (generally public interest information) and the protections offered.

## Occupational health and safety

### What legislation regulates occupational health and safety?

Like long service leave, occupational health and safety has traditionally been regulated on a State and Territory level, with no overarching federal legislation.

However, there has been a movement towards a nationally consistent scheme of laws. Existing occupational health and safety laws continue to apply in Victoria and Western Australia, with the harmonised work health and safety laws applying in all other Australian jurisdictions.

Under both sets of laws, employers have a duty to ensure the health, safety and welfare of their employees, contractors and other persons affected by the way they conduct their business. Employers also have a duty to report incidents under both sets of laws, including the death of a person, a serious injury or illness of a person, and a dangerous incident or hazard.

Generally speaking, these duties:

- are non-delegable;
- can be owed concurrently by a number of duty holders;
- can only be prosecuted or enforced by the relevant health and safety regulator; and
- give rise to criminal liability.

Substantial penalties apply for a failure to comply with these duties.

## Data protection

### What legislation regulates data protection?

National privacy laws and health records legislation in some States and Territories govern the collection, use, disclosure and transfer of personal and health information. In some States, specific workplace surveillance or non-workplace specific device legislation has also been enacted.

The primary piece of federal legislation is the *Privacy Act 1988* (Cth) (**Privacy Act**), which protects the privacy of an individual's personal information, sensitive information and health information.

Significantly, under the Privacy Act, the handling of an employee's personal information by a private sector employer is exempt from the Act if it is directly related to the current or former employment relationship. This means that a private sector employer does not need to comply with the Australian Privacy Principles (**APPs**) in the Privacy Act when it handles current and past employee records. The employer also does not have to grant access to employee records (which would otherwise be a requirement of the APPs). However, this exemption only applies in respect of the organisation's employees, and not, for example, to information regarding job candidates.

Under the Privacy Act, personal information is defined as information or an opinion about an individual whose identity

is apparent, or can be reasonably ascertained from the information or opinion. Sensitive information is health information or genetic information about an individual, or information or an opinion about an individual's:

- racial or ethnic origin;
- political opinions;
- membership of a political association;
- philosophical beliefs;
- membership of a professional or trade association or union;
- sexual preferences or practices; or
- criminal record.

Information which is:

- anonymous;
- aggregated;
- depersonalised; or
- about companies or other entities,

will not generally be personal information.

When collecting personal information, the organisation must take reasonable steps to ensure that the individual is aware of why the information is collected, that the individual can gain access to the information, the types of third parties the information may be disclosed to, any law requiring the collection of the information, and the main consequences (if any) to the individual if the information is not provided.

Once collected, information can only be used or disclosed for the primary purpose of its collection, for related secondary purposes within the individual's reasonable expectations or with the individual's consent, subject to certain exemptions such as where the use or disclosure is necessary to lessen or prevent a serious and imminent threat to an individual's life, health or safety.

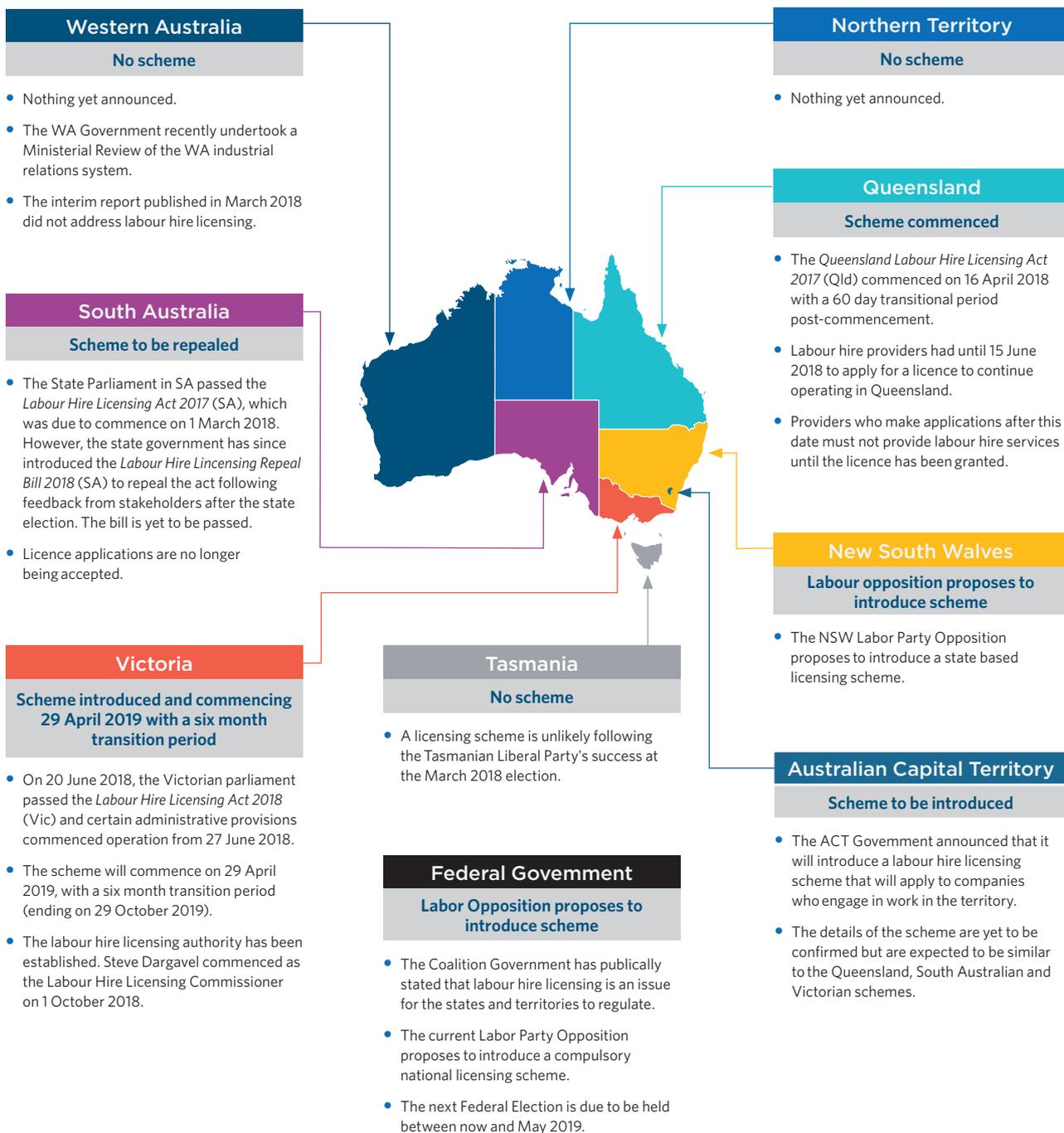
As of 22 February 2018, all entities bound by the APPs must follow a mandatory notification procedure for data breaches. This involves notifying the Office of the Australian Information Commissioner and any parties who are at risk because of the breach. For Australian companies that have a place of business in the European Union (EU), offer goods and services in the EU, or monitor the activity of EU individuals, the *General Data Protection Regulation (GDPR)* has applied since 25 May 2018. The GDPR contains additional rights for individuals and responsibilities for companies that handle customer data.

## Regulation of outsourcing and contracting

### How are outsourced/dispatch workers and independent contractors regulated?

#### Outsourcing/dispatch labour

There are several different labour hire licensing schemes across Australia. They are summarised in the below infographic.



Further, where a company outsources a function that was previously performed inhouse, specific obligations may apply in respect of any transferring employees taken on by the outsourced provider.

## Contracting

The common law distinguishes between a contract of service (an employer-employee relationship) and a contract for services (a principal-independent contractor relationship).

The courts have set out a number of indicia that must be taken into account in determining whether a person is an employee or is more accurately classified as an independent contractor:

- the intention of the parties as to the nature of the relationship;
- the degree of control that the employer can exercise over the person carrying out the work. An employee is generally instructed as to the manner in which a task is carried out, while a contractor's instructions generally only relate to the end result required;
- the mode of remuneration. An employee is generally paid hourly, daily or piece rates and a contractor is usually paid for the performance of a particular task or the achievement of a particular result, generally upon presentation of an invoice;
- the provision and maintenance of equipment. Employees' equipment is provided while contractors are required to provide and maintain their own equipment;
- the hours of work and provision for holidays. Employees' hours are set and they may receive holiday and sick leave. Independent contractors generally work their own hours and do not receive paid leave;
- the deduction of income tax. Income tax is withheld by employers from the employees' pay whereas independent contractors are generally responsible for the fulfilment of their own taxation obligations; and
- the delegation of work by the employee. Employees are not able to delegate their work, while contractors can delegate to another suitably qualified person.

The application of these indicia is a balancing exercise, in which no one factor is determinative, and all relevant factors must be considered and weighed in reaching a conclusion. Thus, even where parties may have intended to create an independent contractor relationship and express such intention in a written signed contract, if the other factors point toward an employment relationship then a court will find that the worker is in fact an employee.

For the purposes of the application of employment-related statutes, regard must be had to the specific definitions set out in the statute itself. The statute may restrict or expand the common law definition of employee or independent contractor.

## Industrial relations

### What legislation regulates industrial relations?

The FW Act is Australia's primary piece of federal industrial relations legislation and is supported by a number of regulations relevant to industrial relations.

For the construction industry, the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (**BCIIP Act**) also play a significant role in industrial relations. The Australian Building and Construction Commission (**ABCC**) is responsible for regulating industrial relations in the building industry and has power to institute proceedings for contraventions of the FW Act and BCIIP Act in the building and construction industry, including in relation to unprotected industrial action.

### What role do trade unions and collective agreements play in the workplace?

Trade unions and enterprise agreements play a significant role in the industrial relations landscape, with the FW Act regulating the bargaining process.

Enterprise agreements can be either:

- **single-enterprise** – one employer, or two or more employers that are "single interest" employers; or
- **multi-enterprise** – two or more employers that are not all "single interest" employers.

For existing enterprises, an enterprise agreement can only be made once it is approved by a majority of the employees who will be covered by the enterprise agreement.

For genuinely new enterprises, an enterprise agreement can be made with one or more unions which are entitled to represent the industrial interests of any employees who will be covered by the agreement, in relation to work to be performed under the agreement. If an agreement cannot be reached with the union(s), an employer may seek the FWC's approval of such an enterprise agreement after a six month negotiation period has passed. To approve the enterprise agreement, the FWC must be satisfied that, on an overall basis, it provides for pay and conditions that are consistent with those prevailing within the relevant industry for equivalent work.

The process of bargaining for an enterprise agreement in Australia is a complex one. An employer cannot be compelled to make an agreement but can be compelled to bargain in accordance with the good faith bargaining requirements. Once bargaining commences, an employee organisation (ie trade union) will automatically be considered a bargaining representative of an employee if the employee is a member of the organisation and the organisation is entitled to represent the industrial interests of the employee.

Employees can revoke the automatic appointment of the employee organisation, or appoint a different bargaining representative in its place, provided this is done in writing.

During bargaining, the FW Act identifies six good faith bargaining requirements that all bargaining representatives must follow:

- attending and participating in meetings at reasonable times;
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- responding to proposals made by other bargaining representatives for the agreement in a timely manner;
- giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving

reasons for the bargaining representative's responses to those proposals;

- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- recognising and bargaining with the other bargaining representatives for the agreement.

The good faith bargaining requirements do not apply in relation to enterprise agreements for genuinely new enterprises once the notified negotiation period has expired.

After a majority of employees have approved the enterprise agreement, the FWC is responsible for reviewing and approving the agreement before it can operate.

Strict content and procedural requirements apply to enterprise agreements. A failure to meet these requirements can impact approval by the FWC. Each enterprise agreement must include a nominal expiry date, a dispute settlement procedure, a flexibility term and a consultation term. Each enterprise agreement must also pass the "better off overall test", which requires employees to be "better off overall" under the terms of the enterprise agreement than they would have been under the relevant modern award. There are also terms that must not be included, such as terms that exclude the operation of the National Employment Standards and certain "unlawful" terms.

With a federal election due to occur in 2019, the Australian Labor Party (currently in opposition) has indicated its support for the expansion of industry-level bargaining where single or multi enterprise bargaining has failed. Industry-level bargaining is intended to tackle poor wage growth in low-paid industries such as childcare and cleaning by allowing bargaining by employee organisations across an industry rather than a workplace.

### What is the position regarding industrial action and dispute resolution?

The FW Act allows protected industrial action to be taken by employers and employees, and organised by unions, during bargaining for an enterprise agreement provided that certain pre-conditions are met.

Where industrial action is "protected", the individuals or the employer involved are immune from any legal action relating to it.

There are some exemptions, however, such as where the industrial action involves or is likely to involve personal injury, wilful or reckless destruction of property, or the unlawful taking, keeping or use of property.

Other "unprotected" industrial action is not immune from legal action. An employer, employee, union or even a third party (depending on the circumstances) may be able to initiate proceedings for orders to stop or prevent unprotected industrial action. In some circumstances, they may also seek damages.

"Industrial action" is defined in the FW Act to mean action of the following kinds:

- the performance of work by an employee in a manner different from that in which it is customarily performed, or the adoption of a practice in relation to work by an employee, the

result of which is a restriction or limitation on, or a delay in, the performance of work;

- a ban, limitation or restriction on the performance of work by an employee or on the acceptance or offering for work by an employee;
- a failure or refusal by employees to attend work or a failure or refusal to perform any work at all by employees who attend work; or
- the lockout of employees from their employment by the employer in response to employee industrial action—a lockout is the only type of action by an employer that falls within the definition of industrial action under the FW Act.

A picket is not considered to be industrial action.

The vast majority of disputes initiated under the FW Act progress through an informal conciliation process in an attempt to resolve the dispute before a formal hearing. If the conciliation remains unresolved, the application will be determined by a member of the FWC through a formal arbitration process.

In certain circumstances, parties may also have rights to make an application to the relevant State or Territory Supreme Court or to the Federal Court or Federal Circuit Court in relation to alleged unprotected industrial action.

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