

Employment law in Australia – an overview



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Introduction

Like all other economies in the region, Australia has been hard-hit by the COVID-19 pandemic. This included its first recession for 30 years. However, community transmission is now at a very low level, and with the implementation of a vaccination program due to commence in 2021, its economic position seems set to improve. It remains, therefore, a stable environment in which to do business.

This in-brief provides a snapshot of some of the key aspects of employment law in Australia. Our Hong Kong office coordinates employment and immigration/global mobility support across the Asia Pacific region (including Australia). This publication provides general guidance only: expert advice should be sought in relation to particular circumstances. Our Hong Kong office can source Australian advice through its links with local firms in Australia.

The employment law landscape

Australia has a common law system.

The federal Fair Work Act 2009 ('the Act') is the principal piece of legislation governing employment relationships. Each state and territory also has legislation which deals with issues such as occupational health and safety, workers' compensation, equal opportunity, anti-discrimination and long service leave. In December 2020 the federal government introduced a Bill in the Parliament which proposes a substantial number of amendments to the Act. These are not radical in character, but when enacted they will make a number of significant changes in the way in which the system operates. It is anticipated that the proposed changes will become law in the second quarter of 2021. It is important, therefore, to ensure that you obtain appropriate advice on the amended version of the Act. The Australian employment landscape tends to be employee-friendly. For example, the National Employment Standards ('NES') which came into effect in January 2010, set out ten minimum entitlements for all employees including maximum weekly hours, flexible working arrangements, leave entitlements and termination and redundancy pay. There are also minimum pay provisions, including a national minimum wage. In addition, there are Modern Awards, which are instruments which apply at the level of industry or occupation and include minimum terms and conditions (including pay) for employees covered by those instruments. They cover a large proportion of the workforce, but can be displaced by enterprise agreements which are negotiated at the level of the enterprise or business. Enterprise agreements contain negotiated terms and conditions which must result in the employees covered by them being 'better off overall' than they would be if the Modern Award applied.

Commencing employment

Structuring the employment relationship

There is no requirement for foreign employers to set up a local entity to employ local workers. Foreign employers may employ employees through a foreign company. However, that company must be registered with the Australian

Securities and Investment Commission as an overseas company. The other alternative is for an Australian subsidiary to be set up. There are advantages and disadvantages of each (many of them tax related).

Types of employment

There are a range of different forms of employment relationships: full-time, where the employee has ongoing employment and works an average of 38 hours a week or more; part-time, where the employee works regular hours of less than an average of 38 hours per week; or casual, where the employee works as and when required and receives a casual loading. Employees may work a traditional working week (e.g. 8.30am – 5.30pm) or shift work, where the employee works to set patterns of hours (e.g. afternoon shifts, day shifts, night shifts) and receives an allowance for doing so.

Some employees are engaged on a fixed-or maximum term basis, where the employment contract with the company is expressed to come to an end on a specified date, or on completion of a specific project. Such employees are entitled to receive the same pay and conditions as permanent staff, and similar benefits. They are also eligible for redundancy pay and protected against dismissal if dismissed during the life of the contract, although probably not if it expires on the agreed date.

Independent contractors are not covered by most of the provisions of the Act – although they are covered by provisions relating to adverse action on a range of proscribed grounds. The Independent Contractors Act 2006 does provide a limited measure of protection for independent contractors, and they are also covered by other labour legislation such as anti-discrimination and work health and safety laws. In some cases, individual contractors (especially those who have not been engaged through a company) may also be entitled to superannuation and to the benefit of workers' compensation legislation because of an extended definition of employee in the relevant legislation. Businesses may also be required to pay payroll tax in respect of independent contractors in some instances (essentially in the same circumstances as where contractors are entitled to workers' compensation coverage).



The employment contract

Contracts are not required to be in writing, although it is always advisable that they are. Parties are generally free to negotiate the terms and conditions of the contract, provided that they comply with the applicable minimum statutory standards. All employees are covered by the NES and most are covered by a Modern Award or enterprise agreement (depending on their industry or occupation), regardless of whether they have signed a written contract. Employers may also impose probation periods which can be whatever length the employer prefers (although they rarely exceed six months). Employees have the same entitlements during their probationary period though they are not protected against unfair dismissal during the first six months of employment (or 12 months for employers with fewer than 15 employees, which includes all overseas employees of related entities).

Key minimum employment rights

Employees receive different entitlements depending on their type of employment. Minimum entitlements for employees are prescribed by the NES and modern awards, which vary depending on the industry in which they work or the job that they do.

Leave

All employees except for casual employees are entitled to paid annual leave under the NES. Full-time and part-time employees are entitled to the equivalent of four weeks of annual leave, based on their ordinary hours of work. For example, an employee who works 20 hours per week for a year will accumulate 80 hours of annual leave. Shift workers may be entitled to up to five weeks of annual leave per year. Accrued but untaken annual leave is carried forward from year to year and must be paid out on termination of employment. In addition to paid annual leave, employees are also entitled to eight specified public holidays and additional state or territory public holidays.

All employees (except casuals) are entitled to 10 days' paid and additional unpaid sick and carers' leave under the NES (collectively, 'personal/carer's leave'). Untaken personal/carer's leave accrues from year to year, but is not

paid out on termination of employment unless this is provided for in an applicable award or agreement (which is unusual).

All employees, including casual employees, are entitled to two days of unpaid carer's leave for each occasion when a member of the employee's immediate family or household requires care or support because of a personal illness, injury, or an unexpected emergency.

All employees, including casuals, are entitled to up to two days' compassionate leave where a family member contracts an illness or suffers an injury which poses a serious threat to their life, or dies. Employees, except casuals, are entitled to payment for compassionate leave.

Employees, including casuals and employees on fixed or maximum term contracts, are entitled to up to five days' unpaid domestic violence leave each year. This leave does not, however, accumulate from year to year.

In relation to parental leave, the basic entitlement of an employee under the NES is to take unpaid leave of up to 12 months following the birth or adoption of a child, with a right to request an additional 12 months' leave. This entitlement can be shared between parents, but the maximum leave that can be taken per couple is 24 months. Under a separate statutory parental leave scheme, employees may be entitled to up to 18 weeks of paid parental leave per child at the national minimum wage – this is paid by the government. Employers may also additionally provide for paid parental leave in the employment contract or workplace policies. From 1 July 2020, eligible employees can claim paid parental leave for one set period and one flexible period, which should be agreed with their employer.

The NES also includes minimum entitlements for community service leave, which includes leave to perform jury service and to undertake voluntary emergency management activity.

Long service leave

Long service leave is usually governed by the various state and territory legislation, which differs between jurisdictions. However, the general standard long service entitlement is 2 months' leave after 10 years' service. Accrued but untaken long service leave must be paid

out on termination of employment after 10 years. Where termination occurs earlier (usually after five or seven years), pro-rata payments can be triggered depending on the reason for termination (e.g., a dismissal that is not for cause).

Working time

The maximum working hours under the NES are 38 hours per week. Employee can be required to work additional hours if they are reasonable. Employees must be paid the statutory minimum wage for all hours worked – including additional reasonable hours. However, higher overtime rates will only apply if the employee is covered by an Award or enterprise agreement or if they are provided for in the employment contract. Awards and enterprise agreements also provide for rest and meal breaks, as well as overtime rates.

Pay and social security

The Act and the Award system provide for minimum wages. These are adjusted with effect from 1 July annually. The national minimum wage is currently set at AUD\$19.84 per hour (AUD\$753.80 per 38 hour week). Casual employees covered by the national minimum wage also receive a minimum 25% casual uplift to compensate for the lack of other benefits. Similar loadings apply under Awards and enterprise agreements.

Employers are required to make quarterly contributions to a relevant superannuation fund. This contribution must be equivalent to at least 9.5% of the employee's ordinary time earnings, up to a quarterly earnings cap of AUD\$57,090 per quarter (equivalent to an annual salary of AUD\$228,360) for financial year 2020-21.

Terminating employment

Terminating employment is relatively challenging for employers because of the range of claims an employee can bring. Unfair dismissal protections under the Act apply to employees who have been employed for at least six months (or 12 months for small employers) and who are either covered by an award or enterprise agreement, or earn less than \$153,600 if they are not covered by an award or agreement.



NES redundancy payment of between four to 16 weeks' pay calculated by reference to age and length of service. Higher redundancy pay is often negotiated in enterprise agreements. In the case of collective redundancies (i.e. 15 or more redundancy dismissals) or where an employee is covered by an Award or enterprise agreement, employers must consult with employees and their representatives. Employers must also notify Centrelink, a government agency that delivers health, social and welfare payments and services in the case of a collective redundancy.

Notice

The amount of notice that is required for terminating contracts of employment may be derived from the express agreement of the parties, from the Act or industrial instrument, or from a contractual term implied by law. The NES provide for a service-related minimum of between one to four weeks, plus an additional week for employees who are over 45 years old and who have a minimum of two years' employment with the employer. For managerial employees, contractual notice commonly ranges from three to six months (although it can be up to 12), whilst contractual notice entitlements for non-managerial employees are generally around one month.

An employer may summarily dismiss an employee without providing notice or payment in lieu where the employee has committed 'serious misconduct'. This might include conduct such as theft from the employer, assaulting a colleague, or engaging in conduct that indicates an intention not to be bound by the employment contract by refusing to work.

Discrimination and harassment

Full-timers, part-timers, casual employees, probationary employees, trainees, individuals employed for fixed periods of time or specific tasks, and independent contractors are all protected by discrimination laws. Discrimination laws operate at federal level and state or territory level and generally prohibit the same types of discrimination. The specific laws however, may apply with slight differences and there are gaps in the protection that is offered between different states and territories and at

Commonwealth level. Employers should always check the Commonwealth legislation and the applicable state or territory legislation to ensure compliance with all relevant laws.

Protected attributes include race, colour, sex, sexual preference, age, medical record, criminal record, physical or mental disability, marital status, family or carer's responsibilities, trade union activity, pregnancy, religion, political views, and national or social origin. Harassment of all employees and contractors on the basis of a protected attribute is prohibited. All state and territory legislation also prohibit retaliation against an employee who has filed a complaint.

Protecting the business

Post termination non-compete, non-solicitation, non-dealing and non-poaching restrictions will be enforceable only to the extent that they are reasonably necessary to protect the employer's legitimate business interests and are not against public policy. In assessing the validity of a restrictive covenant, an Australian court will determine whether the restraints are reasonable having regard to their duration, the applicable geographic area, and the activities of the employee that the employer is seeking to control. Restraints must be carefully drafted and tailored in order to be enforceable.

Resolving disputes

Employees may bring claims against employers with or without legal representation. Workplace disputes may be resolved either with the involvement of the Fair Work Commission or employer organisations and unions.

Unfair dismissal and adverse action claims involve a compulsory mediation, at which stage most claims settle. Mediation also occurs as part of most court claims.

Some courts will require parties to file a 'genuine steps' statement to demonstrate the steps taken in a sincere attempt to resolve the dispute before commencing litigation, or require the parties to engage in some form of alternative dispute resolution mechanism including mediation, conciliation and arbitration prior to trial.

Employee representation

Employees are entitled to be represented by trade unions in certain matters or circumstances. Work health and safety legislation includes an extensive provision for employee consultation and representation. Furthermore, enterprise agreements and awards must include consultation requirements in relation to certain issues including 'major workplace changes' (such as that which may give rise to redundancy).

Business transfers

Employees are not entitled automatically to be transferred when a business is sold or outsourced. The purchaser has no obligation to offer employment or maintain any employment terms from the previous employment contracts. However, where an employee of a transferor becomes employed by a transferee within three months of the transfer of business then any enterprise agreement that previously applied to the transferring employee will become binding upon the new employer in relation to that employee.

The transfer of business provisions provide for the recognition of the employee's previous service by the new employer for certain purposes including personal leave, flexible working arrangements and parental leave. However, the new employer can refuse to recognise service for some purposes, in which case the former employer will need to pay out the employee's accrued entitlements, and (in many instances) provide redundancy pay.

Data protection

The Australian Privacy Principles ('APPs') regulate the collection and handling of personal information and apply to all private sector and not-for-profit organisations with an annual turnover exceeding A\$3 million, all private health service providers nationally, small businesses and all Australian government agencies. The APPs provide higher privacy standards when organisations are handling sensitive information though privacy laws will not apply to 'employee records' which include pay records, details of overtime hours worked, records of leave taken, or any superannuation

The legislation provides broad-ranging protection from dismissal on grounds which are procedurally or substantively unfair. Employees who have been unfairly dismissed may be entitled to remedies including reinstatement, sometimes with arrears of pay, or compensation capped (as at 1 July 2020) at the lesser of six months' pay or AUD\$76,800.

Termination of employment is prohibited on grounds of race, sex, disability, temporary absence due to illness, family or carer's responsibilities, and/or an employee's right to initiate legal proceedings or make complaints to the employer or an external body (among others). Compensation in these circumstances is generally uncapped.

On redundancy, employers must follow any consultation requirements set out in the applicable award or enterprise agreement. In addition, the employee may be entitled to an the employment of an employee) are exempt from the operation of the Privacy Act 1988 and employers are not generally required to give current or former employees access to employment records

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