LABOUR & EMPLOYMENT

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Matthew Howse, K Lesli Ligorner, Walter Ahrens, Michael D. Schlemmer, Sabine Smith-Vidal

Morgan, Lewis & Bockius LLP

Quick reference guide enabling side-by-side comparison of local insights, including legislation, protected employee categories and enforcement agencies; worker representation; checks on applicants; terms of employment; rules on foreign workers; post-employment restrictive covenants; liability for acts of employees; taxation of employees; employee-created IP; data protection; business transfers; termination of employment; dispute resolution; and recent trends.

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Contributors

Australia

Joydeep Hor
joydeep.hor@peopleculture.com.au
People + Culture Strategies

LEGISLATION AND AGENCIES

Primary and secondary legislation

What are the main statutes and regulations relating to employment?

The Fair Work Act 2009 (Cth) (the FW Act) is the principal statute governing the employment of the majority of Australian employees, although some public-sector workers sit outside this coverage. The FW Act contains the National Employment Standards, as well as provisions regulating modern awards, enterprise agreements, minimum wages and other terms and conditions of employment, and the processes for challenging terminations of employment. The FW Act operates in conjunction with other federal, state and territory legislative schemes relating to areas such as work health and safety and non-discrimination.

An individual's employment may also be regulated by applicable industrial instruments, such as a relevant modern award or enterprise agreement. Modern awards are determined and reviewed by the Fair Work Commission (the FWC) and provide a safety net of minimum pay rates and employment conditions. From 1 July 2021 , the national minimum wage was set to A$772.60 per week, equating to A$20.33 per hour. The national minimum wage is also used in the approval process conducted by the FWC for assessing whether employees are 'better off overall' under a proposed enterprise agreement.

In the absence of coverage by a modern award or enterprise agreement, contractual terms agreed to in the contract of employment and common law principles may determine the terms and conditions of employment.

Law stated - 16 February 2022

Protected employee categories

Is there any law prohibiting discrimination or harassment in employment? If so, what categories are regulated under the law?

There is a range of federal, state and territory legislation prohibiting discrimination and harassment in employment in Australia. There is no unified equality act operating at the federal level in Australia, with attributes such as sex, race, age and disability each covered by separate pieces of legislation. Coverage of discrimination based on sexual orientation, gender identity and intersex status is included in the Sex Discrimination Act 1984 (Cth).

State and territory anti-discrimination legislation tends to have a more unified coverage, with numerous protected attributes contained in one piece of legislation, for example, the Anti-Discrimination Act 1977 (NSW), but each state and territory anti-discrimination legislation varies as to the attributes covered, the conduct proscribed and the context in which they operate. Specific prohibitions on sexual harassment and disability harassment operate under federal anti-discrimination legislation, as well as under some state and territory anti-discrimination legislation.

Outside the equality arena, employees are further protected by the 'general protections' provisions in the FW Act that prohibit an employer from taking adverse action against an employee or prospective employee because of an attribute of theirs that is protected by discrimination laws.

This complex matrix of coverage can present challenges in practice in identifying the appropriate legislative regime under which to pursue a claim of employment-based discrimination or harassment.

Although the attributes covered in each legislative scheme vary, common protected attributes include race, colour, descent, national or ethnic origin, sex, sexual orientation, gender identity, intersex status, age, disability, marital or domestic status, family or carer's responsibilities, pregnancy, religion, political opinion, and social origin.

Law stated - 16 February 2022

Enforcement agencies

What are the primary government agencies or other entities responsible for the enforcement of employment statutes and regulations?

The FWC is one of the principal agencies involved in the enforcement of minimum employment standards for the majority of Australian workers. As the national workplace relations tribunal, it has a range of functions that include:

- setting minimum wages for employees;
- determining the conditions under modern awards;
- facilitating good faith bargaining; and
- making and approving enterprise agreements.

The FWC also has jurisdiction to grant remedies for unfair dismissals and, in limited circumstances, some breaches of the general protections' provisions. The FWC has oversight over industrial action taken by employees and employers, and has the power to assist in resolving a range of collective and individual workplace disputes through conciliation and arbitration.

Additionally, it has specific functions concerning workplace determinations, equal remuneration, transfers of businesses, bullying, rights of entry and the stand-down of employees.

The other key federal agency is the Fair Work Ombudsman. This is an independent statutory office tasked with ensuring compliance with Australian workplace laws. It provides information and advice to employers and employees about workplace rights and obligations, as well as assessing complaints and alleged breaches of workplace laws or statutory instruments, such as awards or agreements. In certain circumstances, the Fair Work Ombudsman itself will initiate litigation to enforce workplace laws.

Finally, the Federal Court of Australia and the Federal Circuit and Family Court of Australia (the FCFCOA) have jurisdiction regarding civil and criminal matters brought under the FW Act. The FCFOA also has a small claims jurisdiction.

Law stated - 16 February 2022

WORKER REPRESENTATION

Legal basis

Is there any legislation mandating or allowing the establishment of employees' representatives in the workplace?

Although there is no legislation establishing a framework for the operation of a works council in Australia as there is in some European countries, a comparable structure operates in some Australian workplaces in the form of consultative committees. These committees are often limited to dealing with work, health and safety in the workplace or overseeing the implementation of provisions of an enterprise agreement, where the agreement sets up such a committee.

In more general terms, the regulation of trade unions, employer associations and enterprise associations is dealt with through registration under the Fair Work (Registered Organisations) Act 2009. Oversight in this area is now split between Fair Work Commission and the Registered Organisations Commission. Obligations regarding auditing arrangements and financial disclosures by officers and related persons now apply.

Law stated - 16 February 2022

Powers of representatives

What are their powers?

One of the most significant powers that trade union representatives have is the power to enter workplaces to engage in discussions with their members and to investigate alleged breaches to enforce compliance with awards, agreements and other workplace obligations. Officials of registered organisations who hold entry permits are entitled to enter premises to fulfil their representative role under the Fair Work Act 2009 (Cth) (the FW Act) and state or territory work, health and safety laws. Permit holders can also enter premises to investigate suspected contraventions of the FW Act or instruments made under the FW Act, and to inspect documents for these purposes.

Registered trade unions are entitled to represent their members in bargaining over enterprise agreements and can become a party to such agreements. Employer associations and trade unions can initiate proceedings concerning breaches of modern awards, and trade unions can also initiate proceedings concerning breaches of the National Employment Standards, national minimum wage orders and enterprise agreements.

Law stated - 16 February 2022

BACKGROUND INFORMATION ON APPLICANTS

Background checks

Are there any restrictions or prohibitions against background checks on applicants? Does it make a difference if an employer conducts its own checks or hires a third party?

Background checks are generally permissible in the Australian employment law context to the extent that the checks are necessary to ascertain a candidate's ability to fulfil the role. Police records and working-with-children checks are generally mandated for roles that involve working with vulnerable individuals. Other justifiable circumstances include checks regarding honesty and integrity, for example, where an employer is seeking to engage an individual in a role that involves responsibility for significant financial transactions. Some legislative schemes in Australia specify the circumstances in which convictions are no longer taken into account, commonly referred to as 'spent convictions' regimes. Also, some roles in certain organisations require specific security clearances.

Background checks that do not carry some form of justification run the risk that they will be considered discriminatory or an infringement of the individual's privacy, irrespective of whether they are conducted directly by the employer or by a third party as the employer's agent.

Law stated - 16 February 2022

Medical examinations

Are there any restrictions or prohibitions against requiring a medical examination as a condition of employment?

Pre-employment medical testing can be justified where it relates to a specific industry legislative requirement (eg, working in the mining industry), the ability to perform the inherent requirements of the job or compliance with work health and safety obligations. A mandatory pre-employment medical examination or requiring an applicant to provide satisfactory answers to questions about their medical history may be justified based on the nature of the work involved. The framing of such requirements is designed to enable the employer to determine an individual's capacity to perform the inherent requirements of the job or to identify any reasonable accommodations that can be made.

Law stated - 16 February 2022

Drug and alcohol testing

Are there any restrictions or prohibitions against drug and alcohol testing of applicants?

Employers may have a designated drug and alcohol policy or a general work health and safety policy that deals with drug and alcohol testing at work. Alternatively, the terms of an enterprise agreement may specify how drug and alcohol testing can be implemented in the workplace. Where the health and safety concerns of a particular work environment warrant a strict testing regime, an employer may be justified in refusing to hire a prospective employee who does not submit to a test. There has been an ongoing debate in Australia about the efficacy of urine testing compared with saliva testing and the circumstances in which each of these types of testing may be used or relied on.

Law stated - 16 February 2022

HIRING OF EMPLOYEES

Preference and discrimination

Are there any legal requirements to give preference in hiring to, or not to discriminate against, particular people or groups of people?

There is no legislative scheme specifically requiring preference in hiring. However, employers can actively encourage applications from members of disadvantaged groups to enhance diversity. If an employer seeks to restrict recruitment to a designated group, for example, based on age or gender, the action must constitute a special measure or positive discrimination under anti-discrimination legislation. An employer can also seek an exemption from the application of specific anti-discrimination legislation so it can have a targeted hiring preference.

Federal, state and territory anti-discrimination laws and the Fair Work Commission (the FWC) prohibit discrimination based on specified attributes in recruitment, although the attributes differ under different legislative schemes. By way of example, the Fair Work Act 2009 (Cth) (the FW Act) prohibits an employer from taking adverse action against a prospective employee because of the person's race, colour, sex, sexual orientation, age, physical or mental disability, marital status, family or carer's responsibilities, pregnancy, religion, political opinion, national extraction, or social origin.

Law stated - 16 February 2022

Must there be a written employment contract? If yes, what essential terms are required to be evidenced in writing?

Employment contracts may be formed by a verbal agreement, a written agreement or a combination of both. The fact that the parties have reached an agreement may be inferred from their conduct, such as the commencement of work and the payment of wages. The extent of any documentation that is created may vary, particularly for managerial appointments that are often regulated largely by the contract of employment and can involve very detailed terms.

The terms of the employment contract must provide sufficient certainty to enable the contract to be performed. Therefore, the contract must have clear terms on the essence of the bargain between the employer and employee, that is, the work to be undertaken and the remuneration for the work undertaken. Even where there is some uncertainty on these points, the courts are unlikely to find the contract to be unenforceable as terms may be implied to reflect the intentions of the parties. Terms that are implied as a matter of law in all employment contracts include the obligation to act in good faith and with fidelity, to work with skill and diligence, and to obey lawful and reasonable directions.

Law stated - 16 February 2022

To what extent are fixed-term employment contracts permissible?

Fixed-term employment contracts are permissible under Australian law, and there is no legal maximum duration for such contracts. However, a true fixed-term contract (which is a contract that does not allow for termination with notice before its end-date) may imply a term of reasonable notice if either party attempts to bring the contract to an end before the expiry of the term (particularly if the term of the contract is so long as to be unreasonable). Alternatively, bringing a fixed-term contract to an end before its end date may constitute a breach for which the party not in breach may recover damages. To mitigate these risks, employers often utilise maximum-term contracts, which may be terminated with notice before their end date.

Law stated - 16 February 2022

Probationary period

What is the maximum probationary period permitted by law?

Probationary periods are a matter of contract and may, therefore, be of any length agreed between an employer and an employee. An employer may increase an employee's probationary period by obtaining the employee's agreement to vary the employee's employment contract (however, employers may not contract out of the notice periods required under the FW Act by extending a probationary period).

The duration of a probationary period will often reflect the duration of the relevant 'minimum employment period' for the unfair dismissal jurisdiction under the FW Act (12 months for small business employers and six months for all other employers). This is because an employee whose employment is terminated within the minimum employment period is not eligible to bring a claim for unfair dismissal.

Law stated - 16 February 2022

Classification as contractor or employee

What are the primary factors that distinguish an independent contractor from an employee?

A distinction is drawn between work done under a contract of service (an employee) and work undertaken under a contract for services (independent contractor). At common law, the distinction between employees and independent contractors is determined by applying a multi-indicia test, which looks at the totality of the employment relationship and the reality of the work arrangements.

Some of the factors which are relevant to determining whether a person is an employee or an independent contractor include:

- whether the person has the ability to subcontract all or part of their work;
- the amount of control that the person has over their own work;
- whether the person bears the financial risk over their work;
- if the person is responsible for providing their own tools and equipment; and
- who is responsible for withholding tax.

This dichotomy may be altered by specific legislative schemes, such as in the context of work health and safety

legislation, which use expanded definitions of 'worker' that impose obligations in respect of both employees and independent contractors, or the FW Act, which provides some protections for independent contractors.

Law stated - 16 February 2022

Temporary agency staffing

Is there any legislation governing temporary staffing through recruitment agencies?

Recruitment agencies that are the employers of workers placed in organisations on a temporary basis are required to comply with labour law and employment legislation concerning those employees. For example, such recruitment agencies must comply with obligations imposed under anti-discrimination legislation, and the unfair dismissal and general protections regimes of the FW Act.

Further, certain Australian states and territories (South Australia, Western Australia, Australian Capital Territory and Queensland) have legislation in place governing licensing regimes for recruitment agencies (although there is no such legislation at the Commonwealth level).

Law stated - 16 February 2022

FOREIGN WORKERS

Visas

Are there any numerical limitations on short-term visas? Are visas available for employees transferring from one corporate entity in one jurisdiction to a related entity in another jurisdiction?

The primary short-term working visa in Australia is the temporary skill shortage (TSS) (subclass 482) visa. These visas are designed to address labour shortages by bringing in skilled workers where employers cannot source an appropriately skilled Australian worker. These visa holders must pass English language requirements and health checks and demonstrate adequate professional skills and experience.

The Short-term Skilled Occupations List sets out occupations required to meet critical, short-term skills needs, and the maximum duration of the visa is two years (unless international trade obligations apply). The Medium and Long-term Strategic Skills List sets out occupations that have been assessed as being of high value to the Australian economy and align with the government's longer-term training and workforce strategies. This visa can be issued for a maximum duration of four years, with eligibility to apply for permanent residence after three years.

Law stated - 16 February 2022

Spouses

Are spouses of authorised workers entitled to work?

Partners and dependents, including children and stepchildren of TSS visa holders (or the previous subclass 457 visa holders) have full work and study rights.

Law stated - 16 February 2022

General rules

What are the rules for employing foreign workers and what are the sanctions for employing a foreign worker who does not have a right to work in the jurisdiction?

Australian employers have the onus of reviewing the visa status of any prospective employee before they can commence work. For migration purposes, 'work' is broadly defined.

Where this is not complied with, the Migration Act 1958 (Cth) (the Migration Act) stipulates that any employer that knowingly or recklessly allows or refers an illegal worker to work will have committed a criminal offence. The legislation has also introduced aggravated offences where an illegal worker is found to have been subject to exploitation.

As to the sanctions that may be imposed for employing a foreign worker that does not have a right to work, the Migration Act imposes either a term of imprisonment or a civil penalty on the employer. The employer will not be subject to a sanction if they can provide evidence that all reasonable steps were taken to verify that the foreign worker had the right to work.

Law stated - 16 February 2022

Resident labour market test

Is a labour market test required as a precursor to a short or long-term visa?

Under the TSS visa scheme, labour market testing will be mandatory, except where an international trade obligation applies. Among other requirements, the sponsoring employer will need to provide concrete evidence of attempted recruitment within at least four weeks of the four-month period immediately prior to lodging the nomination, including the advertising undertaken.

Law stated - 16 February 2022

TERMS OF EMPLOYMENT

Working hours

Are there any restrictions or limitations on working hours and may an employee opt out of such restrictions or limitations?

The National Employment Standards (NES) prevent employers from requesting or requiring an employee to work more than 38 hours per week unless the additional hours are reasonable. When determining what is 'reasonable', a court must consider the following:

- any risk to the employee's health and safety from working the additional hours;
- the employee's personal circumstances (including family responsibilities);
- the needs of the business;
- whether the employee is entitled to receive overtime payments or other compensation for, or a level of remuneration that reflects an expectation of, working additional hours;
- any notice provided by the employer of the additional hours;
- the usual patterns of work in the industry;
- the nature of the employee's role; and
- whether the additional hours are capable of being averaged under a modern award and have been averaged under the award.

Employment contracts for employees receiving a salary often stipulate that any reasonable additional hours are compensated for through an employee's total remuneration.

Law stated - 16 February 2022

Overtime pay

What categories of workers are entitled to overtime pay and how is it calculated?

Employees who are covered by a modern award or enterprise agreement may be entitled to overtime pay under the relevant industrial instrument. Overtime concerns work performed outside the ordinary hours set out in the modern award or enterprise agreement (eg, 7am to 7pm, Monday to Friday). The rate of pay for overtime will vary depending on the terms of the industrial instrument but is usually paid at a rate of time and a half for the first several hours and double time thereafter.

Employees who are not covered by a modern award or an enterprise agreement do not receive overtime unless their contract of employment provides for such payments. These employees may be required to work 'reasonable' additional hours above 38 hours per week, and their remuneration is typically expressed to incorporate payments for any 'overtime' performed.

Law stated - 16 February 2022

Can employees contractually waive the right to overtime pay?

Every modern award contains a flexibility provision that allows an employer and individual employees to agree to vary the application of various terms of the award to that employee, including, among others, overtime rates. The agreement is only valid if it is genuine (ie, without coercion or duress).

Any agreement that is entered into must result in the employee being better off overall at the time the agreement is made than the employee would have been if no individual flexibility agreement had been made. For example, an employee may wish to start and finish an hour early to attend to family commitments. Without the flexibility agreement, the employer may be liable for an hour of overtime pay and, therefore, would be unlikely to allow the arrangement. As a result of the agreement, the employee can attend to family responsibilities and is, therefore, subjectively better off.

Employers may also include what is known as a 'contractual set-off' clause which expressly states that the employee's remuneration package is in satisfaction of any overtime payments that they may be entitled to under the relevant award. However, the employer must reconcile the employee's hours of work against the pay they are receiving to ensure they are in fact receiving at least the same amount that they would receive under the relevant award.

Law stated - 16 February 2022

Vacation and holidays

Is there any legislation establishing the right to annual vacation and holidays?

Under the NES, full-time employees are entitled to four weeks of paid annual leave per year of service. If an employee is a shift worker, he or she is entitled to five weeks paid annual leave per year of service. Where there is no applicable modern award or enterprise agreement, employees qualify for the shift work entitlement if they are employed in an enterprise in which shifts are continuously rostered 24 hours a day for seven days a week, they are regularly rostered to work those shifts, and they regularly work on Sundays and public holidays. The Fair Work Commission (the FWC) has

set the threshold of an employee working at least 34 Sundays and six public holidays over a year to qualify for the additional week of annual leave.

Part-time employees are entitled to paid annual leave on a pro-rata basis. Casual employees are not entitled to paid annual leave. An employee's entitlement to paid annual leave accrues progressively during a year of service according to the employee's ordinary hours of work, and it accumulates from year to year.

Law stated - 16 February 2022

Sick leave and sick pay

Is there any legislation establishing the right to sick leave or sick pay?

Under the NES, full-time employees are entitled to 10 days' paid personal or carer's leave per year of service. Part-time employees are entitled to paid personal or carer's leave on a pro-rata basis, and casual employees are not entitled to paid personal or carer's leave. An employee's entitlement to paid personal or carer's leave accrues progressively during a year of service according to the employee's ordinary hours of work and accumulates from year to year. The NES also provides for unpaid personal or carer's leave in certain circumstances.

Law stated - 16 February 2022

Leave of absence

In what circumstances may an employee take a leave of absence? What is the maximum duration of such leave and does an employee receive pay during the leave?

Leave of absence is not a prescribed entitlement under Australian workplace legislation or industrial instruments. A period of leave of absence is usually granted at the discretion of the employer and is generally unpaid.

There is no maximum duration of such leave; however, a period of unpaid leave of absence typically does not count as 'continuous service' to calculate entitlements such as annual leave, personal or carer's leave, or redundancy pay. Although it does not count as continuous service to calculate entitlements, a period of unpaid leave of absence does not break an employee's continuity of service with the employer. Therefore, service with the employer both before and after the period of unpaid leave of absence will count when determining the accrual of these entitlements.

Law stated - 16 February 2022

Mandatory employee benefits

What employee benefits are prescribed by law?

The NES sets minimum standards of employment across 11 areas:

- maximum weekly hours;
- requests for flexible working arrangements;
- offers and requests for casual conversion
- parental leave and related entitlements;
- annual leave;
- personal carers' leave, compassionate leave and unpaid family and domestic violence leave;
- community service leave;
- long-service leave;

- public holidays;
- notice of termination and redundancy pay; and
- the Fair Work Information Statement.

The entitlements provided under the NES may be supplemented by the terms of a modern award or an enterprise agreement, and these benefits are also regarded as prescribed by law.

Law stated - 16 February 2022

Part-time and fixed-term employees

Are there any special rules relating to part-time or fixed-term employees?

Part-time employment in Australia is usually defined in modern awards or enterprise agreements as applying to a situation where an employee is engaged to work for fewer than 38 hours per week. The award or enterprise agreement may also set out the 'rules' that apply to ensure that a part-time working arrangement is effectively implemented. Part-time employees are entitled to the same benefits as full-time employees, calculated on a pro-rata basis. Under the NES, employees have a right to request flexible work arrangements in designated circumstances, such as a return from parental leave, or for other care responsibilities, including the right to request part-time work.

A fixed-term employment contract comes to an end when the specified period expires and does not involve termination of employment. Where an employee continues to work beyond the expiry date of the contract, this may be seen as implicitly agreeing to an ongoing employment relationship. If the contract is a genuine fixed-term contract with no provision for notice, and an employer seeks to bring the arrangement to an end before the expiry of the period, it may be liable for the payment of salary and other benefits for the full period. Some awards and agreements limit the use of fixed-term contracts.

Law stated - 16 February 2022

Public disclosures

Must employers publish information on pay or other details about employees or the general workforce?

The Workplace Gender Equality Act 2012 (Cth) (the WGE Act) imposes an obligation on relevant employers to publish certain information relating to gender equity. A 'relevant employer' for the WGE Act is any registered higher-education provider that is an employer, or any natural person, body or association with 100 or more employees. Relevant employers must prepare a report disclosing information on a range of gender equality indicators, including gender representation in management and pay gaps.

The Corporations Act 2001 (Cth) requires that the annual directors' report include a remuneration report for any individual that falls within the definition of 'key management personnel', being persons having authority and responsibility for planning, directing and controlling the activities of the corporation or group. This obligation includes reporting on the board's policy for determining the nature and amount of remuneration of the key management personnel, any performance conditions and any options granted. At a listed company's annual general meeting, the chair must allow a reasonable opportunity for the members as a whole to ask questions about, or make comments on, the remuneration report.

Law stated - 16 February 2022

POST-EMPLOYMENT RESTRICTIVE COVENANTS

Validity and enforceability

To what extent are post-termination covenants not to compete, solicit or deal valid and enforceable?

Restrictive covenants, or restraints of trade, will be upheld by the courts provided they go no further than is reasonable and necessary to protect an employer's 'legitimate business interests'. Such restraints include preventing a former employee from taking up work with a competitor, or soliciting or accepting work from the employer's clients.

The most common forms of post-employment restrictive covenants are non-solicitation, non-dealing and non-compete covenants. Non-solicitation covenants prevent former employees from pursuing clients, customers or suppliers they had dealings with during their employment. Non-dealing covenants prevent dealing with or doing business with anyone who has a business connection with the former employer (eg, customers, clients or employees) irrespective of whether former employees seek out the clients or the clients approach the employees for services. Non-compete covenants prohibit former employees from approaching clients, working for competitors or establishing their own businesses during the period of restraint.

Law stated - 16 February 2022

Post-employment payments

Must an employer continue to pay the former employee while they are subject to post-employment restrictive covenants?

Unless the contract of employment makes provision to the contrary, an employer is not obliged to continue to pay the former employee who is subject to a valid restraint clause.

Law stated - 16 February 2022

LIABILITY FOR ACTS OF EMPLOYEES

Extent of liability

In which circumstances may an employer be held liable for the acts or conduct of its employees?

At common law, an employer will be vicariously liable for the acts or omissions of its employees that occur in the course of the performance of their employment duties. This is replicated in a statutory form in many legislative schemes. For example, under the Sex Discrimination Act 1984 (Cth), where an employee engages in unlawful discrimination or harassment in connection with his or her employment, the employer will also be liable for the conduct unless it can establish that it took all reasonable steps to prevent the employee from engaging in the conduct.

Law stated - 16 February 2022

TAXATION OF EMPLOYEES

Applicable taxes

What employment-related taxes are prescribed by law?

Employers are required by law to deduct income tax directly from their employees' salaries each pay period under tiered

income tax rates. Employers must also meet their obligations under state and territory laws concerning payroll tax. Payroll tax is assessed on the total wages bill of an employer and arises where the total wages bill exceeds a threshold amount.

Under the Superannuation Guarantee (Administration) Act 1992 and the Superannuation Guarantee Charge Act 1992, employers must direct a percentage of an employee's wages into a specified superannuation fund to enable the employee to accumulate retirement savings. Failure to do so will lead to the imposition of a tax or charge on the employer.

A fringe benefits tax is payable for certain benefits provided by the employer to its employees beyond their wages or salary, such as allowing private use of a work vehicle, certain entertainment expenses or reimbursement of private expenses such as school fees.

Concessional tax treatment applies to employee share schemes (ESS) where employees have the opportunity to obtain shares in the company they work for at a discounted price or the option to buy shares in the company in the future. Changes to the taxation treatment of ESS put in place on 1 July 2015, defer the taxing point for some ESS interests and allow for tax concessions on ESS interests in start-up companies under certain circumstances.

Law stated - 16 February 2022

EMPLOYEE-CREATED IP

Ownership rights

Is there any legislation addressing the parties' rights with respect to employee inventions?

There is no Australian legislation dealing with the ownership of employee inventions, although it is dealt with at common law. It is an implied contractual term that an employer is entitled to the benefit of any employee inventions made in the course of employment. This implied term is consistent with the common law duty of fidelity and good faith, which assumes an employee will devote his or her full attention to his or her duties so that the employer will solely benefit from his or her service.

The question of whether an invention is developed in the course of employment is answered through careful consideration of many factors, such as the position and duties the employee is paid to perform, whether the invention was made during the employee's own time and whether it was developed using their own resources. To simplify matters, an employer will typically draft express provisions in the employment contract addressing intellectual property and the circumstances under which ownership will be assigned to it.

Law stated - 16 February 2022

Trade secrets and confidential information

Is there any legislation protecting trade secrets and other confidential business information?

There is only a very limited range of legislative provisions that specifically protect trade secrets and other confidential business information. Employees owe a common law duty to their employers that prevents them from misusing information. This duty has been codified in the Corporations Act 2001 (Cth), which specifically prohibits a director, officer or employee (or a past director, officer or employee) from improperly using the information to gain an advantage for themselves or someone else at the expense of the corporation they serve (or served).

The Copyright Act 1968 (Cth) provides that the creators of copyright material, such as employees, can maintain their 'moral rights' to be recognised as the author of those works, even where the employer or a third party has ownership in the copyright of the work.

Employers commonly protect themselves against the misuse of information by employees by including post-employment obligations in the contract of employment. This enables the employer to sue for breach of contract if an employee were to compromise trade secrets or confidential information. In some circumstances, an employer may rely on these contractual terms to seek an injunction to prevent the occurrence of a potential or further breach of confidentiality.

The courts recognise the protection of trade secrets and other confidential business information as legitimate business interests and will uphold post-employment restraints where an employer can demonstrate the reasonableness of the restraint.

Law stated - 16 February 2022

DATA PROTECTION

Rules and obligations

Is there any legislation protecting employee privacy or personnel data? If so, what are an employer's obligations under the legislation?

While there is no common law right to privacy in Australia, the collection, use and disclosure of personal information is regulated by the Privacy Act 1988 (Cth). However, the Privacy Act contains an 'employee records' exemption that relieves employers from compliance obligations regarding the collection, use or disclosure of information that forms part of an employee record, that is, where the record pertains to the employment relationship. The exemption does not apply to records relating to unsuccessful job applicants and contractors; hence, these are subject to the compliance obligations imposed by the Privacy Act.

Law stated - 16 February 2022

Do employers need to provide privacy notices or similar information notices to employees and candidates?

There is no specific need to provide privacy notices to employees and candidates in Australia.

Law stated - 16 February 2022

What data privacy rights can employees exercise against employers?

There are no specific privacy rights for employees. In many cases, rights under the Commonwealth privacy laws do not apply when it comes to employee records. Those rights will generally only apply to employee personal information if the information is used for something that is not directly related to the employment relationship between the employer and the employee.

Law stated - 16 February 2022

BUSINESS TRANSFERS

Employee protections

Is there any legislation to protect employees in the event of a business transfer?

The Fair Work Act 2009 (Cth) contains a range of provisions that protect employees in the event of a transfer of

business. For example, the Act, certain business transfers operate in such a way that an employee's period of service with their first employer counts as service, and the employee retains his or her entitlements, such as accrued annual leave (unless paid out on termination of employment with the first employer). The transfer of business provisions may also operate to transfer across the terms of an industrial instrument that applied to the employment of the employees in their previous employment.

For these protections to apply, the transferring employee must commence work within three months of the termination from the old employer, the work performed must be substantially the same, and one of the following connections must be established between the old employment and the new employer, namely:

- they are associated entities;
- there is outsourcing or insourcing of business between them; or
- there is an arrangement concerning the ownership or the assets to which the transferring work relates.

Law stated - 16 February 2022

TERMINATION OF EMPLOYMENT

Grounds for termination

May an employer dismiss an employee for any reason or must there be 'cause'? How is cause defined under the applicable statute or regulation?

An employer may dismiss an employee for any reason provided the minimum period of notice set out below is provided. However, the dismissal is open to challenge under unfair dismissal legislation if the termination cannot be substantively justified based on a 'valid reason' (eg, unsatisfactory performance, misconduct or changes to the operational requirements of the business), or was executed in a procedurally unjust manner.

Law stated - 16 February 2022

Notice

Must notice of termination be given prior to dismissal? May an employer provide pay in lieu of notice?

Minimum statutory notice periods apply under the Fair Work Act 2009 (Cth) (the FW Act), based on length of service, as follows.

	Employee's period of continuous service with the employer at the end of the day the notice is given	Notice period
1	Not more than 1 year	1 week
2	More than 1 year, but not more than 3 years	2 weeks
3	More than 3 years, but not more than 5 years	3 weeks
4	More than 5 years	4 weeks

An additional one week's notice applies where the employee is over 45 years old and has completed at least two years of continuous service with the employer.

To end employment, an employer must give the employee written notice of the last date of employment or payment in lieu of notice. Longer notice requirements may apply under an industrial instrument, contract or policy. In the absence of an express provision, a longer term may be implied requiring the provision of reasonable notice.

Law stated - 16 February 2022

In which circumstances may an employer dismiss an employee without notice or payment in lieu of notice?

Serious misconduct can warrant summary dismissal without notice or payment, such as in the case of dishonesty, fraud or other serious conduct that impacts significantly on the employer's interests, operations or reputation to amount to a repudiatory breach of contract. Summary termination in those circumstances arises as a matter of common law, although many employment contracts also specify the circumstances where summary dismissal may arise. The FW Act sets out examples of conduct that may constitute serious misconduct, such as being intoxicated at work or refusing to follow lawful and reasonable instructions.

Law stated - 16 February 2022

Severance pay

Is there any legislation establishing the right to severance pay upon termination of employment? How is severance pay calculated?

The FW Act sets out a scale of severance pay based on years of service as the minimum entitlement for all employees, including senior management. The amount of severance pay is based on the base rate of pay for ordinary hours of work and excludes bonuses and other discretionary entitlements. For service before the commencement of this regime in 2010 to be taken into account in calculating an employee's severance pay entitlements, the employee must have had an existing entitlement to severance pay under an industrial instrument, contract or policy.

Law stated - 16 February 2022

Procedure

Are there any procedural requirements for dismissing an employee?

Procedural factors are relevant in determining whether a dismissal is unfair, including whether the employee was notified of the reason for termination and allowed to respond and, in the case of unsatisfactory performance, whether the employee was made aware of performance concerns and allowed to improve. Where an employee's employment is being terminated on the ground of redundancy, and the employee is eligible to make an unfair dismissal claim, the redundancy must be 'genuine'. For a redundancy to be considered genuine, the employee's job must no longer be required to be performed by anyone because of changes to operational requirements, and an employer must have followed any consultation requirements contained in an applicable award or enterprise agreement and considered reasonable redeployment opportunities.

Law stated - 16 February 2022

Employee protections

In what circumstances are employees protected from dismissal?

In addition to the protections offered by the unfair dismissal regime, employees are protected under the FW Act from discriminatory dismissals, dismissals relating to their union activities or the assertion of workplace rights, or where the dismissal is because of a temporary absence from work owing to illness or injury.

Law stated - 16 February 2022

Mass terminations and collective dismissals

Are there special rules for mass terminations or collective dismissals?

Where a decision to terminate based on economic, technological or structural factors will affect 15 or more employees, an employer must notify the relevant trade union representatives and give notice to the government employment agency (the Department of Human Services – Centrelink). Specific consultation obligations also apply when a decision has been made by an employer to implement major changes in the workplace.

Law stated - 16 February 2022

Class and collective actions

Are class or collective actions allowed or may employees only assert labour and employment claims on an individual basis?

Generally, employment claims concerning unfair dismissal, discriminatory treatment, harassment or breach of contract are pursued as individual rather than collective actions. However, some aspects relating indirectly to the termination of an individual's employment, such as the failure to consult regarding redundancies, may be pursued as collective actions. The negotiation of terms and conditions at work under a new or varied enterprise agreement is also pursued collectively.

Law stated - 16 February 2022

Mandatory retirement age

Does the law in your jurisdiction allow employers to impose a mandatory retirement age? If so, at what age and under what limitations?

The general rule is that specifying a mandatory retirement age is not permitted in Australia under anti-discrimination laws, although some legislative schemes still allow for some forms of mandatory retirement. Specific exemptions also apply concerning certain professions, such as judges and defence force personnel.

Law stated - 16 February 2022

DISPUTE RESOLUTION

Arbitration

May the parties agree to private arbitration of employment disputes?

Generally, parties are free to agree to any dispute resolution process to resolve the dispute that has arisen between

them. Whether the parties agree to be bound by the outcome of that process depends on the nature of the agreement reached between the parties and the wording of any applicable dispute resolution clause in an enterprise agreement or employment contract. Private arbitration is not commonly used in Australia as Fair Work Commission (the FWC) is regarded as providing an appropriate arbitration service. However, the use of private arbitration may be designated as the dispute resolution method in the relevant clause of an enterprise agreement if the bargaining parties agreed on it.

Law stated - 16 February 2022

Employee waiver of rights

May an employee agree to waive statutory and contractual rights to potential employment claims?

An employee can waive his or her rights concerning an employment claim, except for workers compensation and superannuation matters. The settlement of claims is generally formalised in the form of a deed of release, with undertakings given by both parties as to the consideration for bringing those claims to an end.

Law stated - 16 February 2022

Limitation period

What are the limitation periods for bringing employment claims?

The most common types of employment claims made by employees are general protections and unfair dismissal claims. An employee must make his or her unfair dismissal application to the FWC within 21 days of the termination of employment occurring. It is at the discretion of the FWC as to whether a claim may be accepted following the lapse of this period.

In the case of general protections dismissal claims involving termination of employment, the 21-day time frame also applies. If a general protections dismissal claim fails to settle at the conciliation stage, and all reasonable attempts have been made to resolve the dispute, a certificate will be issued confirming this, and the employee will have 14 days to apply for the matter to be heard by the court unless the parties agree to the FWC arbitrating the claim.

Other employment claims, such as claims concerning entitlements or general protections claims not involving dismissal, may be made within six years of the claim or upon the entitlement arising.

Law stated - 16 February 2022

UPDATE AND TRENDS

Key developments of the past year

Are there any emerging trends or hot topics in labour and employment regulation in your jurisdiction? Are there current proposals to change the legislation?

A significant development that occurred recently was the progress of the reforms recommended in the Respect@Work Report, which was published following a 2018 government-commissioned national inquiry into sexual harassment and discrimination in Australian workplaces. On the back of this report, the federal government introduced the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, which amended the existing Commonwealth legislation to introduce a number of reforms including extending the existing anti-bullying regime to enable workers to apply for an order to stop sexual harassment in the workplace. It will be interesting to see how employees will make use of this new avenue of redress, and how the Fair Work Commission will exercise its powers in this space.

Law stated - 16 February 2022

Jurisdictions

Angola	FTL Advogados
Australia	People + Culture Strategies
Austria	Schindler Attorneys
Belgium	Van Olmen & Wynant
Brazil	Cescon, Barrieu, Flesch & Barreto Advogados
Canada	KPMG Law
China	Morgan, Lewis & Bockius LLP
Colombia	Holland & Knight LLP
Denmark	Norrbom Vinding
Egypt	Eldib Advocates
Finland	Kalliolaw Asianajotoimisto Oy
France	Morgan, Lewis & Bockius LLP
Germany	Morgan, Lewis & Bockius LLP
Ghana	Globetrotters Legal Africa
Greece	Rokas Law Firm
Hong Kong	Morgan, Lewis & Bockius LLP
Hungary	VJT & Partners Law Firm
India	AZB & Partners
Indonesia	SSEK Legal Consultants
Ireland	Arthur Cox LLP
Israel	Barnea Jaffa Lande
Italy	Zambelli & Partners
Japan	TMI Associates
Kazakhstan	Morgan, Lewis & Bockius LLP
Luxembourg	Castegnaro

Malta	GVZH Advocates
Mauritius	Orison Legal
Mexico	Morgan, Lewis & Bockius LLP
Monaco	CMS Pasquier Ciulla Marquet Pastor Svara & Gazo
Netherlands	CLINT | Littler
Nigeria	Bloomfield Law
Norway	Homble Olsby | Littler
Panama	Icaza González-Ruiz & Alemán
Philippines	SyCip Salazar Hernandez & Gatmaitan
Puerto Rico	Morgan, Lewis & Bockius LLP
Romania	Mușat & Asociaţii
Singapore	Morgan Lewis Stamford LLC
Slovenia	Law firm Šafar & Partners
Sweden	Advokatfirman Cederquist KB
Switzerland	Wenger Plattner
Taiwan	Brain Trust International Law Firm
Thailand	Pisut & Partners
Turkey	Bozoğlu Izgi Attorney Partnership
United Arab Emirates	Morgan, Lewis & Bockius LLP
United Kingdom	Morgan, Lewis & Bockius LLP
USA	Morgan, Lewis & Bockius LLP