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Employment 2022

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Australia: Law & Practice

Dianne Banks, James Pomeroy, Kaushalya Mataraaratchi and Tom Brett
Gilbert + Tobin

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AUSTRALIA

Law and Practice

Contributed by:
Dianne Banks, James Pomeroy, Kaushalya Mataraaratchi and Tom Brett
Gilbert + Tobin see p.26

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1. Introduction

1.1 Main Changes in the Past Year

High Court Decisions on Independent Contractors

In February 2022, the Australian High Court delivered two important decisions concerning independent contractors. The Court held that where a written agreement governs the relationship between the parties, generally that agreement will determine whether a person is an employee or independent contractor. The High Court's approach provides greater certainty for businesses that have properly recorded their independent contractor relationships in written contracts that accurately reflect the nature of the relationship.

The decisions are a significant departure from the approach previously applied by Australian courts which involved an extensive assessment of the actual circumstances of the working relationship between the parties (not just their contract) to determine whether or not an employment relationship exists.

Facts of the cases in brief

In Construction, Forestry, Maritime, Mining and Energy Union & Anor v Personnel Contracting Pty Ltd [2022] HCA 1 (Personnel Contracting), a labour hire worker was engaged under a written contract as a "self-employed contractor" by Construct, a labour hire company specialising in the provision of workers to the construction industry. During two engagements with Construct, the labour hire worker performed labouring on construction sites owned by a construction company, Hanssen.

In ZG Operations & Anor v Jamsek & Ors [2022] HCA 2 (Jamsek), Mr Jamsek and Mr Whitby (the "Respondents") were initially employed by ZG Lighting Pty Ltd or its predecessors (ZG) and drove its trucks. Around 1986, ZG offered to engage the Respondents as contractors but otherwise could not guarantee them work. The Respondents accepted and each established separate partnerships.

The Respondents borrowed money to purchase the trucks from ZG and were responsible for their maintenance and operational costs.

The decisions

In both cases, the High Court rejected the proposition that the parties' actual conduct after entering into their consultancy agreements was relevant to working out if an employment or contractor relationship exists, holding that subsequent conduct is only relevant to:

- identifying the contractual terms (ie, where the contract is not wholly or partly in writing); or
- challenging the enforceability of the contract (including where the contract has been varied by the conduct of the parties or is a "sham").

Importantly, the High Court confirmed that the parties' description of their relationship in the contractor agreement (ie, the parties do not intend to create an employment relationship) will not be determinative of the actual legal relationship.

Implications of the decisions

The key messages for principals when engaging contractors are:

- the terms of engagement should be comprehensively set out in a written agreement between the parties. If key aspects of the relationship are not regulated by the agreement, this could allow a contractor to challenge the contract and a court to examine the conduct of the parties;
- agreements should prescribe the methods by which they are varied (ie, by written agree-

ment of the parties, not their conduct) and provide that the written agreement constitutes the entire agreement;
- documents relating to the recruitment of contractors (such as advertisements and description of proposed services) could be examined by the Courts to ascertain the intention of the parties when entering into the contract and should be consistent with a contractor relationship; and
- to review and update their contractor agreements to ensure the legal rights, duties and obligations created between the parties are consistent with the relationship of an independent contractor and principal.

Changes to the FW Act and Sex Discrimination Laws

On 11 September 2021 the Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021 (Cth) (Respect at Work Amendment Act) took effect. The Respect at Work Amendment Act amended the FW Act in the following key ways.

- Including an entitlement to two days paid compassionate leave if the employee, or the employee's current spouse or de facto partner, has a miscarriage.
- Expressly providing that sexual harassment is a "valid reason" for dismissal of an employee in the context of the unfair dismissal provisions of the FW Act (addressed in **7. Termination of Employment**). A "valid reason" for dismissal is one of the provisions that needs to be satisfied by employers to defend an unfair dismissal claim commenced by a former employee.
- Expanding the existing anti-bullying jurisdiction to include "sexual harassment". Consequently, a "stop sexual harassment order" can now be made by the Fair Work Commission (FWC) where an individual has been "sexually harassed at work". Such orders are intended to prevent the risk of future harm and may include requiring the individuals or group to stop the specified behaviour and/or the regular monitoring of behaviours by an employer.

The Respect at Work Amendment Act also amended the Sex Discrimination Act 1984 (Cth) (SDA) and Australian Human Rights Commission Act 1986 (Cth) (AHRCA) by:

- specifying that sex-based harassment is now an express form of unlawful conduct which may include (but is not limited to) asking intrusive questions based on a person's sex, making inappropriate comments to a person based on their sex and displaying images or materials that are sexist, misogynistic or misandrist;
- broadening the concept of "worker" so that interns, apprentices, volunteers, and self-employed persons are also protected under the revised sex discrimination regime;
- providing an avenue for a civil claim to be made under the SDA if a complainant is victimised or subjected to detriment as a result of their complaint (additionally, the Australian Federal Police can also respond to egregious victimisation via criminal proceedings);
- extending the time for the Australian Human Rights Commission's President to terminate a complaint on the grounds of time from six months to 24 months;
- introducing ancillary/accessorial liability; and
- broadening the scope of the SDA to include all members of federal and state parliaments, state and territory public servants, judges and their staff.

New Western Australia WHS Laws

On 31 March 2022, Western Australia introduced its new work, health and safety (WHS) laws. The laws are contained in the Work Health and Safety

Act 2020 (WA) (the WA WHS Act) The key features of the laws are the following:

- The new laws have broad application and apply to any "person conducting a business or undertaking" (PCBU) and not just traditional "employers". A person will be considered a PCBU regardless of whether the person conducts a business or undertaking alone or with others, and regardless of whether the business or undertaking is conducted for profit or gain.
- The WA WHS Act introduces a new primary WHS duty for a PCBU to ensure, so far as is reasonably practicable, the health (physical and psychological) and safety of workers and other persons arising from the conduct of their business or undertaking. The duty requires a PCBU to eliminate risks to health and safety, so far as is reasonably practicable and, where that is not possible, to minimise those risks.
- The primary duty under the WA WHS Act includes ensuring the provision of safe working environments, plant and structures, systems of work, facilities for workers, and information, training, instruction or supervision necessary to protect persons from risks to their health and safety arising from work carried out as part of the conduct of a PCBU's business or undertaking.
- Officers of a PCBU now have a personal, non-delegable statutory WHS duty to exercise due diligence to ensure that the PCBU complies with their statutory WHS obligations. The officer duty requires the taking of reasonable steps to: keep up to date knowledge of WHS matters; gain an understanding of operational hazards and risks; ensure appropriate processes are in place for receiving, considering and responding to WHS information about incidents, hazards and risks; ensure WHS compliance processes are in place; and verify the provision and use of WHS resources and processes.
- The Act provides for three main categories of WHS offences (each with different "fault elements"), along with a new offence of industrial manslaughter. The maximum penalty for a WHS offence is 5 years imprisonment and a fine of AUD680,000 for an individual and AUD3.5 million for a body corporate. The maximum penalty for industrial manslaughter is 20 years imprisonment and a fine of AUD5 million for an individual and a fine of AUD10 million for a body corporate.

Fair Work Ombudsman Priorities

In June 2022, the Fair Work Ombudsman (FWO) published its priorities for FY23. The FWO is the Australian statutory regulator responsible for investigating workplace complaints and enforcing compliance with national system workplace laws. Each year the FWO releases a statement of priorities that indicates the investigative and enforcement actions that the FWO is likely to pursue.

The industries identified by the FWO as a priority were large corporates, fast food/cafes/restaurants, agriculture, universities and contract cleaning. The FWO has also signalled that it will be closely looking at offences relating to sham contracting and wage theft.

Reform of Public Interest Disclosure Act 2013

In November 2021, the Australian government announced its intention to reform the whistleblower laws for the public sector under the Public Interest Disclosure Act 2013.

The government flagged reforms that would make it easier for whistle-blowers to access legal advice and provide greater support during the process. Protections for whistle-blowers would also be improved. Broadly, the public sector whistle-blower laws would be brought in line

with the whistle-blower laws under the Corporations Act 2001 (Cth) (Corporations Act).

COVID-19 and the Workplace

During 2020 and 2021, in response to the COVID-19 pandemic, state and territory governments in Australia implemented a range of orders under public health legislation in response to the spread of COVID-19, many of which directly impacted on the employment relationship and how work was performed. Broadly, public health orders included:

- the obligatory wearing of face masks in certain public areas and workplaces;
- mandatory requirements to be vaccinated against COVID-19 for workers in certain industries (including health care, aged care, child care, construction and manufacturing, hospitality and retail), which included restrictions on the attendance of unvaccinated persons at certain commercial premises;
- "lockdowns" and stay at home orders requiring employees to work from home where reasonably practicable and, in some states like Victoria and certain local government areas in New South Wales (NSW) in 2021, preventing people from leaving their homes outside of a defined geographical radius and during curfew hours;
- social distancing, and limitations on essential and non-essential gatherings of people; and
- restrictions on domestic travel.

Remaining impacts

While the majority of the public health orders outlined above have been wound back and/or removed by state and territory governments, face masks are still required to be worn on public transport and by workers in certain industries (including health care).

The lasting impacts also vary across Australia's various jurisdictions. For example, in July 2022, temporary amendments were made to Victoria's occupational health and safety (OHS) legislation, enabling employers to collect, record, hold and use COVID-19 vaccination information in respect of employees, independent contractors and volunteers for the purposes of performing a duty under OHS legislation.

Further, employers must consider legal obligations under privacy legislation when collecting, recording and holding COVID-19 vaccination information.

Challenges to public health orders

Australian courts and tribunals heard challenges to public health orders and directions issued by state and territory governments, particularly those which prevented unvaccinated persons from attending their workplace. The validity of the public health orders were challenged on numerous grounds, including that public health orders were inconsistent with federal legislation and impugned human rights under international instruments.

These challenges have all been dismissed by the courts and tribunals which emphasised that the vaccination mandates were of critical importance to protecting public health and minimising the risk of transmission of COVID-19 in the workplace.

Vaccination directions: the scope of an employer's lawful and reasonable direction

Under Australian common law, employees have an implied obligation in their employment contract to comply with the lawful and reasonable directions of their employer. The COVID-19 pandemic has seen challenges by employees and some trade unions to employers directing employees to be vaccinated in order to attend work. Australia's employment tribunal, the FWC handed down numerous decisions considering

whether mandatory vaccination directions are both lawful and reasonable.

A lawful direction is one which falls within the scope of the employee's employment and which is not against any law (or does not require the employee to do something that is against any law). The question of whether the direction is also reasonable is more nuanced, being a question of fact having regard to all relevant circumstances. In Construction, Forestry, Maritime, Mining and Energy Union & Anor v Mt Arthur Coal Pty Ltd [2021] FWCFB 6059 (the Mt Arthur Coal Case), the Full Bench of the FWC (the "Full Bench") clarified that the reasonableness of a direction includes whether the employer has complied with any relevant consultation obligations in relation to a proposed direction.

Key case

In the Mt Arthur Coal Case, the Full Bench heard a challenge by a trade union and employees to a direction from their employer to receive at least one dose of a COVID-19 vaccine by a certain date or be prevented from entering their mining workplace. The Full Bench considered there were a range of circumstances which favoured a finding that the employer's direction was reasonable, including that the direction:

- was to ensure the health and safety of workers;
- had a logical and understandable basis;
- was reasonably proportionate to the risk created by COVID-19 at the time (being a period where the rate of transmission in the community was high);
- had regard to the circumstances at the workplace in question, including the fact that the workers cannot work from home and inevitably come into contact with other workers whilst at work in the mine; and
- was only implemented after the employer spent a considerable amount of time encouraging vaccination and enabling vaccination to occur at the workplace.

However, the Full Bench ultimately found that the employer's decision to introduce the vaccination direction was not reasonable because of its failure to adequately consult with its workers under applicable work health and safety laws prior to making the decision. None of the above factors were found to outweigh the failure to provide the employees with an opportunity to meaningfully engage with the relevant issues and provide feedback which the employer ought to consider before reaching its decision whether to introduce the direction.

Coming out of the pandemic

Despite the easing of public health orders in late 2021 and early 2022, cases challenging employer directions to be vaccinated have continued before the FWC:

- challenging the efficacy of vaccination as a control measure to manage the health and safety risks posed by COVID-19 (Jovcic and other v Coopers Brewery Ltd [2022] FWC 1931); and
- that an employer's direction for employees to be vaccinated was disproportionate to the risks posed by COVID-19 in the context of eased government restrictions (Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers' Union (AMWU) v ASC Pty Ltd [2022] FWC 1198).

In these cases, the FWC found that it was reasonable for the employers to adopt the vaccination directions based on a number of considerations, including:

- the reasonableness of an employer's policy proposing a vaccination mandate is to be objectively considered on its merits, and is

not contingent on government authorities declaring that worksite to be a high-risk setting;
- the easing of restrictions does not mean that vaccination is no longer relevant (particularly where the easing of restrictions in fact contributed to increased transmission in the community);
- although vaccination is not a complete defence to transmission, it is one component of a risk management strategy to mitigate against the health and safety risks posed by COVID-19 to workers;
- the policies provided for a medical exemption, meaning the direction was not an unqualified vaccination mandate; and
- the direction was on the basis of government advice.

New Australian Government: Proposed Reforms

On 21 May 2022, a new Australian government was elected with the Australian Labour Party (ALP) winning office for the first time since 2013.

The new government has promised to deliver more secure jobs, better pay and a fairer industrial relations system as part of its "Secure Jobs Plan" including reforms to:

- set benchmark entitlements for "gig economy" workers and providing greater protections against unsafe work practices;
- amend the statutory definition of a casual employee. It is expected that a casual will be defined as an employee to whom no firm advance commitment by the employer has been made as to the duration of the employee's employment or number of days or hours of work;
- ensure labour hire workers and direct employees receive like-for-like pay and entitlements;
- make wage theft a criminal offence (addressed below); and
- limit the number of fixed-term contracts an employer may offer to workers in the same role within a 24-month period.

An objective of the Secure Jobs Plan includes amending the family and domestic violence (FDVL) leave provisions of Australia's employment legislation, the Fair Work Act 2009 (Cth) (FW Act). Full-time, part-time and casual employees in Australia are currently entitled to five days of unpaid family and domestic violence leave each year.

One of the new government's first bills introduced into Parliament was the Fair Work Amendment (Paid Family and Domestic Violence Leave) Bill 2022 (Cth) (Bill). The Bill seeks to replace this existing entitlement with a right to ten days paid FDVL for all employees (including casual employees) at their full rate of pay.

Unlike other paid leave entitlements, FDVL does not accrue annually based on ordinary hours worked and can be accessed by an employee in full at the commencement of each year of employment. Employees will still be required to give notice to their employer to access FDVL and, where appropriate, provide evidence supporting their circumstance. The definition of "family and domestic violence" under the FW Act will also be extended to include violent, threatening or other abusive behaviour by a current or former intimate partner, or a member of the employee's household.

On application by the parties to an enterprise agreement or a trade union, the FWC may vary the enterprise agreement to make its FDVL provisions consistent with (or to operate effectively with) the new statutory entitlement to FDVL.

If the Bill is passed by the Australian Parliament and signed into law, the new entitlement will commence on and from:

- 1 February 2023 for all employers who are not small business employers (being an employer and its associated entitles with less than 15 employees); and
- 1 August 2023 for all small business employers.

Wage Theft Laws

On 1 July 2021, the Victorian Wage Theft Act 2020 (Vic) (Wage Theft Act) came into effect. This means that in Victoria, it became a criminal offence for an employer to:

- deliberately and dishonestly underpay employees, withhold an employee's wage, superannuation or other entitlements;
- falsify employee entitlement records to gain a financial advantage; and
- avoid keeping employee entitlement records to gain a financial advantage.

Each offence is punishable by a fine of up to AUD1,090,440 for companies or a fine of up to AUD218,088 or up to ten years' imprisonment for individuals.

Liability under the Wage Theft Act for individuals is limited to those who are officers of the employer. The definition of "officer" is broad, however, and includes roles such as directors, office holders, partners and any individuals that have significant decision-making responsibilities or who have the capacity to affect significantly the employer's financial standing.

Victoria was the second Australian state to introduce wage theft reforms, with Queensland also introducing a similar regime which came into effect in September 2020.

At a federal level, the new ALP government have signalled its intention to introduce penalties for wage theft, stating that Australia needs a national wage theft system to address this issue.

The new government is expected to consult with states and territories, unions and employers to develop nationwide wage theft laws. The new government has stated that it has no intention to water down any wage theft laws already passed by the states and, as a result, it is expected that any national scheme will mirror laws already in place in Victoria and Queensland.

More information on the new government's plan is anticipated to be released after its job submit expected to take place in September 2022.

Greenfields Enterprise Agreement Overturned

In 2020, a private sector bus operator (Busways) was the successful tenderer to operate three bus regions in the Sydney metropolitan area formerly operated by the NSW government through its agency, Transport for NSW (TfNSW). In anticipation of being awarded the regions, Busways negotiated a greenfields enterprise agreement (Greenfields EA) with the Transport Workers' Union under the FW Act. The Greenfields EA was approved by the FWC and covered the same, or essentially the same, employee classifications which were to transfer from TfNSW to Busways.

As the successful tenderer, Busways was required to offer employment to existing employees of TfNSW employed in the three regions (Transferring Employees), on the same terms as the employee's existing industrial instruments. With the approval of the Greenfields EA, Busways could employ new employees subject to the Greenfield EAs rather than the existing industrial instruments which otherwise would have applied. This created a two-tiered workforce where Busways' new employees were employed subject to less favourable terms and conditions under the Greenfields EA compared to the Transferring Employees subject to the existing industrial instruments.

The trade union representing the Transferring Employees appealed the FWC's approval of the Greenfields EA to the Full Federal Court (see Australian, Rail, Tram and Bus Industry Union v Busways Northern Beaches Pty Ltd (No 2) [2022] FCAFC 55). The issue on appeal was whether the Greenfields EA met a key condition to qualify as a greenfields agreement under the FW Act; ie, whether it related to a "genuine new enterprise" (being a business, activity, project or undertaking) that an employer is establishing or proposing to establish.

The Full Federal Court unanimously held that the Greenfields EA did not relate to a genuine new business. The Court conducted a comparison of the business carried on by TfNSW and considered that it was not materially different from to the one to be operated by Busways under its contracts with TfNSW. The fact that Busways would operate the three regions for a profit (unlike TfNSW when it operated the regions) was not sufficient to constitute a genuine new enterprise.

2. Terms of Employment

2.1 Status of Employee

Blue-Collar and White-Collar Workers

The expressions blue and white-collar workers are used in Australia to describe workers who are trade-qualified or perform manual labour and office-based workers or professionals, respectively. These expressions do not have any legal significance. A more useful distinction is that between (i) employees whose employment is subject to a modern award or enterprise agreement, and (ii) those employees who are not subject to either of these instruments.

Modern Awards

Employees in certain industries and occupations are covered by modern awards. Modern awards are made by the FWC and prescribe minimum terms and conditions of employment. Modern Awards do not apply to employees whose earnings exceed the high-income threshold (currently AUD162,000) and are subject to a guarantee of annual earnings.

Enterprise Agreements

An enterprise agreement is a collective labour agreement that is usually negotiated at an enterprise level and most often applies to one employer in respect of its employees. Like a modern award, enterprise agreements prescribe minimum terms and conditions of employment. Within Australia there are various types of employment arrangements which vary depending on the numbers of hours worked each week, the terms of engagement and the agreement between the parties. These include the following:

- Full-time employment – employees who work for 38 hours per week (plus reasonable additional hours).
- Part-time employment – employees who work less than 38 hours per week (for example, three days a week on an ongoing basis).
- Fixed- or maximum-term employment – employees who work for a temporary specified term (for example, six months) either on a full-time or a part-time basis. Termination of employment usually occurs at the end of the fixed or maximum term, but the parties may include provisions dealing with termination at any time on notice.
- Casual employment – a person who is offered and accepts employment on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work. These employees are viewed as being employed under a series of separate engagements.

2.2 Contractual Relationship

Types of Employment Contracts

Ordinarily, the key terms of an employment contract will be set out in a written agreement between the parties. However, the terms may also be concluded by a verbal agreement or a combination of both. The key terms of employment will usually include the employee's position, title, location, employment status (ie, full-time, part-time, fixed-term or casual), remuneration, incentive entitlements, obligations with respect of use and disclosure of confidential information, intellectual property rights, post-employment restraints of trade (if any, addressed in **3. Restrictive Covenants**), termination and redundancy.

Employment contracts may provide for ongoing employment or for a fixed or maximum term of employment (addressed in **2.1 Status of Employee**).

Minimum Requirements

An employment contract cannot provide for less than the legal minimum requirements set out in the National Employment Standards (NES) or collective instruments, such as modern awards or enterprise agreements.

The ten standards set out under the NES are:

- maximum weekly hours of work (38 plus reasonable additional hours);
- a right to request flexible work arrangements in certain circumstances;
- parental leave (up to 12 months' unpaid leave and the right to request a further 12 months);
- annual leave (four weeks per annum cumulative from year to year, or five weeks for some employees);
- personal/carer's leave (ten days paid plus two days of unpaid carer's leave), compassionate leave (two days' paid) and family and domestic violence leave (currently five days unpaid, but legislation is before the Australian Parliament providing for ten days paid leave);
- community service leave (unpaid leave for community service activities and jury duty (the first ten days of jury duty is paid));
- long-service leave (governed usually by state and territory legislation);
- public holidays (a paid day off (unpaid for casuals), except where reasonably requested to work);
- notice of termination and redundancy pay (up to five weeks' notice of termination and up to 16 weeks' redundancy pay, both based on length of service); and
- provision of a Fair Work Information Statement to employees (which provides information to employees on the minimum terms and conditions) and a Casual Employment Information Statement to casual employees, which provides information to casual employees on the changes to the FW Act discussed in **1.1 Main Changes in the Past Year** (Changes to the FW Act and Sex Discrimination Laws).

It is in the interests of all parties to have a written employment contract outlining the terms of the employment relationship, in order to mitigate the risk of a dispute about the terms of employment.

2.3 Working Hours

Maximum Working Hours

The NES provides that the maximum hours per week are 38 hours for a full-time employee. The hours an employee works in a week are taken to include any hours of leave or absence (whether paid or unpaid) authorised by the employer under the terms of the employee's employment or by or under a law.

Reasonable Additional Hours

The NES provides that employers cannot require employees to work more than 38 hours unless the additional hours are reasonable. Under the

NES, the following must be considered in determining whether additional hours are reasonable:

- any risk to employee health and safety;
- the employee's personal circumstances, including family responsibilities;
- the needs of the workplace or enterprise;
- whether the employee is entitled to receive overtime payments, penalty rates or other compensation for (or a level of remuneration that reflects an expectation of working) additional hours;
- any notice given by the employer to work the additional hours;
- any notice given by the employee of his or her intention to refuse to work the additional hours;
- the usual patterns of work in the industry;
- the nature of the employee's role and the employee's level of responsibility;
- whether the additional hours are in accordance with averaging provisions included in an award or agreement that is applicable to the employee or an averaging arrangement agreed to by an employer and an award/agreement-free employee; and
- any other relevant matter.

Averaging of Hours

The hours of work for employees not covered by a modern award or enterprise agreement may be averaged over a period of up to 26 weeks. Modern awards and enterprise agreements may provide that ordinary hours of work are averaged over a period greater than 26 weeks.

Overtime Payments

Not all employees are entitled to additional remuneration (known as overtime) or time off in lieu of overtime for working outside their ordinary hours or above their agreed number of hours. Employees are only entitled to overtime if it is a contractual entitlement (which is not common) or a modern award, enterprise agreement or other industrial instrument that provides for overtime.

2.4 Compensation

National Minimum Wage

The FWC annually reviews and sets the minimum wage that must be received by employees in Australia. The FWC national minimum wage order comes into effect from the first pay period on or after July 1st each year.

From 1 July 2022, the national minimum wage increased to AUD812.60 per week or AUD21.38 per hour. This is an increase of AUD40.00 (or 5.2%) to the current national minimum weekly rate. A casual loading of 25% applies to award/enterprise agreement free casual employees. Percentages for junior employees apply as set out in the miscellaneous modern award.

Two national minimum wage rates apply to employees with a disability: AUD812.60 per week or AUD21.38 per hour based on a 38-hour week (for employees with a disability whose productivity is not affected) and otherwise an assessment under the supported wage system, subject to a minimum payment fixed under the Supported Wage System Schedule.

The FWC increased minimum wage rates in modern awards by 4.6% subject to a minimum increase for adult award classifications of AUD40 a week, which is based on a 38-hour week for a full-time employee.

Modern award minimum wage rates above AUD869.60 per week will receive a 4.6% adjustment. Wage rates below AUD869.60 per week will be adjusted by AUD40 per week. The casual loading will remain at 25%.

2.5 Other Terms of Employment

Statutory Leave Entitlements

Under the NES, permanent (ie, full-time and part-time) employees are entitled to the following:

- Four weeks' paid annual leave per annum. It accrues progressively during a year and is cumulative from year to year. Some shift workers are entitled to up to five weeks' annual leave per annum.
- Ten days' paid personal/carer's leave and are entitled to take two days' unpaid carer's leave on each relevant occasion once they have exhausted their paid-leave accrual – this allows employees to take time off when they are unwell or a family member for whom they are required to care is unwell.
- Two days' paid compassionate leave – this is also known as bereavement leave and allows employees (including casual employees) to take leave when an immediate family member dies or contracts or develops a life-threatening illness or injury.
- Five days' unpaid family and domestic violence leave – this is available to allow employees (including casual employees) to deal with the impact of family and domestic violence.
- Up to 12 months' unpaid parental leave – this is available to employees (including casuals) who give birth or whose spouse or de facto partner gives birth or who adopts a child under 16 years of age. Casuals are eligible if they have been working on a regular and systematic basis for at least 12 months and there was a reasonable expectation of continuing work with the employer but for the birth or adoption of a child. Eligible employees can receive up to 18 weeks' paid parental leave from the Australian government, which is paid at the national minimum wage level.
- Long-service leave – this is paid leave provided to employees who have completed a specific period of continuous service with an employer (for example, employees in New South Wales are entitled to 8.67 weeks' long-service leave after ten years' service). Where the criterion for continuous periods service has been met, accrued and untaken long-service leave must be paid out to the employees on termination. Long-service leave is governed by state and territory legislation; therefore, long-service leave may be available to casuals in some states and territories.

Confidentiality Provisions

Contractual confidentiality obligations are commonly used in Australian employment contracts (particularly for senior employees and those with access to confidential information during the course of their employment) in addition to the statutory obligations imposed on employees under the Corporations Act. By the use of contractual confidentiality provisions, the employer may protect its business information which otherwise may not be protected by an equitable duty of confidence after termination of employment.

Limitations on the enforceability of contractual confidentiality obligations arise including where (i) the information is in the public domain other because of breach of obligation, (ii) the information is not identified with sufficient clarity, and (iii) where disclosure of the information is required by law.

Non-disparagement

Non-disparagement obligations are more commonly included in a release agreement entered into by the parties to settle disputes when the employment terminates. The obligations may be mutual or apply only to the employee depending on the commercial terms of settlement.

Non-disparagement provisions are less common in employment contracts but, if included, generally only impose obligations on the employee in practice.

There are no apparent limitations on the enforceability of non-disparagement provisions in the employment context.

Employee Liability
The common law position is that an employee is liable to indemnify their employer for torts committed by the employee during the course of their employment. However, in three Australian states (New South Wales, Tasmania and South Australia), legislation prevents the employer from seeking contribution from or enforcing an indemnity against their employees unless the employee has been involved in serious and wilful misconduct. A similar limitation applies to an employer's insurer where seeking to recover from an employee.

3. Restrictive Covenants

3.1 Non-competition Clauses

Legitimate Business Interest
Non-compete clauses and other restraints of trade are, as a general rule, contrary to public policy and void unless they are justified by special circumstances in a particular case. The party seeking to enforce the non-compete clause bears the onus of establishing its validity.

Whether any of the restrictions are enforceable will depend on whether:

- the non-compete protects a legitimate business interest (considering the factual circumstances of the company and the industry in which it operates); and
- the non-compete goes no further than is reasonably necessary to protect that legitimate business interest, having regard to the duration, geography and activities sought to be restrained by it.

Legitimate business interests that may justify non-compete clauses include protection of the following:

- confidential information;
- client or customer connections;
- trade secrets;
- staff and staff connections; or
- goodwill.

An employer is not entitled to be protected against mere competition. The legitimate business interest is assessed in the context of the factual circumstances existing at the time the restraint was entered into. The circumstances of the individual being restrained in the context of the employment will also be considered in determining the validity of the non-compete clause.

Consideration
A basic requirement of any contract is that there is consideration for the agreement reached. This principle also applies in restraint cases. However, employees are not required to receive remuneration equivalent to the period of restraint for the restraint to be enforceable, although the fact that an employee will suffer no financial loss in being restrained will be a matter considered by the court in assessing the issue of consideration.

Position in NSW
In all states of Australia except NSW, restraints cannot be read down and enforced in the circumstances that they are considered unreasonable. In NSW, the position is different because of the NSW Restraints of Trade Act 1976 (RTA). The RTA provides that a restraint is valid to the extent it is not against public policy. Where a NSW restraint is challenged, the RTA empowers the NSW Supreme Court to consider and in effect read down to "save" and effectively amend an unreasonable restraint in the context of an actual breach and impose a lesser restraint; for example, a court may find that an employee should be

restrained for three months in NSW rather than six months throughout Australia. While there are numerous cases where the RTA has been used, the outcome of each case will turn on its particular facts.

Position outside NSW

In a recent decision, United Petroleum Pty Ltd v Justin Barrie [2022] FCA 818, the Federal Court (Victorian registry) dismissed an employer's (United Petroleum) application for interlocutory relief to enforce a restrictive covenant for a three-month period. The application sought to prevent the employee from commencing employment with a business that operated in a market that United Petroleum planned to enter into (but was not, at the time of the application, operating in).

Employee representatives have touted the decision as indicative of a shift in the enforceability of restrictive covenants outside of NSW. To date, there has been no further judicial commentary to suggest this is the case. The decision does not displace established precedent where the enforceability of a restrictive covenant is based on the assessment of the restriction imposed against the legitimate business interest that the covenant claims to protect.

3.2 Non-solicitation Clauses – Enforceability/Standards

Employee Restraint

Australian courts have recognised an employer's interest in maintaining a stable workforce. This interest may be protected by a time-limited post-employment restraint prohibiting the former employee from soliciting the employer's employees. In granting an order enforcing an employee non-solicitation restraint, the court will consider its length of operation and the nature of the former employee's contact with or knowledge of the employer's employee's.

Customer Relationships

Australian courts have recognised that some customer relationships which an employee develops and/or maintains on behalf of their employer may be protected by a time-limited post-employment restraint prohibiting the former employee from soliciting those customers.

Not all customer relationships will justify the protection of a non-solicitation restraint. The courts will consider various factors, such as the employee's role and seniority and the nature of the employee's relationship with the customer (including the length and quality of the relationship, their frequency of contact and the exclusivity of their dealings compared to other employees). A non-solicitation restraint is also more likely to be enforceable when the employee's dealings with the customer took place at the customer's premises.

In other words, the non-solicitation restraint is more likely to be enforced where the employee is seen by the customer as (according to one case) the "human face" of the business.

4. Data Privacy Law

4.1 General Overview

The Privacy Act 1988 (Cth) (Privacy Act) provides the governing framework for privacy in Australia and regulates the collection, use, storage and disclosure of personal information by private sector organisations (with some exceptions) and federal government agencies (but not state agencies).

In particular, the Privacy Act sets out 13 Australian Privacy Principles (APPs) which set out specific obligations in respect of personal information. "Personal information" means information or an opinion about an identified individual, or an individual who is reasonably identifiable, wheth-

er the information or opinion is true or not and whether the information or opinion is recorded in a material form or not.

Employee Records' Exemption

The Privacy Act provides an exemption for employee records that are directly related to a current or former employment relationship in a private sector organisation.

For an employee record to be exempt from protection under the Privacy Act, three requirements must be satisfied:

- the private sector organisation must act in its capacity as a current or former employer of an individual;
- the act or practice must be directly related to a current or former employment relationship with the private sector organisation; and
- the act or practice must be directly related to an employee record (being a record of personal information relating to the employee) held by the employer organisation and relating to the individual.

This exemption does not extend to unsuccessful job applicants (since no employment relationship is formed) or contractors.

Sensitive Information

Sensitive information is subject to higher levels of protection under the Privacy Act. It comprises information or an opinion about certain characteristics of an individual, including racial or ethnic origin, political opinions, membership of a professional or trade association, criminal record, health and health status, and biometrics used for the purpose of biometric verification and identification. Sensitive information would include an employee's COVID-19 vaccination status in circumstances where the employer is not obliged by law to collect the information.

Once an employer has lawfully collected sensitive information, the employee-records exemption in the Privacy Act will mean, in most cases (if used and disclosed in a way that is directly related to the employment relationship), that the APPs do not apply to it. Best practice, however, suggests that the information should still be kept secure and up-to-date and only for as long as it is needed.

Privacy Act Reform

In late 2021, the Attorney-General's Department of the Australian Government released a Privacy Act Review Discussion Paper (the "Discussion Paper"). This is part of a comprehensive review of the Privacy Act undertaken as recommended by the Digital Platforms Inquiry which was published in July 2019.

The Discussion Paper raises possible options for reform in relation to the employee records exemption under the Privacy Act:

- Whether to remove the exemption from the Privacy Act.
- Modifying the exemption to provide greater protection for employee records. This could resolve the anomaly that the exemption does not apply when an employer collects sensitive information but does once the information has been collected.
- Whether privacy protections for employee's personal information should be dealt with in workplace relations legislation rather than the Privacy Act.

The new Australian government has committed to continuing the review.

5. Foreign Workers

5.1 Limitations on the Use of Foreign Workers

General

Various visas for the purpose of employment (as opposed to other visas which may allow work) are available to employers/foreign workers, however these are subject to stringent requirements.

Non-sponsored Visitor visa options are available to "business visitors" (subclass 600, 601 and 641) for up to three-month stays; for highly specialised, short-term, non-ongoing employment of up to three or six months the subclass 400 Temporary Work (Short Stay Specialist) visa is widely used.

Longer periods of employment generally require employer sponsorship.

Employer Sponsorship

Employers may sponsor foreign workers to obtain a visa to work lawfully in Australia for longer periods (up to two or four years under the subclass 482 Temporary Skill Shortage visa; up to five years for regional positions under the subclass 494 Skilled Employer Sponsored Regional (Provisional) visa). With few exceptions, the worker must be on a list of skilled occupations, which was split into national need-based lists in 2017, limiting visa validity and permanent residence pathways for workers in many occupations. Employers must be a registered business sponsor with the Department of Home Affairs in order to sponsor workers.

In almost all cases, among other things employers must undertake Labour Market Testing, show that positions are "genuine", and prove that foreign workers will be afforded equivalent terms and conditions to Australian workers, including salary (except where limited exemptions apply). Workers must show that they have the skills/experience/qualifications to meet the requirements of their occupation, and meet health and character requirements.

If the occupation required by the employer is not on the list of skilled occupations or other concessions are needed (eg salary, English, skills), it may be possible to enter into a Labour Agreement with the Australian government through direct negotiation. Subclass 482 and 494 temporary visas are available under a Labour Agreement, as is employer sponsored permanent residence under the Employer Nomination Scheme (subclass 186).

Permanent Residency

The Employer Nomination Scheme Visa can be used for permanent residency sponsored by an Australian business, either upon initial application through the "Direct Entry stream" or after three years working for the employer in Australia on a subclass 482 visa under the "Temporary Residence Transition stream". Generally only high-need occupations in the "medium-term stream" of the subclass 482 programme allow access to employer-sponsored permanent residence; however, all holders of subclass 494 regional visas have a pathway to permanent residence, which does not require employer sponsorship.

5.2 Registration Requirements

Under relevant employment law, licensing/registration may be required for certain occupations; eg, doctors, nurses and lawyers. If licensing/registration is required, under migration law for temporary visas (subclass 482/494) this does not need to be in place in order to obtain the visa; however, it must be held in order to undertake the employment on the visa, under condition 8607/8608 on such visas. For employer-sponsored permanent visas (subclass 186) licensing/registration is a requirement at the time of application for the visa. Skills assessments by

a relevant nominated authority may be required for both temporary and permanent residency applications, depending on many factors. Skills assessments and licensing/registration are sometimes undertaken by the same authority; however, they are different requirements.

Due to the effects of the COVID-19 pandemic, Australia's borders were largely closed for approximately two years. in November 2021 the travel exemption system ended (but vaccination requirements remained), and as of July 2022 borders are fully open, with no requirement for evidence of vaccination or pre-travel testing.

With the borders opening has come a high level of applications for employment-related visas; however, a processing backlog including applications left pending during the COVID-19 pandemic has meant significant processing delays for businesses in dire need of skills.

Before entering caretaker mode, the previous coalition government announced some concessions to allow some people sponsored in lesser-need occupations but who remained in Australia during the COVID-19 pandemic to have a pathway to employer-sponsored permanent residency; this pathway commenced in July 2022.

The new ALP government has announced it will make improving processing times a priority, and that it will focus on offshore applicants for skilled permanent visas in the future. Details of any changes are yet to be formalised as at the time of writing (September 2022).

6. Collective Relations

6.1 Status/Role of Unions

Trade unions, enterprise associations (an association of member employees performing work in the same enterprise) and employer associations are legally recognised entities which are required to be registered with the Registered Organisations Commission. This Registered Organisations Commission and the FWC have split responsibilities for the regulation of these unions and associations.

In addition to the unions' key roles of acting as the bargaining representatives for employees in relation to enterprise agreements, as set out below, trade unions and enterprise associations have broad rights to enter workplaces to:

- engage in discussion with workers who are entitled to be represented by that union and who are willing to meet with them; or
- investigate suspected breaches of modern awards, enterprise agreements or other workplace-related laws (such as work, health and safety laws).

Unions commonly act as advocates for employees in disputes with their employer and have standing under the FW Act to initiate proceedings on behalf of employees with respect to certain workplace-related laws.

6.2 Employee Representative Bodies

There is no broad legislative framework for employee representative bodies or committees in Australia. There are, however, state and territory laws relating to work health and safety which provide for health and safety committees and representatives. The main functions of such committees are to co-operate with the employer and other relevant parties in developing and carrying out measures to improve the safety of workers.

Enterprise agreements (addressed in **6.3 Collective Bargaining Agreements**) may also provide a framework for the structure and rights of employee representative committees, which are

generally limited to matters of work health and safety or major changes in the workplace.

6.3 Collective Bargaining Agreements

General

Employers and employees may negotiate collective agreements, referred to as "enterprise bargaining agreements", based on terms and conditions that must be better overall when compared to the minimums under applicable modern awards.

Modern awards set the minimum terms and conditions across most industries and occupations in Australia.

Mandatory Terms

The mandatory terms that must be included in enterprise agreements relate to the coverage and term of the agreement, consultation, flexibility and dispute resolution.

Greenfields Agreement

For genuinely new businesses, activities, projects or undertakings, employers and unions can bargain directly for a "greenfields agreement", without employees being involved or employed by the new enterprise. As noted in **1.1 Main Changes in the Past Year**, the Full Federal Court of Australia held that these types of agreements were only available to "truly authentic or really new" enterprises.

Processes for Making an Enterprise Agreement

When bargaining for an enterprise agreement, the employer and employees may nominate a bargaining representative. Unions are the default representative for its member employees, unless revoked or another appointment is made by the employee. Bargaining must be in accordance with the prescribed good-faith bargaining requirements, which includes attending to and participating in meetings and genuinely considering a bargaining representative's proposals. However, good-faith bargaining requirements do not require parties to make concessions or reach an agreement on terms to be included in the agreement.

Employees are able to take protected industrial action by striking or imposing partial work or overtime bans. However, protected industrial action may only be taken by employees when they are negotiating a new enterprise agreement and subject to certain notice and procedural requirements being satisfied. Employers may take responsive protected industrial action by locking out employees.

Once an enterprise agreement is made by the employer and employees (by a majority of employees voting in favour of the agreement), the employer must then make an application to the FWC for its approval. Once approved by the FWC, it will operate for its nominated term for a maximum period of four years and will continue to apply to the employer and employees even after its nominated expiry date, unless it is replaced or terminated.

There are also certain circumstances involving the acquisition of a business and the transfer of employees where enterprise agreements can transfer to the new employer and continue to apply to the transferring employees and the new employer, until replaced or terminated. In some instances, new employees of the new employer can also be covered by the transferring enterprise agreement. Applications can be made to the FWC for orders in relation to transfer of enterprise agreements, such as an order that the transferring enterprise agreement will not cover transferring employees.

7. Termination of Employment

7.1 Grounds for Termination

General

An employer may dismiss an employee by giving him or her the required period of notice without having a reason, or without notice for serious misconduct. Employees are able to challenge their termination in certain circumstances, as set out below.

Procedure

Different procedures apply or are recommended, depending on the reason for termination and the employee's eligibility to bring a claim. Where an employee is able to bring an unfair dismissal claim, the employer must have a valid reason for the termination and follow a fair process (which is, to an extent, prescribed by the FW Act). Where the reason for the dismissal is the employee's capacity, conduct (other than serious misconduct) or performance, this will generally involve a series of discussions with the employee and the giving of warnings.

Additional requirements apply where the termination is due to redundancy (which arises where the employer no longer requires anyone to perform the employee's job). For employees who are covered by an award or enterprise agreement, consultation must take place in accordance with the consultation provisions of the award or enterprise agreement. To avoid an unfair dismissal claim, redeployment to an available and suitable role within the employer's business or the business of an associated entity must occur (which can include related overseas entities in certain circumstances).

Where 15 or more employees are to be made redundant, the employer has an additional obligation to notify the government employment agency and the union for any employees who are union members.

7.2 Notice Periods/Severance

Notice

Unless termination without notice is justified, the FW Act requires that employers give employees a specified minimum period of notice in writing for the termination to be effective. The required minimum notice is a sliding scale ranging from one week (for employees with up to one year's continuous service) up to four weeks (for employees with more than five years' continuous service). An additional one week's notice is required for employees who are over 45 years of age and have more than two years' continuous service.

Longer periods of notice can also be specified in enterprise agreements and contracts of employment. An employer should give the longest period of notice legally required.

Redundancy Pay

Redundancy pay (or severance) is payable in addition to minimum period for notice of termination in the FW Act. The FW Act sets out a minimum redundancy payment scale based on years of service. To qualify for a payment, employees must have at least one year's continuous service. The minimum payment is four weeks' pay for employees with at least one year's service and the highest payment is 16 weeks' pay for employees with nine years' but less than ten years' service. After ten years' service, the required redundancy payment is 12 weeks' pay. "Pay" is calculated by reference to base pay for ordinary hours and excludes bonuses. Employees employed by a business with less than 15 employees are not entitled to redundancy pay under the FW Act.

It is possible that an enterprise agreement, employment contract or a legally binding company policy may provide for more generous redundancy benefits.

Consultation obligations must be met with award and enterprise agreement employees (see **7.1 Grounds for Termination**).

There is no legal requirement for external advice or authorisation; however, it is recommended that employers obtain legal advice before proceeding with redundancies.

7.3 Dismissal for (Serious) Cause (Summary Dismissal)

Serious Misconduct

Termination without notice is permitted where the employee commits an act of serious misconduct. Serious misconduct is a breach of contract by the employee that is serious enough to warrant immediate termination because it demonstrates an intention by the employee not to be bound by his or her employment contract. Employment contracts commonly include examples of when termination for serious misconduct will be justified, including but not limited to where the employee is charged with a criminal offence. The Fair Work Regulations 2009 (Cth) also have a definition of serious misconduct which includes examples of theft, fraud, assault, being intoxicated at work and refusing to carry out a lawful and reasonable instruction.

Process

For employees who are able to bring an unfair dismissal claim, they must be given details of the allegations against them, an opportunity to explain their conduct and be notified of the reason for termination. Procedurally, an unreasonable refusal by the employer to let the employee have a support person at any discussions related to the dismissal is a matter taken into account in an unfair dismissal claim context.

7.4 Termination Agreements

Deeds of release or settlement/termination agreements are permitted in Australia. They can be used at the time of termination and are standard in the settlement of claims. They are most commonly in the form of a deed of release. The deed must be in writing, signed, witnessed (if executed by an individual outside Victoria) and stated to be a deed. It will only become effective on the date the parties indicate (by words and by the conduct and the circumstances surrounding the execution of the deed) that they intend to be bound.

Releases are not able to cover statutory workers' compensation claims (which relate to workplace injuries) or claims under superannuation legislation (which is a compulsory retirement-funding scheme).

7.5 Protected Employees

Unfair Dismissal

Employees who are covered by a modern award or enterprise agreement or whose earnings are less than the high-income threshold under the FW Act (currently AUD162,000) are able to bring an unfair dismissal claim. Earnings include base salary, salary sacrificed amounts and agreed value of non-monetary benefits. The high-income threshold is indexed annually. Service thresholds also apply; six months for an employee of a business with 15 or more employees and one year for employees of a business with fewer than 15 employees.

Prohibited Reasons

The FW Act also contains prohibitions on termination for specified reasons. These include where the reason is because of a workplace right (such as a right under the FW Act or a right to make a complaint or inquiry in relation to an employee's employment), discriminatory grounds (including race, sex, age) or an employee's temporary absence through illness or injury or engagement in industrial action. To avoid an inference of the above unlawful reasons being found to be the reason for termination, it is recommended that employees are notified, in writing, of the lawful

reason(s) for termination, such as due to redundancy or because of performance or conduct concerns (also addressed in **8.1 Wrongful Dismissal Claims**).

8. Employment Disputes

8.1 Wrongful Dismissal Claims

Breach of Contract

A breach of contract claim is available where an employee alleges that his or her dismissal constitutes a breach of an express or implied term of his or her contract. A breach of contract claim may be commenced in the state, territory or federal courts of the jurisdiction most closely connected to the claim (depending on the value of the claim and the contents of the allegation of breach). Since the commencement of the whistle-blower provisions under the Corporations Act, claims under the victimisation provisions of the Corporations Act are can also be made in respect of dismissals (and other forms of detriment suffered by employees).

The successful party in breach of contract claims will ordinarily be awarded their costs of the proceedings on an indemnity or party/party basis. Because of the cost implications, breach of contract claims are generally commenced for claims seeking a substantial award of damages or are attached to a FW Act claim (such as a general protections claim) in an attempt to avoid an adverse costs order if unsuccessful.

General Protections

General protection claims under the FW Act that involve dismissal are also commenced before the FWC. If they remain unresolved after a mandatory conciliation conference, a certificate will be issued by the FWC. An employee can then elect to continue his or her claim before the Federal Court or the Federal Circuit Court of Australia or, if both parties consent, the FWC may also arbitrate the matter. This type of claim usually involves an allegation that an employer has taken adverse action against an employee, such as by dismissing him or her because the employee has a workplace right, has exercised that workplace right or proposes to exercise that workplace right.

A "workplace right" includes:

- complaints or inquiries about the employee's employment (eg, a bullying or harassment complaint about an employee's manager);
- the employee being able to participate in a proceeding under a workplace instrument or law (eg, making a request for flexible working arrangements); or
- the employee having the benefit and responsibility under a workplace law (eg, the role of a bargaining representative or a health and safety officer).

A reverse onus is placed on employers in these claims. An employer is required to establish that the alleged adverse action (such as demotion or dismissal) taken against the employee was not made by reason of the employee's exercise of a workplace right. There is no minimum period of employment or maximum income threshold for a general protections claim.

The remedies available include reinstatement and payment of compensation (which is not capped). Penalties can also be imposed by the court against the employer and individuals who were knowingly involved in the breach of the general protections provisions of the FW Act. The current maximum penalties are AUD66,600 per breach for corporations and AUD13,320 per breach for individuals.

Whistle-Blower Laws

An eligible whistle-blower includes (among other classes of persons) a current or former employ-

ee or contractor of a company that has made a complaint to an eligible recipient of that company about misconduct or an improper state of affairs or circumstances relating to that company.

An individual can make a claim against another individual or company for breaching the victimisation provision of the whistle-blower laws in the Federal Court or Federal Circuit Court. These claims involve allegations by an individual claiming that they suffered detriment and were victimised by reason that the individual was, proposed to be or was suspected of being a whistle-blower. The onus of proof is reversed in these proceedings.

The remedies available for breach of the whistle-blower laws include:

- non-monetary relief reinstatement, injunctive relief to prevent or stop detrimental conduct or an apology;
- civil penalties against a company (up to AUD555 million) or an individual (up to AUD1.11 million); and
- criminal sanctions – up to two years imprisonment for individuals.

8.2 Anti-discrimination Issues

Attributes

Australian federal, state and territory laws prohibit discrimination of employees based on certain grounds or attributes. These grounds and attributes include:

- race;
- sex, sexual orientation, gender identity or intersex status;
- marital or domestic status, family or carer's responsibilities or pregnancy;
- age;
- disability;
- religion;
- political opinion; and
- social origin.

These attributes vary across the Australian federal state and territory anti-discrimination laws. A claim of unlawful discrimination usually involves a claim that an individual or company has engaged in an act or omission based on one (or more) of the applicable attributes that result in some harm or less favourable treatment.

Direct and Indirect Discrimination

The types of discrimination that apply to most of these protected attributes include the following:

- Direct discrimination that occurs when a person or group of people is treated less favourably than another person or group in the same (or materially the same) circumstances because of a protected attribute (listed above).
- Indirect discrimination that occurs when a condition, unreasonable rule or policy that is applied universally disadvantages a group of people who share a particular protected attribute (listed above).
- Harassment that occurs where an individual behaves in a manner to intimidate, insult, or humiliate, or places an individual in a hostile environment. The most common types of harassment that occur in an employment context are sexual harassment and disability harassment.
- Victimisation that occurs where an individual is threatened or suffers detriment because they have:
  (a) lodged or propose to lodge a complaint of discrimination or harassment;
  (b) provided information regarding an internal investigation or external agency investigating a discrimination complaint; and
  (c) reasonably asserted their rights or supported someone else's rights under anti-discrimination laws.

See also allegations of victimisation under whistle-blower provisions in **8.1 Wrongful Dismissal Claims** and **1. Introduction** in relation to proposed changes to discrimination legislation.

Burden of Proof

In Australia, successful claims of discrimination must be proved on the balance of probabilities. Complainants alleging direct discrimination are generally required to establish all the elements of the offence. The onus in claims of indirect discrimination under the Disability Discrimination Act 1992 (Cth), SDA and Age Discrimination Act 2004 (Cth) is on the employer to prove that the condition, rule or policy was reasonable, having regard to the circumstances of the case.

Damages

Damages available in discrimination proceedings generally include:

- economic loss – past and future income loss of the complainant;
- general damages – non-economic loss resulting from the complainant's pain, disability, loss of enjoyment of life, disfigurement or loss of expectation of life;
- pecuniary loss – the complainant's out-of-pocket expenses for medical and other treatment expenses, aids and appliances and domestic and personal care;
- aggravated or exemplary damages – awarded where increased distress is suffered by the complainant because of the defendant's conduct or where the court intends to deter other potential wrongdoers.

Other relief in discrimination claims include declarations, injunctions, a variation of contract (in limited circumstances), apologies and retractions.

9. Dispute Resolution

9.1 Judicial Procedures

Fair Work Commission

The FWC is a specialist employment tribunal which is responsible for conciliating and arbitrating collective and individual employment disputes.

As previously noted, the FWC has jurisdiction to conciliate and arbitrate unfair dismissal claims. The conciliation of general protections' claims is usually commenced in the FWC, which may arbitrate the claim if both parties consent.

Class Actions

Class actions or "representative proceedings" for employment law matters are becoming increasingly common in Australia. Class actions in the Federal Court may be commenced where seven or more people have a claim against the same person. The claims must: (i) be in respect of or arise out of the same, similar or related circumstances; and (ii) give rise to a substantial common issue of law or fact, both being requirements which Australian courts have interpreted broadly to permit representative proceedings. Australian class actions generally operate on an "opt-out" system where all members within the relevant class are bound by the judgment (without needing to obtain their consent to be part of the group) unless they opt out. The court can also order that proceedings should not continue on a representative basis if it is in the interests of justice to do so (for example, where the costs of individual actions would be less than the class action).

Representation

In court proceedings, a party is generally entitled to be represented by a legal practitioner. In some employment proceedings, a party is not entitled to be represented, such as claims under the FW Act or a modern award where the amount

which may be awarded by the court is less than AUD20,000.

Similarly, a party is not entitled to be represented by a legal practitioner in proceedings before the FWC without the permission of the FWC.

9.2 Alternative Dispute Resolution

The parties are generally free to agree to have disputes arising between them determined through arbitration. This includes pre-dispute agreements including employment contracts. Where the parties have agreed to settle a particular dispute through arbitration and an action is nonetheless brought before a court, the court will generally stay those proceedings and instead refer the dispute to arbitration in accordance with that arbitration agreement.

9.3 Awarding Attorney's Fees

The FWC has a general power to order a party to pay the legal costs of another party where (i) the applicant's claim (or the other party's response to the claim) was vexatious or without reasonable cause, and (ii) it should have been reasonably apparent to the party that its position in the proceedings had no reasonable prospect of success.

The Federal Circuit Court or Federal Court of Australia has similar powers to make an order of costs in favour of the successful party for claims arising out of the FW Act.

The FWC has additional powers to award costs in respect of particular proceedings. For example, the FWC may award costs in respect of an unfair dismissal claim against a party if their unreasonable act of omission in relation to their conduct in the proceedings caused the other party to incur costs.

There are similar limitations on the court's power to award costs in matters arising under the FW Act (such as a general protections' claim).

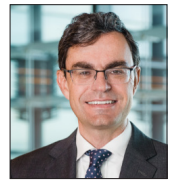
In claims for breach of contract, successful parties may receive a costs award in their favour on an indemnity or party/party basis for claims made in the state, territory or federal courts (see **8.1 Wrongful Dismissal Claims**).

Gilbert + Tobin is a leading Australian law firm. It focuses on excelling in targeted and strategic areas of law that are business-critical to its clients – eg, transactions, disputes and investigations. Employment takes a central role in all three of these pillars and its employment practice offers agile, prompt and commercially focused advice tailored to the needs of its clients. The firm's specialist advice covers the most sensitive and complex areas of employment and work, health and safety law. From investigations, transfer of business issues and strategic industrial relations advice through to enterprise agreements and complex litigation (whether before superior courts or specialist employment-related tribunals), it provides commercial and innovative legal solutions for ASX100 and multinational companies, government bodies and other organisations, as well as senior executives, both in Australia and around the world. The firm is privileged to count among its clients leading corporates such as Virgin Airlines, Fujitsu, Smeg, Nuix, Phillips, Guzman Y Gomez, Allied Pinnacle and Yancoal.

The authors would like to thank Jacob Wyllie for his assistance in compiling this chapter. Mr Wyllie is Director of Wyllie & Co. Migration Services Pty Ltd and has over a decade of experience in the migration industry, both working as a Registered Migration Agent and for the Department.

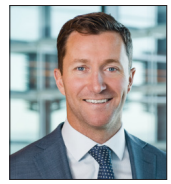
Authors

Dianne Banks heads the employment team at Gilbert + Tobin, advising on all aspects of the employment relationship from commencement to termination. In particular, Dianne specialises in strategically complex and business-critical disputes and investigations. Her expertise includes post-employment restraints, performance management and termination of staff, investigations into discrimination, sexual harassment and critical WHS incidents, as well as regulatory investigations. She is an experienced employment litigation lawyer, acting in all courts and tribunals in which employment-related disputes are litigated, including the Fair Work Commission, Australian Human Rights Commission, the NSW Supreme Court, the Federal Circuit Court and the Federal Court of Australia. Dianne's clients include government authorities, public and private companies and senior executives. Her work cuts across many industries, including private equity, telecommunications, technology, transport, energy and entertainment.



James Pomeroy is a special counsel in the employment team Gilbert + Tobin and specialises in employment law. He advises employers on the complete range of employment-related claims, including statutory claims such as unfair dismissal, general protections applications, employment misrepresentations' claims and discrimination matters, as well as contractual matters such as enforcing post-employment obligations. He also has extensive experience in relation to the employment implications of commercial transactions, advising employers on the transfer of employee entitlements and industrial instruments when a business is transferred from one employer to another and outsourcing. This experience includes working on major transactions requiring employment due diligence. James frequently addresses seminars and conducts training courses on issues concerning Australian employers.

Kaushalya Mataraaratchi is a special counsel in the employment team Gilbert + Tobin. Kaushalya's practice focuses on acting for employers in complex, high-value employment disputes in the Federal and Supreme Courts. She has a proven track record, successfully enforcing post-employment obligations, pursuing employees for breaches of their employment contract and defending claims brought by employees following their termination. Kaushalya has expertise in the new whistle-blower laws and delivers training, advice on compliance issues, oversees whistle-blower investigations and represents clients in Federal Court proceedings, defending allegations seeking relief for breaches of these laws.



Tom Brett is a partner in the employment team Gilbert + Tobin, whose practice focuses on both contentious and non-contentious employment matters. Tom advises clients across the full scope of employment law and industrial relations, bringing a pragmatic approach that balances legal, commercial and people-based issues in the workplace. He is regularly involved in termination of employment disputes, post-employment restraint matters and complex transactions. Tom has a broad client base including large public listed organisations, private equity clients, and fintechs and financial services firms. He has involvement with government authorities and public and private sector clients in litigation in the Federal Circuit Court of Australia, Federal Court of Australia and the Fair Work Commission (including but not limited to appellate jurisdictions, general protections, unfair dismissal and discrimination-based claims).

Gilbert + Tobin

Level 35, Tower Two
International Towers Sydney
200 Barangaroo Avenue
Barangaroo
NSW 2000
Australia

Tel: +61 2 9263 4000
Fax: +61 2 9263 4111
Email: info@gtlaw.com.au
Web: www.gtlaw.com.au

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