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Employment law in Australia – an overview

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Introduction

Australia remains to be a strong and stable environment in which to do business.

This in-brief provides a snapshot of some of the key aspects of employment law in Australia.

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

The employment law landscape

Australia has a common law system.

The federal Fair Work Act 2009 ('the Fair Work Act') is the principal piece of legislation governing employment relationships. Each state and territory also have legislation which deals with issues such as occupational health and safety, workers' compensation, equal opportunity, anti-discrimination and long service leave. Recent amendments to the Fair Work Act have made significant changes regarding the classification of independent contractors, prioritising the "real substance, practical reality, and true nature of the relationship" over merely contractual terms. The National Employment Standards ('NES') set out 11 minimum entitlements for all employees including maximum weekly hours, flexible working arrangements, leave entitlements and termination and redundancy pay. There are also minimum pay provisions, including a national minimum wage. In addition, there are Modern Awards, which are instruments which apply at the level of industry or occupation and include minimum terms and conditions (including pay) for employees covered by those instruments. They cover a large proportion of the workforce but can be displaced by enterprise agreements which are negotiated at the level of the enterprise or business. Enterprise agreements contain negotiated terms and conditions which must result in the employees covered by them being 'better off overall' than they would be if the Modern Award applied.

Commencing employment

Structuring the employment relationship

There is no requirement for foreign employers to set up a local entity to employ local workers. Foreign employers may employ employees through a foreign company. However, that company must be registered with the Australian Securities and Investment Commission as an overseas company, and must still observe all obligations under the Fair Work Act. The other alternative is for an Australian subsidiary to be set up. There are advantages and disadvantages of each (many of them tax related).

Types of employment

There are a range of different forms of employment relationships: full-time, where the employee has ongoing employment and works an average of 38 hours a week or more; part-time, where the employee works regular hours of less than an average of 38 hours per week; or casual, where the employee works as and when required and receives a casual loading. Casual employees who believe they no longer meet the statutory definition of 'casual employee' may request to convert to permanent employment after six months. Employers must respond within 21 days, either approving the conversion or providing reasonable business grounds for refusal, such as lack of work or a significant change in the employee's duties.

A new 'Employee Choice Pathway' is now available to casual employees who wish to convert to permanent employment. Since 26 February 2025 (and since 26 August 2025 for small business employers), eligible casual employees have been able to give their employer written notice of their choice to become permanent, to which employers must respond within 21 days. The employer can refuse the casual employee's notification on the basis of fair and reasonable operational grounds. The Fair Work Commission ('FWC') will be able to arbitrate all disputes about the Employee Choice Pathway if other methods of resolution have failed. Any orders considered appropriate by the FWC can be made, including that the employee continue to be treated as casual or become permanent.

Employees may work a traditional working week (e.g. 8.30am – 5.30pm) or shift work, where the employee works to set patterns of hours (e.g. afternoon shifts, day shifts, night shifts) and receives an allowance for doing so.

Some employees are engaged on a fixed-or maximum term basis, where the employment contract with the company is expressed to come to an end on a specified date, or on completion of a specific project. Such employees are entitled to receive the same pay and conditions as permanent staff, and similar benefits. Depending on the length of engagement, these employees may not meet the threshold of minimum employment (six months), and therefore will not have access to the unfair dismissal regime under the Fair Work Act. Employees engaged on a maximum-term basis are eligible for a redundancy payment, but fixed-term workers are not.

Fixed-term contracts are limited to a maximum of two years, including any extensions. Employers can renew a fixed-term contract only once, and must provide employees with a Fixed Term Contract Information Sheet when they are engaged. Exceptions exist for highly specialised roles, training arrangements, and government-funded positions.

Independent contractors are covered by provisions relating to adverse action on a range of proscribed grounds. The Independent Contractors Act 2006 does provide a limited measure of protection for independent contractors, and they are also covered by other labour legislation such as anti-discrimination and work health and safety laws. Businesses may be required to pay payroll tax (a State based tax) on payments made to independent contractors who provide labour services in some instances. However, there are some exclusions to the payroll tax regime that may apply to the provision of certain services depending on the type and duration of the services being performed.

The employment contract

Contracts are not required to be in writing, although it is always advisable that they are. Parties are generally free to negotiate the terms and conditions of the contract, provided that they comply with the applicable minimum statutory standards. All employees are covered by the NES and most are covered by a Modern Award or enterprise agreement (depending on their industry or occupation), regardless of whether they have signed a written contract. Employers may also impose probation periods which can be whatever length the employer prefers (although they rarely exceed six months).

Employees have the same entitlements during their probationary period though they are not protected against unfair dismissal during the first six months of employment (or 12 months for employers with fewer than 15 employees, which includes all overseas employees of related entities).

Key minimum employment rights

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

Leave

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

All employees (except casuals) are entitled to 10 days' paid and additional unpaid sick and carers' leave under the NES (collectively, 'personal/carer's leave').

Untaken personal/carer's leave accrues from year to year, but is not paid out on termination of employment unless this is provided for in an applicable award or agreement (which is unusual).

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

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

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

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

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

Long service leave

Long service leave is usually governed by the various state and territory legislation, which differs between jurisdictions. However, the general standard long service entitlement is 2 months' leave after 10 years' service. Accrued but untaken long service leave must be paid out on termination of employment after 10 years. Where termination occurs earlier (usually after five or seven years), pro-rata payments can be triggered depending on the reason for termination (e.g., a dismissal that is not for cause).

Working time

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

Pay and social security

The Fair Work Act and the Award system provide for minimum wages. These are adjusted with effect from 1 July annually. The national minimum wage is currently set at AUD$24.95 per hour (AUD$948 per 38 hour week as at 2025). Casual employees covered by the national minimum wage also receive a minimum 25% casual uplift to compensate for the lack of other benefits. Similar loadings apply under Awards and enterprise agreements.

Employers are required to make quarterly contributions to a relevant superannuation fund. Employers must now make superannuation contributions of at least 12% of the employee's ordinary time earnings as of 2025, up to a quarterly earnings cap of AUD$62,500 per quarter for financial year 2025-26.

Terminating employment

Terminating employment is relatively challenging for employers because of the range of claims an employee can bring. Unfair dismissal protections under the Fair Work Act apply to employees who have been employed for at least six months (or 12 months for small employers) and who are either covered by an award or enterprise agreement, or earn less than the high income threshold (currently AUD$183,000) if they are not covered by an award or agreement.

Additionally, a new category of worker called 'employee-like' workers has been introduced in Australia. Workers who have performed work on a digital labour platform under a services contract or a series of contracts on a regular basis (for at least six months) will be able to apply to the Fair Work Commission, if they consider they have been unfairly deactivated by a digital labour platform.

The NES provides for a redundancy payment of between four to 16 weeks' pay, calculated by reference to age and length of service. Higher redundancy pay is often negotiated in enterprise agreements.

In the case of collective redundancies (i.e. 15 or more redundancy dismissals) or where an employee is covered by an Award or enterprise agreement, employers must consult with employees and their representatives. Employers must also notify Centrelink, a government agency that delivers health, social and welfare payments and services in the case of a collective redundancy.

Notice

The amount of notice that is required for terminating contracts of employment may be derived from the express agreement of the parties, from the Fair Work Act or industrial instrument, or from a contractual term implied by law. The NES provide for a service-related minimum of between one to four weeks, plus an additional week for employees who are over 45 years old and who have a minimum of two years' employment with the employer. For managerial employees, contractual notice commonly ranges from three to six months (although it can be up to 12), whilst contractual notice entitlements for non-managerial employees are generally around one month. An employer may summarily dismiss an employee without providing notice or payment in lieu where the employee has committed 'serious misconduct'. This might include conduct such as theft from the employer, assaulting a colleague, or engaging in conduct that indicates an intention not to be bound by the employment contract by refusing to work.

Discrimination and harassment

Full-timers, part-timers, casual employees, probationary employees, trainees, individuals employed for fixed periods of time or specific tasks, and independent contractors are all protected by discrimination laws. Discrimination laws operate at federal level and state or territory level and generally prohibit the same types of discrimination. The specific laws however, may apply with slight differences and there are gaps in the protection that is offered between different states and territories and at Commonwealth level. Employers should always check the Commonwealth legislation and the applicable state or territory legislation to ensure compliance with all relevant laws. Protected attributes include race, colour, sex, sexual preference, age, medical record, criminal record, physical or mental disability, marital status, family or carer's responsibilities, trade union activity, pregnancy, religion, political views, and national or social origin. Harassment of all employees and contractors on the basis of a protected attribute is prohibited. All state and territory legislation also prohibit retaliation against an employee who has filed a complaint.

Organisations are also under a positive legal duty to take 'reasonable and proportionate measures to prevent and eliminate sexual harassment in the workplace. The Australian Human Rights Commission has the power to enforce compliance with this positive duty, including the ability to commence an inquiry where it 'reasonably suspects' that an organisation is failing to comply with their positive duty.

Protecting the business

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

The recently re-elected Federal Government has announced it will prohibit non-compete clauses for workers earning below the high-income threshold (currently AUD$175,000 and adjusted annually on 1 July), effective from 2027. Organisations may need to consider alternatives to non-compete provisions, such as retention benefits or payments and deferral of at-risk payments contingent on employees being a "good leaver".

Resolving disputes

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

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

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

Employee representation

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

Business transfers

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

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

Data protection and privacy

The Australian Privacy Principles ('APPs') regulate the collection and handling of personal information and apply to all private sector and not-for-profit organisations with an annual turnover exceeding AUD$3 million, all private health service providers nationally and all Australian Federal government agencies. The APPs provide higher privacy standards when organisations are handling sensitive information though certain privacy law requirements (such as requirements around use and disclosure of information) will not apply to 'employee records' which may include pay records, details of overtime hours worked, records of leave taken, or any superannuation contributions, when these records are handled by the employer in the course of a current or former employment relationship.

'Employee records' (broadly defined as a record of personal information relating to the employment of an employee) are exempt from certain requirements of the Privacy Act 1988 (Cth) when they are handled in the course of a current or former employment relationship and employers are not generally required to give current or former employees access to employment records.

The Privacy and Other Legislation Amendment Bill 2024 (Cth, introduced a new legal cause of action for serious invasions of privacy under the Privacy Act 1988 (Cth), which commenced in Australia on 10 June 2025. The changes mean that employees can seek compensation through the courts if their personal information has been misused at work. The cause of action contains a public interest balancing test, where the court must be satisfied that the public interest in protecting the plaintiff's privacy outweighs any public interest in the invasion of privacy for which the defendant can adduce evidence. This new cause of action provides for a range of remedies, including compensation. It also specifies some other modifications, including a AUD$ 478,550 cap on damages.

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