

## Understanding Australian Labour Law

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*The purpose of this paper is to provide an overview of the legal framework within which employment conditions are established in Australia. Comparative studies in the field of employment relations can promote understanding of the factors and processes that determine such phenomena and can generate a better understanding of our own country's institutions and practices. The need for such understanding is becoming more urgent in the context of globalisation and the quest for some understanding of what might be deemed as socially responsible employment conditions. However, comparative international employment relations study also presents particular challenges, as there are international differences in terminology as well as problems in distinguishing between the law and actual practice. This paper aims at assisting the development of comparative employment relations study by providing a detailed but simplified examination of Australian labour law which might form the bases for future comparative study.*

### Introduction

Governments of all political persuasions in all industrial and industrialising countries pass laws establishing the framework within which employment relations institutions and processes are determined. The rights of individuals in employment flow either directly from legal standards established by government or from the operations of institutions and processes provided under the law. The forces of globalisation have a significant impact upon employment conditions and have increased the need for understanding of labour law at international and national levels. There is considerable and growing pressure for multinational organisations operating in countries offering cheap labour to provide employment conditions that are socially responsible. In determining what might be 'socially responsible', standards established by the International Labour Organisation (ILO) provide a valuable benchmark. However, ILO standards provide little assistance for determining the appropriate mechanisms for the establishment of such standards. Comparative studies in the field of employment relations can promote understanding of the factors and processes that determine such phenomena (Bean, 1994: 4-5; Bamber and Lansbury, 1998: 3). Such studies can generate a better understanding of our own country's institutions and practices (Kahn-Freund, 1979:3) and have important implications for public policy (Bamber and Lansbury, 1998: 3). Comparative employment relations research can reveal differences between otherwise similar systems and similarities in those which are otherwise different (Banks, 1974).

In this paper, the structure and sources of labour law in Australia will be discussed. The Australian system of employment relations continues to be quite distinctive and different from that found in many other countries including the United States of America. The material presented in this paper may facilitate further comparative studies by clearly outlining the processes operating in one country. The paper begins with an overview of Australian legal structure. Legal requirements on companies to keep certain records and the nature of

inspection services is then briefly explained. A range of legislation establishing employment conditions is outlined. Finally, Australian laws establishing leave entitlements are examined.

### Legal Structure

Employment law in Australia is a mixture of common law handed down from the British, Australian Commonwealth (Federal) law and Australian State and territories laws. To the extent of any inconsistency, Federal law and awards prevail over State law and awards (CCH 1999: 51).

The 1901 Australian Constitution granted to the Commonwealth (Federal) government only limited powers to make industrial laws, with the States retaining those powers not granted to the Commonwealth. Section 51 (xxxv) of the Australian Constitution gave the Federal Parliament the power to make laws for the conciliation and arbitration of industrial disputes extending beyond the limits of one State. In 1904, the *Conciliation and Arbitration Act* established the Australian Conciliation and Arbitration Commission the objectives of which include the prevention and settlement of industrial disputes extending beyond the limits of one State. Federal parliament, supported by favourable High Court decisions, has also been able to utilise other powers under the Constitution (notably Foreign affairs and Corporations powers) to broaden the scope of its labour relations powers. Each of the Australian States have also established Industrial Relations Tribunals except for the State of Victoria which ceded most of its industrial relations powers to the Federal Government, although has recently introduced legislation to establish a new industrial relations system (CCH 1999: 52-3).

An "award" is the name commonly given by Australian industrial legislation to a legal document issued by an industrial tribunal for the purposes of settling an "industrial dispute" and/or regulating wages and conditions in an industry or occupation (or some part of an industry or occupation). Awards provide the minimum rates which must be legally paid to employees. State awards have 'common rule' application and apply to all persons performing a category of work specified in an award. Federal awards apply only to those employees working for an employer or a member of an employer organisation made respondent or party to the award. All federal awards list the respondents (CCH 1999: A-313-5, A331).

The objectives of the Federal *Workplace Relations Act 1996* include "providing the means (i) for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and (ii) to ensure the maintenance of an effective award safety net of fair and enforceable minimum wages and conditions of employment..." (s3(d)). Under the Act, the Australian Industrial Relations Commission (AIRC) is the main body responsible for facilitating agreements between employers and employees or organisations of employees about wages and conditions of employment and for ensuring that a safety net of fair minimum wages and conditions of employment is established and maintained to prevent and settle industrial disputes (Div 1) (Section3(d) and Division 1).

The Federal *Workplace Relations Act 1996* provides for Certified Agreements and for Australian Workplace Agreements (AWA). Both forms of agreements set out the wages and conditions to apply at a particular workplace. Certified Agreements may be made with a

union or directly with a group of employees (Part VIB). AWA's are agreements between individual employers and individual employees (Part VID). A union may be appointed as a bargaining agent but cannot be a party to an AWA. A relevant award remains a benchmark for both forms of agreements and agreements must pass a no disadvantage test; that is when the agreement is compared to the award, the employees must not be disadvantaged overall (Part VIE). Under the Federal *Workplace Relations Act 1996*, award provisions are limited to twenty "allowable matters" which has had the effect of simplifying and reducing the range of matters covered in Federal awards (s.89A(2)).

At State level, laws have also been passed for enterprise bargaining between employers and unions or employees to establish conditions of employment applying at a particular workplace. A "no disadvantage" provision similar to that operating Federally applies; for example, NSW *Industrial Relations Act 1996*, S.38 S. 35(1).

The Australian Industrial Relations Commission (AIRC) and the various State industrial relations tribunals review the minimum or 'living wage' wage annually. Provisions included in the relevant State Acts requires the relevant State Commission to consider any National decision and unless satisfied that there are good reasons for not doing so, to adopt the principles or provisions of the National decision (S.50(1)). The most recent National decision of the AIRC in May 2001, subsequently adopted by the State Commission's, granted the following adjustments:

- a \$13 per week increase in award rates up to and including \$490 per week;
- \$15 per week increase in award rates above \$490 per week up to and including \$590 per week; and
- a \$17 per week increase in award rates above \$590 per week (AIRC 2001).

When the Australian government ratifies an international convention, it passes legislation to satisfy the requirements of the Convention. In seeking to fulfil the requirements of particular international conventions, the Federal government has on occasion passed specific legislation such as the *Racial Discrimination Act 1975*, the *Sex Discrimination Act 1984* and the *Disability Discrimination Act 1992*. In some cases, the government has not passed specific legislation but rather sought to implement the standard by including the matter under the objectives of the *Workplace Relations Act 1996*. This Act includes among its objectives a commitment to providing a framework for "assisting in giving effect to Australia's international obligations in relation to labour standards" (s.3(k)). The objects of the Act also include several specific references to ensuring the fulfilment of particular conventions including freedom of association and non-discrimination (s.3 (f) (j)). The Act also establishes procedures, remedies and sanctions "to assist in giving effect to the Termination of Employment Convention" (s.170CA(e)). The functions of the AIRC as specified in the Act State, for example, that "the Commission must take account of the principles embodied in the Family Responsibilities Convention" (s.93A).

### Company Regulations

Employers are required to keep certain information concerning employees to satisfy the requirements of Federal and State legislation as well as industrial awards and agreements. The precise requirements under each of the Federal and State industrial relations laws

concerning employer records are similar but do differ. The *Workplace Relations Act 1996* (regs 131A-131R) require that records may be computerised or written and must include:

- Employer's name
- Employee's name
- Employees' date of birth
- Name of award, AWA, Certified agreement or old industrial agreement
- Employee's award or agreement classification
- Employee's status: that is, full-time, part-time, permanent, casual or temporary
- Date of commencement of employment
- Number of hours worked each day including starting and finishing times
- Rate of payment, including gross and net pay and any deductions
- Details of leave taken, including leave accrual details
- Details of award superannuation contributions, including any employee fund election
- Termination details, including the name of the person who acted to terminate the employment.

The *Workplace Relations Act 1996* provides that inspectors appointed by the Minister may enter premises during normal working hours to inspect and make copies of documents "for the purpose of ascertaining whether awards and certified agreements and the requirements of the Act are being or have been observed (s.86). Obstructing or misleading an inspector may be subject to imprisonment for six months (s.305). The Act also provides that a union officer may be issued with a permit by the Industrial Registrar to investigate suspected breaches of the Act, an award or a certified agreement (s.285). The person 'for the purpose of investigating a suspected breach' may enter the employer's premises during working hours and inspect and make copies of relevant (to the suspected breach) time sheets, pay sheets and other documents, other than an AWA (s.285B(3)). Obstructing or misleading an authorised officer may be subject to imprisonment for six months (s.305A).

The *Workplace Relations Act 1996* provides that an employee may make a claim for underpayment of wages 'not later than six years after the employer was required to make the payment' (s.179). The *NSW Industrial Relations Act 1996* (and other State Acts) requires employers to keep employees records for a minimum of six years (s.129(4)). Awards and agreements also frequently include provisions concerning employee records. Employers' records relating to employees are the property of the employer. Most federal and state awards provide that an employee may view, copy or keep records relating to them. Under the Freedom of Information Act, employees may also be granted the right to inspect their employment records.

### Contract Of Employment

The contract of employment comes about through the engagement of one person to perform work for and under the direction and control of another. Everything that constitutes the employment relationship is either contained in a written contract between the employer and employee or is implied in that contract. The contract does not need to be a written one. It may be verbally agreed between the employer and employee or it may be implied by their conduct and behaviour (CCH 1999: C-573).

A contract is formed from a number of elements: -express terms, -implied terms and terms implied by legislation. The personal and individual contract of employment applies if there is neither a Federal award (or agreement) nor a State award (or agreement) applicable. Into this contract of employment, State legislation implies terms relating to annual leave, long service leave, equal opportunity, occupational health and safety and workers compensation. State legislation on employment applies to all persons specified in any piece of legislation who are employed in that State unless there is Federal legislation or a Federal industrial award or agreement applicable which is on the same subject matter as the State legislation. However, Federal laws will override State laws which are on the same subject when there is an inconsistency between the two (CCH 1999: C591-2).

There is a difference in law between a contract "for services" (appointing an independent contractor on a freelance basis) and a contract "of service" which establishes the relationship of employer and employee between the parties. A contractor can choose where to work, when to work and how the work is done. It is this relative freedom from the control and direction of the person who has requested the work to be done that distinguishes a contractor from an employee. Contractors are not employees and are not usually covered by awards. Where the employer supervises the actual work or interferes with its manner of performance, the relationship between the parties may become one of employment rather than of principal and independent contractor (CCH 1999: C552-3).

A contract of employment of an indefinite nature (that is, not a fixed term contract) will be terminated when one of the parties to the contract no longer exists such as in the case of the death of either party to the contract, the sale of business or changes in the composition of an employing partnership. The contract may also be 'frustrated' due to unforeseen circumstances, such as destruction of the employer's plant or imprisonment of the employee. Bankruptcy does not necessarily end the contract of employment and termination by notice may also be subject to appeal C-614).

### Wages And Hours

The Federal minimum wage is determined by the AIRC and adjusted to reflect National wage Case decisions. As a result of the May 2001 National Wage Case decision, the Federal minimum wage was increased by \$13 per week to \$413.40 per week. The various State Commissions adopted the principles and provisions of the national decision and the minimum wage applying at State level is also \$413.40 (AIRC 2001). Awards of the Federal and State industrial tribunals set out the wage rates applying to particular occupations and industries. The minimum rates applicable vary accord to classifications, skill level and other factors such as hours worked. Increases in national and State minimum wages flow on to minimum rates in awards upon application by the parties (CCH 1999: W-2382).

The Federal *Workplace Relations Act* provides that an 'allowable matter' which may be included in an award is 'hours of work'. The *NSW Industrial Relations Act 1996* States that the number of ordinary hours of week of an employee when set by an award must not exceed forty hours per week, averaged over a twelve week period (s22(1)). The NSW Act also States that the ordinary hours of an employee cannot be reduced by an award unless the reduction is made by a Full Bench of the Commission (s.22(3)). The National and State Wage Fixing

Principles that a reduction in working hours to thirty-eight per week may be allowed subject to certain considerations but that claims for a reduction below thirty-eight hours will not be allowed. Most awards in Australia provide for a standard thirty-eight-hour week.

Overtime is usually defined as all work performed by employees for their employer outside, or in addition to, the ordinary hours of work as fixed by awards or enterprise and individual agreements. The Courts have usually held that an employer can only require an employee to work 'reasonable overtime'. Awards usually provide that an employer may require an employee to work reasonable overtime and provide for additional payments to be made, for example, work in excess of the normal number of daily hours or outside the span of ordinary hours of work will be paid overtime at the rate of time and a half for the first three hours and double time thereafter.

### Termination of Employment

The common law of employment as well as Federal and State statutes provide for summary dismissal of an employee under certain circumstances. An employee may be dismissed without warning where it has been established that there has been an act of gross misconduct, major breach of duty or conduct that brings the company into disrepute. Such behaviour includes: insubordination, serious breach of safety rules, theft or fraud, breach of clocking rules, being under the influence of alcohol or illegal drugs during working hours, flagrant failure to follow company rules, breach of duty regarding non-disclosure of confidential information, deliberate damage to company property or that of other employees, disorderly or indecent conduct, inciting or enforcing discrimination based on sex, race, religion, colour or ethnic origin (CCH 1999: D-772-3).

The law relating to unfair termination under the Federal Workplace Relations Act 1996 only applies to award-free employees who earn under \$75,200 (as at 1 July 2001), employees of an incorporated organisation covered by Federal awards and agreements, waterside, maritime or flight crew employees under a Federal award who are involved in interstate or Territory trade, Federal Government employees, Victorian employees (public and private) and Territory employees (public and private). In all States except Victoria, the State's industrial tribunals can also make orders concerning an "unfairly" dismissed employee. In Victoria, the unfair dismissal law that applies is the Federal *Workplace Relations Act 1996*. The State unfair dismissal laws generally apply to employees within the State, working under State awards or agreements. Where an employee can rely on a State unfair dismissal law, the Federal law does not apply. In some States, the State law only applies to employees under a State award or agreement. Employees under a Federal award or agreement who cannot rely on State unfair dismissal laws must rely on the Federal law (CCH 1999: D-772).

A termination is unlawful under the *Federal Workplace Relations Act 1996* if it is for a prohibited reason, done without the prescribed notice, a redundancy without the required notice or in contravention of a Commission order made to give effect to the Termination of Employment Convention (the Convention covers matters such as severance allowances or other separation benefits, or consultation over proposed redundancies). The Act states that the following are prohibited grounds for dismissal: temporary absence due to illness or injury, union membership, or participation in union activities outside work hours, or in hours with employer consent, non-membership of a union, having been, being, or trying to be an

employee representative, participation in a complaint or proceedings against an employer for breaking the law, race, colour, sex, sexual preference, age, disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin (except where the discrimination is based on the inherent requirements of the position, or the person terminated is a member of the staff of a religious institution and the termination is done in good faith so as not to hurt the followers of that religion), absence from work during maternity or parental leave, refusal to negotiate an Australian Workplace Agreement, or to sign, vary or extend one.

The Federal *Workplace Relations Act 1996* and the various State laws require that in any dismissal "all the circumstances of the case" are looked at in settling any later dispute. Included in this consideration would be whether the employer had a "valid reason" to terminate the employment. Any employer terminating an employee should give a valid reason, ensure the employee knows that reason and has had an opportunity to respond to it and give the required period of notice. If a termination is harsh, unjust or unreasonable, taking account of all the circumstances, then the reason for the termination will not be valid, and the dismissal will be unfair and illegal. The law concentrates on the notion of a "fair go all round". The facts of any case will decide if a dismissal was fair or unfair. The unfairness of a particular dismissal may spring from the fact that the employee did not deserve to be dismissed, or in the methods used by the employer in investigating the circumstances of an alleged misconduct. The employer must provide both substantive and procedural fairness. Substantive fairness requires the reason for dismissal to actually justify the dismissal. A valid reason will relate to the employee's capacities and conduct or to the operational requirements of the business. Procedural fairness means that the employee to be dismissed must be treated fairly in the process leading up to dismissal. This requires the employer to provide written warnings (where and when appropriate), provide proper notice of termination, conduct proper investigations of allegations and performance issues, give the employee a chance to be heard and provide written notice of termination.

Both Federal and State legislation grants the Commission the power to order reinstatement or compensation not exceeding the amount of remuneration received by the employee during the six months immediately prior to the termination.

The *Workplace Relations Act 1996* and the various State Acts each provide that an employer must give a period of notice of termination to an employee except where an employee is guilty of serious misconduct. Notice of termination and severance pay entitlements are usually provided for in awards and agreements. Under the Act, in order to terminate the employment of an employee, the employer must give to the employee a period of notice based upon the employee's period of service.

Period of service	Period of notice
1 year or less	1 week
1 year and up to the completion of 3 years	2 weeks
3 years and up to the completion of 5 years	3 weeks
5 years and over	4 weeks

In addition to the notice set out above, employees over forty-five years of age at the time of the giving of notice with not less than two years service are entitled to an additional weeks notice. Payment in lieu of the notice must be made if the appropriate notice period is not required to be worked. In calculating the payment in lieu of notice, the employer must use the wages an employee would have received in respect of the ordinary time he or she would have worked during the notice period had their employment not been terminated. The period of notice does not apply in the case of dismissal for serious misconduct or in the case of apprentices or employees engaged for a specific period of time or for a specific task or tasks. The notice of termination required to be given by an employee is the same as that required of an employer, except that there is no additional requirement based on the age of the employee concerned. If an employee fails to give notice the employer has the right to withhold monies due to the employee to a maximum amount equal to the ordinary time rate of pay for the period of notice.

In the case of redundancy (where the job no longer exists), a severance pay entitlement applies which is in addition to the period of notice prescribed in the Award. The employee is entitled to the following amount of severance pay in respect of his or her period of service as follows:

Period of service	Severance pay entitlement
1 year or less	Nil
Over 1 year and up to the completion of 2 years	4 weeks' pay
Over two years and up to the completion of 3 years	6 weeks' pay
Over three years and up to the completion of 4 years	7 weeks' pay
Over four years	8 weeks' pay

#### **Paid Leave and Vacation**

Under federal and state laws as well as awards, Australian employees are entitled to a number of forms of paid leave.

Sick leave is leave with pay for a prescribed period and then unpaid leave after the prescribed period available to employees who are too sick to work but are not entitled to workers compensation benefits. Sick leave is an award (or agreement) provision sometimes supplemented by statutory requirements. Sick leave is not subject to direct Federal legislation but is an 'allowable award matter' under the *Workplace Relations Act 1996*. Most States have legislated to provide minimum paid sick leave entitlements for employees after a qualifying period, such as three months service, after which retrospective payments can be made for unpaid sick leave taken. The leave usually accrues monthly or annually so that there is a certain entitlement available to each employee for every year of service. Awards and agreement frequently provide more generous entitlements than those prescribed by statute. In some cases entitlement may accumulate for a prescribed number of years or for an unlimited period. Normally, untaken sick leave cannot be 'paid out'. Some agreements provide for unlimited sick leave subject to supporting medical evidence. The NSW *Industrial Relations Act 1996* provides that sick leave provisions included in an award must provide for not less than one week of sick leave on full pay for each continuous year of service and that untaken sick leave must accumulate for a minimum of three years (s.26).

The *Workplace Relations Act 1996* includes annual leave as an 'allowable matter'. Annual leave is covered by Federal awards and agreements, and in each State by both awards and legislation. The relevant NSW Act is the *Annual Holidays Act 1944*. Annual leave is paid leave to which an employee becomes entitled after twelve months continuous service or continuous employment with the one employer. The general standard is four weeks leave, although some industries and agreements do provide more. Leave falls due every twelve months on the anniversary of the employee's date of commencement. Employees working less than full-time are entitled to pro-rata leave. Casual employees usually receive a loading on their hourly rate of pay to 'compensate' for lack of leave entitlements. A common standard provided under Federal and State awards is an 'annual leave loading' (usually at a rate of 17.5 per cent of the ordinary rate of pay) to compensate for extra payments such as overtime and shift allowances which the employee would not receive while on leave. A common feature of many industrial agreements negotiated in Australia over recent years has been to absorb the leave loading into ordinary rates of pay thus removing the loading as an entitlement whilst satisfying the 'no disadvantage' test.

There are ten standard public holidays in Australia: New Year's Day, Australia Day, Good Friday, Easter Saturday, Easter Monday, ANZAC Day, Queen's Birthday, Eight-Hour/Labour Day, Christmas Day, Boxing Day (Proclamation Day in South Australia). Other additional holidays may apply to particular sections of the workforce, such as Bank Holiday, show day, union picnic days or special award holidays. Awards and agreements will usually include further entitlements and provisions. The AIRC has determined that all Federal award employees should be entitled to all of the ten days listed above. The Commission also determined that there should be one additional holiday each year that is relevant to the State, Territory or locality employees work in or is on some other basis (such as an award picnic day). States and Territories may add to these minimum holidays, but cannot subtract from them. Where Christmas Day, Boxing Day, New Year's Day and Australia Day fall on a weekend, a substitute day is provided.

#### **Other Benefits**

A number of other important benefits and protections are provided employees in Australia under federal and state legislation.

Superannuation is dealt with extensively by legislation including the *Superannuation Guarantee (Administration) Act 1992*, the *Superannuation Guarantee Charge Act 1992*, the *Superannuation Industry (Supervision) Act 1993* and the *Superannuation (Resolution of Complaints) Act 1993*. The Superannuation Guarantee Scheme (SGS) requires all employers to contribute to the superannuation of their employees. The aim is to ensure all employees have superannuation coverage and to ensure employers comply with their superannuation obligations to those employees. If there is an existing award requirement for superannuation contributions, this will usually count towards the SGS requirement. Employers are exempt from providing SGS superannuation support in certain circumstances including where employees are sixty-five and over, receive a salary or wage of less than \$450 in a month, are part-time employees under eighteen or are employees paid to do part-time work of a domestic or private nature.

Long service leave is leave with pay granted to employees after a prescribed period of continuous service or employment (usually ten or fifteen years) with the one employer. There are "pro rata" (proportional) payment provisions applicable where an employee leaves after serving a certain period of the time (commonly after five, seven or ten years). Long service leave is defined as an 'allowable matter' under the *Workplace Relations Act 1996* and there are provisions in Federal awards or agreements. In every State, there exists legislation plus awards and agreements covering long service leave. In all States except New South Wales, South Australia, the Australian Capital Territory and the Northern Territory, the entitlement is thirteen weeks leave after fifteen years service. In South Australia and the Northern Territory, it is thirteen weeks leave due after ten years. The ACT and New South Wales provide 'or two months' leave due after ten years' service. In certain cases, there exist pro-rata leave entitlements and employees with broken service with the one employer may be regarded as having continuous service with respect to these entitlements.

Family and/or Carer's Leave entitlements may also apply. The AIRC made decisions on family leave in its Family Leave Test Case and Personal/Carer's Leave Test Case held during 1994 and 1995. In 1996, the Commission issued a model draft clause for use in Federal awards. The model clause allows both sick leave and bereavement leave to be "banked" (five days per year) for use as carer's leave. Such leave is available to employees to take care of a member of their household or family for whom they are responsible and who is ill. It is not a separate entitlement but is included under sick leave and compassionate leave entitlements. This form of leave is an 'allowable matter' under the *Workplace Relations Act 1996* and is covered under the legislation in most States.

Bereavement leave is paid leave for employees following the death of a close family member. Compassionate leave is broader in scope and might be granted when an employee wishes to spend time with a seriously ill relative. Western Australia is the only jurisdiction that provides statutory rights to bereavement leave. This leave is available to all employees regardless of whether they are employed under an award or not and the entitlement is for two days paid leave. However, paid bereavement or compassionate leave is granted under some Federal and State awards. The maximum period of paid leave granted varies from one day to three days with two days being most common. To qualify for leave, the death will usually involve one of the employee's relatives.

Paternity leave entitlements are set out in the *Workplace Relations Act 1996* in Schedule 14 (Part 3). Paternity leave is unpaid leave up to twelve months for male employees who have accrued twelve months continuous service prior to the taking of leave. The maximum amount of leave is reduced by any maternity leave taken by the spouse. Apart from one overlapping week which may be taken at the time of the birth, paternity leave cannot be taken at the same time as the employee's spouse is taking maternity leave. To be eligible for paternity leave, an employee must provide the employer with written notice at least four weeks prior to the estimated date of birth, notifying the employer of the due date of birth and specifying the last date of leave. The employee is required to submit a medical certificate specifying the due date of birth and a statutory declaration specifying the details of any maternity leave applied for in respect of the birth of the child.

Maternity leave entitlements for employees who have no other (or lesser) entitlements are established under the *Workplace Relations Act 1996* in Schedule 14. These standards provide

a safety net for all Australian employees and are those included in the standard Federal award clause. Some State statutes and awards contain maternity leave provisions which are the same as the Federal provision. The law provides for unpaid Maternity leave of up to twelve months for female employees in relation to pregnancy and birth, who have been in continuous employment with the one employer for twelve months at the time of taking leave. The employee is entitled to return to her previous position (or an equivalent) at the end of the leave. An employee is required to apply in writing at least ten weeks before the estimated date of birth notifying the employer of the due date of birth and specifying the last date of leave. The employee is required to submit a medical certificate specifying the due date of birth and a statutory declaration specifying the details of any paternity leave applied for (or to be applied for) in respect of the birth of the child.

Federal, State and Territory legislation prohibits direct and indirect discrimination on grounds of disability, race and sex. These grounds differ from jurisdiction to jurisdiction; for example, *Industrial Relations Act 1996* includes discrimination on the grounds of race, sex marital status, disability, homosexuality, transgender identity and age. The *Workplace Relations Act 1996* prohibits discrimination at the point of termination on the basis of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin, for membership or non-membership of a union, for absence from work due to temporary illness or injury or during maternity or paternity leave or for refusing to negotiate an AWA. The *Workplace Relations Act 1996* provides that the AIRC is to take account of racial discrimination act, sex discrimination act, disability discrimination act and the family responsibilities convention.

Discrimination is essentially any practice which makes distinctions between individuals or groups so as to disadvantage some or advantage others, as defined by the Federal *Workplace Relations Act 1996*, the various State *Industrial Relations Acts*, State *Anti-Discrimination Acts* and the federal *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984* and *Disability Discrimination Act 1992*. Discrimination can also be indirect if a condition of employment is imposed which appears not to be discriminatory but has a disadvantageous effect on people in a certain group. Sex discrimination is discrimination based on whether a person is male or female and it includes conditions and treatment based on presumptions about sex. Race discrimination includes discrimination based on colour, ethnic or national origin. Discrimination against a person because of his or her descent or ethno-religious background is also included in the definition of race discrimination. The *Disability Discrimination Act 1992* makes it unlawful to discriminate against people with disabilities in relation to all aspects of employment and is seen to occur if an employer treats a person less favourably because of their disability and that employer cannot show that the treatment is justified. Employers are not permitted to discriminate against employees on the ground of pregnancy or potential pregnancy.

Employers are not permitted to discriminate against a person on the basis of his or her marital status, even if, for example, that person is married to a person employed by a business rival. Age discrimination has been outlawed in most jurisdictions. This means that employers cannot refuse to employ or give benefits to a person because of their youth or age. The main exceptions are where the job requires a person of a particular age for reasons of authenticity.

such as a role in a play, and employment conditions are based on health and safety requirements. Compulsory retirement at a certain age is also prohibited in most jurisdictions. Discrimination on the basis of political belief, religion, sexual preference are prohibited grounds for discrimination.

Affirmative action means the removal of obstacles in employment so that all employees receive the same opportunities. It is based on the principle of merit, that is, the best person must be employed for the job irrespective of their sex or race. The *Affirmative Action (Equal Opportunity for Women) Act 1986* requires certain organisations to implement programs to ensure women have equal opportunity in employment. This includes all higher education institutions, and private sector companies, community organisations, non-government schools, group training schemes and unions, which employ more than 100 people. Employers covered by the Act must report to the Affirmative Action Agency every year on their activities in this area.

If a person suffers a detriment because of sexual, racial and intentional harassment the harassment then it will be unlawful. The detriment suffered does not necessarily have to be so serious as forced resignation, loss of promotion or dismissal. Separate to any liability which could arise under the Sex Discrimination and Race Relations Acts, intentional harassment is a criminal offence. Such intentional harassment would include using threatening, insulting or abusive words or behaviour towards a person.

### Conclusions

The foregoing discussion has provided some insight to the complexity of employment regulation in a mature industrialised democracy. Many important areas of labour law have not been discussed such as those pertaining to occupational health and safety, child labour and home workers. Examination of these areas would further highlight the extent of detailed regulation required to ensure the protection of employees' rights. Australia has established a solid foundation of employee rights and despite initiatives in recent times, particularly under a federal conservative government, such rights continue to be enforced.

Compared with the approach adopted in some other industrialised countries, government in Australia has been very interventionist in establishing the rules of engagement in the employe-employee relationship. This approach has attracted considerable criticism from both within and beyond Australia's shores particularly from those who view the Australian approach as an impediment to business. As noted by Kahn-Freund (1979: 27), "We cannot take for granted that rules or institutions are transplantable". However, in seeking how best to deal with the conflicting pressures of globalisation, the Australian experience provides a focus for further comparative study.

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### Acts

- Anti-Discrimination Acts  
 Affirmative Action (Equal Opportunity for Women) Act 1986  
 Australian Conciliation and Arbitration Act 1904  
 Disability Discrimination Act 1992  
 NSW Industrial Relations Act 1996  
 Racial Discrimination Act 1975  
 Sex Discrimination Act 1984  
 Workplace Relations Act 1996

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**INTERNATIONAL EMPLOYMENT  
RELATIONS:  
FOCUS ON THE PACIFIC RIM**

**Proceedings of the First and Second  
International Employment Relations Association  
International Conferences**

**San Francisco  
2000 and 2001**

**edited by  
Keri Spooner**

**International Employment Relations Association**

## Preface

The International Employment Relations Association (IERA) actively seeks to encourage the research activities of IERA members and to facilitate the sharing of knowledge among employment relations academics in different countries. Since 1999, a particular focus of IERA activity has been upon growing the IERA membership and developing links between employment relations academics working in Pacific Rim countries. Significant contributions to this focus were provided by the 8<sup>th</sup> and 9<sup>th</sup> Annual Conferences of IERA held during 2000 and 2001 in Singapore as well as the IERA Conference 2001 in Kuala Lumpur, Malaysia. Further important contributions to developing this focus were provided by the IERA Conference held in San Francisco during 2000 and 2001.

The research papers presented by IERA members and significant contributions from colleagues in the Labor Studies Centre at San Francisco State University, the Henning Centre at Berkeley and from Californian trade unions ensured that both the 1<sup>st</sup> and 2<sup>nd</sup> IERA Conferences were rich learning experiences. The papers presented were aimed at not only sharing research findings but also at developing understanding of the particular issues relevant to the employment relationships within countries on the Pacific Rim. Through this discourse, insights were gained not only regarding national differences but also similarities and factors common to international employment relations experiences.

The papers presented in these proceedings are those that were recommended for publication through a double blind refereeing process of full papers. Several other papers that were rejected for publication by the referees also provided a very useful contribution to discussions at the Conference.

I would like to thank the referees for their timely assistance.

Keri Spooner  
President, IERA

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