THE EMPLOYMENT LAW REVIEW

Thirteenth Edition

Editor
Erika C Collins

THE LAWREVIEWS

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PREFACE

For each of the past 12 years, we have surveyed milestones and significant events in the international employment law space to update and publish *The Employment Law Review*. Every year when I update this book, I reread the Preface that I wrote for the first edition in 2009. In that first edition, I noted that I believed that this type of book was long overdue because multinational corporations must understand and comply with the laws of the various jurisdictions in which they operate. I have been practising international employment law for more than 25 years, and I can say this holds especially true today, as the past 13 years have witnessed progressive shifts in the legal landscape in many jurisdictions. This 13th edition of *The Employment Law Review* is proof of the continuously growing importance of international employment law. It has given me great pride and pleasure to see this publication grow and develop to satisfy its initial purpose: to serve as a tool to help legal practitioners and human resources professionals identify issues that present challenges to their clients and companies. As the various editions of this book have highlighted, changes to the laws of many jurisdictions over the past several years emphasise why we continue to consolidate and review this text to provide readers with an up-to-date reference guide.

Speaking of changes, we have now been living with the covid-19 pandemic for more than two years. In 2020, we entered a new world controlled and dictated by a novel coronavirus, one that spread at a rapid pace and required immense government intervention. The ways in which governments responded (or failed to respond) shed light on how different cultures and societies view, balance and respect government regulation, protection of workers and employee privacy. Employment practitioners around the globe have been thinking about and anticipating the future of work for a decade. But with the onslaught of covid-19, the future of work was foisted upon us. Covid-19 has expedited the next decade of technological advancement and employer–employee relations, causing entire industries and workplaces to change in real time and not over the course of years.

Unsurprisingly, this year's text would not be complete without another global survey of covid-19 that summarises some of the significant legislative and legal issues that the pandemic has presented to employers and employees. The updated chapter highlights how international governments and employers continued to respond to the pandemic during the course of 2021, from shutdowns and closures to remote working and workplaces reopening. Employers around the globe have needed to be nimble to deal with the constantly changing environment.

The other general interest, cross-border chapters have all been updated. The #MeToo movement continues to affect global workforces. The movement took a strong hold in the United States at the end of 2017, as it sought to empower victims of sexual harassment and assault to share their stories on social media so as to bring awareness to the prevalence of this behaviour in the workplace. In this chapter, we look at the movement's success in other

countries and analyse how different cultures and legal landscapes affect the success of the movement (or lack thereof) in a particular jurisdiction. To that end, this chapter analyses the responses to and effects of the #MeToo movement in several nations and concludes with advice to multinational employers.

The chapter on cross-border mergers and acquisitions continues to track the variety of employment-related issues that arise during these transactions. The covid-19 pandemic initially caused significant challenges to mergers and acquisitions (M&A). Deal activity slowed substantially in 2020, negotiations crumbled and closings were delayed. Although uncertainty remains about when merger and acquisition activity will return to pre-pandemic levels, it appears that businesses and financial sponsors once again have begun to pursue transactions. Parties already have begun to re-engage on transactions previously put on hold and potential sellers appear willing to consider offers that provide a full valuation. The content of due diligence may change because the security of supply chains, possible crisis-related special termination rights in key contracts and other issues that were considered low-risk in times of economic growth now may become more important. This chapter, and the relevant country-specific chapters, will aid practitioners and human resources professionals who conduct due diligence and provide other employment-related support in connection with cross-border corporate M&A deals.

Global diversity and inclusion initiatives remained a significant issue in 2021 for multinational employers across the globe. Many countries in Asia, Europe and South America have continued to develop their employment laws to embrace a more inclusive vision of equality. These countries enacted anti-discrimination and anti-harassment legislation, and regulations on gender quotas and pay equity, to ensure that all employees, regardless of gender, sexual orientation or gender identity, among other factors, are empowered and protected in the workplace. Unfortunately, there are still many countries where certain classes of individuals in the workforce remain underprotected and under-represented, and multinational companies still have many challenges with tracking and promoting their diversity and inclusion initiatives and training programmes.

We continue to include a chapter that focuses on social media and mobile device management policies. Mobile devices and social media have a prominent role in, and impact on, both employee recruitment efforts and the interplay between an employer's interest in protecting its business and an employee's right to privacy. Because companies continue to implement bring-your-own-device programmes, this chapter emphasises the issues that multinational employers must contemplate prior to unveiling such a policy. Particularly in the time of covid-19 and remote working, bring-your-own-device issues remain at the forefront of employment law as more and more jurisdictions pass, or consider passing, privacy legislation that places significant restrictions on the processing of employees' personal data. This chapter both addresses practice pointers that employers must bear in mind when monitoring employees' use of social media at work, and provides advance planning processes to consider prior to making an employment decision based on information found on social media.

Our final general interest chapter discusses the interplay between religion and employment law. Religion has a significant status in societies throughout the world, and the chapter not only underscores how the workplace is affected by religious beliefs but also examines how the legal environment has adapted to them. The chapter explores how several nations manage and integrate religion in the workplace, in particular by examining headscarf bans and religious discrimination.

In addition to the six general interest chapters, this edition of *The Employment Law Review* includes country-specific chapters that detail the legal environment and developments of 38 jurisdictions around the world.

Covid-19 aside, in 2022, and looking into the future, global employers continue to face growing market complexities, from legislative changes and compliance challenges, to technological and societal forces that are transforming the future of work. Whether solving global mobility issues, designing employee equity incentives, addressing social media issues, negotiating collective bargaining agreements or responding to increasing public attention on harassment or equal pay issues, workforce issues can affect a company's ability to attract and retain talent, or damage its reputation and market value in an instant. These issues have created a confluence of legal and business challenges that no longer can be separated or dealt with in isolation. As a result, every company requires business advisers who can address the combined business and legal issues relating to its multinational workforce. It is my hope that this text provides legal practitioners and human resources professionals with some guidance, best practices and comprehensive solutions to significant workforce issues that affect a company's market position, strategy, innovation and culture.

A special thank you to the legal practitioners across the globe who have contributed to this volume for the first time, as well as those who have been contributing from the first year. This edition has once again been the product of excellent collaboration, and I wish to thank our publisher. I also wish to thank all our contributors and my Faegre Drinker associates, Katherine Gordon, Caroline Guensberg, Charlotte Marshall and Kerry Zaroogian, and my law partners, Alex Denny, Nicole Truso and Jill Zender, for their invaluable efforts in bringing this 13th edition to fruition.

Erika C Collins
Faegre Drinker Biddle & Reath LLP
New York
February 2022

Chapter 9

AUSTRALIA

Joydeep Hor and Andrew Jose[1]

I INTRODUCTION

Legislation, industrial instruments and the common law are the main sources of employment law in Australia. The Fair Work Act 2009 (Cth) (the FW Act) governs the employment of the majority of Australian employees, supplemented by other federal, state and territory legislative schemes pertaining to areas such as work, health and safety and non-discrimination. The contract of employment and common law principles are important sources of the terms and conditions of employees, particularly for those who are not covered by an award or enterprise agreement.

Relevant industrial instruments include modern awards, which are determined by the Fair Work Commission (FWC), and enterprise agreements. Awards provide a safety net of minimum pay rates and employment conditions, and are used as the benchmark for assessing whether employees are 'better off overall' under a proposed enterprise agreement. The FWC conducts an annual wage review each year and decides on a national minimum wage.

The FWC is one of the principal agencies involved in the enforcement of minimum employment standards for the majority of Australian workers. As the national workplace relations tribunal, it has a range of functions that include setting minimum wages for employees, determining the conditions under modern awards, facilitating good faith bargaining and the making of enterprise agreements. In addition, it has jurisdiction to grant remedies for unfair dismissals or adverse action taken in breach of the general protections provisions, has oversight of the taking of industrial action, and is involved in attempting to resolve a range of collective and individual workplace disputes through conciliation and arbitration.

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

1 Joydeep Hor is the founder and managing principal and Andrew Jose is an associate at People + Culture Strategies.

II YEAR IN REVIEW

Recent amendments to the FW Act introduced changes to workplace entitlements and obligations in relation to casual employees. The changes included a Casual Employment Information Statement, which employers are now required to provide to every new casual employee before, or as soon as possible after, they start employment. The FW Act has also been amended to include a new definition of 'casual employee', being an employee who accepts a job offer knowing there is no firm advance commitment to ongoing work with an agreed pattern of work. Most significantly, casual employees now have an entitlement to become permanent employees (either part-time or full-time) in some circumstances. There are certain eligibility requirements and exceptions that apply, including that small business employers are not required to offer casual conversion to their casual employees.

Another significant development was the progress of the reforms recommended in the Respect@Work Report, which was published following a 2018 government-commissioned national inquiry into sexual harassment and discrimination in Australian workplaces. On the back of this report, the federal government introduced the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, which amended the existing Commonwealth legislation to introduce a number of reforms, including extending the existing anti-bullying regime to enable workers to apply for an order to stop sexual harassment in the workplace.

III SIGNIFICANT CASES

The High Court of Australia's decision in *WorkPac Pty Ltd v. Rossato*[2] overturned previous case law to establish the importance of the written terms of employment contracts in determining a person's employment status. The case concerned a casual employee who had been employed by WorkPac under six consecutive casual contracts during a period of three and a half years. He was also covered by the relevant enterprise agreement that applied to WorkPac, and worked under rosters, often operating on a seven days on, seven days off basis, alternating between daytime and night-time work. His shift arrangements were planned well in advance (often 12 months ahead of schedule) and there were limited days and periods during which he did not work.

The employee claimed that he was not a casual employee and should be entitled to paid leave entitlements (including annual leave, personal or carer's leave and compassionate leave) and public holiday pay under the FW Act and the enterprise agreement. In the decision by the Full Federal Court, it was found that the written contract of employment was relevant but not determinative of the characterisation of an employment relationship. The Full Federal Court found that the course of dealing that had taken place under the contract and the conduct of the parties would also be relevant in assessing the characterisation of the overall relationship and determining the true nature of an employment arrangement.

The High Court overturned the ruling in the original Full Federal Court decision, finding that the decision should have looked to the terms of the written contract to determine the character of the employment relationship, rather than looking at the conduct of the parties to the employment relationship. Although the non-contractual rosters may have

2 [2021] HCA 23.

given the employee a 'reasonable expectation' of regular and systematic employment, that 'expectation' fell short of the 'firm advance commitment to continuing employment' that distinguishes permanent employment from casual employment.

The High Court determined that the search for the existence or otherwise of a 'firm advance commitment' must be for enforceable terms and not 'unenforceable expectations' or understandings that might be said to reflect the manner in which the parties performed their agreement. The High Court found the express terms of the employee's contracts were inconsistent with the making of a firm advance commitment to continuing employment beyond each assignment.

IV BASICS OF ENTERING AN EMPLOYMENT RELATIONSHIP

i Employment relationship

Every employment relationship in Australia is regarded as being based on a contractual relationship between the employer and the employee. The agreement does not have to be in writing, as the relationship can be constituted by verbal agreement, written agreement or a combination of both. It may be possible to infer that an agreement has been reached, in the absence of documentation, from the parties' conduct, such as commencing work or paying wages.

Fixed-term employment contracts are permissible under Australian law and there is no limitation on the length of the contracts. In Australia, a distinction is drawn between 'maximum term' contracts (which allow for termination prior to the nominated end date without cause) and 'true' fixed-term contracts (which only allow termination prior to the end date for serious misconduct).

For an employment contract to be enforceable, the terms must be sufficiently certain. This means that, at a bare minimum, the contract needs to be clear on essential terms, such as;

a the work to be undertaken; and

b remuneration payable for the work undertaken.

An employment contract should also be clear regarding the basis on which the person is being employed (for example, full-time or part-time), their responsibilities, notice of termination and post-employment obligations. Even when there is some uncertainty around essential terms, the contract may be enforceable as terms may be implied in accordance with the expressed and implied intentions.

There is no strict obligation on when an employment contract is executed, as the courts may find that an employment relationship has been established without any formal execution. However, it is recommended that a written employment contract is executed after an offer of employment is accepted and prior to the commencement of the employment to avoid the risk of uncertainty as to the terms of employment.

An employment contract can be varied by way of an executed deed of variation, in which both parties agree to an amended contract replacing the original contract. However, the easiest way to vary the conditions of employment (for example, in the event that an employee is promoted) without amending the essential terms is to include a schedule to the contract that sets out details such as the position, remuneration and other benefits that the employee is to receive. This allows the parties to make changes to the contract by way of a letter of variation that amends the schedule, without changing the essential terms that are contained in the body of the contract.

ii Probationary periods

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

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

iii Establishing a presence

Foreign companies are required to be registered by the Australian Securities and Investment Commission to be able to 'carry on business' in Australia, which includes the hiring and engagement of workers. This means that the company must either incorporate a wholly owned or partly owned subsidiary company in Australia or register a branch office in Australia.

Once registered, the company can hire employees in the same way as a local company, either through directly recruiting them or engaging them through a labour hire company. A company may also engage independent contractors to perform work, which may be done through a labour hire company.

In Australia, a company may qualify as having a permanent establishment if it has a fixed place of business through which it wholly or partially carries on its business, such as sales outlets, branches, places of management, factories, workshops and offices. Foreign companies based in countries that have a double taxation treaty with Australia may have their income from business operations in Australia subject to Australian income tax. Foreign companies based in countries that do not have a double taxation treaty with Australia may also be subject to taxation for any income from an Australian source.

When a foreign company hires employees in Australia, those employees will be entitled to the same rights and entitlements that apply to any other employees, including the protections set out in the FW Act and any applicable awards or enterprise agreements. With respect to taxation, the company will be required to withhold amounts for the purposes of taxation for the income earned by employees in Australia.

V RESTRICTIVE COVENANTS

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

The most common forms of post-employment restrictive covenants are non-solicitation, non-dealing and non-compete covenants. Non-solicitation covenants prevent former employees from pursuing clients, customers or suppliers with whom they had dealings during their employment. Non-dealing covenants prevent dealing with or doing business with anyone who has a business connection with the former employer (such as customers, clients or employees) irrespective of whether former employees seek out the clients or the clients

approach the employees for services. Non-compete covenants prohibit former employees from approaching clients, working for competitors or establishing their own businesses during the period of restraint.

VI WAGES

i Working time

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

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

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

ii Overtime

Employees who are covered by a modern award or enterprise agreement will be entitled to overtime pay in accordance with the relevant industrial instrument. Employees who are not covered by an award or agreement do not receive remuneration for overtime unless their contract of employment provides for such payments. These employees may be required to work reasonable additional hours (as discussed above) above 38 hours per week.

The rate of pay for overtime will vary depending on the terms of the industrial instrument or contract but is usually paid at a rate of time and a half for the first several hours and double time thereafter. While there is no strict limit on amounts of overtime set out in legislation, some awards may prescribe a minimum amount of time between shifts (usually 10 hours), which prevent employers from requiring their employees to work successive shifts of overtime within a short period.

Every modern award contains a flexibility provision that allows an employer and individual employees to agree to vary the application of various terms of the award, including, among other things, the application of overtime rates. Such an agreement is only valid if it is genuine (that is, without coercion or duress) and must be entered into after the employee has commenced employment with the employer. Any agreement that is entered into must result in the employee being better off overall, at the time the agreement is made, than the employee would have been if no individual flexibility agreement had been made.

Some awards also contain what are known as 'annualised salary' provisions, which allow employers to come to an agreement with an employee to pay a salary that compensates the employee for entitlements such as overtime, penalty rates and allowances. Contracts of employment may also contain 'contractual set-off' clauses, which operate in a similar way to an annualised salary arrangement.

VII FOREIGN WORKERS

There are a number of visa categories available to businesses wishing to come to Australia. Immigration laws allow for the permanent and temporary entry of businesspeople and highly skilled individuals into Australia. Not every visa allows the holder to perform work in Australia, so it is very important that employers ensure that any foreign workers hold the specific visa that allows them to perform work in Australia.

Employers may act as a sponsor for foreign nationals who perform work, but this is not required for all visas. For example, under a subclass 400 visa, the visa holder may come to Australia to work for up to six months with the employer without the employer's sponsorship (subject to certain requirements). For other visas, it may be necessary for the employer to act as a sponsor and for the employer to first conduct 'labour market testing'. Labour market testing requires the employer to first demonstrate that it tested the local employment market to recruit Australian nationals for the employment position before it sought a foreign national for that position. The employer must provide evidence of this testing to the Department of Home Affairs, such as advertising for the position for a certain period.

Foreign workers will be protected under Australian employment laws while they are employed in Australia and will be taxed on any income that they earn during the period they are a resident for tax purposes.

VIII GLOBAL POLICIES

Employers have the discretion to create and enforce policies, provided that they are lawful and reasonable. In most cases, there is no requirement that an employer consult with employees about such policies, provided that they do not concern work health and safety or major changes that will have a significant impact on their continuing employment.

Employees are protected by a range of federal, state and territory anti-discrimination legislation. Employees are further protected by the 'general protections' provisions under the FW Act, which prohibit an employer taking adverse action against an employee or prospective employee because of a protected attribute. Although the attributes covered in each legislative scheme vary, the specific protected attributes in the FW Act include:

a race;
b colour;
c sex;
d sexual preference;
e age;
f physical or mental disability;
g marital status;
h family or carer's responsibilities;
i pregnancy;
j religion;
k political opinion;
l national extraction; and
m social origin.

IX PARENTAL LEAVE

All employees in Australia are entitled to unpaid parental leave if they have worked for their employer for at least 12 months. Under the National Employment Standards, employees are entitled to 12 months of unpaid parental leave following the birth or adoption of a child, and a request can be made for an additional 12 months of leave.

Parental leave entitlements in Australia extend beyond maternity leave to include paternity and partner leave, adoption leave and special maternity leave (when an employee has a pregnancy-related illness or her pregnancy ends after 12 weeks because of a miscarriage, termination or stillbirth). In the unfortunate situation of a stillborn child, an employee who would have been entitled to unpaid parental leave that was birth-related leave is still entitled to take the unpaid parental leave.

In the event that an employee has a stillborn child, or a child dies during the 24 months after birth, the employee may give notice to her employer to cancel the leave (if the period of leave has not started) or give written notice that she wishes to return to work on a specified day (if the period of leave has started). The date that the employee returns to work from a period of parental leave that has commenced must be at least four weeks after the date that notice is given of the wish to return to work.

The employee may take compassionate leave during the period of unpaid parental leave in respect of the stillbirth or death of the child in relation to whom the employee is taking unpaid parental leave.

Employees may be entitled to paid parental leave from the Australian government or from their employer under an enterprise agreement, contract or policy. The Department of Human Services administers parental leave pay for people who give birth to a child or who become the adoptive parents of a child, as well as 'Dad and Partner Pay'. Parental leave pay is paid at the rate of the weekly minimum wage for a maximum of 18 weeks (or 90 days). A person who is the biological father of a child, the partner of a child's birth mother or an adoptive parent of a child may also be eligible for Dad and Partner Pay for up to two weeks.

Employees have the right to return to the same job they had before going on leave. If an employee was transferred to a safe job before taking parental leave, or reduced her hours because of pregnancy, she is entitled to return to the job she had before the transfer or reduction in hours. If an employee's job no longer exists or has significantly changed, she must be offered a suitable alternative job. If the employee's job no longer exists, a redundancy may arise.

X TRANSLATION

There is no strict requirement that employment documents are translated into an employee's local or native language. In most cases, it would be recommended that all documents are recorded in English.

However, not having a translated version of the contract may lead to confusion about the rights and obligations that exist under the contract. Depending on the circumstances, it may be appropriate to provide a translated version of an employment contract to an employee to ensure that the risk of confusion or misinterpretation is minimised.

XI EMPLOYEE REPRESENTATION

There is no legislation establishing a framework for the operation of works councils along the lines of the schemes that commonly operate in European countries. However, a similar structure does operate in some Australian workplaces in the form of consultative committees, although they do not have the same powers or authority of a works council. For example, employees may establish a committee that deals with health and safety at the workplace.

In terms of representational rights in a broader sense, the regulation of trade unions, employer associations and enterprise associations are dealt with through registration under the Fair Work (Registered Organisations) Act 2009 (Cth). This legislation provides for the registration of employee and employer associations as well as enterprise associations. Oversight in this area is now split between the FWC and the Registered Organisations Commission.

The FW Act and the Work Health and Safety Act 2011 (Cth) enable union officials to enter workplaces for specified purposes. The FW Act allows representatives who hold a valid permit to enter an employer's premises for the purposes of investigating a suspected contravention of the FW Act or a term of an industrial instrument that affects or relates to a union member; exercising rights under occupational health and safety laws; investigating breaches relating to textile, clothing and footwear industry outworkers; or meeting with employees. Where entry is for the purpose of investigating a suspected breach, the permit holder may inspect any relevant work, process or object, interview willing participants, and may require the employer or occupier to provide any record or document about a member that is directly relevant to the suspected contravention. Entry for the purpose of discussions with employees requires written notice of no less than 24 hours, unless an exemption applies.

XII DATA PROTECTION

i Requirements for registration

There is no common law right to privacy in Australia. However the collection, use and disclosure of personal information is regulated by the Privacy Act 1988 (Cth) (the Privacy Act), which applies to most government agencies and to organisations with an annual turnover of more than A$3 million.

The Privacy Act contains an 'employee records' exemption that relieves employers from compliance obligations. As such, employers are free to collect, use and disclose employee records and outsource employment-related functions without obtaining prior consent, provided these actions are directly related to the employment relationship. Records pertaining to unsuccessful job applicants and contractors are not covered by the exemption and must be managed in accordance with the requirements of the Privacy Act.

ii Cross-border data transfers

Owing to the employee records exemption, an employer can freely transmit an employee's records overseas without prior notification. However, the overseas entity in receipt of the records does not have the benefit of the exemption and is obliged to handle the data in accordance with the privacy laws in its own jurisdiction.

Personal information about employees that does not directly relate to their employment relationship and records of unsuccessful job applicants and contractors that are transferred overseas are subject to the requirements of the Privacy Act. In these circumstances, the employer will have a positive obligation to take reasonable steps to ensure that the overseas

entity complies with the Privacy Act. Including compliance with these requirements as a contractual term in an agreement between an employer and an overseas entity may be regarded as a 'reasonable step'.

iii Sensitive data

Sensitive information is personal information that includes information or an opinion about a person's:

a racial or ethnic origin;
b political opinions or associations;
c religious or philosophical beliefs;
d trade union membership or associations;
e sexual orientation or practices;
f criminal record;
g health or genetic information; and
h some aspects of biometric information.

Sensitive information attracts a higher level of protection than other personal information, such as the requirement that this information only be collected with the consent of the person (except in certain circumstances), that it not be disclosed for a secondary purpose (unless it directly relates to the primary purpose for which it was collected) and not be used for direct marketing.

iv Background checks

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

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

XIII DISCONTINUING EMPLOYMENT

i Dismissal

To end employment without cause, an employer must give the employee written notice of the last date of employment, or payment in lieu of notice. Minimum notice periods are based on length of service. Longer notice requirements may apply under an industrial instrument, contract or policy.

For the most part, employers are not required to notify government authorities or other bodies when an employee is dismissed. In the event that a former employee wishes to apply for social security payments through the Department of Human Services, he or she may request that an employer complete an employment separation certificate. Parties can enter

into a deed of release to reflect a settlement that has been reached regarding the termination of a person's employment, which may contain terms such as an indemnity against further legal action and releases from all such actions.

Certain employees are entitled to protection from dismissal if they fall within a protected category at a point in time. For example, an employee cannot be dismissed during the first three months of an absence from work because of illness or injury, provided the employee has complied with obligations to notify and provide appropriate evidence to the employer with respect to that illness or injury.

Employees who have been injured at work and are receiving workers' compensation payments are protected from dismissal during a certain period: the length of the period and exact rules vary from state to state. Employees on parental leave who have worked at a business for more than 12 months prior to taking leave have a 'return to work guarantee', which means that they are entitled to the same job on return to work or, if that job no longer exists, a job that is substantially similar based on position and pay. However, it is still possible for an employer to implement a 'genuine redundancy' provided that it has first consulted with the employee on parental leave.

ii Redundancies

A genuine redundancy occurs when a job is no longer required to be performed by any person (for example because of economic or technological changes). When making a position redundant, employers are required to consult with the affected employee, or employees, about the effects of the change and to allow the employee or employees to provide feedback on the proposed changes.

Awards and enterprise agreements have consultation processes that apply when there are major changes in the workplace, including redundancies. These processes will set out the steps the employer is required to take before making a final decision about the change, notifying the employees who may be affected by the proposed changes, and include:

a providing the employees with information about these changes and their expected effects;
b discussing steps taken to avoid and minimise negative effects on employees; and
c considering employees' ideas or suggestions about the changes.

In the event of redundancy, severance pay is required in addition to the notice period. The FW Act sets out a scale of severance pay based on years of service as the minimum entitlement for all employees, ranging from four to 16 weeks. Employers may also have redundancy policies that apply more generous entitlements to redundancy pay. It is also open for an employer and employee to come to an agreement on settlement terms that are finalised and recorded in a deed of release. When implementing redundancies of 15 or more staff, an employer must give written notification to the Department of Human Services.

XIV TRANSFER OF BUSINESS

At common law, contracts of employment do not automatically transfer. Under the FW Act, there may be a transfer of employment between two employers where the transferring employee commences work within three months of termination from the old employer, the work performed is substantially the same, and one of the following connections is established:

a the employers are associated entities;
b there is an outsourcing or insourcing of business between the employers; or

c there is an arrangement concerning the ownership or the assets to which the transferring work relates.

If there is a transfer of employment, the employee's period of service with the first employer counts as service. This means that an employee retains his or her entitlement to accrued annual leave (unless paid out on termination of employment with the first employer) and that the period of service relevant to redundancies is not interrupted, unless the second employer (not being an associated entity) decides not to recognise the employee's period of service with the first employer. Continuity of long service leave entitlement is dependent on the applicable state legislation. Employees can be dismissed in connection with a business sale if their positions are genuinely redundant.

An enterprise agreement will continue to apply to a transferring employee while they are performing transferring work, until it is terminated or replaced. However, the new employer, a transferring employee or a union may apply to the FWC for an order varying the application of the transferring instrument.

XV OUTLOOK

Covid-19 has had a significant effect on employment law, with many employers putting in place measures to address the risk of exposure and spread, including by way of mandatory vaccination policies. During the coming year, we are likely to see many employers having to deal with pushback from employees and other stakeholders on these measures, which may become more strict as we deal with new variants of covid-19.

There will be a federal election in 2022, which is likely to revolve around the economic recovery and potential changes to existing employment legislation. The opposition party has already flagged that employment conditions will be a topic of debate by introducing a private members' bill, which mandates that labour hire workers are paid the same as employees who perform the equivalent role.

Appendix 1

ABOUT THE AUTHORS

JOYDEEP HOR

People + Culture Strategies

Joydeep Hor is a graduate of Harvard Business School's Owner-President Management Program and one of Australia's most high-profile lawyers and legal entrepreneurs. In July 2010, Joydeep founded a ground-breaking practice in the legal industry, People + Culture Strategies.

Renowned as the go-to person in Australia for difficult terminations of employment and as one of the few thought leaders in people and culture matters, Joydeep is widely published in his area and has co-authored books titled *Managing Workplace Behaviour* (2012), *Managing Termination of Employment* (2010 and 2007), *Inside Employee Screening* and *Finders Keepers: How to Attract and Retain Great Employees* (2008).

He appears as lead workplace commentator on television's Sky Business Channel as an expert commentator every fortnight. He is a Fellow of the Australian Human Resources Institute and a Chartered Fellow of the UK's Institute of Personnel and Development. In 2008 and 2010, he was listed (in Australasian Legal Business) as one of the top 40 lawyers in Australia and New Zealand and the only workplace relations lawyer in this list.

ANDREW JOSE

People + Culture Strategies

Andrew Jose started his legal career at a top tier firm in 2017 in the Australian Capital Territory after completing a Juris Doctor at the Australian National University. He practised in a range of areas, including public sector transactions and commercial litigation. In 2018, Andrew made the move to employment law and has not looked back since.

As an associate at People + Culture Strategies, he regularly advises across multiple employment-related areas, such as termination risks, award compliance and contractual breaches. Andrew has drafted contracts of employment, contractor agreements and workplace policies for a multitude of clients in different industries. Recently he has been involved in the day-to-day management of two major litigation matters involving misleading and deceptive conduct and the anti-bullying provisions of the Fair Work Act.

Andrew has worked with clients in a broad range of industries, including information technology, financial services, retail and manufacturing. Andrew takes a keen analytical and commercial approach to every matter that he works on.

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