HERBERT SMITH FREEHILLS

EMPLOYMENT & WORKPLACE RELATIONS IN AUSTRALIA

LEGAL GUIDE

2024-2025

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Contents

1 Introduction

The Australian Herbert Smith Freehills Employment, Industrial Relations and Safety team assists clients across the full range of workplace risk issues. The environment has never been more complex for employers. There are now intersecting and overlapping responsibilities across a range of functional areas requiring the combined efforts of the industrial relations, employment, safety, legal and operations functions. These teams are now working very closely together to grapple with new requirements, ensure compliance but more importantly to drive productivity and growth for their business.

We are very proud to have the opportunity to partner with these clients and help them achieve success.

We hope you enjoy this annual guide and find it a useful reference tool across the full range of employment topics which impact your role. Given the legal developments over the last 12 months, many of the chapters in this Guide have now been rewritten or updated, and where possible we have included guidance about upcoming proposed reforms or changes which will take effect throughout the year.

The only constant is change

In 2023, there was a significant shift in the Australian industrial relations landscape. The Federal Government commenced its workplace reform agenda with the commencement of the reforms introduced by the Federal Government through the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) (Secure Jobs, Better Pay Act).

This continued in late 2023 into early 2024 through the implementation of a series of reforms which were branded 'Closing the Loopholes Reforms'. As you will see, the changes went far beyond merely tidying up loopholes or issues, but instead made major changes on some central elements of industrial relations, employment and safety issues.

The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) was split into two parts – the first tranche, which passed both houses on 7 December 2023, included the parts of the Bill that dealt with 'same job, same pay' for labour hire workers, workplace delegate rights for employees, criminalisation of intentional wage and superannuation theft, enhanced discrimination protections, amendments regarding conciliation conferences related to industrial action, a new federal criminal offence of industrial manslaughter and right of entry changes for union officials assisting health and safety representatives.

The second tranche was debated in early 2024 under a second Bill, which then passed both houses on 12 February 2024. This included changes to intractable bargaining powers, provisions relating to multi-enterprise agreements, casual employment, the definition of 'employee', protections and minimum standards for digital platform and road transport workers (including workplace delegate rights), and a new 'right to disconnect' (among others).

In many respects, the Closing Loopholes Reforms contain even more significant change than was contained within the pages of the Secure Jobs, Better Pay Act. The unashamed policy intent of the reforms was stated to be the redress of perceived wage stagnation in the Australian economy, and the consequence of this intent was to tilt the balance of workplace bargaining and other powers towards unions and workers.

Time will tell whether there has been an 'over-correction' here, or if there are unintended consequences of these material reforms. One thing is certain though – business leaders need to fully grasp the impact of these changes if they are to navigate through them successfully.

A continued focus on compliance

In the midst of the reforms described above, some things have stayed the same. Wage compliance regulation continues to attract the focus of management and Boards alike.

The changes to federal law have increased the stakes though, particularly noting the introduction of criminal offences in relation to certain types of intentional underpayments (introduced through the Closing Loopholes laws).

'Factor' in complexity

Many underlying concepts in employment law and practice have been unchanged for many years, some even for decades. What has changed over the last year has been a redrafting of the definitions of some of those concepts, with a preference for 'multi-factor' tests.

These tests provide a great deal of flexibility in expanding the scope of key concepts, and this can help ensure nothing 'falls between the gaps'. The other side of that sort of flexibility is of course potential operational uncertainty.

For example, these multi-factor tests apply to questions such as whether:

- a worker is a 'casual', an 'employee', a 'contractor' or an 'employee-like worker'
- a refusal to respond to contact outside of an employee's working hours is reasonable, and
- whether the Fair Work Commission (FWC) should make a same job, same pay order.

More room for contests, likely more need to go before the umpire

Much of the new regulation expands the FWC's jurisdiction to determine conditions and resolve disputes, which will likely lead to an increase in FWC applications. These may include applications for 'stop orders' related to the new 'right to disconnect', orders to ensure same pay for the same job, for minimum standards for employee-like workers, to deal with unfair services contract terms or about casual conversion rights.

Empowering worker representatives

Unions are back at the centre of the industrial relations system, equipped with tools to sustain this position. For example, union delegates now have rights to paid leave for delegate training, and employers must provide reasonable facilities and time for them to communicate with and represent members. Unions will also play a key role in many of the new jurisdictions and powers outlined in the reforms.

Employee matters are business critical

There is no avoiding the macro policy intent of the reforms. Labour costs will be expected to rise.

Getting the most out of this moment in terms of productivity and engagement will mean that sophisticated businesses are now reassessing their industrial playbook and overall strategy.

Thank you

I am very proud to introduce our 2024 Guide to Employment and Workplace Relations in Australia. The Guide is written with the needs of you, our clients, in mind.

This edition contains the most recent legislative reforms (as at the date of publication), and as a consequence, we have added the following new chapters:

- Chapter 16, 'Wage theft and compliance'
- Chapter 22, 'Independent contractors'
- Chapter 23, 'Labour-hire'
- Chapter 24, 'Gig economy and road transport workers'

If you are reading this in hard copy, please note that an electronic and fully searchable version is also available.

This Guide is a feature of the unique place held by Herbert Smith Freehills in the field of Australian employment law, industrial relations and workplace safety.

Our firm has been the leader in this field over many decades. The investment we make in our clients and the development of our lawyers across our Australian offices is hopefully apparent from the breadth of content in our 2024 Guide, and it is all possible because of the support of our wonderful clients, large and small.

On behalf of all of our team, thank you for your ongoing support.

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2 An overview of employment regulation in Australia

Overview

Employment and workplace relations matters in Australia are governed by a range of state and federal laws. These cover areas such as minimum terms and conditions of employment, work health and safety (WHS), privacy, discrimination, superannuation, public holidays and various types of leave.

The terms and conditions of employment and industrial relations obligations of most employers are regulated at the federal level under the system established by the *Fair Work Act 2009* (Cth) (FW Act).

However, certain employment-related matters continue to be regulated at the state and territory level.

This introductory chapter provides a general overview of employment regulation in Australia.

State and federal systems of regulation

Although the FW Act is the primary legislation governing employment in Australia, employers need to be aware of certain matters that are still the responsibility of each state and territory, and understand how the two levels of regulation interact.

The FW Act generally 'covers the field' and overrides state and territory laws that deal with the same subject matter.

However, certain matters are specifically excluded from the scope of the FW Act.

These matters include:

- workers' compensation
- work health and safety
- long service leave (other than for a limited number of employees who have a preserved award–or agreement–derived long service leave entitlement), and
- equal opportunity and discrimination.

Most, but not all, employers are covered by the federal system.

Employers who are not 'constitutional corporations' (trading, financial and foreign corporations) and certain federal and state government bodies will not necessarily be covered by the substantive provisions of the FW Act. A corporation will be considered a trading corporation if it engages in 'substantial or significant' trading activities. State and territory industrial laws regulate employers not covered by the FW Act.

National Employment Standards

The National Employment Standards (NES) are 12 minimum conditions of employment which apply to all employees covered by the FW Act.

The 12 minimum conditions of employment that comprise the NES are set out in the table below.

STANDARD	GENERAL EXPLANATION
Hours of work	maximum 38 'ordinary' hours each week plus 'reasonable' additional hours
Flexible working arrangements	can be requested by employees who are parents, carers, have a disability, are aged 55 or older, are experiencing family and domestic violence or provide care or support to a family member who is experiencing family and domestic violence, and pregnant employees
Casual conversion	a process for employees to convert from casual to full-time or part-time employment
Parental leave	up to 52 weeks of unpaid parental/adoption leave and related entitlements, with the ability to request a further 52 weeks' unpaid leave
Annual leave	4 weeks per year, with an extra week for shiftworkers
Personal/carer's leave, compassionate leave, and family and domestic violence leave	10 days of paid personal (sick/carer's) leave per year plus 2 days of unpaid carer's leave (per occasion required) 2 days of paid compassionate leave (per occasion required) 10 days' paid family and domestic violence leave per annum
Community service leave	to engage in eligible community service activities (eg jury service and voluntary emergency management activities such as fire-fighting)
Long service leave	entitlements are per state and territory long service leave legislation (other than for a few employers who are subject to preserved award and agreement entitlements)
Public holidays	the right to be absent from work without loss of pay on public holidays and the right to refuse to work on a public holiday on reasonable grounds
Notice of termination and redundancy pay	dependent on length of service, up to 5 weeks' notice of termination and up to 16 weeks' redundancy pay
Fair Work Information Statement and Casual Employment and Fixed-Term Contract Information Statements	must be issued to certain employees to provide information about conditions of employment
Superannuation contributions	to pay superannuation contributions (11.5% in 2024-2025) of an employee's ordinary time earnings

Some NES entitlements are tied to employment status (ie whether the employee is engaged on a permanent or casual basis) or length of service (eg parental leave, notice of termination and redundancy pay).

The NES also include rules about how these entitlements apply in practice (eg when annual leave can be taken, what documentation is required for personal leave, whether the leave is paid or unpaid etc). Further information about the NES and these rules can be found in Chapter 3, 'National Employment Standards'.

All enterprise agreements must comply with the NES, and all modern awards are underpinned by the terms of the NES. Common law contracts of employment are also subject to the NES. As the provisions of the NES are statutory minimum terms of employment, they cannot be traded off or bargained away. However, employers and employees are free to negotiate other terms and conditions of employment not covered by the NES or that are more generous than the NES.

Minimum wages

How are minimum wages set?

Minimum wages, including casual loadings, are set and adjusted by the Expert Panel of the Fair Work Commission (FWC) on an annual basis.

The 2023-2024 wage review

Following the Annual Wage Review 2023-2024, the Expert Panel:

- increased the national minimum wage for adults not covered by a modern award by 3.75% to $915.90 per week (based on a 38 hour week) or $24.10 per hour
- increased minimum award wages by 3.75%, and
- maintained the casual loading for award/agreement-free employees at 25%.

For further information on award-specific minimum wage increases refer to Chapter 4, 'Modern Awards'. Employers should consult the wages provisions of any applicable modern award to determine the minimum wages for their employees.

The role of modern awards

What are modern awards?

Modern awards are industry or occupation-based instruments which establish a safety net of terms and conditions of employment that supplement the 12 minimum conditions of employment set out in the NES. Modern award terms are limited to the 12 matters covered by the NES, plus a further 10 terms and conditions of employment.

While awards were once the main source of regulation of employee terms and conditions, since the early 1990s, Australia's industrial relations landscape has been progressively reformed to make enterprise agreements the main focus. Since that time, awards have been intended to be a minimum safety net only, with enterprise bargaining being the primary means of determining actual terms and conditions of employment.

That being the case, not every employer and employee will be covered by a modern award (as they may not fall within the scope of the 'coverage' provisions of the modern award), and awards do not apply to employers or employees who are covered by an enterprise agreement.

Importantly, an enterprise agreement must leave all employees covered by it better off overall compared to the relevant modern award.

Minimum wages and modern awards

Each modern award includes terms dealing with minimum wages and skills-based pay scales for employees covered by the award. The minimum wages in modern awards are adjusted each year following annual wage reviews conducted by the Expert Panel of the FWC, as noted above.

For further information refer to Chapter 4, 'Modern Awards'.

Enterprise agreements

What are enterprise agreements?

Enterprise agreements are collective agreements made by employers and their employees under the FW Act. In most cases, employees are represented by unions which are allotted legal status as 'bargaining representatives'.

All enterprise agreements can operate alongside common law contracts of employment, however a contract of employment can only supplement (not undercut) enterprise agreement terms and conditions.

Sweeping changes to the enterprise bargaining regime in the FW Act were introduced following the passage of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). For further information refer to Chapter 11, 'Enterprise Bargaining'.

Better off overall test (BOOT)

To be approved by the FWC, all new enterprise agreements must pass the BOOT. Under the BOOT, each employee covered by an enterprise agreement must, on balance, be better off overall than they would be under the applicable modern or enterprise award.

The BOOT allows award conditions (but not NES conditions) to be traded off or modified as long as the total remuneration and/or benefits received by the employee under the proposed enterprise agreement leaves them better off overall than if the relevant award applied. The test is applied strictly by the FWC.

Labour hire and 'same job, same pay'

The FWC has power to make 'regulated labour hire arrangement orders'. These orders, which can come into effect from 1 November 2024, require labour hire workers to be paid in accordance with enterprise agreements that apply to the same kind of work performed by the labour hire workers if they were directly employed by the 'host' company they are supplied to. Hosts must also provide sufficient payroll information to employers of labour hire workers to enable them to comply with their new payment obligations, and the Act introduces penalties for businesses who attempt to avoid the scope of the FWC's new powers.

See Chapter 23, 'Labour Hire' for more information.

Minimum standards for 'employee-like' workers

From 26 August 2024, the FW Act will contain provisions providing a new framework of protections for 'employee-like' workers in the gig economy and road transport industries, including powers for FWC to make minimum standards orders similar to modern awards.

See Chapter 24, 'Gig-economy and road transport operators' for more information.

Industrial action

When can employees take lawful industrial action?

Employees can only take lawful industrial action where certain procedural requirements are met. These requirements include that:

- they are genuinely trying to reach agreement about permitted matters
- the nominal expiry date of any existing agreement has passed
- the industrial action has been authorised by a protected action ballot, and
- the required written notice of the action has been given to the employer.

What can employers do if employees take unlawful industrial action?

Where employees take or threaten unlawful industrial action, their employer can seek an order from the FWC that the industrial action stop, not occur or not be organised.

In certain circumstances, action may also be available in the Federal Court of Australia or state/territory courts.

Can employers pay employees who take industrial action?

No. In almost all cases it remains unlawful for an employer to pay employees who take industrial action, whether or not the industrial action is lawful. Special rules apply to the payment of employees who participate in lawful partial work or overtime bans.

If employees engage in any type of 'unprotected' industrial action, the employer must deduct a minimum of 4 hours' pay from participating employees. This applies even if the length of the industrial action is shorter than 4 hours.

For further information refer to Chapter 12, 'Responding to Industrial Action'.

Bullying

The federal anti-bullying jurisdiction empowers a 'worker' who reasonably believes that they have been bullied at work to apply to the FWC for an order that the bullying stop.

The definition of 'worker' is not limited to employees. It includes an individual who performs work in any capacity, including as a contractor, a subcontractor, an outworker, an apprentice, a trainee, a student gaining work experience, or a volunteer.

A person is 'bullied at work' if an individual repeatedly behaves unreasonably towards the worker, and that behaviour creates a risk to the worker's health and safety. The legislation makes it clear that reasonable management action carried out in a reasonable manner is not taken to be bullying behaviour.

Although the FWC does not have the power to impose a financial penalty on an employer, or otherwise award any monetary compensation to an applicant, the types of orders it can make to prevent the bullying from occurring are extremely broad. A failure to comply with a bullying order can attract civil penalties.

For further information refer to Chapter 10, 'Bullying'.

Transfer of business

The FW Act regulates what happens when an employee takes up employment with a new employer as part of a 'transfer of business'. These rules are broad and have been designed to maintain employees' terms and conditions of employment when the employee and their work are transferred to another entity, including within a corporate group.

The key consequence of a transfer of business under the FW Act is that any applicable industrial instruments will transfer to the new employer and apply to the transferring employees, unless the new employer obtains an order from the FWC that this not occur. A transfer of business also has implications with respect to the new employer's recognition of a transferring employee's prior service and leave entitlements with the old employer.

What is a transfer of business?

The transfer of business rules under the FW Act will only be triggered if:

- one or more employees of one employer (the old employer) cease employment with the old employer and, within 3 months, commence employment with another employer (the new employer)
- the transferring employees perform the same or substantially the same work for the new employer as they performed for the old employer, and
- there is a 'connection' between the old employer and the new employer.

A 'connection' will exist where:

- there is a transfer of assets from the old employer to the new employer
- the old employer outsources work to the new employer
- the new employer ceases to outsource work from the old employer (commonly referred to as 'insourcing'), or
- the old employer and the new employer are associated entities.

Further information can be found in Chapter 15, 'Transfer of Business in Australia'.

Right of entry

What rights do unions have to enter a workplace?

Union officials may gain entry to a workplace:

- to hold discussions with employees whose industrial interests the union is entitled to represent (ie who fall within the scope of the union's rules)
- pursuant to state or territory WHS laws, or
- to investigate a suspected breach of the FW Act or an industrial instrument that applies or applied to a member of the union.

There are certain conditions that must be met before a union can exercise rights of entry. For example, a union official must hold a valid entry permit.

Can unions do anything they like once they enter the workplace?

No. Depending on the reason for entry, unions are limited in what they can do.

For instance, where a union is conducting discussions with employees, it can only hold discussions with employees whose industrial interests it is entitled to represent and who wish to engage in those discussions. Where a union is entering to investigate a suspected breach, it can only inspect work and interview employees for the purposes of investigating the breach, and generally can only view records of employees who are members of the union.

The *Fair Work Legislation Amendment (Closing Loopholes No. 2) Act 2024* (Cth) (Closing Loopholes (No 2) Act) introduced changes that have the capacity to further empower permit holders on right of entry. Among these changes is that, from 1 July 2024, permit holders are now able to exercise a right of entry without notice if they obtain an exemption certificate from the FWC for suspected underpayments.

For further information refer to Chapter 13, 'Union Regulation and Right of Entry'.

Workplace delegates

On 14 December 2023, the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) (Closing Loopholes Act) introduced further rights and protections for 'workplace delegates'. Employers are required to provide delegates with reasonable access to the workplace to undertake their duties as delegates. Workplace delegates are entitled to paid time during normal working hours to attend training in relation to their role (except for employees of small businesses). An employee does not need a right of entry permit to exercise the rights of a 'workplace delegate'.

Modern awards (from 1 July 2024), enterprise agreements (where the vote starts on or after 1 July 2024) and workplace determinations (that are made on or after 1 July 2024) will be required to contain clauses providing for these workplace delegate rights.

An employer who fails to provide a workplace delegate with the new entitlements afforded by the Closing Loopholes Act will be liable under the general protections provisions of the FW Act. In addition, the Closing Loopholes Act introduced further protections for workplace delegates that require employers to ensure that they do not:

- unreasonably fail or refuse to deal with a workplace delegate
- knowingly or recklessly make a false or misleading representation to a workplace delegate, or
- unreasonably prevent a workplace delegate from exercising their rights.

For further information refer to Chapter 13, 'Union Regulation and Right of Entry'.

Termination of employment

Several claims are available to employees who are dismissed from their employment. Depending on the circumstances, employees can claim:

- under the common law for breach of contract
- unfair dismissal under the FW Act
- general protections under the FW Act, or
- discrimination under state or federal equal opportunity legislation.

Who can bring an unfair dismissal claim?

Only an employee whose employment has been terminated at the initiative of their employer, or who has been 'constructively dismissed' can bring an unfair dismissal claim. The unfair dismissal jurisdiction provides a remedy to employees if their dismissal was 'harsh, unjust or unreasonable'.

The following employees are excluded from bringing claims:

- employees who have not completed the minimum employment period of 6 months (in the case of employers with 15 or more employees) or one year (in the case of employers with fewer than 15 employees)
- an employee for whom the dismissal was a case of genuine redundancy, where the employer has complied with its redeployment and consultation obligations
- an employee not covered by an industrial instrument and paid more than the 'high income threshold' ($175,000 per annum, as at 1 July 2024), and
- an employee who is pursuing other termination of employment proceedings.

Unfair dismissal and other claims relevant to termination of employment are dealt with in greater detail in Chapter 6, 'Termination of Employment'.

General protections and workplace rights

Under the FW Act, employees cannot be dismissed or subjected to other detrimental action because they have certain rights, entitlements or attributes.

For example, an employer cannot:

- take adverse action against an employee because of the employee's workplace rights or industrial activities (including freedom of association)
- engage in behaviour intended to coerce an employee to exercise, or not exercise, their workplace rights
- take adverse action against an employee because of a particular attribute (eg their race, colour, sex, age, disability, etc), or
- knowingly or recklessly make false and misleading statements about a person's workplace rights.

The general protections provisions also apply to (and protect) employers, independent contractors, unions and prospective employees in certain circumstances.

The implications of the general protections rights are dealt with in greater detail in Chapter 6, 'Termination of Employment' and Chapter 9, 'Discrimination, Sexual Harassment, Diversity and Workplace Rights'.

Discrimination

Discrimination is regulated at both state and federal levels by legislation in all jurisdictions. Under this legislation, employers must not directly or indirectly discriminate against employees for a prohibited reason. These reasons vary from jurisdiction to jurisdiction, but generally include the following:

- sex
- marital status
- pregnancy or potential pregnancy
- breastfeeding

- family or carer's responsibilities
- sexual preference or orientation and lawful sexual activity
- race or nationality
- colour
- gender history, gender identity, transgender, transexual or intersex status
- religious belief or activity
- physical features
- disability
- physical or intellectual impairment
- age
- political belief of activity
- trade union membership or industrial activities
- employment activity, and
- irrelevant criminal or medical record.

Each state/territory has a slightly different definition of protected attributes, and it is therefore important to check the relevant legislation in which the business operates. Most employers adopt a 'high water mark' and ensure that their relevant policies capture all grounds of unlawful discrimination.

In most jurisdictions, it is a defence to a discrimination claim that the discrimination related to a characteristic that prevented the employee (or prospective employee) from fulfilling the inherent requirements of their position or employment.

See Chapter 9, 'Discrimination, Sexual Harassment, Diversity and Workplace Rights' for further information.

Changes to workplace sexual harassment laws

Following the passage of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) on 12 December 2022, the Federal Government has now implemented all of the 55 recommendations in the Australian Human Rights Commission's Respect@Work report which was released in March 2020. There is now:

- a positive duty for employers to take reasonable and proportional measures to eliminate unlawful sex discrimination, including sexual harassment, as far as possible
- a prohibition against conduct that subjects another person to a hostile workplace environment on the ground of sex, and
- the ability for representative bodies (such as unions) to make representative applications in the Federal Courts (also known as 'class actions') on behalf of one or more individuals who have experienced unlawful discrimination.

See Chapter 9, 'Discrimination, Sexual Harassment, Diversity and Workplace Rights' for further information.

Right to disconnect

From 26 August 2024 (or 26 August 2025 for small businesses) the FW Act will contain an employee 'right to disconnect'.

The 'right to disconnect' is a positive right for employees to refuse to monitor, read or respond to contact, or attempted contact, from an employer outside of the employee's working hours unless the refusal is unreasonable. This right also

extends to refusing to respond to contact from a third party if the contact, or attempted contact, relates to the employee's work. This right will be a protected attribute for the purposes of the general protections regime in the FW Act.

The FWC will have powers to deal with a dispute raised by either an employer or employee regarding the 'right to disconnect'. If an application is made to the FWC to deal with a 'right to disconnect' dispute and the FWC is satisfied that:

- the employee is unreasonably refusing to monitor, read or respond to contact or attempted contact and there is a risk the employee will continue to do so, or
- the employee's refusal is not unreasonable and there is a risk the employer will take disciplinary action against the employee due to the reasonable refusal or continue to require the employee to make contact,

then the FWC will have power to make the following orders:

- that the employee be prevented from continuing to unreasonably refuse to monitor, read or respond to contact or attempted contact
- the employer be prevented from taking disciplinary action against the employee for a reasonable refusal, or
- that the employer be prevented from making unreasonable contact with the employee.

Modern awards will also contain a term that specifies that employees can exercise this new 'right to disconnect' and that the FWC must make written guidelines in relation to the operation of the 'right to disconnect' provisions.

Work health and safety and workers' compensation

Work health and safety and workers' compensation continue to be regulated primarily by each state and territory. This has created inconsistency between jurisdictions, especially because of the different rules affecting WHS compliance.

The federal model health and safety legislation was released in May 2010 with the intention of harmonising the disparate WHS laws around Australia. All jurisdictions except Victoria have since adopted the model laws, so some differences nonetheless remain between jurisdictions.

Regardless of whether the harmonised laws or existing state or territory laws apply, the fundamental tenets of Australian WHS law are that employers have an obligation to maintain a safe workplace and ensure the health, safety and welfare of their workers and other persons affected by the way they conduct their business.

WHS is a highly regulated regime, with state and federal regulatory bodies empowered to investigate, enforce and prosecute breaches of WHS laws.

Substantial penalties apply for failure to comply with the relevant legislation and both companies and their employees or officers involved in contraventions can be exposed to criminal prosecution.

Industry-specific (eg mining and petroleum) and task-specific (eg electrical safety and dangerous goods) safety laws also exist in each jurisdiction.

This topic is dealt with in greater detail in Chapter 20, 'Health and Safety, Workers' Compensation and Personal Injury'.

Long service leave

Long service leave provides additional paid leave for employees with lengthy uninterrupted service. It remains primarily regulated by state and territory legislation. The NES preserve, or allow for the preservation of, long service leave entitlements provided by industrial instruments that were in operation on 31 December 2009 in certain limited circumstances.

Unless an entity is subject to award- or agreement-derived long service leave terms, enterprise agreements made under the FW Act are subject to state and territory laws dealing with long service leave.

Most state schemes provide for an entitlement of 3 months' long service leave after 15 years' service, with some states allowing this entitlement to be accessed or paid out on termination of employment after a shorter period of time, such as 7 or 10 years.

Further information can be found in Chapter 3, 'National Employment Standards'.

Superannuation

Under the *Superannuation Guarantee (Administration) Act 1992* (Cth) employers must contribute a minimum of 11.5% of an employee's ordinary time earnings to that employee's approved superannuation fund. The minimum contribution will increase to 12% in 2025.

Generally speaking, employers must provide a choice of superannuation fund for employees.

As of 1 January 2024, the right to superannuation contributions is included as a NES entitlement. Employers already have an obligation to pay superannuation contributions for eligible employees under superannuation guarantee laws. There would be no contravention of the NES provision where an employer has met their obligations under these laws.

This means any unpaid or underpaid superannuation is directly enforceable under the FW Act. Employees, unions or the FWO may take action for breaches by employers. Employer compliance under existing superannuation legislation will continue to be enforced by the ATO, the primary regulator.

See Chapter 18, 'Superannuation', for more information.

Privacy and workplace surveillance

The *Privacy Act 1988* (Cth) sets out the Australian Privacy Principles, which govern the collection, use, disclosure and transfer of personal and sensitive information in Australia's private sector. In addition, some states and territories have enacted health records and/or specific workplace privacy legislation.

State and territory-specific legislation also exists which governs the use of electronic surveillance and monitoring of employees.

See Chapter 17, 'Privacy and Workplace Surveillance', for more information.

29 Contributors

Preparing a publication of this nature is only possible due to the great experience and dedication of our people. We would like to acknowledge the contributions of all the lawyers and support staff from the Herbert Smith Freehills team who helped with this publication:

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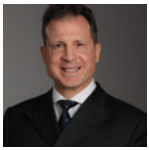

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