HERBERT SMITH FREEHILLS

EMPLOYMENT & WORKPLACE RELATIONS IN AUSTRALIA

LEGAL GUIDE

JANUARY 2022

HERBERT SMITH FREEHILLS GUIDE TO EMPLOYMENT & WORKPLACE RELATIONS IN AUSTRALIA 2022

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Overview

Steve Bell

Australia's employment landscape continued to rapidly evolve over the course of 2021. We have been proud to partner with our clients to support this change, and to help them thrive and grow despite circumstances often beyond their control. There will be no turning back to pre-pandemic ways of working, and this is an exciting time to support our clients in their ambitions.

As I reflect, it goes without saying that 2021 was a year where workplaces and the Australian economy were heavily influenced by the consequences of the COVID-19 pandemic.

Throughout the year, employers were actively involved in the challenges of addressing ongoing lockdowns, interstate border closures and the constant and fluctuating array of public health orders, 'authorised worker' rules, and government vaccination mandates.

These circumstances presented tremendous opportunities for in-house HR, safety and legal teams to closely partner with their businesses to find solutions amongst the uncontrollable and to lead change. It was energising to see these internal teams rise to that occasion, and we were happy to play our small part in helping them to do so.

However, the pandemic did not define all workplaces issues in Australia. As we moved out of lockdowns, the economy has begun the rapid return to normality and growth. The 'war for talent' began in earnest for nearly all sectors of the Australian economy and will continue throughout 2022. The importance of providing a compelling 'employee value-proposition' has never been more important, and the way in which businesses approach employment, safety and industrial relations laws will need to be highly attuned to this context.

Social change also influenced the role of employers. In particular, there was attention given to the questions of providing supportive, safe and successful workplaces for women. The issue of workplace sexual harassment had a long-overdue prominence in political and social discussion in Australia over 2021 – it inevitably now sets a course for addressing systemic barriers to women's success at work, and this will continue in 2022 and beyond. These changes will need to be lasting and meaningful, and many of our clients have led the debate and led by example on these matters. We have been very proud to help them achieve these sorts of changes.

We have seen many of our clients embrace new workplace flexibility, including as to how, when and where work is to be undertaken. Globally, HSF adopted our own agile working policy to reflect our expectation that staff will work in the office an average of 60 per cent of their working hours. We are planning our business accordingly. These sorts of changes offer many positives, not least the opportunity to engage with our national clients virtually, from anywhere. And it means that the skills of our team of

almost one hundred employment lawyers, as well as our training platforms and client services are being brought to bear for the matters where we can add the most value.

As we look to 2022, this will be the year in which many of these issues convalesce, and there will be a need to normalise the new ways of working and to meet the new expectations from employees.

I am very proud to introduce our 2022 Guide to Employment and Workplace Relations in Australia. The Guide is written with the needs of you, our clients, in mind. It is a reference tool for in house counsel, IR, HR and safety practitioners. The Guide covers all of the main employment issues facing Australian employers, from the formation of the employment offer, to termination and everything in between. 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 constantly been the leader in this field over many decades. We hear this from our valued client feedback, and from the ratings of independent sources like Chambers, Doyles and Asia Pacific 500. 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 2022 Guide.

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

Steve Bell
Regional Head of Practice (APAC) Employment & Industrial Relations & Safety
T +61 3 9288 1236
M +61 419 351 022
steve.bell@hsf.com

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
- WHS
- 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) or 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 11 minimum conditions of employment which apply to all employees covered by the FW Act.

The 11 minimum conditions of employment that comprise the NES are set out in the table below. The casual conversion provisions are the latest addition to the NES, commencing from

27 March 2021, and impose an obligation on employers to offer permanent employment to eligible casual employees (subject to some limited exceptions).

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 domestic violence or provide care or support to a family member who is experiencing domestic violence
Casual conversion	employers must make an offer of permanent employment to a casual employee who has been employed for a period of 12 months and worked a regular pattern of hours on an ongoing basis during at least the last 6 months of their employment (subject to some limited exceptions)
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) 5 days of unpaid family and domestic violence leave per year if the employee is experiencing family and domestic violence (also applies to part-time and casual employees in full)
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 (subject to preserved award and agreement entitlements, which apply in limited circumstances)

STANDARD	GENERAL EXPLANATION
Public holidays	the right to be absent from work 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 Information Statement	must be issued to all new employees to provide information about conditions of employment

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 4, '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 2021 wage review

Following the Annual Wage Review 2021, the Expert Panel:

- increased the national minimum wage for adults by 2.5% to $772.60 per week (based on a 38 hour week) or $20.33 per hour, and
- maintained the casual loading for award/agreement-free employees at 25%.

The new national minimum wage applied from the first full pay period on or after 1 July 2021 for employees that are not covered by modern awards. For those employees covered by modern awards, the increase was implemented in three stages and commenced from the first full pay period on or after:

- 1 July 2021 for most modern awards
- 1 September 2021 for the *General Retail Industry Award 2020*, and

- 1 November 2021 for 21 specific modern awards.

For further information on award-specific minimum wage increases refer to Chapter 5, '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 11 minimum conditions of employment set out in the NES. Modern award terms are limited to the 11 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 or enterprise 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 5, '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.

Are there benefits in using enterprise agreements?

There may be benefits in using enterprise agreements, although this will depend on the particular workplace and the terms and conditions that currently apply to employees.

Potential benefits include:

- implementing workplace arrangements that are adapted and suitable for a specific business
- the ability to exclude or modify award conditions that might otherwise apply to the employees. Whilst excluding or

modifying these award conditions may provide more flexibility, the 'better off overall test' (BOOT) must nonetheless be satisfied

- ensuring employees receive adequate compensation for excluded or modified conditions, and
- protecting against industrial action, which will be unlawful during the nominal life of an enterprise agreement.

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 he/she 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.

For further information refer to Chapter 12, 'Enterprise Bargaining'.

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 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. Complications as to the amount of pay that must be withheld may arise where the unprotected industrial action takes the form of bans on working overtime or other forms of action that may be difficult to identify or separate from the employee's performance of work.

For further information refer to Chapter 13, 'Responding to Industrial Action'.

Bullying

The federal anti-bullying jurisdiction empowers a 'worker' who reasonably believes that he or she has 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.

The FWC is required to start dealing with a bullying application within 14 days of it being made. The tight statutory timeframe is at odds with the often lengthy timeline for investigation and prosecution of bullying complaints, which remains within the realm of federal, state and territory safety regulators. Indeed, the overlap between the bullying jurisdiction and WHS laws (which can expose employers and individuals to criminal sanction) is a point of great conjecture.

For further information refer to Chapter 11, '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'. The focus of the transfer of business rules is on a transfer of employment. 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.

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 relevant connection between the old employer and the new employer.

A relevant 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 16, '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.

For further information refer to Chapter 14, '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' (currently $158,500 per annum from 1 July 2021), 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 7, '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, his or her 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 7, 'Termination of Employment' and Chapter 10, '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, which includes:

- sex
- marital status
- pregnancy or potential pregnancy
- breastfeeding
- family responsibilities
- sexual preference or orientation
- race or nationality
- religion
- physical features
- disability
- age

- political opinion or membership
- trade union membership or activities, and
- a specified medical history.

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.

In many cases employers will be subject to concurrent state and federal legislation, though the general obligations that these legislative instruments impose are similar. Employees may bring claims in either jurisdiction, though generally bringing a claim in one jurisdiction will preclude a claim in another.

See Chapter 10, 'Discrimination, Sexual Harassment, Diversity and Workplace Rights' for further information.

Changes to workplace sexual harassment laws

Following the release of the Australian Human Rights Commission's Respect@Work report in March 2021, the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* took effect on 10 September 2021. The amendments go part way to implementing the report's 55 recommendations, with the key changes to sexual harassment laws being the:

- introduction of a definition of sexual harassment into the FW Act, being where a person makes an unwelcome sexual advance, an unwelcome request for sexual favours or engages in other unwelcome conduct of a sexual nature
- expansion of the existing FW Act provisions dealing with orders to stop bullying at work to include orders to stop sexual harassment, with eligible workers able to make such an application from 11 November 2021, and
- confirmation that sexual harassment at work is a form of serious misconduct and can be a valid reason for dismissal under the FW Act.

See Chapter 10, 'Discrimination, Sexual Harassment, Diversity and Workplace Rights' for further information.

Work health and safety and workers' compensation

WHS 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 and Western Australia 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 4, 'National Employment Standards'.

Superannuation

Under the *Superannuation Guarantee (Administration) Act 1992* (Cth) employers must contribute a minimum of 10% of an employee's ordinary time earnings to that employee's approved superannuation fund. The minimum contribution is expected to incrementally increase to 12% by 2025. Generally speaking, employers must provide a choice of superannuation fund for employees.

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.

28 Employment, industrial relations and safety global contacts

Australia

Regional head of practice – Australia

Steve Bell
Regional Head of Practice Australia
Safety
T +61 392 881 236
M +61 419 351 022
steve.bell@hsf.com

Brisbane

Aaron Anderson
Partner
Employment and Safety
T +61 732 586 528
M +61 421 583 066
aaron.anderson@hsf.com

Michael Coonan
Senior Adviser
Employment and Industrial Relations
T +61 732 586 645
M +61 407 136 669
michael.coonan@hsf.com

Wendy Fauvel
Executive Counsel
Employment and Industrial Relations
T +61 732 586 388
M +61 408 967 882
wendy.fauvel@hsf.com

Sydney

Miles Bastick
Partner
Employment, Industrial Relations and Safety
T +61 292 255 722
M +61 416 225 755
miles.bastick@hsf.com

Michael Gonski
Partner
Employment
T +61 292 255 083
M +61 409 987 121
michael.gonski@hsf.com

Drew Pearson
Partner
Employment and Industrial Relations
T +61 292 255 492
M +61 403 437 599
drew.pearson@hsf.com

Shivchand Jhinku
Partner
Employment and Industrial Relations
T +61 292 255 228
M +61 417 637 207
shivchand.jhinku@hsf.com

Nerida Jessup
Special Counsel
Safety
T +61 293 224 732
M +61 447 975 133
nerida.jessup@hsf.com

Melbourne

Steve Bell
Regional Head of Practice Australia
Safety
T +61 392 881 236
M +61 419 351 022
steve.bell@hsf.com

Rohan Doyle
Partner
Employment and Industrial Relations
T +61 392 881 099
M +61 413 312 175
rohan.doyle@hsf.com

Natalie Gaspar
Partner
Employment and Industrial Relations
T +61 392 881 091
M +61 427 044 689
natalie.gaspar@hsf.com

Nicholas Ogilvie
Partner
Employment and Industrial Relations
T +61 392 881 380
M +61 407 156 438
nicholas.ogilvie@hsf.com

Anthony Wood
Partner
Employment and Industrial Relations
T +61 3 9288 1544
M +61 419 873 690
anthony.wood@hsf.com

Dean Farrant
Special Counsel
Employment and Industrial Relations
T +61 392 881 172
M +61 439 362 183
dean.farrant@hsf.com

Julie Marotta
Special Counsel
Safety
T +61 392 881 470
M +61 405 703 731
julie.marotta@hsf.com

Perth

Anna Creegan
Partner
Employment, Industrial Relations and Safety
T +61 892 117 135
M +61 429 986 893
anna.creegan@hsf.com

Rachel Dawson
Executive Counsel
Employment and Industrial Relations
T 61 8 9211 7569
M +61 409 774 557
rachel.dawson@hsf.com

Olga Klimczak
Executive Counsel
Employment, Industrial Relations & Safety
T +61 8 9211 7624
M +61 431 535 640
olga.klimczak@hsf.com

Global key contacts

Global head of practice

Alison Brown
Executive Partner – West
T +44 207 466 2427
M +44 778 525 4950
alison.brown@hsf.com

Asia

Regional head of practice – Asia

Fatim Jumabhoy
Regional Head of Practice Asia
T +65 6868 9822
M +65 9770 0320
fatim.jumabhoy@hsf.com

Bangkok

Chinnawat Thongpakdee
Managing Partner - Bangkok
T +66 2 857 3829
M +66 81 809 8448
chinnawat.thongpakdee@hsf.com

Mainland China

Nanda Lau
Partner
T +86 21 2322 2117
M +86 136 8191 7366
nanda.lau@hsf.com

Gillian Miao
Counsel
T +86 21 2322 2325
gillian.miao@hsfkewei.com

Hong Kong

Gareth Thomas
Partner
Hong Kong
T +852 2101 4025
M +852 9773 5042
gareth.thomas@hsf.com

Tess Lumsdaine
Senior Consultant
Hong Kong
T +852 2101 4122
M +852 6392 8250
tess.lumsdaine@hsf.com

Jakarta

Narendra Adiyasa
Head of Employment Indonesia (HBT)
Jakarta
T +62 21 3973 8000
M +62 81 1100 6719
narendra.adiyasa@hbtlaw.com

Kuala Lumpur

Peter Godwin
Regional Head of Practice – Disputes & Managing Partner
T +60 3 2777 5104
M +60 10 882 2302
peter.godwin@hsf.com

Seoul

Mike McClure
Head of Office, Seoul
T +82 2 6321 5701
M +82 10 5230 5701
mike.mcclure@hsf.com

Singapore

Fatim Jumabhoy
Regional Head of Practice Asia
T +65 6868 9822
M +65 9770 0320
fatim.jumabhoy@hsf.com

Tokyo

David Gilmore
Managing Partner – Tokyo
T +81 3 5412 5415
M +81 90 5537 9521
david.gilmore@hsf.com

Europe, Middle East & Africa

Regional head of practice – Europe

Emma Rohsler
Regional Head of Practice EMEA
T +33 153 577 235
M +33 6 3268 3927
emma.rohsler@hsf.com

Dubai

Benjamin Hopps
Head of Employment, Dubai
T +971 4 428 6369
M +971 50 654 8452
benjamin.hopps@hsf.com

Frankfurt

Moritz Kunz
Head of Employment, Germany
T +49 69 222 282 501
M +49 174 348 3442
moritz.kunz@hsf.com

Johannesburg

Jacqui Reed
Head of Employment, South Africa
Johannesburg
T +27 10 500 2600
M +27 64 753 3377
jacqui.reed@hsf.com

Madrid

José Ignacio Jiménez-Poyato
Head of Employment, Spain, Madrid
T +34 91 423 4019
joseignacio.jimenez-poyato@hsf.com

Paris

Emma Rohsler
Regional Head of Practice EMEA
T +33 153 577 235
M +33 6 3268 3927
emma.rohsler@hsf.com

UK & USA

Regional head of practice – UK

Samantha Brown
Regional Head of Practice UK
T +44 20 7466 2249
M +44 780 920 0083
samantha.brown@hsf.com

London

Andrew Taggart
Partner
T +44 20 7466 2434
M +44 791 746 1269
andrew.taggart@hsf.com

Tim Leaver
Partner
T +44 20 7466 2305
M +44 20 7098 5305
tim.leaver@hsf.com

Christine Young
Partner
T +44 20 7466 2845
M +44 20 7098 4855
christine.young@hsf.com

Peter Frost
Consultant
T +44 20 7466 2325
M +44 778 525 4997
peter.frost@hsf.com

New York

Barbara Roth
Head of Employment US
T +1 917 542 7858
M +1 917 836 9781
barbara.roth@hsf.com

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