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The International Comparative Legal Guide to:
Employment & Labour Law 2011

A practical cross-border insight into employment and labour law

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1 Terms and Conditions of Employment

1.1 What are the main sources of employment law?

Commonwealth, State and Territory legislation (involving nine separate legislatures across mainland Australia) coincide with common law and equity to regulate employment matters in Australia.

While each of the six States and two mainland Territories have their own laws relating to various aspects of employment law, since early 2006, the Commonwealth Parliament has sought to cover the field for employers and workers in the private sector.

Today the most relevant legislation is the Commonwealth *Fair Work Act* 2009. The States generally regulate, through separate legislation, State and local government industrial arrangements.

Australian common law and equitable jurisdictions developed from, and continue to be generally consistent with, English law.

1.2 What types of worker are protected by employment law? How are different types of worker distinguished?

The primary distinction is between employees (who work under contracts of service) and contractors (who work under contracts for services). Various specific statutory protections are extended to both.

For example, while contractors cannot make an unfair dismissal claim, in some circumstances they will have an unfairness remedy under specific contracting legislation, and in any event are protected by anti-discrimination legislation and a broad 'general protections' jurisdiction available also to employees.

In cases of doubt, the classification of a worker as an employee or contractor is subject to a multi-factor approach including: consideration of the intention of the parties; the degree and nature of control exercised over the worker by the employer/principal; the mode of remuneration; the responsibility for the provision and maintenance of tools or equipment; the extent of the obligation to work for the employer/principal; any capacity for the worker to delegate work to others; and where liability to correct defective work lies.

A worker is more likely to be classified as a contractor if they: are paid a lump sum for results achieved (as opposed, for example, to an hourly rate for labour); provide all or most of the necessary materials and equipment to complete the work; are free to delegate work to others; are free to work for others; and bear the risk of correcting defective work.

1.3 Do contracts of employment have to be in writing? If not, do employees have to be provided with specific information in writing?

A contract of employment will usually be binding on the parties if the basic principles of a contract (offer, acceptance and consideration) are present. Writing is not required. However, various legislation does require some information relating to the employment contract or relationship to be provided to employees in particular forms.

These include, for example, the *Fair Work Information Statement*, as part of the *National Employment Standards* (see question 1.5). Other requirements for documentation are imposed by legislation relating to superannuation (retirement savings) and industrial instruments such as awards or statutory workplace agreements. In each of these cases, employers can be liable for significant penalties for non-compliance.

1.4 Are any terms implied into contracts of employment?

An employment relationship is subject to a number of implied rights and obligations, although these can vary from case to case.

In all cases, the law will imply a mutual obligation of good faith, imposing a range of rights and obligations on the parties. These will include, for example, an obligation on the part of the employer not to do anything calculated to destroy the relationship of trust and confidence between the parties; and obligations on the part of the employee to obey the employer's lawful and reasonable directions; to advance the employer's interests; and to not to do anything contrary to the employer's interests.

In some situations the law will imply an entitlement on the part of the worker to be given substantial - up to 12 months - notice of termination of their employment.

Terms may also be implied into a contract of employment based on trade, industry or local custom or practice.

1.5 Are any minimum employment terms and conditions set down by law that employers have to observe?

Yes. The *National Employment Standards* prescribed by the *Fair Work Act* 2009 provide a safety net of 10 minimum standards that apply to all 'national system' employees. These deal with:

- maximum weekly hours of work;
- flexible working arrangements;
- parental leave;
- annual leave;

- personal/carer's leave;
- community service leave;
- long service leave;
- public holidays;
- notice of termination and redundancy pay; and
- provision of the *Fair Work Information Statement* to new employees.

There is also a National Minimum Wage (AUD $15 per hour as at 1 July 2010, excluding a loading payable to casuals) and, for many workers, awards will also impose minimum terms and conditions of employment applicable to particular occupations and industries. Statutory workplace agreements can do likewise in particular workplaces or for individuals to whom a statutory individual agreement applies.

1.6 To what extent are terms and conditions of employment agreed through collective bargaining? Does bargaining usually take place at company or industry level?

According to the May 2010 Survey of Employee Earnings and Hours report by the Australian Bureau of Statistics, approximately 43.4 percent of Australian workers have their pay determined by a collective agreement. This compares with 37.3 percent whose pay is determined by individual arrangement, and 15.2 percent by award only.

While ultimately collective, or enterprise, agreements are made at the enterprise level, unions of employees will sometimes run campaigns for relatively common terms and conditions of employment across particular industries. This can produce some consistency in enterprise bargaining outcomes across the industries concerned.

Many awards apply at industry level and provide the benchmark for minimum terms and conditions of employment for enterprise bargains negotiated in those industries.

2 Employee Representation and Industrial Relations

2.1 What are the rules relating to trade union recognition?

Under current national rules, a union of employees must seek registration through Fair Work Australia, Australia's national workplace relations tribunal. The main criteria for registration are that: the aim of the organisation is to further or protect the interests of its members; it must be free from control, or improper influence from, an employer; the organisation must have at least 50 members who are employees; and there must be no other association to which the members could more conveniently belong or which would more effectively represent them.

2.2 What rights do trade unions have?

Union officials have a conditional right of entry to workplaces to allow them to meet and hold discussions with employees, and to investigate suspected contraventions of industrial laws and instruments, and occupational health and safety laws. Their rights extend to the inspection of related records and things.

Unions also have a default right to represent employees during bargaining for a collective agreement, and are also generally entitled to initiate and prosecute proceedings in the industrial jurisdictions relating to the interests of their members – for example, unfair dismissal and wage recovery proceedings and proceedings to enforce industrial instruments (awards and agreements).

Unions are also entitled to be notified of certain information by employers where the employer has decided to dismiss 15 or more employees, any of whom is a member of the union.

2.3 Are there any rules governing a trade union's right to take industrial action?

Yes. The right to take 'protected' or lawful industrial action is regulated by a detailed legislative scheme.

Employees and their unions can only legitimately engage in industrial action (such as strikes, bans and limitations) to support claims made in negotiations for a proposed enterprise agreement. Various other requirements must also be met including, particularly, authorisation of the taking of the action by secret ballot of the employees concerned. The ballot itself must be undertaken pursuant to a 'protected action ballot order' secured from the workplace relations tribunal, Fair Work Australia. The taking of the action itself cannot then ordinarily occur without three days' notice to the employer.

Fair Work Australia has a range of functions and powers through which it is able to regulate the taking of industrial action, both protected and otherwise, including power to suspend or terminate protected action or to restrain unprotected action.

2.4 Are employers required to set up works councils? If so, what are the mains rights and responsibilities of such bodies? How are works council representatives chosen/appointed?

There is no provision for the recognition of works councils or like groups in the Australian industrial system.

2.5 In what circumstances will a works council have co-determination rights, so that an employer is unable to proceed until it has obtained works council agreement to proposals?

(See question 2.4.)

2.6 How do the rights of trade unions and works councils interact?

(See question 2.4.)

2.7 Are employees entitled to representation at board level?

No, they are not.

3 Discrimination

3.1 Are employees protected against discrimination? If so, on what grounds is discrimination prohibited?

Yes. Commonwealth, State and Territory human rights legislation make provision for the protection of workers against discrimination on certain grounds.

Those grounds and the circumstances in which discrimination is unlawful vary to some extent between Australian jurisdictions. In

most, protection from discrimination in the work area extends to the attributes of age, race, relationship status, pregnancy, parental status, breastfeeding, disability, religious belief/activity, political belief/activity, trade union activity, gender identity, sexuality, family responsibilities, or association with or relation to a person identified by reference to any of these attributes.

Other protections are extended by human rights laws from conduct amounting to: sexual harassment; racial and religious vilification; and victimisation of persons involved or potentially involved in proceedings alleging human rights breaches.

It is also generally unlawful for employers and prospective employers to ask workers and prospective workers to supply information upon which unlawful discrimination might be based.

3.2 What types of discrimination are unlawful and in what circumstances?

Unlawful discrimination can be both direct and indirect. Both are prohibited in a wide range of work and work-related contexts.

Direct discrimination in the work context occurs where an employer treats a worker with a particular attribute less favourably than other workers without that attribute.

Indirect discrimination is any practice which appears non-discriminatory in form and intention but is discriminatory in impact and outcome. For example, the imposition of a minimum height requirement for a particular position has the potential to indirectly disadvantage some ethnic groups and females, who as a group are less likely to meet the height requirement, leading to a risk of indirect discrimination on the ground of race or sex.

In relation to disabled persons, employers have a positive obligation to seek to identify and implement reasonable adjustments to assist persons with disabilities to overcome their limitations.

3.3 Are there any defences to a discrimination claim?

Yes. There are a number of exemptions from what would otherwise amount to unlawful discrimination in the work context. They include, for example, the imposition of genuine occupational requirements or something done for reasons associated with workplace health and safety.

Liability upon an indirect discrimination claim can be avoided if the alleged discriminator can show that the condition or requirement said to be discriminatory is reasonable.

Employers can avoid liability for failing to make reasonable adjustments for disabled persons if they can show that to implement the adjustments required would cause "unjustifiable hardship".

Generally speaking, employers will be vicariously liable for conduct amounting to unlawful discrimination engaged in by their workers or agents. However, an employer can escape vicarious liability if they can show that they took reasonable steps to avoid contravention by their workers or agents of the legislation.

3.4 How do employees enforce their discrimination rights? Can employers settle claims before or after they are initiated?

In all jurisdictions the enforcement process is complaint driven, although the dispute resolution process varies. Typically the parties to a complaint will be required to participate in some form of conciliation followed, in the absence of a resolution, by formal adjudication.

Opportunities for settlement arise at all stages of the complaint process and, by far, most complaints are resolved without formal adjudication. Employers are encouraged by the regulators to have internal complaint handling systems which, in some cases, will enable claims to be resolved without the commencement of formal proceedings.

3.5 What remedies are available to employees in successful discrimination claims?

There are a wide range of remedies available to employees who are subject to unlawful discrimination at, or in connection with, their work. They include orders:

- for reinstatement or re-employment;
- for promotion/redeployment;
- for payment of compensation for loss or damage (including for embarrassment, humiliation and intimidation);
- varying or invalidating agreements;
- requiring publication of an apology;
- requiring implementation of specific management programmes;
- restraining a person from repeating or continuing specific conduct; and
- in some jurisdictions, requiring payment of a civil or criminal penalty.

4 Maternity and Family Leave Rights

4.1 How long does maternity leave last?

Employees do not become entitled to take parental leave unless they have completed 12 months' continuous service with the employer.

There is an entitlement to take up to 12 months' unpaid parental leave if the leave is associated with the birth of a child of the employee or the employee's partner. Both parents (including *de-facto* and same sex couples) are entitled to take consecutive periods of 12 months' leave each, or one parent can request their employer for an extension to their leave period for up to a further 12 months (for a total of two years' leave).

The same entitlements are available to parents adopting a child under the age of 16.

To be eligible for the leave, the employee must have or will have primary responsibility for the care of the child.

Employers can refuse requests for an extension to an initial period of parental leave upon 'reasonable business grounds'. If a request is to be refused the employer must provide written reasons for the refusal within 21 days after the request was made.

4.2 What rights, including rights to pay and benefits, does a woman have during maternity leave?

The employment of a person taking a period of parental leave is suspended; the leave period does not break continuity of service, but does not count toward entitlements dependant upon service, for example leave or termination entitlements.

While on leave, employees are entitled to be kept informed of decisions made by their employer that will have a significant effect on them. Employers are obliged to take all reasonable steps to inform employees on leave about, and to given them an opportunity to discuss, the effect of such decisions.

There is no requirement for employers to provide paid parental leave, although many larger employers do so voluntarily as part of their staff retention strategies. In some industry sectors paid parental leave is a common feature of collective agreements.

Subject to a number of conditions, employees on unpaid parental leave may be entitled to government funded paid parental leave. Payments are made at the level of the National Minimum Wage for a maximum period of 18 weeks to eligible primary carers. In most cases the payments are administered by the employer.

4.3 What rights does a woman have upon her return to work from maternity leave?

The employee is entitled to return to their pre-parental leave position. If the position no longer exists, the employee must be offered an alternative position for which they are qualified and suited, nearest in status and pay to their original position.

4.4 Do fathers have the right to take paternity leave?

Both parents have the same rights to parental leave dependent upon which of them is the primary care giver, although mothers have additional rights arising out of the physical issues associated with pregnancy.

When one parent takes parental leave, the other is entitled to take concurrent leave, usually upon the birth or adoption of the child, for a period of up to three weeks.

4.5 Are there any other parental leave rights that employers have to observe?

An eligible pregnant mother is entitled to take unpaid special maternity leave if she is not fit for work because of a pregnancy-related illness, or if the pregnancy ends otherwise than through the birth of a living child within 28 weeks of the expected date of birth.

Pregnant mothers are also entitled to be transferred to an 'appropriate safe job', without affecting their pay and conditions, if they are certified as medically fit for work but, because of the pregnancy, advised not to perform the duties of their current position because of medical risks. If there is no appropriate safe job available, the employee is entitled to take paid 'no safe job leave' for the risk period.

All employees are entitled to up to two days of unpaid pre-adoption leave to attend interviews or examinations required for the adoption of a child, although the employer can choose to direct the employee to take some other form of leave, such as paid annual leave, before accessing the entitlement.

Parents also have an entitlement to paid carer's leave (unpaid for casuals), funded from their personal leave entitlement, where required to care for or support a child who is sick, injured or in the event of an unexpected emergency. This is part of the broader personal leave entitlement provided for in the *National Employment Standards* (see question 1.5).

4.6 Are employees entitled to work flexibly if they have responsibility for caring for dependents?

The primary carer of a child under school age, or under 18 with a disability, may request their employer for a change in their work arrangements to assist the employer to care for the child.

The right to request such an arrangement is limited to employees who have completed at least 12 months' continuous service, and is also available to some long term casual employees.

An employer may only refuse a request for a flexible work arrangement upon reasonable business grounds. If a request is to be refused the employer must provide written reasons for the refusal within 21 days after the request was made.

5 Business Sales

5.1 On a business sale (either a share sale or asset transfer) do employees automatically transfer to the buyer?

Unless the transaction involves only the transfer of shares in a corporate employer - which of itself will have no effect on the employer's relationship with its employees - generally not.

In an asset sale, the vendor's arrangements with its employees come to an end, and the decision whether or not to re-employ the workers in the business is at the discretion of the purchaser.

5.2 What employee rights transfer on a business sale? How does a business sale affect collective agreements?

If the transaction is a share sale, employees continue to be employed on their existing terms and conditions.

Otherwise, if the purchaser re-employs the vendor's workers in positions similar to their old positions with the vendor, the purchaser will usually become bound by the terms of any industrial instrument - a 'transferable instrument' - that applied to the workers in their service with the vendor. Applicable collective agreements will usually transfer in this way.

In both cases, the employees' service with the vendor will usually count as service with the new employer, except that in the case of an asset sale the purchaser can decline to recognise prior service for annual leave or redundancy pay purposes. The effect of this will be to crystallise those entitlements with the vendor, requiring the vendor to pay them out upon completion of the sale.

5.3 Are there any information and consultation rights on a business sale? How long does the process typically take and what are the sanctions for failing to inform and consult?

Usually a business sale will trigger the notice and consultation provisions - relating to 'major workplace change' - included in modern awards or applicable collective agreements and individual statutory agreements. These require workers to be notified of impending significant changes by which they might be affected, and to be consulted about mitigation measures. Commonly there is an exception for sensitive commercial information, which need not be disclosed.

The obligation to notify and consult generally arises as soon as relevant decisions are made. The duration of the consultation process will be affected by a range of variables and can range from a few days to weeks or months.

Failure to comply with relevant requirements imposed by an industrial instrument can lead to prosecution for breach of the instrument and imposition of substantial civil penalties, upon both the employer and any natural persons involved in the contravention.

No such obligations arise for employees not covered by a statutory instrument or agreement, unless they arise out of contracts of employment or policies binding the employer.

5.4 Can employees be dismissed in connection with a business sale?

Upon the sale of a business to a new employer, the positions occupied by the employees of the old employer become redundant, and the employees may be dismissed on that ground.

5.5 Are employers free to change terms and conditions of employment in connection with a business sale?

Yes, with varying degrees of difficulty, consequences and expense.

As one example, an incoming employer who becomes or will become bound by a transferring collective agreement can apply to Fair Work Australia for an order that the agreement not apply, with or without an order that some other instrument apply instead.

6 Termination of Employment

6.1 Do employees have to be given notice of termination of their employment? How is the notice period determined?

Yes, unless the termination is for serious misconduct, in which case no notice or payment in lieu is required.

Minimum notice entitlements are determined by the *National Employment Standards*, ranging from one week to five weeks dependant upon length of service and age.

Employers are commonly bound, by express or implied terms in the contract of employment, to provide greater periods of notice than the statutory minima.

6.2 Can employers require employees to serve a period of "garden leave" during their notice period when the employee remains employed but does not have to attend for work?

Usually yes, although the issue can be affected by express or implied terms of the contract of employment. In some situations these can preclude an employer from insisting that an employee serve a period of "garden leave".

However, even where the employer is able to insist on a period of garden leave, this will not necessarily enable the employer to prevent the employee from commencing alternative employment during the leave period.

6.3 What protection do employees have against dismissal? In what circumstances is an employee treated as being dismissed? Is consent from a third party required before an employer can dismiss?

Employees are provided with a wide range of protections from dismissal. They include protections from a dismissal that is:

- harsh, unjust or unreasonable (unfair dismissal);
- the consequence of the exercise of a 'workplace right' (general protection);
- for a reason expressly prohibited by legislation (unlawful dismissal); or
- contrary to worker's compensation, anti-discrimination or workplace health and safety legislation.

An employee is treated as being dismissed if, regardless of the form of relevant events, in substance the employment was terminated at the employer's initiative.

There are no situations where the consent of a third party is required before a dismissal can occur.

6.4 Are there any categories of employees who enjoy special protection against dismissal?

Only those employees who meet certain criteria have access to the 'unfair dismissal' jurisdiction, although a greater percentage of the workforce than not is likely to qualify. The main criteria are:

- length of service (one year for small business and six months for others); and
- coverage by an industrial instrument; or
- annual earnings beneath the 'high income threshold' (AUD $113,800 as at 1 July 2010, indexed annually for inflation).

There are no threshold requirements for access to the other jurisdictions described at question 6.3.

6.5 When will an employer be entitled to dismiss for: 1) reasons related to the individual employee; or 2) business related reasons? Are employees entitled to compensation on dismissal and if so how is compensation calculated?

Employees who do not have access to the unfair dismissal jurisdiction can be dismissed for any lawful reason (including no reason), subject only to compliance with any relevant statutory and contractual requirements – for example, to give notice or to pay redundancy pay.

For employees who qualify to access the unfair dismissal jurisdiction, employers must be able to show in the case of an employee dismissed for:

- a reason related to them – that the reason justified termination (e.g. unsatisfactory work performance) and the dismissal was accompanied by a fair process (e.g. warnings, opportunity to improve); or
- business-related reasons – that the employer no longer requires the employee's job to be done by anyone; that the employer followed the consultation requirements imposed by any applicable industrial instrument; and that there was no reasonable opportunity for redeployment of the employee within the employer's business or a related business.

In most cases employees will be entitled to notice of termination or to payment in lieu for any short notice. See questions 1.4, 1.5 and 6.1.

If an employee's position is made redundant, the employee may be entitled to receive redundancy pay ranging from four to 16 weeks' pay, dependent upon length of service.

6.6 Are there any specific procedures that an employer has to follow in relation to individual dismissals?

See question 6.5. Additionally, on dismissal of an employee, an employer must generally:

- give the employee written notice of the effective date of the dismissal; and
- ensure the requisite notice, or payment in lieu, is provided to the employee (see questions 1.4, 1.5 and 6.1),

although neither requirement will usually apply where the reason for the dismissal is serious misconduct by the employee.

6.7 What claims can an employee bring if he or she is dismissed? What are the remedies for a successful claim?

Possible claims include:

- a claim for common law damages upon a variety of grounds – for example, for damages for short notice. See question 1.4;
- a claim to Fair Work Australia for a remedy for unfair dismissal, unlawful dismissal, or breach of the general protections provisions;
- a claim to Fair Work Australia alleging breach of legislative requirements or an industrial instrument; and
- a claim to another Commonwealth or State regulator alleging unlawful discrimination or breach of workers' compensation or workplace health and safety legislation.

Potential remedies range from reinstatement or re-employment to payment of compensation and, in some cases, to the imposition of civil and criminal penalties. Maximum compensation in the unfair dismissal jurisdiction is capped at six months' pay, but is unlimited in the other jurisdictions where compensation orders are available.

6.8 Can employers settle claims before or after they are initiated?

Yes, they can.

6.9 Does an employer have any additional obligations if it is dismissing a number of employees at the same time?

An employer who has decided to dismiss 15 or more employees for reasons of an economic, technological or structural nature must, before any dismissal occurs:

- notify unions, of whom affected employees are members, of certain matters; and
- give notice of certain matters to the Commonwealth Services Delivery Agency (Centrelink).

6.10 How do employees enforce their rights in relation to mass dismissals and what are the consequences if an employer fails to comply with its obligations?

Failure to comply with the requirements at question 6.9 can result in the intervention of Fair Work Australia, corrective orders and the imposition of substantial civil penalties.

Application to Fair Work Australia for corrective orders can be made by affected employees or their unions.

7 Protecting Business Interests Following Termination

7.1 What types of restrictive covenants are recognised?

Employers can incorporate limited post-employment non-compete restraints into their employment contracts. Legitimate employer interests which may be protected include the employer's trade secrets and confidential information, customer connections and staff connections. A bare restraint against competition, or one that has broad application, will not be enforceable.

7.2 When are restrictive covenants enforceable and for what period?

Post-employment restraints are only enforceable if they can be shown to be reasonably necessary for the protection of the legitimate business interests of the employer. What is reasonable in any given case will depend upon the duration of the restraint, the geographic area in which it will apply, and the activities to which it will apply. A restraint that is too broad against any of these dimensions will not be enforceable (as unreasonable).

There is no limit on the permissible duration of a restrictive covenant. However, longer restraints will be more difficult to justify as reasonable than shorter restraints. Restraint periods of 12 months or more might be justifiable in some cases, but this is approaching the outer limit of what can be enforced.

7.3 Do employees have to be provided with financial compensation in return for covenants?

No, they do not.

7.4 How are restrictive covenants enforced?

The remedy commonly sought by employers faced with an employee's breach of a restraint clause is a court-ordered injunction, sought on an urgent basis.

An employer can also seek damages for breach of contract based on breach of a restraint.

8 Court Practice and Procedure

8.1 Which courts or tribunals have jurisdiction to hear employment-related complaints and what is their composition?

They include Australia's State courts with jurisdiction to hear common law claims; Fair Work Australia; the Federal Court and several other bodies with jurisdiction to hear anti-discrimination claims and claims arising out of State and Territory based workers' compensation and safety laws.

Fair Work Australia is the national workplace relations tribunal with statutory jurisdiction over a range of industrial and employment matters, but not common law matters. In most instances it is constituted by a single conciliator or member. Members typically come from an industrial background and may or may not have legal qualifications.

The Federal Court has jurisdiction to hear and determine a range of industrial matters and associated claims, usually following compulsory conciliation proceedings in Fair Work Australia. Usually it is constituted by a single judge or Federal Magistrate sitting alone. Federal judges and magistrates are qualified lawyers.

Anti-discrimination complaints can be made to State or Territory regulators or, at federal level, to the Australian Human Rights Commission. All jurisdictions feature some form of preliminary conciliation which, if unsuccessful, lead to formal adjudication. Adjudication procedures vary between jurisdictions. In the federal jurisdiction, unconciliated discrimination complaints proceed to hearing in the Federal Court.

8.2 What procedure applies to employment-related complaints? Is conciliation mandatory before a complaint can proceed?

The procedures vary depending on the nature of the claim and the jurisdiction in which it is made.

Unfair dismissal claims are dealt with entirely by Fair Work Australia. Other claims based on rights conferred by the *Fair Work Act* 2009 must generally be initiated in Fair Work Australia but, if

not resolved through conciliation, proceed to hearing and determination in the Federal Court. All of these kinds of matters are generally subject to mandatory conciliation as a means of early resolution.

Similar procedures apply in all Australian anti-discrimination jurisdictions in that a preliminary attempt at settlement through conciliation is a mandatory pre-requisite to formal adjudication. In some jurisdictions the conciliating body is separate from the adjudicating body.

Claims that cannot be resolved at conciliation must generally be prepared for hearing and heard according to procedures that require the parties to document their respective cases, disclose relevant documents and give evidence at a public hearing. In most jurisdictions legal representation is allowed, either with leave or as of right.

8.3 How long do employment-related complaints typically take to be decided?

The time for determination of any complaint will depend on the nature of the complaint, the jurisdiction in which it is brought and numerous other variables. As examples:

- Initial conciliation of an unfair dismissal claim by Fair Work Australia will normally occur within a few weeks or less and, if the matter is unresolved, the parties can normally expect it to proceed to hearing within a matter of two to four months or so following the conciliation.
- Other types of claims initiated in Fair Work Australia generally follow a two-stage process, involving initial conciliation conducted by Fair Work Australia, with unresolved complaints proceeding to a hearing in the Federal Court. While initial conciliation will normally occur within a few weeks after lodgement of a claim, the progression of a claim through the Federal Court to hearing will normally take between six and 12 months.
- Initial conciliation of an unlawful discrimination complaint made to the Australian Human Rights Commission will usually follow within two to three months after lodgement of the complaint. A complainant with an unresolved complaint then has 60 days within which to elect to pursue their complaint to a hearing in the Federal Court, where progression of the matter to hearing will normally take another six to 12 months.

8.4 Is it possible to appeal against a first instance decision and if so how long do such appeals usually take?

While it is possible to appeal an unfair dismissal decision to a full bench of Fair Work Australia, permission to appeal is required and permission will not be granted unless the full bench considers it is in the public interest to do so. Appeals are normally heard and determined within three to four months of the decision at first instance.

Federal Court decisions in employment and human rights matters can also be appealed, usually to a full bench of the Federal Court, although a Federal Court judge sitting alone can hear appeals from Federal Magistrates. Determination of these kinds of appeals can be a lengthy process, taking up to 12 months or more from the original decision.

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Damon has advised clients in a variety of sectors, including government agencies, blue-chip insurers and large employers. He has extensive experience conducting alternative dispute resolution, including mediation, to resolve employment-related disputes.
Damon holds qualifications in Laws from Queensland University of Technology and was admitted to practice in 2000. He is currently studying towards a Master in Laws, majoring in labour relations.

HopgoodGanim LAWYERS

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