

Week 4:

Employment rights:

As an employee, you are protected from discrimination in the workplace by Victorian and federal laws.

Impact of ILO conventions on Aus employment legislations:

ILO conventions can shape domestic/national legislations when a government signs up to the conventions. Much of Australia's protective legislation is influenced by the ILOs preamble

Overview of Aus Employment legislation:

Fair Work Act 2009 Australian Human Rights Commission Act 1986 Racial Discrimination Act 1975 Sex Discrimination Act 1984 Disability Discrimination Act 1992 Equal Opportunity for Women in the Workplace Act 1999 Age Discrimination Act 2004 Gender Equality Act 2012 Safety, Rehabilitation and Compensation Act 1988

Features of the Fair Work system:

Fair Work system was created under the Fair Work Act 2009 and started on 1 July 2009. It is the name used for the minimum employment laws and agency bodies that were created by the Fair Work Act. It is the national workplace relations system. Key features:

- Fair Work Australia (FWA) was established as the new employment regulator
- The office of the Fair Work Ombudsman was established to promote and enforce compliance with the new workplace law
- Unfair dismissal protection was broadened to cover all workers in enterprises with fewer than fifteen full time equivalent positions. Employees are only excluded if during a qualifying period of service (generally 12 months)
- The national minimum wage and ten national employment standards (NES) were established to set minimum employment conditions for all workers covered by the national system
- A new system of modern awards was introduced to provide an additional safety net for most employees nationally for specific industries and occupations
- Individual statutory agreements such as AWAs were abolished but individual common law contracts of employment were permitted
- Enterprise flexibility clauses were introduced to allow employees earning more than \$100,000 per year to be on arrangements not based on an award
- Employers and unions are now required to bargain in good faith, although parties are not required to reach an agreement. However FWA is permitted to make a workplace determination where a party ignores a good faith bargaining order
- FWA is empowered to settle disputes between parties where there is protracted industrial action which is causing damage to people or the economy
- No distinction is made between union and non-union agreements but an agreement now requires the approval of employees

- Union officials are given rights to enter workplace to hold discussions with employees provided that they hold a permit issued by FWA and that they abide by certain conditions of that permit

Importance of having legally protected employment rights:

EMPLOYERS CAN:

- Have a stable base from which to manage a workforce and covers all employees
- Use those employment rights as strategies to retain a stable workforce
- Build trust between employers and employee to maintain a culture of employee relations
- Can improve the productivity and organisational performance by keeping a healthy and positive employment relationship between employers and employees

EMPLOYEES CAN:

- Minimum wage and minimum conditions of employment (NES)
- Protected from unfair dismissal
- Protected from employers adverse action against them by altering their positions of employment to their detriment due to the employees being part of a union
- Protected from discrimination in the workplace
- Protected from being bullied and harassed at work

National minimum wage:

A minimum wage is an employee's base rate of pay for ordinary hours worked. Employers and employees cannot be paid less than their applicable minimum wage, even if they agree to it

On 6 June 2017, FWC granted 2.3 million award-reliant workers a 3.3% increase, lifting the national minimum wage by \$22.20 a week or 59 cents an hour

The national minimum wage is currently \$18.29 per hour or \$694.90 per 38 hour week (before tax)

Casual employees covered by the national minimum wage also get at least 25% casual loading

For award and agreement-free junior employees, the percentage scale in the Miscellaneous Award 2010 is applied to the national minimum wage

Changes to penalty rates in some awards

Arguments for the change	Arguments against the change
<ul style="list-style-type: none"> • It will allow employers to hire more staff • More hospitality venues will be able to operate on Sundays • Businesses would make more money from the increased opening hours and increased staff levels 	<ul style="list-style-type: none"> • It will take money directly from the pocket of people who suffered • There are no guarantees employers will hire more staff • The double pay is fair compensation for mission family events etc. • Casual staff with children will have less time at home
The Productivity Commission	ACTU and Workers
"Sunday penalty rates ... are inconsistent across similar work, anachronistic in the context of changing consumer preferences...."	"This decision will have a massive impact on household budgets of so many families. Nearly a million workers will be affected by this pay cut".

- ☐ From 1st July 2017, certain penalty rates in the **Hospitality, Restaurant, Fast Food, Retail and Pharmacy Awards** changed (source: <https://www.fairwork.gov.au/pay/penalty-rates-and-allowances/penalty-rates-changes-2017>)
- ☐ This decision affects penalty rates for some permanent and casual employees working on Sundays, public holidays, evenings, or after midnight in these awards.

The National Employment Standards:

All employees in the national workplace relations system are covered by the NES regardless of the award, registered agreement or employment contract that applies

- A maximum standard working week of 38 hours for full-time employees, plus 'reasonable' additional hours
- A right to request flexible working arrangements – you may request a change in your working arrangement including changes in hours, patterns or location of work from your employer if you:
 - Are parents, or have responsibility for the care of a child who of school age or younger
 - Are a carer
 - Have a disability
 - 55 yrs or older
 - Are experiencing violence from a member of your family or
 - Provide care of support to a member of your immediate family or household, who requires care or support because they are experiencing violence from their family
- Parental and adoption leave of 12 months (unpaid) with a right to request an additional 12 months
- 4 weeks paid annual leave each year (pro rata) plus an extra week for some shift workers
- 10 days paid personal carers leave each year (pro rata), two days paid commission leave for each permissible
- Community service leave for jury service or activities dealing with certain emergencies or natural disasters. This leave is unpaid except for jury service (10 days paid leave for jury service, after 10 days, leave is unpaid)
- Long service leave
- Public holidays – paid days off on public holidays unless its reasonable to ask the employee to work
- Notice of termination and redundancy pay – up to 4 weeks notice of termination (plus extra week if the employee is over 45 and has been in the job for at least 2 years) and up to 16 weeks redundancy pay

- The right for new employees to receive the Fair Work informational statement

What if you are casual employees?:

If you are casual employees and employed regularly and systematically at least 12 months, you only get NES entitlements relating to:

- 2 days unpaid carers leave per occasion
- 2 days unpaid compassionate leave per occasion
- Community service leave (except paid jury service)
- Days off on public holidays unless it is reasonable to ask you to work
- Fair Work Information statement
- The right to request for flexible working arrangements and access to parental leave

Casuals don't get paid holiday leave or sick leave but are entitled to higher rate of pay (casual loading) and parental leave, which is equivalent permanent hourly rate plus 15-25% of this hourly rate

Where an unpaid work experience or internship might be unlawful?

Unpaid work experience, job placement and internships that are not vocational placements will be unlawful if the person is in an employment relationship with the business or organisation they are doing the work for

Key indicators that an employment relationship exist are:

- Reason for the arrangement – when the person is doing work to help with the ordinary operation of the business or organisation rather than just observation rather than just observation, learning, training or skill development
- Length of time
- Significance to the business – when the person is doing work that would otherwise be done by a paid employee
- What the person is doing – when the person are expected or required by the business or organisation to do productive activities
- Who is getting the benefit – when the business or organisation is getting the main benefit

Impacts of paid parental leave on employees and employers:

Paid parental leave is not a leave entitlement, rather it complements parents entitlements to leave such as unpaid parental leave under the NES

Paid parental leave is for a max of 18 weeks (at National minimum wage rate). It is treated the same as any other taxable income

In order to be eligible for government funding parental leave, you must:

- Must have worked 10 of the 13 months before the birth or adoption of the child
- Have received an individual adjusted taxable income of \$150,000 or less in the financial year
- Be on leave or not working from when they become the child's primary carer until the end of the 18 week paid parental leave period

The government funded paid parental leave scheme was introduced on 1 Jan 2011 to help employers retain valuable and skilled staff by encouraging them to stay connected with their workplace when they become parents, and to enhance

family friendly workplace conditions without having to fund parental leave pay themselves

Employers should keep records of funds they receive from Department of Human Services and paid their employees

Employers should inform DHS if their employees return to work before the end of their Paid Parental Leave period

Domestic violence leave:

From the FWCs perspective: FWC supports unpaid family and domestic violence leave and formed the preliminary view that it is necessary for 10 days of unpaid leave to be inserted into modern awards as a mandatory entitlement

FWC rejected the claim for paid leave because a number of matters concerning the extent of the entitlement remain in dispute, eg

-Should an employee be required to exhaust other forms of leave (eg personal/carer leave) before becoming entitled to unpaid family and domestic violence leave

-Is the entitlement to be limited to a specified quantum of unpaid leave per annum, and if so what is that quantum

From the ACTU's perspective: The ACTU is campaigning for 10 days paid family violence and domestic violence leave after the FWCs in principle decision in favour of unpaid leave

The cost of extending access to 10 day paid leave across the workforce would average less than five cents per worker each working day with the base salary used \$60,000 a year

This leave would be part of the NES and therefore more widely available to a greater number of employees

If the paid leave can be included, Australia will become the first country in the world to have a nationally enshrined right to family and domestic violence leave

Australian Charter of Employment Rights (ACER)

1. Good faith performance – Employers and employees have an obligation to co-operate with each other and ensure a 'fair go all round'.

2. Work with dignity – Employers and employees have the right to be accorded dignity at work and to experience the dignity of work, such as being treated with respect etc.

3. Freedom from discrimination and harassment - Employers and employees have the right to enjoy a workplace that is free of discrimination or harassment based on race, colour, descent, national, social or ethnic origin etc.

4. A safe and healthy workplace

5. Workplace democracy – Employees have the right to express their views to their employer and have those views duly considered in good faith etc.

6. Union membership and representation – Employees have the right to form and join a trade union for the protection of their occupational, social and economic interests etc.

7. Protection from unfair dismissal – Employees have the right to security of employment and to be protected against unfair, capricious or arbitrary dismissal without a valid reason related to employees' performance or conduct or the operational requirements of the enterprise affecting those employees.

8. Fair minimum standards – Employees are entitled to the protection of national minimum standards, mandated by law.
9. Fairness and balance in industrial bargaining – Employees have the right to bargain collectively through the representative of their choosing; Employees' representatives and employers have the obligation to conduct any such bargaining in good faith.
10. Effective dispute resolution – Employers and employees have the right and the obligation to participate in dispute resolution processes in good faith.

Some thoughts on ACER:

Nine of the ten rights are underpinned by Australian legislation but 'Work with Dignity', while the most important, is not legally underpinned in any way.

Despite the chapter on workplace democracy in ACER, the HR professionals in Australia still operate in the best interests of the corporation for which they work, rather than in the best interests of employees. This is their legal obligations. As such, the recognition of workplace democracy rights involves a rejection of adversarial workplace relations and support a more co-operative relationship between employers and employees based on the pursuit of cost-cutting strategies.

ACER is an articulate defence of the social democratic system, and its values are progressive alternative to the former Work Choices laws, however, it fails to map out a feasible framework in the globalized era, where labour market flexibility, outsourcing, casualization are the pervasive trends.

The notion of 'workers' in the ACER only refer to those who are full-time employees (core workers) in an organization, and fail to represent the non-standard workers who have little income security, no assured entitlement to state or enterprise benefits and no other forms of security (work, skill, occupational or representation) (Standing, 2007).