



WORK RIGHT

TEACHER RESOURCE



Acknowledgements

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This component of the package was written by *Lisa Heap* (AIER) and *Trevor McCandless*.

Further information is available at www.aierights.com.au or www.tln.org.au

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INTRODUCTION

Workers and employers have much in common. Together, they provide the workplaces that sustain our material needs and contribute to the social cohesion that defines us as a community. A foundational unit of our society, workplaces, provide most of us with sustenance, an identity, a purpose and many of our social connections. They also take so much that is precious – our time, our energy, our opportunities to pursue other endeavours.

Humans interact through work and their workplaces, making workplaces a hub of human exchanges conducted through the medium of work relationships. The relationships between workers and their employer are of particular importance given the fact that it is the success of these relationships that shapes the workplace. From the prosperity of the business to the emotional wellbeing of each worker, the quality of workplace relations has a crucial role to play.

Mordy Bromberg in Bromberg and Irving p.1. Mordy Bromberg SC was one of Australia's leading labour lawyers and was made a judge of the Federal Court in 2009.

THE WORKPLACE RELATIONSHIP

There exists between an employee and an employer a relationship, often referred to as the contract of employment. It exists regardless of the presence or absence of a formal written agreement between the parties. Legally the relationship includes duties and responsibilities. For example an employee owes to an employer, loyalty, good service and an obligation to deploy their skills and knowledge for the job for which they have been employed. An employer owes among other things a duty of care to the employee, an obligation to provide a safe and healthy workplace and a fair wage in return for labour.

As everyone is well aware relationships are complex at the best of times; workplace relationships carry added pressure. It is important for managers to understand that for most people work is satisfying a number of needs and is impacting on their day to day lives. When people feel confident, secure and rewarded and work and personal life is in balance then work relationships are more likely to be harmonious.

Government intervention

The legal recognition of this workplace relationship historically favoured the interests of the employer. The employment "contract", governed by common law, was modelled on the master-servant relationship. Governments and indeed international bodies (such as the International Labour Organisation or ILO) have sought to regulate the workplace relationship and establish minimum standards to bring about greater balance and fairness. Laws, regulations, and government agencies have been established to shape, monitor and influence the workplace relationship.

AN AUSTRALIAN CONTEXT

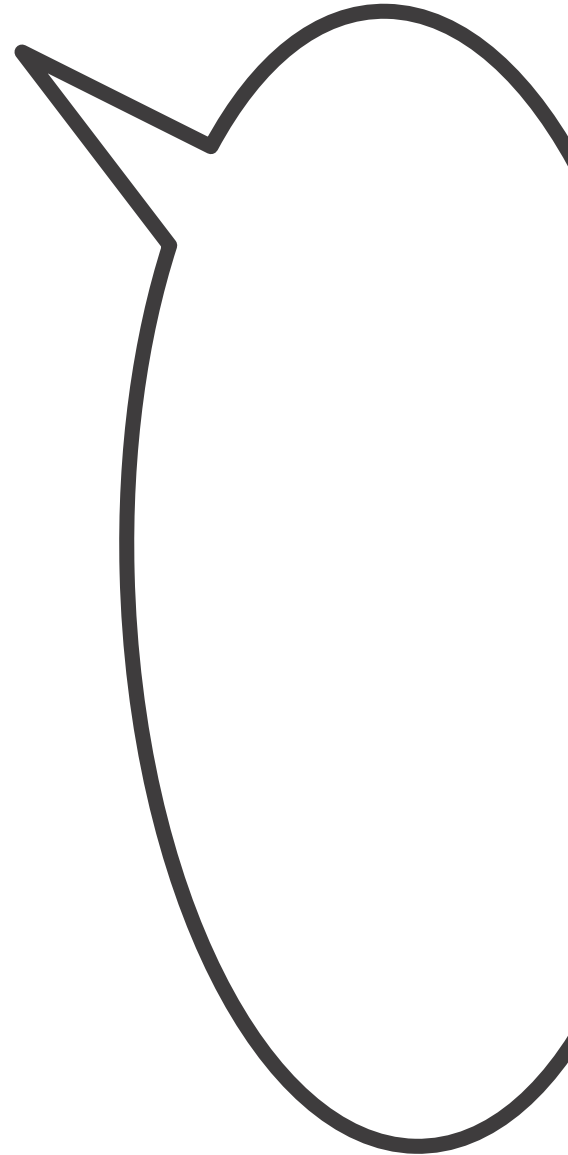
Australia's system of workplace regulation was established in 1904 and was the most innovative system in the world at that time (see Pg 4). The government established the Conciliation and Arbitration Court (later to become the Australian Industrial Relations Commission or AIRC). It was charged with the responsibility of establishing minimum rights, monitoring observance of these rights and resolving workplace conflict. Trade unions agitated for the improvement of minimum standards that were captured in instruments known as awards. These standards once established in awards often flowed to the general community through government legislation eg annual leave, long service leave, 38 hour week, public holidays.

Moving away from the centralised system towards collective bargaining at the workplace commenced in the 1980s, and continued in the 1990s.

Under the Howard government from 1996 greater emphasis was given to individual bargaining and under what's now referred to as WorkChoices, individual contracts in the form of AWAs override collective arrangements.

The Rudd government was elected in 2007 on a platform of restoring balance to the workplace relationship. They moved immediately to phase out AWAs. The new system is based on the use of collective bargaining and collective agreements once again. This move back to collective arrangements is seen by some as a key factor in restoring balance.

The Rudd government has also introduced a new Workplace tribunal, Fair Work Australia, that has taken over the role of the AIRC.



INDUSTRIAL RELATIONS IN SCHOOLS

The vast majority of people in schools employed as leaders or managers are not Human Resource specialists, (nor should they be). It is not expected that teachers with leadership positions would know the full details of an award or enterprise agreement or be versed in contract law. It is unlikely that most middle managers would be involved in negotiations about awards, agreements or any form of individual contract of employment.

AUSTRALIA'S UNIQUE INDUSTRIAL HISTORY

Many commentators have lauded Australia's unique industrial history. It has been described as one of the "pillars of Australian settlement" (Kelly in Bromberg and Irving 2007 p.4). Many of those commentators make reference to the words of Justice Kirby of the High Court of Australia who in his judgement on the constitutionality of the WorkChoices legislation made the following observations about Australia's industrial relations system:

The story (the Australian approach to industrial relations) can be traced back at least to the decision of Higgins J in Ex parte H V McKay ("the Harvester Case") which, with its successors, had a profound effect on the wages and conditions of life of Australian workers and their families. But it also extended to decisions concerning standard hours of work; the development of the principle of equal pay for women workers; fairness and training requirements in the conditions of juniors and apprentices and the removal of discriminatory employment conditions for Aboriginals. The regulation of excessive overtime to compensate workers and to encourage employers to a better system of organising the work; the introduction of bereavement or compassionate leave entitlements; the introduction of provisions for retrenchment for redundancy; and reinstatement in cases of unfair termination are just some of the matters arising in industrial disputes in Australia decided by processes of federal conciliation and arbitration over the course of a century. Work value cases frequently ensured attention to the provision of fair wages and conditions to manual and other vulnerable workers which market forces and corporate decisions alone would probably not have secured. Attention to particular conditions of work, including arduous, distressing, disagreeable, dirty or offensive work, instilled in Australian work standards an egalitarian principle not always present in the pure operation of the market or the laws and practices of other countries.

(New South Wales v Commonwealth [2006] HCA 52; 81 ALJR 34; 231 ALR 1 (14 November 2006) available at <http://www.austlii.edu.au/au/cases/cth/HCA/2006/52.html>)

However, managers in schools should be familiar with relevant standards in the workplace, their origin and the instrument (award or agreement) that governs the standard. This is particularly important in seeking to make changes to workplace practices. There are obvious standards eg obligations under Occupational Health and Safety legislation, responsibilities under Equal Opportunity legislation. However, there are also more subtle matters that will impact on standards that form part of the employment relationship. For example, changing working or teaching hours, adding additional professional learning activities, requiring attendance at "out of hours" meetings. Many of these impact on standards contained in awards or agreements.

It is also true for all employees in a school setting that knowledge about their conditions of employment, their salary and the rights and obligations helps to ensure that the relationships between employee and employer is one that can be conducted in "good faith", that is both parties know what is expected of them, deliver on those expectations and understand when more is being asked or given and that this is recognised.

References

Bromberg, M. and Irving, M. (eds) *Australian Charter of Employment Rights*, Hardie Grant Books, Melbourne, 2007

A FAIR GO AT WORK

The concept of a 'fair go' or good faith performance is central to the employment relationship.

In general terms an employer should be able to trust that their employees will act in good faith, work diligently and not undermine the business or its reputation. An employee should be able to trust that their employer will pay them appropriately, treat them fairly and provide a safe working environment.

In the legal system the relationship between every employer and worker is characterised as a contract. This is true even if no literal, written contract exists and even though many of the arrangements and requirements are not spelt out in detail.

Employers and employees often have a long-term relationship. This means that the details of the employment contract can be hard to identify as they shift and change over time. Common law has determined that some features exist in every employment contract.

EMPLOYMENT AND COMMON LAW

The common law implies that the following features exist in every contract of employment between an employer and an employee¹:

The employee has:

- the duty to obey any lawful reasonable instructions of the employer
- a duty of fidelity, that is to act honestly in handling property, not abuse any trust or confidences and not disclose any confidential information
- a duty of care and competence when doing the job

The employer has:

- the requirement to pay wages for the work performed
- a general duty of care that includes the requirement to provide for competent staff that have adequate materials and training, a proper system of work and adequate supervision
- a duty to indemnify the employee for any expenses incurred in the course of employment

EMPLOYMENT AND STATUTES

In addition to these common law duties or responsibilities, the government can impose additional requirements through the passing of legislation. For example the Fair Work Act operates at the national level. This Act, which came into effect on 1 July 2009, and applies to every employer and employee in the national system (e.g. all Victorian employers and employees), includes many duties and requirements in addition to those spelt out above. Occupational Health and Safety and Anti Discrimination legislation also act to regulate aspects of the employment relationship.

GOOD FAITH PERFORMANCE

In recent times the common law has interpreted the need for co-operation, mutual trust and confidence as an implicit expectation of the relationship between employer and employee. This is often spoken of as a requirement of "good faith".

In Australian industrial practice this expectation of mutual trust and confidence, or good faith, has also been expressed as a commitment to a "fair go all round".

The idea underpinning this concept of "good faith" or a "fair go" is that both parties to the contract will act in ways that nourish rather than undermine the relationship. This includes understandings like:

- Employers and employees do not seek to mislead, trick or deceive each other but act in an honest and trustworthy manner
- Employers and employees do not abuse any powers or discretions granted to them in the employment contract
- No person in the workplace is subjected to harassment or humiliation

- Employees are dismissed only for a reason relating to their performance or conduct or genuine operational reasons (e.g. redundancy)
- Employees are willing to serve the notice period required in their contract if they decide to terminate their employment
- Employers and employees do not maliciously damage each other's reputation
- Employers do not seek to place illegitimate restrictions on the freedom of the employee to pursue their career once the employment relationship is over (e.g. they don't seek to unduly restrict who they work for or where they work).

Further support for this relationship can be achieved by employers giving employees written descriptions of the requirements of the job, generally in the form of a position description, and giving clear instructions about the levels of performance that are required, and support and training to achieve this. In return employees can support the relationship by carrying out their role thoroughly and applying all of their skills to the best outcome.

GOOD FAITH AND PRODUCTIVITY

This commitment to a respectful relationship pays off in productivity terms.

A report commissioned by the Victorian Government in 2008 found that companies that implemented fair and cooperative business practices, practices that encouraged communication in the workplace and other forms of employee involvement, had higher productivity, greater staff commitment and staff that were more loyal. (Gahan et al),

IN SUMMARY

- The relationship between every employer and employee is a contract that is influenced by common law and legislation
- The success of a working relationship depends on cooperation, trust and confidence between the employer and the employee in dynamic circumstances
- The idea underpinning this concept of "good faith" or "a fair go" is that both parties to the contract will act in ways that nourish rather than undermine the relationship.

References

Peter Gahan, David Taft, Richard Mitchell and Kathryn Bion, *Impact of Fair and Co-operative Employment Practices on Business Performance*, 15 June 2008, WERRC Monash University)

More

If you have 2-3 hours then it is worth accessing the following resources, both are written by experts and are easily digestible.

Bromberg, M. and Irving, M. (eds) *Australian Charter of Employment Rights*, Hardie Grant Books, Melbourne, 2007

Howe, J, *Australian Standard of Employment Rights*, Hardie Grant Books, Melbourne 2009

With less time available try:

Heap, L, "Industrial Relationships" in *Taking the Lead*, TLN Journal Vol. 15 No. 1 Autumn 2008 available through www.tln.org.au

Riley, J. (ed) *The Debate: Good Faith and the Employment Relationship*, Australian Institute of Employment Rights April 2009 No. 2 available through www.aierights.com.au

Issues for students

For students, issues may arise about developing a work ethic in their first job. e.g are they providing fair and loyal service to their employer and do they understand what this means? Many traits that are fostered in schools such as independent thought, challenging and debating viewpoints are not the same qualities that are valued in many of the part time positions that are open to students. Some students will take time to adjust to the differences. It is also true that young workers are vulnerable to unscrupulous employers who take advantage of their youth and inexperience.

The activities in the accompanying curriculum resource – **Work Right** are designed to assist young people think through the issues they will face when they take up employment.

¹ Note these requirements do not apply if the person is not an employee but is in fact a contractor. Whether or not a person is an employee or contractor can be difficult to determine however it would be safe to assume that most workers between the ages of 14 –18 are unlikely to be anything other than employees.

WORK WITH DIGNITY

All human beings, irrespective of race creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity (Philadelphia Declaration¹)

Human dignity, the ability to establish a sense of self-worth and self-respect and to enjoy the respect of others, is necessary for a fully realised life. Work makes up a very large part of how we spend our adult lives and our self-image can be strongly influenced by the work that we do and how we are treated in the workplace.

The concept of dignity in the workplace contains two complementary elements:

- Dignity at work
- Dignity of work

DIGNITY AT WORK

This refers mainly to the employment relationship and how people are treated and treat one another in the workplace. It refers to the need to protect against abuse or disadvantage and raises issues such as fair wages and just conditions of work, the right to belong to a trade union, the development of fair bargaining processes and protections from unfair dismissal.

It refers also to a work as a place of social interaction in which all participants have a right to protection against unsociable behaviour such as discrimination, harassment and bullying. There are many laws that prevent people being treated at work in a way that undermines their self-respect, (discussed in more detail in later sections of this resource).

DIGNITY OF WORK

This refers to the work process and emphasises the intrinsic value of work and the benefit of having satisfying, rewarding work. This raises issue of job satisfaction, job and work design, and access to skill enhancement and career progression. Dignity also implies that we are able to grow in our jobs. This means that our jobs should allow us to continue to learn by enhancing our skills and being treated like a valued member of a team, rather than a replaceable cog in a machine.

Sometimes context makes all the difference as to whether a job enhances our dignity or not for example, some people enjoy part time work because they can meet their childcare responsibilities. It represents better work/life

balance. It is also good for students as it is a way for them to earn an income while studying.

However, in 2006-07 in Australia 29% (or nearly one in three) people in part time jobs wanted to work more hours. This phenomenon is referred to as underemployment².

SOCIETAL VALUES

How we feel about ourselves is also influenced by the way society values what we do for work. Here we can look at so-called high or low status jobs or those who do unpaid work in the home.

The book *Dirt Cheap: Life at the Wrong End of the Labour Market* by Elisabeth Wynhausen looks at jobs that are often described as “unskilled”. The conclusion of those observed in this book is that it was not the nature of the work itself that impacted on status but the views and attitudes that others had of that work which had an impact.

For many women the work that they have done inside the home has not been counted as real productive work. This has meant that the work done is not recognised and the status of women who perform this work is often undervalued. Perhaps this helps to explain why domestic work in the home is not valued or visible to many men? Data shows that women, even those employed in fulltime work, spent substantially more time (an average of 46 minutes per day in 2006) doing domestic duties than men³. Women tend to do two thirds of all unpaid work⁴. Women often find that they have to work a “double shift”, because after completing their shift of paid work they then go home to work a “second shift” of unpaid housework.

SURVEILLANCE

The increasing trend toward surveillance at work raises important questions about dignity in the workplace. An organisation can collect personal information about an individual however this is not an unfettered right. The National Privacy Principles provide that this collection of information should only occur if it is necessary for a function of the organisation, should only be collected by lawful and fair means and not in an unreasonably intrusive way. The organisation should also take all reasonable steps to disclose

to the individual concerned the information they have collected, if requested. These principles can be applied in environments where surveillance involves the monitoring of phone calls, emails or computer access and also video surveillance of workers⁵.

However, the organisation does not achieve or build trust by using surveillance of employees and this surveillance where applied inappropriately has the potential to undermine the employment relationship.

THE RIGHT TO WORK

An important related topic is the concept of the right to work. Given that work forms such an important part of our society and therefore can have such an impact on our status and sense of self worth, it is important to recognise that we as a society have a responsibility to provide work to those that want it but do not have it. Understanding the role that work plays in our society gives us some sense about the impact that unemployment can have on a person's status and own sense of self worth.

DECENT WORK

Ensuring dignity at work is an international issue. Australia is a member state of the International Labour Organisation (ILO) that is the United Nations agency that deals with labour and work issues. The ILO has adopted a decent work agenda aimed at promoting this as an overarching priority in all countries and workplaces. According to the ILO decent work involves:

- the creation of jobs so that those who want work can
- recognising and respecting fundamental principles and rights in the workplace
- extending social protections and social security systems
- promoting dialogue in and about work and supporting conflict resolution.

See http://www.ilo.org/global/About_the_ILO/decent-work-agenda/

IN SUMMARY

- *Dignity at work* refers mainly to the employment relationship and how people are treated and treat one another in the workplace.
- *Dignity of work* refers to the work process and emphasises the intrinsic value of work and the benefit of having satisfying, rewarding work.
- Work forms an important part of our society - the status of our work, the right to work and decent work impact on our sense of self worth.

References

Wynhausen, E 2005, *Dirt cheap: life at the wrong end of the job market*, Pan-Macmillan, Sydney 2005

More

To consider the concept of work and dignity in a broader context:

Bromberg, M. and Irving, M. (eds) *Australian Charter of Employment Rights*, Hardie Grant Books, Melbourne, 2007

Howe, J, *Australian Standard of Employment Rights*, Hardie Grant Books, Melbourne 2009

Websites

International Labour Organisation website on their Decent Work campaign. There is a 3-minute cartoon movie that makes the point rather well. http://www.ilo.org/global/About_the_ILO/decent-work-agenda/

This site contains an agreed charter between employers and employees developed by Unions NSW with a focus on dignity and work.

http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0006/10896/Dignity_Respect_Charter.pdf

This website has a comprehensive list of papers produced by the Catholic church on work and social teaching.

<http://www.socialjustice.catholic.org.au/index.shtml>

The ACTU has a short paper and position statement on Decent Work.

<http://www.actu.asn.au/Issues/DecentWork/default.aspx>

Issues for students

Students, particularly those in middle to late adolescence will often have strong views about the status of work but may have given limited consideration to the concept of dignity and work. Care will need to be exercised in some groups where students might be inclined to be disparaging about occupations held by the parents of other students in the same class.

The activities in the accompanying curriculum resource – **Work Right** are designed to assist young people to “stand in the shoes” of another person when considering dignity and work.

1 the Philadelphia Declaration establishing the principles of the International Labour Organisation can be found at <http://actrav.itleo.org/actrav-english/telearn/global/ilo/law/phila.htm#Annex>

2 <http://www.abs.gov.au/AUSSTATS/abs@.nsf/Previousproducts/6105.0Feature%20Article4Jul%202005?opendocument&tabname=Summary&prodno=6105.0&issue=Jul%202005&num=&view=>

3 http://www.ofw.facs.gov.au/work_education/unpaid_work/unpaid_work_economy.html.

4 (ABS 4102.0 Trends in House Work March 2009)

5 <http://www.privacy.gov.au/publications/npps01.html>

FREEDOM FROM DISCRIMINATION AND HARASSMENT


As a democracy Australia is committed to achieving the equality of all its citizens. This objective extends to the workplace. Unequal treatment because of discrimination or harassment undermines this objective. Achieving workplaces that are free from discrimination and harassment is essential to the fabric of our democracy.

DISCRIMINATION

Treating someone differently to the way another person is treated does not mean that discrimination has taken place (as defined by the law).

To unlawfully discriminate is to treat someone either unfairly or less favourably because they possess a personal attribute that is set out in legislation. Discrimination can also be setting a requirement that people with a particular characteristic cannot meet and which is not reasonable. It is unlawful to discriminate against someone because of the following personal attributes:

- 1. Age:** You cannot discriminate against someone on the basis of their age – for example, no one should be automatically disqualified for applying for a job simply because they are “too young” or “too old”. However, it is lawful to discriminate against someone on the basis of their experience or lack of experience.
- 2. Breastfeeding and Pregnancy:** It is unlawful to discriminate against a woman on the basis that she is pregnant or that she may become pregnant. For example it is unlawful for a potential employer to not select a person for a job on the basis that they presume she is or may become pregnant. Asking questions to female applicants like ‘are you thinking of starting a family?’ may place an employer at risk of an allegation that they unlawfully discriminated in the selection process. Women have the right to breastfeed in public. This includes breastfeeding on public transport or in public venues. Employers are required to provide facilities to enable women to breastfeed or express at work.
- 3. Carer or Parental Status:** Providing care to our family and to those we live with plays an important role in the life of our society. A carer cannot be discriminated against on the basis of their caring responsibilities. Under national workplace laws there are a number of minimum entitlements available to all employees to help them balance work and family or caring responsibilities. (see the National Employment Standards in the Fair Minimum Standards section of this resource)
- 4. Disability or Impairment:** This is the major source of complaints to the Equal Opportunity and Human Rights Commissions in most jurisdictions. It is unlawful to discriminate against people with a disability if their disability does not prevent them from doing their job. Employers must take all reasonable steps to accommodate people with a disability in the workplace. This includes making modifications to systems of work or workplace machinery, for example, modifications to computers in order that the person’s disability can be accommodated.
- 5. Employment Activity:** It is unlawful to discriminate against an employee simply because they want information about their entitlements at work. For example, it would be unlawful to terminate someone because they asked for information about their rate of pay or what penalties they get paid for overtime work.

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- 6. Gender Identity:** It is against the law to discriminate against someone on the basis of his or her gender identity. Gender identity means self-identification as a person of a particular gender. A person may identify as a member of a particular gender by their style of dress, medical intervention or by other means, including a change of name.
- 7. Industrial Activity:** It is against the law to discriminate against someone either because they are, or are not, a member of a union or because they have or have not participated in industrial action.
- 8. Lawful Sexual Activity:** Heterosexuality, homosexuality, lesbianism and bisexuality are all lawful sexual activities. Sex between consenting adults is lawful and so it is unlawful to discriminate against someone on the basis of either their sexual activity or their suspected sexual orientation.
- 9. Marital Status:** Whether someone is married, single, divorced, separated or in a de facto relationship is not a lawful ground for discriminating against him or her.
- 10. Physical Features:** In Victoria it's against the law to discriminate against or treat someone unfairly due to their physical appearance, including their height, weight, body shape, a disfigurement, skin condition, scar or birthmark.
- 11. Political Belief or Activity:** Central to any democracy is the protection of those who hold political beliefs that are different to those of the majority. It is therefore against the law to discriminate against someone on the basis of their political beliefs or any political activities they either do or do not engage in.
- 12. Race:** It is unlawful to discriminate against someone because of their race (including colour of skin or language they speak at home). In Victoria there are also Racial Vilification Laws that make it an offence to incite hatred against people on the basis of their race.
- 13. Religious Belief or Activity:** There are over 100 different religions practiced in Australia. It is against the law to discriminate against someone on the basis of either their religious belief or their non-belief.
- 14. Sex:** It is unlawful to discriminate against someone because of their sex and sexual orientation. Sexual orientation covers homosexuals, lesbians, bisexuals, heterosexuals and people perceived to fall into one of these groups.
- 15. Personal Association:** It is unlawful to discriminate against someone because they associate with someone else that has any of the personal attributes listed above.

Organisations can apply for exemptions from these laws in special circumstances. These exemptions often create controversy and are regularly reviewed.

Since it is unlawful to be discriminated against on the basis of any of these characteristics it is not necessary to include any reference to these on any material you submit for a job application or in a job interview.

It is unlawful to discriminate against a person:

- when they apply for work (not getting the job because they have children)
- while employed (not being given training opportunities because they are pregnant)
- when they are terminated from their employment (sacked because they ask why they have not been paid overtime rates)
- after they have left employment (telling potential future employers they were a union troublemaker)

Discrimination is not dispelled by treating everyone the same. Sometimes this concept of "equality" may simply reinforce systemic discrimination in favour of a dominant group.

Direct discrimination

This is the easiest to identify as it occurs when someone makes it very clear why they are treating you less favourably because of one of the attributes outlined under the law. When someone says that they will not employ you because you are a woman, for example, this is direct discrimination.

Indirect discrimination

This type of discrimination is often harder to identify or prove, however, it occurs if a person with a particular attribute is required to comply with an unreasonable requirement, condition or practice which a person without that attribute could comply with. For example if a potential employer required all employees to be above a certain height and there was nothing in the job that required a person to be of a certain height, and this height screened out the majority of female applicants but the majority of male applicants could meet the requirement, this may be unlawful, indirect discrimination.

Organisations can be held to be responsible (vicariously liable) for the actions of their employees if their employees discriminate against someone and it is found that the organisation did not take all reasonable steps to discourage. To avoid this organisations often make sure that they have clear and unambiguous anti discrimination policies and training that they promote to all of their staff.

BULLYING AND HARASSMENT

Workplace bullying is repeated, unreasonable behavior directed toward an employee, or group of employees, that creates a risk to health and safety. It may occur in one-to-one situations, in front of managers or supervisors, co-workers, clients or customers or by written, visual, electronic communications such as letters, drawings, emails or telephone communications.

Bullying behavior

Bullying can include:

- Physical or verbal assault
- Belittling opinions or constant criticism
- Yelling or screaming or offensive language
- Derogatory, demeaning or inappropriate comments or jokes about a person's appearance, lifestyle and background
- Insults
- Isolating workers from normal work interaction, training and development or career opportunities
- Overwork, unnecessary pressure and unreasonable deadlines
- An unacceptably aggressive style from a superior
- Undermining work performance by deliberately withholding work-related information, access, support or resources or supplying incorrect information
- Being under-worked, creating a feeling of uselessness
- Unexplained job changes, meaningless tasks, tasks beyond a person's skills and training, and failure to give credit where credit is due
- Over-detailed supervision and unwarranted checking of performance
- Unreasonable "administrative sanctions" such as undue delay in processing applications for training, leave or expenses

Sexual harassment

Sexual harassment is conduct of a sexual nature that is unwelcome, it can be physical, verbal or written. It involves behaviour that could reasonably be expected to make a person feel offended, humiliated or intimidated. Sexual harassment is against the law. A survey by the Australian Human Rights Commission in 2008 found that 22% of women and 5% of men had been sexually harassed at work.

Sexual harassment focuses on how the person being harassed feels and how a reasonable person would feel in those circumstances. The motive of the harasser is irrelevant, when determining if the behaviour was unwelcome.

Employers are expected to provide a workplace that is free from discrimination and harassment. This means that they must do everything that is reasonably practical to ensure that such behaviour does not occur in their workplace. This means that employers can be held legally responsible for discriminatory or harassing behaviour by their employees or customers, especially if they have not done enough to prevent this kind of behaviour.

Employees are also required by law not to act in a way that either discriminates against or harasses others in the workplace.

Every organisation should:

- Proactively promote a workplace free from discrimination bullying and harassment and act on incidents
- Provide appropriate training and information to staff of the work area about what are acceptable and unacceptable workplace behaviors
- Inform staff of the actions they can take if they feel they are being discriminated against bullied or harassed including provision of a list of designated discrimination or harassment contact officers
- Arrange or provide adequate and appropriate support to staff who make a complaint, including ensuring that the matter is treated confidentially and that the complainant is not victimised
- Deal fairly with all persons involved in allegations including ensuring due process

More

The areas of discrimination and harassment are complex and ever changing. For this reason the websites of government institutions are often the best sources of accurate and up to date information.

Websites

For external support or assistance in relation to discrimination or harassment contact can be made with WorkSafe <http://www.worksafe.vic.gov.au/wps/wcm/connect/WorkSafe/Home/>

Victorian Equal Opportunity and Human Rights Commission <http://www.equalopportunitycommission.vic.gov.au/home.asp>

Australian Human Rights Commission website. This site gives a brief description of each of the Federal Acts that exist to protect our rights regarding discrimination, EEO, Sexual Harassment and so on. <http://www.hreoc.gov.au/resources>

Equal Opportunity for Women in the Workplace site.

<http://www.eowa.gov.au/>

Fair Work Ombudsman - has Fact Sheets on employment information including information about discrimination.

<http://www.fwo.gov.au>

Issues for students

People, particularly students can be inclined to bandy around words like “bully”, “harassment” and “it’s discrimination”. Many will also have direct experience of being victims. The activities in the accompanying curriculum resource (**Work Right**) are designed to assist students to understand discrimination, harassment and bullying from a workplace law perspective.

Given the sensitive subject it is advisable that teachers take some steps to maintain a layer of protection when exploring this subject with students. Where appropriate direct whole class discussion away from discussions of specific manifestations of discrimination, bullying and harassment and back to exploring what actions can be taken by those who have faced discrimination, bullying or harassment. It is important to ensure that students are aware of the opportunities that they have to debrief in private if they wish to discuss any confidential issues that might arise from exploring these issues.

IN SUMMARY

- Discriminatory and harassing behaviours and actions are illegal because they undermine our ability to achieve equality for all.
- Treating someone differently to the way another person is treated does not mean that discrimination (as defined by the law) has taken place.
- To unlawfully discriminate is to treat someone either unfairly or less favourably because they possess a personal attribute that is set out in legislation.
- Workplace bullying is repeated, unreasonable behavior that creates a risk to health and safety.
- Sexual harassment is any conduct of a sexual nature that is unwelcome and that could reasonably be expected to make a person feel offended, humiliated or intimidated.

A SAFE AND HEALTHY WORKPLACE

The right of an employee to a safe and healthy working environment is recognised in Australian law as a duty imposed on the person's employer

Employees have the right to a safe and healthy work environment and to be free from the risk of injury. The term "injury" includes physical as well as mental injury. Being exposed to bullying, harassment and intimidation can constitute an unsafe working environment.

EMPLOYERS

The OHS obligations on employers include:

1. A requirement to eliminate the risk or do everything reasonably practicable to reduce those risks. There is an expectation that employers will be proactive in both identifying and seeking to eliminate risks from the workplace. That is, they will seek to reduce risks before accidents happen, not once they have happened.
2. A systematic risk management approach to health and safety including the following steps:
 - Identifying hazards
 - Assessing risks that may result because of the hazards
 - Deciding on control measures to prevent or minimise the level of risk
 - Implementing the control measures
 - Monitoring and reviewing the effectiveness of the measures taken.
 - The provision of training in safety as a way to reduce threats at work
3. The duty to notify any serious incidents that occur in the workplace. In Victoria this is to notify WorkSafe, the Victorian Government's Workplace Safety Authority.

EMPLOYEES

Employees have an obligation to cooperate and assist employers to provide a safe working environment.

The obligation on employees includes:

1. A duty to take reasonable care and to act in a way that does not endanger their own or the health and safety of others in the workplace
2. Reporting accidents, injuries or incidents to someone in authority and if possible to write the details down in an accident book.

CONSULTATION

The most successful approaches to health and safety are those that encourage employers and employees to work together to address the dangers and risks in the workplace. Legislation encourages employees to be involved in regular discussions with their employer about health and safety. Employees are also able to be represented (for example by their union) in matters associated with health and safety in the workplace.

Health and Safety legislation also provides for inspections of workplaces by both government inspectors and representatives of employee organisations (unions) to ensure that the workplace is safe and healthy and that regulations are being complied with.

At the time of going to print a new national law for Health and Safety at Work was being considered by Commonwealth and State governments. The principles of this new proposed legislation are the same as those outlined here.

YOUNG WORKERS

Young workers are more likely to be injured at work than any other age group. In Victoria those in the 15 to 24 age group in all types of employment, casual, part-time, labour hire, work experience, structured workplace learning or apprenticeships, have the highest rate of injury in the state, and their injuries are more likely to result in hospitalisation. (WorkSafe 2007)

This rate of injury for young workers may reflect the fact that it is more difficult for them to speak up about any concerns they have (including the need for more training) as they may not be as confident as those with more experience in the workplace.

More

Major employer groups in the education sector have extensive OHS information and services eg DEECD and CEO. They also have staff who focus on proactive strategies to promote student and staff wellbeing.

Both unions, AEU and VIEU, who represent employees in the education sector have specialist OHS staff to assist union members.

Websites

For external support or assistance in relation to OHS issues contact can be made with WorkSafe.
<http://www.worksafe.vic.gov.au/wps/wcm/connect/WorkSafe/Home/>

Victorian Trades Hall Council site is comprehensive with lots of fact sheets and materials that OHS Representatives could use in the workplace. There are also several sheets for doing workplace inspections, etc.

<http://www.ohsrep.org.au/>

West Australian Worksafe page on OHS, includes modules on manual handling and noise.

<http://www.commerce.wa.gov.au/worksafe>

The Australian Education Union website

<http://www.aeuvic.asn.au/ohs/>

The Independent Education Union website

<http://www.vieu.org.au/1119.html>

Issues for students

Students are at serious risk of injury when they engage in part time work and/or work experience. It is common for students to be required to complete OHS training before undertaking formal work experience. In Victoria, for example, there are compulsory online modules to be completed (see <http://www.education.vic.gov.au/safe@work/index.asp>)

The activities in the accompanying curriculum resource – **Work Right** are designed to get students engaged in OHS inspections, (there is a comprehensive school audit checklist); to know where to get information; and to develop the confidence to “speak up”.

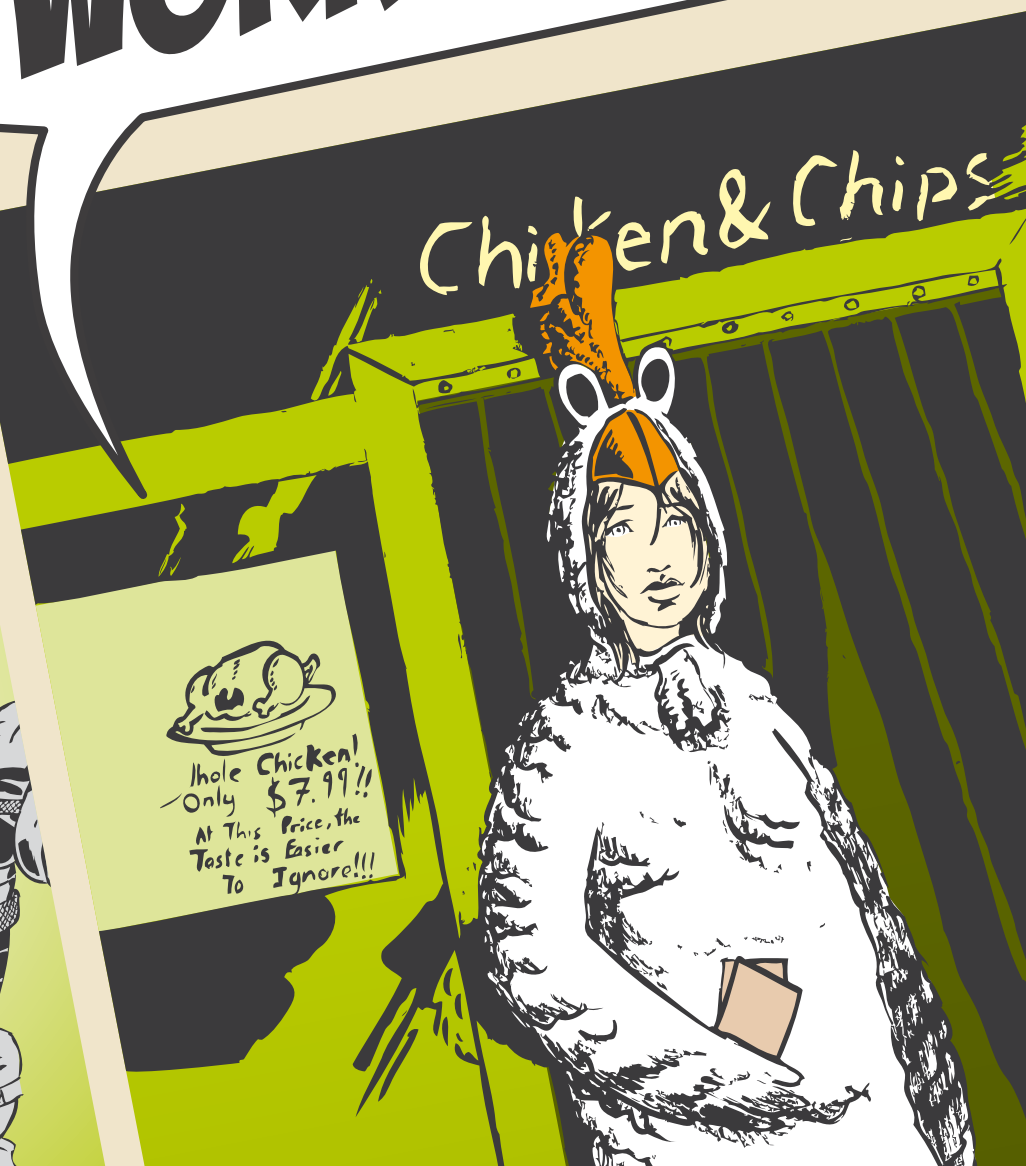
IN SUMMARY

- The Workplace Health and Safety legislation imposes a duty on employers to provide a workplace that is free from risks to the health and safety of those working there.
- Employees have a duty to comply with reasonable instructions and work practices to ensure both their own health and safety and the health and safety of those who work with them.
- Successful approaches to health and safety encourage employers and employees to work together.





WORK RIGHT!



WORK RIGHT!

1

Your "Fair Go" at work

Successful relationships are based on trust and confidence. This is true also of the employment relationship.

Your employer should be able to trust that you will do your job as best you can and be loyal.

You should be able to trust that your employer will pay you properly, treat you fairly and provide a safe working environment.

This is a "fair go" at work.

2

Work with dignity

Everyone has a right to feel that the work they do is worthwhile and they are respected for what they do.

Before you start work, or on your first day, your employer should give you written information about:

- what you will be paid and the duties you must perform
- whether you are employed on a full-time, part-time or casual basis
- your hours of work
- when you will be told your roster
- contact details for your employer if you need to call in sick or ask for your roster to be changed, and
- occupational health and safety

They should also tell you where you can go to get advice about your workplace rights.

3

Discrimination, bullying and harassment are against the law

It is against the law for anyone in the workplace to treat you differently because you are female or male, or because you come from a different country or have a different religion, because of your age or the fact that you are gay or lesbian or have a disability of some kind.

Workplace bullying includes things like using loud and abusive language, intimidation, being subject to ridicule or humiliating jokes in front of others, leaving offensive messages on emails, the internet and social networking sights or via text message.

Sexual harassment is any conduct of a sexual nature that is unwelcome. Sexual harassment can be physical, verbal or written.

Every organisation has a responsibility to ensure that these behaviours don't occur in the workplace.

If you feel discriminated against, bullied or harassed:

- tell the person to stop
- keep a diary of events
- tell your employer, your human resources manager or occupational health and safety representative
- Report the problem to your parents or guardian, Worksafe or your union

Contact the Fair Work Ombudsman about discrimination, bullying and harassment at work.

4

Being safe at work depends on everyone

Employers must do everything practicable to ensure all risks in the workplace have been removed. Under law they must spot the hazard, assess the risk associated with the hazard and make changes by putting risk controls into place.

As an employee you must act reasonably and comply with instructions designed to protect your own health and safety and the health and safety of those you work with.

You do not have to do something that is unsafe or that you haven't been trained to do.

You should be introduced to your health and safety representative when you start work.

If you are feeling unsafe

- Tell you supervisor or manager
- Report your concerns to your health & safety representative
- Tell your parents or guardian and contact Worksafe Victoria or your union to ask for help.

5

Speak up and be heard

Workplaces that encourage their employees to be actively involved are safer, more productive and generally considered better places to work.

Consultation about changes in the workplace is an important way to involve you in decisions that affect you. Consultation involves more than being told what is happening. Consultation is about listening and being heard. It includes being able to make suggestions about better ways to work or about your concerns.

6

Having someone to help you

Both the employee and the employer have a right to have someone speak on their behalf when raising problems or concerns in the workplace.

Every employee (including those who are casual or part-time) has the right to belong to a union.

Unions provide information advice and support to their members. They help to resolve problems in the workplace and negotiate improvements in wages and conditions.

Your right to be a member of the union is protected by law. Laws also protect the rights of individuals to choose not to be a member of a union.

For details about what unions do and how to join contact the ACTU.

7

Getting the basics right

Every employee is entitled to minimum standards of pay and conditions.

Information about the minimum standards that apply to you including rate of pay, hours of work, payment of overtime and on public holidays etc. can be obtained from the Fair Work Ombudsman or Fair Work Online.

Your employer should:

1. pay the correct rates for all hours worked, including for compulsory work meetings, training and time spent opening and closing the business
2. issue a pay slip within 1 working day of pay day
3. pay for "trial work" unless it's part of an approved education or training course
4. pay any applicable penalty rates for working public holidays
5. pay weekend and penalty rates, if they are in your workplace conditions
6. pay on a regular basis – usually per week or per fortnight but at least monthly.

It is not legal for an employer to make you do a "trial" without being paid.

Contact the Fair Work Ombudsman if you think you are not getting paid properly.

8

Lost your job – was that fair?

Australia's workplace laws provide that employees should not be unfairly dismissed.

If you have been dismissed and you haven't been told that your performance or behaviour is a problem or given the chance to improve, your termination may be unfair.

If you are not a casual or fixed term employee and you think you have been treated unfairly you can have this matter reviewed by the workplace tribunal, Fair Work Australia.

You would need to show:

- that you have worked in the organisation for the minimum period (12 months for small business – fewer than 15 employees, 6 months otherwise)
- that you have been "dismissed" not resigned
- that the dismissal was unfair
- that the dismissal was not because the employer doesn't want the job done by anyone anymore.

If you have been unfairly dismissed you might get your job back or receive compensation.

A claim form needs to be lodged with Fair Work Australia within 14 days of being dismissed.

9

Bargaining for Better

Australian workplace laws allow employees to bargain with their employer to achieve pay and conditions above (but not below) the minimum.

Individual employees are generally not in a power position when bargaining with their employer alone so workplace laws promote the concept of employees grouping together to bargain with their employer. This is called collective bargaining.

You shouldn't be asked to agree to something about your employment entitlements, that you haven't been consulted about, don't have any information about or if you haven't had a chance to seek advice or assistance.

Employees may be represented by their union or another person in collective bargaining negotiations.

10

Get that problem fixed - quickly and fairly

Every workplace should have a dispute resolution procedure that shows the steps to be followed to resolve problems. These steps include:

1. Telling you supervisor or manager about the problem
2. If the problem is not fixed raising the problem with a more senior manager for resolution
3. If the problem is not fixed in the workplace getting someone from outside who is independent to assist
4. At any stage in the process you should be allowed have someone assist you. This can be your union representative.

If you have a problem in the workplace follow the steps above to have the matter resolved.

If you are not being heard by your employer contact your union or the Fair Work Ombudsman to seek help.

Making Contact

Worksafe Victoria

Advice & information in relation to safety

Advisory Service (03) 9641 1444
or 1800 136 089 (toll free).
www.worksafe.vic.gov.au

Victorian Equal Opportunity and Human Rights Commission

Information about discrimination
and harassment

Tel: (03) 9281 7111
or 1800 134 142 (toll free)
E: information@veohrc.vic.gov.au
TTY: (03) 9281 7110
www.humanrightscommission.vic.gov.au

Fair Work Ombudsman

For information about minimum
entitlements and appropriate
workplace practices

Advice line: 13 13 94
www.fwo.gov.au

also

Fair Work Online

www.fairwork.gov.au

Fair Work Australia

To lodge an unfair dismissal claim
www.fwa.gov.au
Tel: 1300 799 675

ACTU

For information about unions and
entitlements at work

www.actu.asn.au
Tel: 1300 486 466
www.worksite.actu.asn.au

also

Victorian Trades Hall Council

Young unionist network

www.yun.org.au
Tel: (03) 9659 3511

Jobwatch Employment Rights Legal Centre

For employment rights information and
legal advice

Tel: (03) 9662 1933
or 1800 331 617
www.jobwatch.org.au

Youth Central

Youthcentral is a web based resource
that offers a range of information and
advice on issues like jobs, study, travel,
money and events in your local area
- wherever you live in Victoria.

www.youthcentral.vic.gov.au





HAVING A SAY AT WORK

A modern forward looking business does not keep its workers in the dark about important decisions that affect them. It trusts them and involves them.
(UK Department of Industry and Trade)

There is a broad spectrum of opinions about how much employees should have a say in the workplace. Some feel that making decisions in the workplace is a “managerial prerogative” and it is a manager’s role to make decisions and then tell employees about them.

At the other end of the spectrum there are those who believe that management contribute nothing to the workplace and that employees would be better off if they managed the work for themselves.

Between these two extremes are those who believe that whilst it is a manager’s role to manage, this function should be carried out responsibly and should seek to engage employees in the process.

It might best be summarised by these statements from the Australian Charter of Employment Rights:

- Employers have the right to responsibly manage their business
- Workers have the right to express their views to their employer and have those views duly considered in good faith
- Workers have the right to participate in the making of decisions that have significant implications for themselves or their workplace

(Australian Institute of Employment Rights <http://www.aierights.com.au/>)

HIGH PERFORMING WORKPLACES

Workplaces that encourage employees to be actively involved in the life of the organisation are safer, more productive and generally considered better places to work. Research, including some completed by the Victorian state government, supports the view that involving employees in decision making at work has a positive effect on both productivity and the retention of staff. (Gahan et al)

Involving employees sends the signal that their view is respected and trusted. It encourages them to make suggestions about how work processes and practices can be improved. When the decision is likely to have an impact on them directly, involving employees helps them to understand why change is necessary and what role they can play in making change work. This type of involvement recognises that work plays a significant part in people’s lives and therefore what happens at work can have a significant impact on them.

A high staff turnover is a major cost in running an organisation, not just because interviewing is a long and costly process, but also because employees who leave take with them a wealth of knowledge about the organisation. Many organisations talk about “knowledge management”, often the most efficient and cost effective form of knowledge management is retaining long-term employees. Involving employees in the decisions that affect them is one way to help retain those employees.

FORMAL CONSULTATION

Australia’s workplace laws are designed to encourage both employers and employees in workplaces to come together and discuss ways in which they can make workplaces more productive to both improve the pay and conditions of employees and make workplaces more profitable. Sometimes this involves negotiations about the terms and conditions that will apply in the workplace. These negotiations may conclude and be set out in “enterprise agreements”.

An enterprise agreement is an agreement between a group of employees and an employer (although sometimes the agreement can also cover a group of related employers) that sets out the terms and conditions of work in that workplace. These agreements themselves are required to contain an agreement that the employer will consult with their employees before introducing changes into the workplace.

Consultation means more than just notification. Companies use a wide variety of ways to involve staff in the life of the organisation. It is hardly surprising that the most effective mechanisms occur where employees can see their contribution is actively considered and has made a real difference to the final decision. Where “consultation” in the workplace is seen as just “going through the motions” before management implements what it had already decided to do it may negatively impact on the implementation of change.

It is not enough for an employer to simply notify their employees that a change is about to happen in the workplace. Consultation involves more than a mere exchange of information. For consultation to be effective the participants must have an opportunity to contribute in a real and meaningful way to the decision-making process.

REPRESENTATION

Employees are often represented in bargaining and consultation about change by their union. Australia’s workplace laws allow the union to represent their members in bargaining. They also allow the employee to choose anyone else to represent them. Employers will often seek assistance from an employer organisation.

CONSULTATION IN SCHOOLS

Schools across Australia, those in the Government and Catholic sector and many in the Independent sector, operate under agreements that require employers and employees to consult on issues at the local level eg class sizes and arrangements, and classroom contact time.

Information about the consultation processes is available from the Australian Education Union for Government schools and the Independent Education Union for Catholic and Independent schools.

IN SUMMARY

- Australia’s workplace laws encourage employers and employees in workplaces to come together and discuss how their workplaces can be more productive.
- Consultation involves an exchange of information AND the opportunity to contribute in a real and meaningful way to the decision-making process.
- Employees are often represented in bargaining and consultation about change by their union.

References

Peter Gahan, David Taft, Richard Mitchell and Kathryn Bion, *Impact of Fair and Co-operative Employment Practices on Business Performance*, 15 June 2008, WERRC Monash University

United Kingdom Department of Trade and Industry, *High Performance Workplaces: The Role of Employee Involvement in a Modern Economy – A discussion paper* (2002) p.1

More

To consider the concept of workplace democracy in a broader workplace context:

Bromberg, M. and Irving, M. (eds) *Australian Charter of Employment Rights*, Hardie Grant Books, Melbourne, 2007

Howe, J, *Australian Standard of Employment Rights*, Hardie Grant Books, Melbourne 2009

Websites

The Business Victoria website has three informative fact sheets on workplace consultation that are written in simple language.

http://www.business.vic.gov.au/BUSVIC/STANDARD.HTML/PC_60875.html

Issues for students

Many students, particularly those in middle to late adolescence are keen to “have their say” on many topics. However, experience suggests that in the workplace where they are often in “junior” roles they feel the power imbalance and are often reluctant to speak up on issues that are important to them. The activities in the accompanying curriculum resource – **Work Right** are designed to assist young people to consider the viewpoints of many stakeholders on an issue and to recognise that many people can be involved in a decision making process and their own view is a valid perspective.

UNION MEMBERSHIP AND REPRESENTATION

The right of a worker to join with other workers and freely associate in a union is recognised internationally as a fundamental human right

Both the employee and the employer have a right to be represented when seeking to address issues in the workplace. A representative should be a person who:

- can provide independent advice and assistance
- has knowledge of the law and the circumstances that need to be dealt with
- can assist in promoting and communicating the interests of the person in an effective manner

Employees may find it hard to speak with their employer on some issues. There are a number of reasons why this may be the case:

- It's hard to tell the employer that you don't like something that they are doing
- It's hard for many people to say that they think they deserve to be paid better or get better conditions
- It may be difficult to deal with someone who represents the employer such as a human resource manager or a lawyer, who is trained and has access to more information than an individual worker may have

This is the reason why Australia's workplace laws allow employees to group together to form and join unions. Australian laws also allow that a union can represent employees in bargaining, resolving conflict or disputes and in ensuring the workplace is safe and healthy.

EMPLOYEE UNIONS

Any employee has the right to belong to a union (including part-time and casual employees). This is called freedom of association. Unions provide information advice and support to their members. Unions are funded by the membership fees they receive. A union officer may be asked by members to assist them with progressing their interests in the workplace.

Unions generally encourage employees in a workplace to elect a representative or representatives to speak on behalf of them. This person ensures that the employees views or concerns are raised with the employer. This representative also ensures that the views of member are communicated to the union office – where paid employees of the union work.

There are laws that mean you cannot be discriminated against if you choose to be a member of a union or be represented by a union. These laws also protect the rights of individuals to choose not to be a member of a union. If you are not a member of a union someone of your choosing may still represent you when bargaining.

Unions have had a long history in Australia. For most of that time the majority of Australian workers have been members of unions. In recent times the level of union membership has decreased. There are a number of reasons for this. From the mid 1980s the Australian economy has witnessed dramatic change. There has been a severe decline in manufacturing industries in Australia (an industry that was traditionally highly unionised), and a similar increase in employment in the service industries eg cafes and restaurants (traditionally an industry that is not unionised). There has also been a drop in fulltime employment and a steady, and accelerating, growth in casual labour (historically casual workers have not been highly unionised).

At the national level union members are represented by the Australian Council of Trade Unions (ACTU). The ACTU has a significant role in negotiating with the Government and employer organisations about improvements to workplace laws, jobs and employment, taxation and social security. It is also active on issues that have a broader impact such as the environment.

The right to be a member of a union and to have that union represent you (freedom of association) is a right that is recognised as a core or fundamental labour standard by the International Labour Organisation (ILO).



MANAGER AND EMPLOYER UNIONS

There are unions that represent the interests of managers. Managers often are required to act like the owner of a business in that they “manage” the employment of staff from recruitment and selection through performance appraisal to termination. However, managers are also employees of a business or an organisation and at times they need someone to represent their interests to their employer. In school settings Principals are eligible to join their respective union.

Employers have a right to representation also. Often employers are members of their own unions called employer associations. They join these associations in order to gain access to information and advice in much the same way that an employee joins a union. Of course human resources personnel or lawyers that they employ or engage may also represent them.

IN SUMMARY

- Both the employee and the employer have a right to be represented when seeking to address issues in the workplace.
- The right to be a member of a union and to have that union represent you (freedom of association) is a right that is recognised as a core or fundamental labour standard by the International Labour Organisation (ILO).
- There are laws that mean you cannot be discriminated against if you choose to be a member of a union or be represented by a union or choose not to be a member of a union.

More

The ACTU runs a website for school students called Worksite. Amongst other things this has interesting historical information about the role of unions.

<http://www.worksite.actu.asn.au/>

For information on employer associations contact Victorian Chamber of Commerce and Industry, VECCI.

Websites

The Australian Education Union website for employees in Victoria

<http://www.aeuvic.asn.au>

The Independent Education Union website for employees in Victoria

<http://www.vieu.org.au>

The International Labour Organisation has an excellent website dealing with international standards and protocols on issues of representation (to which Australia is a signatory)

<http://www.ilo.org/global/lang--en/index.htm>

ACTU website

<http://www.actu.org.au/>

Issues for students

This topic provides a great opportunity to explore notions of representation and advocacy. The activities in the accompanying curriculum resource – **Work Right** - encourage students to focus on representation at the school level e.g Student Representative Councils and then broadens the debate into a consideration of the contribution of unions to Australian society.

PROTECTION FROM UNFAIR DISMISSAL

Work plays an important role in our lives, the decision to take it away (i.e. terminate employment) should not be taken lightly.

Australia's workplace laws provide that employees should not be unfairly dismissed. In order to be treated with dignity employees should be afforded the right to be heard about any proposed termination. Termination should also be for a fair reason that can be justified on the basis of the employees performance, or conduct or because of genuine organisation needs (e.g. redundancy)

Replacing staff is a difficult and costly exercise for organisations. It makes sense to follow good processes before terminating anyone. This is also true because employees who are left in the organisation are unlikely to feel secure or loyal if they witness a colleague being terminated unfairly.

A FAIR PROCESS

Organisations should do everything in their power to ensure that the following occurs:

- employees are warned about behaviour that is inappropriate or that required standards are not being met and they should be given the chance to address these issues
- employees are given a clear indication of what is required of them and the consequences that follow if these requirements are not met
- employees are given the opportunity to respond to any concerns and to have a representative assist them in this process
- termination is either in response to the employee's behaviour/conduct or because changes in work have meant their position is no longer needs to be performed by anyone
- a clear and open process has been followed and that everyone has been made aware of the steps involved in that process

Employees are excluded from unfair dismissal laws if they are either casual or fixed term and have reached the end of their employment contract'. These employees cannot claim unfair dismissal as under the laws they have not been 'dismissed', their period of employment has ended.

Employees who work in organisations that employ more than 15 full time equivalent employees do not have access to unfair dismissal laws until they have worked with the business for more than six months.

Employees who work in small organisations (employing less than 15 full time equivalent employees) have no access to unfair dismissal until they have been employed for more than a year.

There are special unfair dismissal arrangements that apply to small organisations. They recognise small organisations usually don't have human resource departments to help them, can't afford lost time and might find it difficult to find other positions for employees. There is a Small Business Fair Dismissal Code² for small businesses. This code provides recommended actions for small business. It allows for instant dismissal in the case of fraud, theft or misconduct and otherwise requires the employer to show that a fair process has been used when dismissing the employee including the provision of warnings and the chance for the employee to improve.

IS IT AN UNFAIR DISMISSAL?

Employees who believe that they have been treated unfairly may seek to have the matter reviewed under Australia's workplace laws. However these laws do not provide an avenue for address for every worker who is dismissed.

To make a claim for unfair dismissal an employee lodges a form with the government's workplace tribunal called Fair Work Australia within a specified period after being dismissed⁵.

To be able to claim unfair dismissal an employee needs to be able to show:

- that they have worked in the organisation for the minimum period (12 months for small business, 6 months otherwise)
- that they have been "dismissed" (that is, that their employer terminated their employment and that they did not resign or abandon their job)
- that the dismissal was harsh, unjust or unreasonable
- that the dismissal was not because they were made redundant

Whether dismissal was harsh unreasonable or unjust involves considerations such as:

- Was the action to terminate in proportion to the alleged poor performance or unacceptable conduct?
- Was the employee warned and given a chance to address any concerns?
- Was the employee given the opportunity to have a representative present when discussions were taking place about their behaviour?

Some workers may be able to argue that even though they have resigned from their position in the workplace they should have access to unfair dismissal, as they have effectively been forced to resign by their employer or that the employer's behaviour made it impossible to remain employed there. They may believe they have been "constructively dismissed". It is very difficult to prove that this was the case.

REMEDY FOR UNFAIR DISMISSAL

If it is determined that dismissal was unfair the question then to be resolved is how is this to be remedied.

The primary remedy is reinstatement, however, if this is deemed to be impractical, then compensation may be awarded to the terminated employee.

This compensation is limited to a maximum of 26 weeks pay up to a maximum amount. This amount is indexed overtime.

More

To consider the concept of Unfair Dismissal in a broader workplace context:

Bromberg, M. and Irving, M. (eds) *Australian Charter of Employment Rights*, Hardie Grant Books, Melbourne, 2007

Howe, J, *Australian Standard of Employment Rights*, Hardie Grant Books, Melbourne 2009

Websites

The Fair Work online site is a federal government site with information about the new workplace regulations. There is information about unfair dismissal for both employees and employers. There are direct links to other sites including to the process for applying for an unfair dismissal hearing.

<http://www.fairwork.gov.au>

Issues for students

Many students, particularly those in middle to late adolescence have a very strong sense of “What’s fair or unfair”. The activities in the accompanying curriculum resource – **Work Right** are designed to assist young people to recognise that “Unfair Dismissal” has a legal definition. It is also the case that “termination” or “dismissal” has many shades of meaning for young workers in casual employment. It may be that the employer simply stops ringing to offer shifts at work. Termination of employment is such a complex area that students should be encouraged to seek specialist advice (eg from a relevant union, JobWatch, or the Fair Work Ombudsman) if they believe they have been “unfairly dismissed”.

1 It should be noted that whether an employee is actually casual or fixed term can require some investigation. When dealing with students who are at work the issues are likely to be whether they are casual or an ongoing part-time employee. A casual worker is one who works intermittently so this would normally mean they don't work a regular roster and are free to accept or reject shifts as offered to them. They would also normally receive a loading on their pay in lieu of other entitlements such as paid sick leave or annual leave. If this definition doesn't apply then they should be treated as permanent part-time employees which would mean that they are entitled to sick pay and annual leave on a pro rata basis.

2 <http://www.fairwork.gov.au/Termination-of-employment/>

3 Call the FWA Help Line on 1300 799 675 or go to <http://www.fwa.gov.au/>

IN SUMMARY

- Loss of work impacts on a person's economic well-being and those who depend on them and on the person's self-esteem.
- Employees who are aggrieved that they have been treated unfairly may seek to have this matter reviewed under Australia's workplace laws.
- Not all dismissals are unfair. Unfair dismissal only applies to dismissals that are harsh, unreasonable or unjust.

FAIR MINIMUM STANDARDS

The Harvester Judgement set a minimum wage for unskilled labourers of 2 pounds, 2 shillings per week. Justice Higgins set the minimum weekly wage by establishing a cost of living - the amount an average worker paid for food, shelter and clothing. The judgement was designed to ensure that a worker could keep his wife and children healthy and comfortable. It did not cover women workers as it was assumed that either their father or their husband would support them. (<http://www.worksite.actu.asn.au/fact-sheets/history-harvester-judgement.aspx>)

MINIMUM STANDARDS

A series of fair minimum standards is essential to enable employees to be justly rewarded for their work, to ensure fairness across the labour market and to assist people to live fulfilling lives that assist them to balance their inside and outside of work responsibilities.

All employees in Australia have some basic minimum conditions of employment. From 1st January 2010 the new National Employment Standards (NES) came into effect.

1. maximum weekly hours of work (38 hours)
2. the right to request flexible working arrangements (to balance work and family responsibilities)
3. parental leave and related entitlements
4. annual leave (4 weeks per year)
5. personal/carer's leave and compassionate leave
6. community service leave
7. long service leave
8. public holidays
9. notice of termination and redundancy pay
10. provision of a "Fair Work Information Statement" for all employees that makes clear their rights and entitlements under the new system and how to get advice and help.

In addition after 1st January 2010 the minimum standard for all employees incorporates matters contained in modern awards, which may include:

1. minimum wages
2. types of employment (casual, part-time, full-time, fixed term etc)
3. arrangements for when work is done (hours etc)
4. overtime and penalty rates
5. annual wage or salary arrangements
6. allowances
7. leave related matters
8. superannuation
9. procedures for consultation representation and dispute settlement
10. outworker terms
11. certain industry specific redundancy schemes
12. calculating ordinary hours
13. pieceworker provisions
14. variations of allowances

Modern awards can also have a flexibility clause, which means employers and employees will be able to negotiate changes to meet their individual needs.

JUNIOR RATES OF PAY AND CONDITIONS FOR YOUNG WORKERS

In some circumstances it is legal to pay junior rates of pay for workers under 21 years of age. Junior rates of pay are usually a percentage of an adult rate for a job. The percentage of pay a junior employee should get will usually change depending on the employee's age. For example, an employee who is 18 might get 70 per cent of the adult rate, according to their pay scale. If the pay scale doesn't contain junior rates of pay, the employee must be paid the same as the adult rate.

It is not legal for employers to require employees to perform work trials without pay. The only time when work can legally be performed without pay is when it is part of work experience i.e. as a component of an approved education or training course.

Employers must follow this checklist for ALL junior employees:

1. pay the correct rates for all hours worked, including for compulsory work meetings, training and time spent opening and closing the business
2. issue a pay slip within 1 working day of pay day
3. pay for "trial work" unless it's part of an approved education or training course
4. pay any applicable penalty rates for working public holidays
5. pay weekend and penalty rates, if they are in the employee's workplace conditions
6. pay on a regular basis - usually per week or per fortnight but at least monthly.

It is one thing for minimum standards of employment to exist, but quite another to make sure they are enforced. If a worker does not know what conditions apply to them they have little hope of knowing what they are entitled to.

The major industries in which full time students

work part-time are retail, accommodation, cafes and restaurants. The Fair Pay Commission estimates that 12% of those working in retail and 34% of those working in accommodation, cafes and restaurants were being paid less than the minimum youth rate for their work. (Fair pay Commission)

A survey of 5,000 young people living in NSW found:

1. half didn't know the difference between casual or permanent part-time work
2. half of those who believed they were part-time did not receive any paid leave
3. half had no written information about their pay, hours of work or safety on the job when they started work with their employer
4. a quarter never received any pay slips
5. one in seven casuals worked unpaid overtime.

http://www.actnow.com.au/Issues/Young_workers_rights.aspx

Age limits that determine how old you need to be to start work apply in most states in Australia. There are also laws that limit the types of work that children can do depending on their age. It is unlawful to work before the age of 13 in Victoria (except for delivering newspapers at which the minimum age is 11, or to work in a family business). A Child Employment Permit is required to employ any child under the age of 15. There are restrictions on what a child can be asked to do including hours of work, the work must be "light" and not interfere with either the child's schoolwork nor be likely to have a negative physical impact on the child. This can be a complex area – more information is available at

http://www.legalaid.vic.gov.au/740.htm#Answer_1 or [HTTP://www.business.vic.gov.au/BUSVIC/STANDARD/PC_50559.html](http://www.business.vic.gov.au/BUSVIC/STANDARD/PC_50559.html) (the full link is provided as the website can be difficult to navigate)

Yes!

BEYOND THE MINIMUM

Fair basic conditions for all employees also includes the entitlements contained in Occupational Health and Safety, Anti-Discrimination, Equal Opportunity and human rights laws.

There are standards above and beyond the minimum standards in the legislation that are becoming increasingly important to employees in the workplace. People are becoming increasingly drawn to workplaces that recognise their need to have a life outside of work and organisations are advertising these benefits in order to attract the quality people that they want for their organisation

If an employee does not believe they are receiving their proper conditions they should either contact their union or the Federal Government's Fair Work Ombudsman via their helpline 13 13 94.
<http://www.fwo.gov.au/>

IN SUMMARY

- A series of fair minimum standards is essential to enable employees to be justly rewarded for their work
- Minimum, legally enforceable standards of employment are defined in the Fair Work Act. The core of these minimum standards are detailed in the ten National Employment Standards and modern awards.
- There are specific guidelines for employers for ALL junior employees

References

Fair Pay Commission 'The Economic and Social Circumstances of Australian Young People Aged 15–20 Years' Report prepared by P Flatau, M Dockery & T Stromback Centre for Labour Market Research, Perth, Western Australia May 2008
<http://www.fairpay.gov.au>

More

The broad underpinning philosophy for Minimum Standards can be found in:

Bromberg, M. and Irving, M. (eds) *Australian Charter of Employment Rights*, Hardie Grant Books, Melbourne, 2007

The latest information is best sourced from the Fair Work Ombudsman <http://www.fwo.gov.au>
<http://www2.fwa.gov.au/education/>

Fair Work Australia has produced a resource describing the history of the Arbitration Court, the Australian minimum wage, working hours and paid leave. The site includes a resource section for teachers

Issues for students

The activities in the accompanying curriculum resource – **Work Right** are activities designed to assist young people to understand what the minimum standards are.

FAIRNESS AND BALANCE IN INDUSTRIAL BARGAINING

The Masters and Servants Acts were laws requiring the obedience and loyalty from servants to their contracted employer, with infringements of the contract punishable before a court of law, often with a jail sentence of hard labour. It was used against workers organising for better conditions from its inception until well after the first Trade Union Act was implemented in Great Britain in 1871 (and in Australia at least until 1902), which secured the legal status of trade unions. Up till then a trade union could be regarded as criminal because of being “in restraint of trade”. (http://en.wikipedia.org/wiki/Master_and_Servant_Act)

Employees in Australia have a right to engage in collective bargaining through representatives of their own choosing. This right is enshrined in two key conventions of the International Labour Organisations, conventions that Australia ratified in 1973. These rights seek to balance the power relationship for individual employees who are generally not in a power position when bargaining with their employer alone so workplace laws (and international standards) promote the concept of employees grouping together to bargain with their employer. This is called collective rather than individual bargaining.

Australian workplace laws envisage that employees will bargain with their employer to achieve pay and conditions above the minimum standards. The ability to bargain to get a fair deal means that both sides (employer and employee) are able to do this and have some power in this relationship.

HISTORICAL PERSPECTIVE

In the last one hundred years in Australia there was very little bargaining at a workplace level. Unions, representing employees, negotiated with the Government and Business groups for better pay and conditions. This generally occurred in an industrial court or tribunal. This was known as ‘centralised wage fixing’.

In the 1980s Australia took its first steps away from the centralised wage fixing system down the path of enterprise bargaining. Enterprise bargaining was designed to allow employers and employees to negotiate ways to improve productivity in the workplace and the conditions and salary that employees received. Negotiation at this level would allow for greater flexibility and responsiveness to the needs of individual organisations (i.e. enterprises).

Under the Howard federal government, legislation was changed to encourage individual bargaining, that is, bargaining between individual employees and their employers. In effect, this was seen as a way to encourage ultimate flexibility in the workplace. At the same time there was also a move to reduce the minimum standards that employees could expect to a very small number of core minimums and that even these “minimums” could be traded away if the employee agreed. This raised concerns about the potential for workers to be exploited and became a focal point for a community campaign against the Government.

The Rudd Government, elected in 2007 amended the workplace legislation. The Fair Work Act has moved the focus back to enterprise level bargaining. There is now a right for employees, if they wish to negotiate a collective agreement with their employer, to do so. The employer is required to negotiate with their employees and their representatives.

THE BARGAINING PROCESS

Under the Fair Work Act all parties are required to act in “good faith”. That is, they are required by the law to meet and to respond to each other’s claims and genuinely seek to reach agreement.

The process for bargaining generally involves the following steps:

1. Each side decides on the matters they wish to raise and the demands they wish to make.
2. Generally employees will present this to their employer as a “log of claims” or a list of what they would like in the agreement.
3. The employer can also make a list of matters it wishes to be included in the agreement.
4. Employees and their representatives will meet with representatives of the employer to negotiate and try and reach agreement on matters.
5. If agreement cannot be reached employees are allowed under the workplace laws to take industrial action to try and persuade their employer to agree with them.
6. In Australia the right to take industrial action is limited to the time when employers and employees are negotiating a new agreement. At all other times industrial action, such as strikes, is “unprotected” and therefore illegal unless it is a genuine health and safety matter.
7. The parties to the negotiation can also seek the help of independent conciliators or mediators to help them resolve their differences.
8. Once agreement on the issues has been achieved, a written document “the agreement” is produced to capture the outcomes.
9. An agreement once written is put to a vote of the workers whose employment will be covered by it and if the majority agree it can then be lodged in the workplace tribunal, Fair Work Australia, for registration.
10. Fair Work Australia checks that the agreement does not produce conditions of employment that are less than the legislative minimum, and that employees are better off overall under the agreement.

11. Once it is “registered” the terms in the agreement become the new minimum conditions for all workers whose employment is covered by the agreement. The employer is not legally allowed to pay less than this or to offer conditions that are less.

The right for employees to group together to bargain with their employer to improve their conditions of employment is a fundamental human right recognised in both Australian and International law. The right to be represented in this process is also recognised.

In the school sector a centralised approach is common. In government schools agreements are generally negotiated between the Australian Education Union and the state governments. While there are variations in each state, as a general rule, it can be said, that the Catholic Education Office negotiates agreements for all Catholic schools with the Independent Education Union. Arrangements vary in Independent schools. Some schools belong to a system eg Lutheran schools and the system authority negotiates with the Independent Education Union; some schools negotiate with the Union as a single enterprise. Currently some schools do not engage in bargaining with the union.

More

The broad underpinning philosophy for Fairness and Balance in Industrial Bargaining can be found in:

Bromberg, M. and Irving, M. (eds) *Australian Charter of Employment Rights*, Hardie Grant Books, Melbourne, 2007

The chapter also includes a section on the “right to strike”.

Websites

The Fair Work Online site is a federal government site with information about the new workplace regulations. There is information about enterprise agreements and workplace bargaining. The information on this topic is more technical – it may be of interest to teachers but will have limited value for students doing research.

<http://www.fairwork.gov.au>

Issues for students

This is a complex area for students as many will have limited experience of industrial relations or bargaining. The activities in the accompanying curriculum resource – **Work Right** focus student attention on the concept of a healthy workplace and how this might be achieved and seeks to introduce the language of bargaining.

IN SUMMARY

- There is a right in Australia for employees to negotiate collectively for improvements in pay and conditions.
- Enterprise bargaining is the process whereby employees and employers can negotiate for higher productivity, better pay and conditions.
- Collective bargaining, where a group of employees join together, often represented by a Union, generally provides employees with better pay and conditions than individual negotiations.

EFFECTIVE DISPUTE RESOLUTION

Disharmony and conflict in the workplace can cause disruption and impact negatively on production and productivity, relationships and the health and wellbeing of employees.

When people talk about workplace conflict they often think of strikes, as these are what make media headlines. In terms of the level of strike activity in Australia we live in a very peaceful time. The number of days lost to strikes in Australia has never been so low. In 1987 there were 1519 industrial disputes, by 2007 there were 135¹. There are a number of reasons why strikes have declined over the years, including changes in the laws relating to when industrial action can be taken.

Although strikes are easy to measure, they are not the only way that people can express dissatisfaction in the workplace or be in “dispute” with their employer. Employees who are dissatisfied with their employer may not work as hard as they otherwise would, they may have increased absenteeism and may be less willing to participate in positive initiatives to improve productivity.

Judging the impact of this covert dissatisfaction is difficult, however, difficulty in measuring something does not make the effect any less real. In fact, strikes, which are overt manifestations of employee dissatisfaction, are more likely to be solved quickly and therefore cost the employer less than long term dissatisfaction that is embodied in less obvious disputes.

Many organisations recognise this issue and make sure that they have ways to identify when workers are unhappy and seek to find ways to address these concerns. They do this by promoting dispute resolution procedures.

Dispute resolution procedures are often set out in enterprise agreements or human resources policies. These procedures allow employers and employees who are in dispute about something happening in the workplace to have a clear process to follow to resolve their concerns.

DISPUTE RESOLUTION PROCEDURE

A typical dispute resolution procedure will contain the following steps:

1. An individual employee who has a concern is encouraged to raise this with their manager or supervisor.
2. If the concern is not resolved at this level it can be raised with a more senior manager for resolution.
3. Finally if the dispute is not resolved in the workplace it may be able to be referred to an external umpire to have the matter resolved.
4. At any stage in the process the employee is permitted to have a representative assist them. This can often involve a union delegate or official.

What happens if a dispute cannot be settled by the parties agreeing to an outcome? Agreements include a provision that allows for the matter to be taken to the independent umpire, called Fair Work Australia, to have the matter dealt with. This sometimes involves a commitment to abiding by a decision of this tribunal even if that isn't what was wanted. The benefit of this process is that each party can feel that they had the best chance to put their point of view forward and are likely then to accept the outcome because the process of getting a decision was fair.

CONSULTATIVE COMMITTEES

A dispute may involve an entire workplace, e.g. the introduction of some change to process or rosters or hours of work. In these cases organisations may use consultative committees to discuss the matter and resolve any concerns. Consultative Committees are generally made up of representatives of the employer and the employees at a workplace.

It is important to the ongoing health of employment relationships that disputes are resolved and are seen to have been resolved fairly. If either side feels they have been forced to agree to a resolution it is unlikely that the dispute will be properly settled.

More

The broad underpinning philosophy for Dispute Resolution can be found in:

Bromberg, M. and Irving, M. (eds) *Australian Charter of Employment Rights*, Hardie Grant Books, Melbourne, 2007

Websites

The Fair Work Online site is a federal government site with information about the new workplace regulations. There is information about dispute resolution and links to the Fair Work Australia site. <http://www.fairwork.gov.au>

Issues for students

Workplace disputes are often featured in the daily press. The activities in the accompanying curriculum resource – **Work Right** focus on the language of Industrial Relations to assist students in understanding the nature of the disputes, the parties involved and how the dispute might be resolved.

¹ (ABS 4102.0)

IN SUMMARY

- Disputes can be very destructive in workplaces.
- Dispute resolution procedures seek to resolve disputes quickly and at the lowest possible level within an organisation.
- Fair Work Australia provides conciliation services to seek common ground between those in dispute and in some cases organisations agree to have the dispute arbitrated.





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