THE LEGAL REGULATION OF INFORMATION IN AUSTRALIAN LABOR MARKETS: INFORMATION THAT IS REQUIRED TO BE DISCLOSED BY EMPLOYERS TO EMPLOYEES AND TRADE UNIONS

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This article presents work undertaken as part of a larger project examining the legal regulation of information in Australian labor markets. The first part of the project examined the legal rules pertaining to the disclosure of information about employees and job applicants to employers and prospective employers. It addressed the question: What information about employees or prospective employees may be disclosed to employers and prospective employers?[1] This article examines the types of information that employers and prospective employers are required to disclose to their workforces. Specifically, it addresses the question: What information must employers disclose to employees, prospective employees, and trade unions (either automatically or upon request)?

Australian law places obligations on employers to provide various types of information to employees, job applicants, and trade unions. Importantly, employers are obliged to provide information relating to:

- agreement-making under industrial relations legislation;
- termination of employment;
- health and safety matters;

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1. The first article is Anna Chapman & Joo-Cheong Tham, *The Legal Regulation of Information in Australian Labor Markets: Disclosure to Employers of Information About Employees*, 21 COMP. LAB. L. & POL'Y J. 613 (2000).

- discrimination, harassment, and equal opportunity policies and programs; and,
- miscellaneous matters including parental and adoption leave.

The body of this article explores these different types of obligations in this order.[2] Due to space constraints, this study focuses on the main legal rules at the Commonwealth level and in the States of New South Wales and Victoria, Australia's most populous States.

I. INFORMATION RELATING TO AGREEMENT-MAKING UNDER INDUSTRIAL RELATIONS LEGISLATION

A. Commonwealth and Victoria

1. Regulatory Framework

In 1997, the Victorian legislature referred its power over industrial relations to the Commonwealth parliament.[3] The effect of this reference was that Victorian industrial relations was henceforth governed by the Commonwealth industrial relations legislation, the Workplace Relations Act 1996 (Cth) ("Workplace Relations Act").

2. As stated in the first article, Australia's framework of labor law is constructed on a distinction drawn from the common law between employees who are engaged under contracts of employment or contracts of service and independent contractors who provide their labor to principals under contracts for services. Independent contractors are sometimes referred to as the self-employed. The coherence of this distinction is questionable, particularly in light of the marked growth in non-employment type relationships in Australia since the early 1990s. Due to space constraints, this article focuses on employees rather than independent contractors. The article does, however, canvass the position of independent contractors at various points in the discussion as relevant. On the employee/independent contractor distinction, *see generally* BREEN CREIGHTON & ANDREW STEWART, LABOUR LAW: AN INTRODUCTION Ch. 7 (2000); Adrian Brooks, *Myth and Muddle—An Examination of Contracts for the Performance of Work*, 11 U. NEW S. WALES L.J. 48 (1988); Rosemary Hunter, *The Regulation of Independent Contractors: A Feminist Perspective*, 5 CORP. & BUS. L.J. 165 (1992); ALAN CLAYTON & RICHARD MITCHELL, STUDY ON EMPLOYMENT SITUATIONS AND WORKER PROTECTION IN AUSTRALIA: A REPORT TO THE INTERNATIONAL LABOUR OFFICE (1999).

3. This reference was pursuant to § 51(37) of the Australian Constitution and was executed by a Victorian Act, the Commonwealth Powers (Industrial Relations) Act (Vic. 1996), and Part XV of the Workplace Relations Act (Austl. 1996). It should be noted that a number of matters are excluded from this reference. The excluded matters include occupational health and safety and various aspects of public sector employment: Commonwealth Powers (Industrial Relations) Act § 4 & 5 (Vic. 1996). For a discussion of this reference, *see* INDEPENDENT REPORT OF THE VICTORIAN INDUSTRIAL RELATIONS TASKFORCE Ch. 4 (Aug. 2000). *See also* Stuart Kollmorgen, *Towards a Unitary National System of Industrial Relations? Commonwealth Powers (Industrial Relations) Act 1996 (Vic.)*; *Workplace Relations and Other Legislation Amendment Act (No. 2) 1996 (Cth)*, 10 AUSTRALIAN J. LAB. L. 1580 (1997). This reference was the result of a failed attempt to radically deregulate the Victorian industrial relations system: Marilyn Pittard, *Victorian Industrial Relations: From Deregulation to Devolution*, *in* THE AUSTRALASIAN LABOUR LAW REFORMS: AUSTRALIA AND NEW ZEALAND AT THE END OF THE TWENTIETH CENTURY 172, 187-8 (Dennis Nolan ed., 1998).

Accordingly, the Commonwealth and Victorian legislative framework can be discussed together.

Before discussing employers' obligations to provide information relating to agreement-making under the Workplace Relations Act, it is necessary to sketch the regulatory framework contained in the Act. One of the mainstays of this framework is the conciliation and arbitration system, which is presided over by the Australian Industrial Relations Commission ("AIRC").[4] In essence, the AIRC conciliates and arbitrates industrial disputes within its jurisdiction. Such jurisdiction is defined by both constitutional and statutory provisions. For instance, the AIRC is empowered to act only with respect to "industrial disputes." The statutory definition of this phrase, while incorporating the constitutional limitations, further restricts it to disputes about "matters pertaining to the relationship between employers and employees."[5] In other words, the AIRC's jurisdiction is limited to persons in employment relationships.[6] Further, an industrial dispute must have an "interstate" character (i.e. "extending beyond the limits of any one State").[7] However, the Victorian legislature's referral of industrial relations power has removed this particular limitation with respect to Victorian employees.[8] Thus, strictly intra-state Victorian industrial disputes can still attract the AIRC's jurisdiction.

Once the AIRC's jurisdiction is invoked, typically by virtue of the existence or possibility of an "industrial dispute," the AIRC is obliged to settle such disputes.[9] It initially attempts to do so through conciliation.[10] If unsuccessful, it then proceeds to arbitration.[11] The order made by the AIRC upon completion of arbitration is known as an award. After being made, an award binds the parties to the industrial dispute.[12]

4. For further discussion on the compulsory conciliation and arbitration system as contained in the Workplace Relations Act (Austl. 1996), *see* Marilyn Pittard, *Collective Employment Relationships: Reforms to Arbitrated Awards and Certified Agreements*, 10 AUSTRALIAN J. LAB. L. 62, 65-79 (1997).

5. Workplace Relations Act § 4 (Austl. 1996). There is a strong argument that § 51(35) of the Australian Constitution allows the AIRC to conciliate and arbitrate with respect to disputes between employers and non-employees, for instance, between employers and independent contractors. *See* CREIGHTON & STEWART, *supra* note 2, at 80.

6. This restriction illustrates the point made in note 2 that other forms of regulation presuppose an employment relationship.

7. *See generally* CREIGHTON & STEWART, *supra* note 2, at 74-5; W.B. CREIGHTON, W.J. FORD & R.J. MITCHELL, LABOUR LAW: TEXT AND MATERIALS 395-441 (1992).

8. Workplace Relations Act § 493 (Austl. 1996).

9. *Id*. § 89.

10. *Id*. §§ 100 & 102.

11. *Id*. § 104.

12. *Id.* § 149.

It should be noted that the AIRC's power to arbitrate is subject to various limitations. Firstly, when parties are engaged in formal negotiations for an enterprise agreement under the Act, the AIRC, while able to employ its conciliation powers, is precluded from arbitrating on matters at issue.[13] Further, the Act imposes restrictions upon the matters that can be included in an award.[14] Generally, the subject matter of an award is restricted to 20 allowable award matters. These include rates of pay and leave entitlements.[15] Moreover, the AIRC must exercise its award-making power so that awards act as a "safety net of fair minimum wages and conditions of employment."[16]

The last-mentioned restriction, together with that affecting the AIRC's arbitral powers in relation to negotiations for enterprise agreements under the Act, were deliberately imposed to encourage regulation by agreements.[17] There are three types of such agreements: enterprise agreements preventing or settling industrial disputes ("industrial dispute" enterprise agreements), enterprise agreements involving corporations,[18] and statutory individual contracts known as Australian Workplace Agreements ("AWAs").[19] The existence of three types of agreements reflects one of the present Act's aims, decentralization of labor regulation through regulation at the level of the enterprise via agreements.[20] Further, the existence of AWAs reflects another thrust of the Act, individualization of employment relations.[21]

13. *Id.* § 170N. Curiously, there is no equivalent prohibition with respect to formal negotiations for an AWA.

14. Previously, the restrictions on the subject matter of an award were largely constitutional: *see* CREIGHTON, FORD & MITCHELL, *supra* note 7.

15. Workplace Relations Act § 89A (Austl. 1996). It should be noted that the Act makes provision for the AIRC to include non-allowable award matters in "exceptional matters" awards: *see* § 89A(7).

16. This is the combined effect of §§ 3(d)(ii), 88A(b) and 88B(1) of the Workplace Relations Act (Austl. 1996).

17. *See id.* §§ 3(d)(i).

18. Enterprise agreements are described as certified agreements in the Act.

19. While AWAs can be collectively negotiated (§ 170VE of the Act), they are designed to be, and in reality are, individually completed. For a brief discussion of employers' choices of agreements under the Act, *see* Ron McCallum, *Individuals and Agreement-Making: The Legal Options*, *in* AUSTRALIAN CENTRE FOR INDUSTRIAL RELATIONS RESEARCH AND TRAINING (ACIRRT), NEW RIGHTS AND REMEDIES FOR INDIVIDUAL EMPLOYEES: IMPLICATIONS FOR EMPLOYERS AND UNIONS: 5TH ANNUAL LABOUR LAW CONFERENCE PROCEEDINGS 3, 6-7, ACIRRT, WORKING PAPER NO. 48, SYDNEY (1997).

20. Section 3(b) of the Act stipulates that one of the purposes of the Act is to ensure that "the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employer and employees at the workplace or enterprise level."

21. *See generally* EMPLOYMENT RELATIONS, INDIVIDUALISATION AND UNION EXCLUSION: AN INTERNATIONAL STUDY (Stephen Deery & Richard Mitchell eds., 2000).

These agreements can only be made in specific circumstances. For instance, the making of "industrial dispute" enterprise agreements, as its name suggests, is contingent on the existence of an "industrial dispute."[22] On the other hand, the making of enterprise agreements involving corporations and AWAs largely[23] depend on the employer being a corporation.[24] The situation, however, is different in Victoria with the referral of Victoria's industrial relations power. This referral has meant that enterprise agreements and AWAs can be made between employees and any employer.[25]

Apart from the differences noted above, these agreements differ on the level of the agreement and the necessity for trade union involvement. The first two mentioned agreements are pitched at the enterprise level,[26] whereas AWAs exist at the level of an individual employee. It is only enterprise agreements settling industrial disputes that require trade union involvement. The other agreements allow, but do not necessitate such involvement.

Some general observations can be made about these agreements. Firstly, they are confined to employers and employees. Moreover, the Workplace Relations Act formalizes the process of negotiating such agreements by laying down the required procedures for employees' approval of the agreements,[27] and providing limited protection for industrial action, including lock-outs.[28]

The completion of an agreement by the parties does not immediately result in the agreement taking effect.[29] That occurs only

22. Workplace Relations Act §§ 170LN-LP (Austl. 1996). This requirement is to bring the agreements within § 51(35) of the Australian Constitution.

23. The Workplace Relations Act (Austl. 1996) does rely upon other constitutional heads of power with respect to enterprise agreements involving corporations and AWAs, for instance, the head of power found in § 51(1) with respect to "(t)rade and commerce with other countries, and among the States." This is reflected in §§ 170VC(d)-(f) (AWAs).

24. *Id.* § 170LI (enterprise agreements involving corporations) and § 170VC (AWAs). This brings the making of such agreements within the scope of § 51(20) of the Commonwealth Constitution, the corporations power. Strictly speaking, § 51(20) of the Commonwealth Constitution does not confer power on the Commonwealth legislature to regulate all corporations. It is only power with respect to "trading, financial and foreign corporations." *See further* W. Ford, *Reconstructing Australian Labour Law: A Constitutional Perspective*, 10(1) AUSTRALIAN J. LAB. L. 1, 20-30 (1997).

25. Workplace Relations Act §§ 494-5 (Austl. 1996).

26. *See id.* at § 170LI (enterprise agreements involving corporations); § 170LO ("industrial dispute" enterprise agreements) and § 170VF (AWAs) of the Act.

27. Such procedures are most relevant to "industrial dispute" enterprise agreements (§ 170LR) and enterprise agreements involving corporations (§ 170 LJ-LK).

28. *See* Division 8 of Part VIB (enterprise agreements) and Division 8 of Part VID (AWAs) of the Act.

29. For enterprise agreements, agreement by a valid majority of the employees to be covered by the agreement is sufficient to represent agreement on the employees' side (§§ 170LJ(2); 170LK(1) & 170LR(1)). A "valid majority" is usually a majority of the employees

when the agreement is certified or approved.[30] The central requirement for certification and approval is the "no-disadvantage" test. This test is passed if the agreement does not, on the whole, compare unfavorably with the terms and conditions of the relevant award.[31] The body that certifies enterprise agreements is the AIRC,[32] whereas the primary body in the approval of AWAs is the Employment Advocate. When the Employment Advocate has concerns whether the no-disadvantage test is satisfied by a proposed AWA, he or she is required to refer the proposed AWA to the AIRC for approval.[33]

Once certified or approved, all the agreements will prevail over any award to the extent of any inconsistency.[34] Generally, an AWA prevails over any enterprise agreement that is made after the making of the AWA.[35]

2. Obligations to Provide Information Relating to Agreement-Making Under the Workplace Relations Act

Employers engaged in the process of making agreements under the Workplace Relations Act are subject to various obligations to provide information to employees with respect to the agreements. The purposes of these obligations appear to be two-fold. Firstly, the provision of information facilitates genuine agreement-making. Secondly, the provision of information seems to serve a protective function, especially in relation to AWAs.

In this, the Act contains a complex matrix of obligations with requirements to provide information varying according to the type of agreement. Notwithstanding this complexity, the requirements relate to four principal matters:

- intention to make an agreement;
- the content of the proposed agreement;
- the effect of the proposed agreement; and,

who cast a vote in the poll deciding whether to support a proposed enterprise agreement (§ 170LE).

30. For a discussion of the certification process of these agreements, *see* Pittard, *supra* note 4, at 83-4 (1997), and Richard Naughton, *New Approaches in the Vetting of Agreements*, *in* ACIRRT, *supra* note 19, at 18-23.

31. Workplace Relations Act § 170XA (Austl. 1996).

32. *Id.* §§ 170LT-LW.

33. *Id.* § 170VPB.

34. *Id.* § 170LY (enterprise agreements) and § 170VQ(1) (AWAs).

35. *Id.* § 170VQ(6).

- industrial action, including lock-outs engaged in by employers during the negotiation of such agreements.

a. Information Relating to the Intention to Make an Agreement, the Content of the Proposed Agreement, and the Effect of the Proposed Agreement

The Workplace Relations Act requires, with respect to enterprise agreements involving corporations, that an employer take reasonable steps to provide notice of its intention to make such an agreement to every employee who is to be covered by the proposed agreement at least 14 days before making it.[36] Such a notice must advise employees of their rights to trade union representation in the negotiations for such an agreement.[37] These requirements do not apply to "industrial dispute" enterprise agreements.

The Act further requires that employers take reasonable steps to ensure that every employee who is to be covered by a proposed agreement has ready access to this agreement at least 14 days before the making of such an agreement.[38] The precise consequences of breaching these requirements relating to notice of intention to make an agreement and access to the proposed agreement are unclear as the Act does not characterize these requirements as express conditions of AIRC certification. However, it is a condition of certification that a "valid majority" of employees to be covered by the proposed enterprise agreement genuinely approved the agreement.[39] Breaches of the above requirements would clearly be relevant to the question of genuine approval. Indeed, this appears to be the approach adopted in one recent application to certify an enterprise agreement involving a corporation and its employees.[40] The Commissioner of the AIRC in this case found that employees did not have ready access to the agreement because insufficient copies of it were made available and employees were not otherwise advised where they could obtain a copy. This finding, along with another that the employer had misinformed employees regarding some of the terms of the proposed agreement, prompted the Commissioner to conclude that the majority

36. *Id.* § 170LK(2).
37. *Id.* § 170LK(4).
38. *Id.* § 170LK(3) (enterprise agreements involving corporations) and § 170LR(2)(a) ("industrial dispute" enterprise agreements).
39. *Id.* §§ 170LT(5) & (6).
40. *Section 170LK Application for Certification of Agreement by Coles Myer Pty. Ltd.* (Unreported, Australian Industrial Relations Commission, Print R3504, March 31, 1999).

of the employees did not genuinely approve of the proposed agreement despite voting in favor of it.[41]

With respect to AWAs, it is a condition of approval that an existing employee receive a copy of the AWA 14 days before the making of the AWA. A new employee, on the other hand, must only receive such a copy five days before the making of the AWA.[42]

Employers are also obliged to take reasonable steps to explain the terms of any proposed enterprise agreement before the making of such an agreement.[43] It is a condition of the certification of any enterprise agreement that such obligation is performed with regard to the employees' particular circumstances and needs. These circumstances and needs include the employees' gender, language background, and age.[44]

The making of AWAs is accompanied by more onerous obligations on the employer, presumably because AWAs are, in essence, individual contracts given statutory form[45] and have the effect of overriding awards. It is a condition of approval by the Employment Advocate that an employer had explained the effect of the proposed AWA to the employee concerned between the receipt of the copy of the proposed AWA and the making of such an agreement.[46] The Office of the Employment Advocate has taken the view that this requirement would include explaining to employees the effect of the AWA as displacing the relevant award, as well as any trade-off between conditions and increased pay.[47] Further, it is a condition of approval of an AWA that the employer has provided the employee with an information statement prepared by the Employment Advocate. This statement must include, among other things, information about Commonwealth statutory entitlements and the Employment Advocate's services.[48] Further, an employer who has made an AWA with an employee is to provide to the employee, as soon as practicable, copies of various documents issued by the

41. *Id.* ¶ 115.

42. Workplace Relations Act § 170VPA (Austl. 1996).

43. *Id.* § 170LK(7) (enterprise agreements involving corporations) and § 170LR(2)(b) ("industrial dispute" enterprise agreements).

44. *Id.* § 170LT(7).

45. Ron McCallum has commented that AWAs are "nothing but a bunch of individual contracts": Ron McCallum, *cited in* David Chin, *Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism,* 10 AUSTRALIAN J. LAB. L. 259, 261 (1997).

46. Workplace Relations Act § 170VPA(1)(c) (Austl. 1996).

47. OFFICE OF THE EMPLOYMENT ADVOCATE, AUSTRALIAN WORKPLACE AGREEMENTS: A HOW-TO GUIDE 5 (1999). The text is *available at* http://www.oea.gov.au.

48. *Id.* §§ 170VO(1)(b)(ii) and (2).

Employment Advocate and/or the AIRC. These documents include filing receipts, approval, and refusal notices (where relevant).[49]

b. Information Relating to Lock-Outs Engaged in by Employers During the Negotiations of Such Agreements

As noted above, employers are also subject to requirements to provide information in relation to industrial action, in particular, lock-outs that they may engage in.[50] Strictly speaking, these requirements are not obligations imposed by the Workplace Relations Act. They are, more accurately, conditions that need to be met before legal immunity is conferred by the Workplace Relations Act upon such industrial action.[51] In the absence of such immunity, an employer taking industrial action, in particular lock-outs, would probably be liable in damages for breaching its contractual obligation to provide employees with the opportunity to earn wages by providing work.[52]

The Workplace Relations Act reflects a view that industrial action, including lock-outs, within certain limits, is a legitimate aspect of bargaining and, accordingly, confers legal immunity on lock-outs provided certain conditions are met. Under the Act, locking-out an employee means preventing the employee from performing work under a contract of employment without terminating the contract.[53] For convenience, lock-outs that are covered by such immunity will be described as protected lock-outs.

The obligations on employers to provide information stemming from these conditions would appear to serve two primary purposes. Firstly, as lock-outs invariably mean that affected workers temporarily lose their means of income, the information in relation to lock-outs seems to be required as a matter of fairness so that workers can order their affairs. Secondly, the obligations appear to facilitate further negotiations between the parties by requiring that a party provide advance notice of industrial action. Presumably, this "cooling-off" time is to allow for more intensive negotiations.

In understanding the obligations on employers to disclose information in this context, the first thing to note is that the process of taking protected lock-outs is intimately connected with the process of

49. *Id.* § 170WH.

50. *See generally* Greg McCarry, *Industrial Action under the Workplace Relations Act 1996 (Cth)*, 10 AUSTRALIAN J. LAB. L. 133 (1997).

51. Workplace Relations Act § 170MT (Austl. 1996) (immunity for certain industrial action with respect to enterprise agreements) and § 170WC (AWA industrial action).

52. CREIGHTON & STEWART, *supra* note 2, at 238-9.

53. Workplace Relations Act §§ 170ML(4); 170WB (Austl. 1996).

negotiating an agreement. The main instance of this nexus is illustrated by the fact that lock-outs can only be protected if a bargaining period has been initiated under the Act.[54] The bargaining period is the period of formal negotiations for an agreement under the Act. The requirements for protected lock-outs are then bound up with the requirements for initiating a bargaining period. In this, an employer wanting to negotiate an enterprise agreement in the corporate stream must initiate the bargaining period by providing a written notice to its employees. If the agreement is an "industrial dispute" enterprise agreement, such a notice must be provided instead to the relevant trade union(s).[55] Such notices must include particulars of the employees who will be subject to the proposed agreement, matters that will be in the proposed agreement, and the intended duration of the agreement.[56] The failure to supply such particulars, however, does not mean that the notice is invalid and that no bargaining period was initiated. The Full Bench of the AIRC has held that the provisions relating to notices to initiate a bargaining period are aimed at facilitating the bargaining process and not at ensuring the validity of the initiation of the bargaining period. Hence, while a failure to properly supply particulars of a notice exposes the culpable party to the risk of an adverse AIRC ruling, this failure in itself will not invalidate either the notice or the initiation of the bargaining period.[57]

Apart from notices initiating a bargaining period, an employer intending to engage in protected lock-outs in the negotiation of AWAs must issue a notice of intention to engage in a lock-out at least three working days before such action.[58] Such a notice must include particulars of the date, duration, and "nature and form" of the action.[59] Curiously, no requirement in relation to notice applies to employers with respect to enterprise agreements, despite employees and trade unions being required to provide notice of industrial action they propose to take.[60]

The requirement of three working days has been enforced fairly rigorously with respect to notices issued by trade unions of an

54. Workplace Relations Act § 170ML (Austl. 1996).
55. *Id.* § 170MI.
56. *Id.* § 170MJ.
57. CPSU v. Vic., 44 A.I.L.R. ¶ 3-895 (1998). In referring to the risk of an adverse ruling, the AIRC was presumably adverting to its power to suspend or terminate a bargaining period on grounds including the failure of a negotiating party to genuinely reach an agreement (§ 170MW).
58. Workplace Relations Act § 170WD (Austl. 1996).
59. Workplace Relations Regulations, Reg. 30ZL (Austl. 1996).
60. Workplace Relations Act § 170MO (Austl. 1996).

intention to engage in industrial action for the negotiation of an enterprise agreement. In *CFMEU v. Curragh Queensland Mining Ltd.*,[61] the Federal Court ruled that, for the purposes of calculating three working days, the day on which the notice is given and the day on which industrial action commences are to be disregarded. The main union, in this case, notified the employer of its intention to engage in industrial action on July 29, 1997, with the industrial action to take place three days later on August 1, 1997. On the Federal Court's interpretation of the notice provision, while there was a 72-hour span between the issuing of the notice and the taking of industrial action, there was only two working days' notice and, hence, the notice requirements had not been met and the industrial action taken by the union was not protected. In a separate case, the AIRC has further stated that the requirement of a "working day" is not met by a Saturday worked overtime or a short shift on a Sunday.[62] In all likelihood, such rulings would be equally applicable to the AWA notice provisions.

The statutory provisions relating to the particulars that must accompany an employer's notice to take industrial action in the negotiation of AWAs were recently interpreted by the Full Bench of the Federal Court in *AMIEU v. G & K O'Connor Pty. Ltd.*[63] The employer, in this case, issued a notice of AWA industrial action stating that it was "locking-out" the employees from a specified date until the employees completed negotiating AWAs. The notice further specified that employees need not attend for or perform any work during the period of this "lock-out" and that they would not be paid for that time. The union argued that the notice failed to supply the particulars of the date and duration of the lock-out because it did not specify a date on which the lock-out would end. It also argued that the notice did not supply particulars of the nature and form of the industrial action as it did not indicate whether the employees would continue receiving payments for public holidays and sick leave while the lock-out was in force. Both arguments failed to persuade the Federal Court. The Court found that the requirements relating to the particulars of the date and duration of industrial action did not necessitate a specific date, but could also be satisfied by the specification of an event, so long as that event was described with

61. *See supra* note 57, ¶ 3-888.

62. McPherson's Printing Pty. Ltd. & AMWU, 43 A.I.L.R. ¶ 3-702 (1997). Section 170LF of the Workplace Relations Act (Austl. 1996) defines "working day" as a "day on which employees normally perform work in that business or part."

63. 47 A.I.L.R. ¶ 4-218 (2000).

sufficient particularity. The Court peremptorily rejected the second argument by stating that particulars of the nature and form of the industrial action were supplied by the characterization of the industrial action as a "lock-out" and the further specifications relating to non-attendance for work and the non-payment of wages.

B. New South Wales

As with agreement-making under the Workplace Relations Act, it is necessary to sketch the regulatory framework governing industrial relations in New South Wales before examining employers' obligations to provide information relating to agreement-making.[64] The principal industrial relations legislation in New South Wales is the Industrial Relations Act 1996 (NSW) ("Industrial Relations Act"). The regulatory framework contained in the Act is constituted by two elements: awards and collective agreements. Awards are binding orders made by the New South Wales Industrial Relations Commission ("NSWIRC").[65] They are made in two situations: upon application by an employer, trade union or employee[66] and, secondly, in industrial disputes.[67] Unlike the Workplace Relations Act, the Industrial Relations Act does not impose any statutory restriction on the matters that can be included in an award. Indeed, the Act stipulates several matters that must be included in an award if a party applies for such inclusion. These matters include maximum ordinary hours of employment, equal remuneration for men and women doing work of equal or comparable value, employment protection provisions, and provisions relevant to technological change.[68]

The Act contains only a single stream of collective agreements. These agreements may cover any "relevant group of employees." The Act specifically states that this phrase includes employees of a single business, as well as those of associated businesses. Thus, agreements under the Act are not confined to enterprise agreements.[69] Further,

64. For reasons of space, this article will not examine the complex interaction of the Commonwealth and New South Wales industrial and workplace legislation. For an excellent account, *see* Greg McCarry, *Relationships Between the Federal and New South Wales Industrial Relations Systems*, 11(2) AUSTRALIAN J. LAB. L. 69 (1998); *see also* George Williams, *The Return of State Awards—Section 109 of the Constitution and the Workplace Relations Act 1996 (Cth)*, 10 AUSTRALIAN J. LAB. L. 170 (1997).

65. Industrial Relations Act § 10 (N.S.W. 1996). *See* Dictionary at the end of the Act for the definition of "award."

66. *Id*. § 11.

67. *Id.* §§ 136-8.

68. *Id*. § 21.

69. *Id.* § 30.

these agreements can be made between the relevant employers and employees or a trade union.[70]

Before coming into operation, an agreement must be approved by the NSWIRC.[71] Various requirements must be satisfied before such approval is forthcoming. Several warrant mention. Generally, a proposed agreement must conform to the relevant principles set down by the Full Bench of the NSWIRC.[72] Moreover, the content of any proposed agreement must satisfy a "no-disadvantage" test.[73] Further, if an agreement is made directly with the relevant group of employees, it must be approved by 65% of these employees in a secret ballot.[74] If the NSWIRC approves the enterprise agreement, the agreement comes into operation and prevails over any award with respect to matters provided in the agreement.

Employers that are engaged in the process of making agreements under the Industrial Relations Act are subject to various obligations to provide information to employees. As with obligations to provide information in relation to agreement-making under the Workplace Relations Act, these obligations seem aimed at facilitating genuine agreement-making and protecting employees.

These obligations stem from the principles the NSWIRC has adopted for the approval of collective agreements. These principles are determined by the Full Bench of the Commission after having regard, among others, to the need for ensuring that sufficient information is provided to the employees concerned about the effect of the agreement and the need for an appropriate negotiating process.[75] In a decision delivered in 1996, the Full Bench of the Commission laid down a set of principles in the form of criteria to be used in approving such agreements.[76] These principles were largely

70. *Id.* § 31.

71. *Id.* § 32.

72. *Id.* § 35(3). This subsection allows departure from these principles if the NSWIRC is satisfied that no prejudice is occasioned to any of the parties by such a departure.

73. *Id.* § 35(1)(b).

74. *Id.* §§ 36, 37.

75. *Id.* §§ 33(1) and (2).

76. *Re Principles for Approval of Enterprise Agreements: Application by Minister for Industrial Relations*, 70 I.R. 437 (1996). An application for the approval of such collective agreements must be accompanied by an affidavit that states, amongst other matters, the basis upon which the proposed agreement complies with these principles. In the event of departure from these principles, the affidavit must explain the basis upon such departure does not prejudice the interests of any of the parties to the agreement: Industrial Relations Commission Rules § 41(1)(b)(v) (N.S.W. 1996).

confirmed by a recent decision of the Full Bench of the Commission.[77] The following criteria are relevant to the provision of information.

Firstly, one of the criteria is the involvement of the parties and/or their representatives in the negotiation process.[78] The involvement of parties and/or their representatives would necessarily imply that they possess some information about the proposed agreement.

Secondly, the negotiating process should be structured so as to encourage participation by all groups and categories of employees. Action taken in this regard includes:

- taking reasonable steps to consult all employees who are to be covered by the proposed agreement;
- taking reasonable steps to ensure that such employees have an understanding of the agreement and its effect;
- informing such employees of the employer's intention to have the Commission approve the agreement and the consequences of such approval;
- ensuring such employees have access to the proposed agreement and the relevant award(s); and,
- providing such employees with reasonable time to acquire advice from sources independent of the employer, including advice from the relevant trade union(s).

The final criterion to note requires that the parties understand the nature and effect of the agreement.[79]

In addition to these conditions of approval, the Act expressly requires the provision of information to the relevant trade unions when collective agreements are being proposed or negotiated. Collective agreements with employees cannot be approved unless the following conditions have been met.

Firstly, the employer must have advised the Industrial Registrar that a collective agreement is being proposed or under negotiation. Secondly, it must also notify the Registrar of the awards and/or collective agreements that presently apply to the employees. Such

77. REVIEW OF THE PRINCIPLES FOR APPROVAL OF ENTERPRISE AGREEMENTS 2000, [2000] NSWIR Comm. 250.

78. While the New South Wales Industrial Relations Commission has stated this criterion to be the involvement of the parties and/or their representatives, it would appear that this criterion is, in substance, directed towards the level of involvement and not involvement *per se*.

79. This criterion is reinforced by the specific requirement that any application for the approval of such collective agreements be accompanied by an affidavit which states, amongst other matters, the basis upon which it is contended that the parties understand the effect of the agreement: Industrial Relations Commission Rules § 41(1)(b)(iii) (N.S.W. 1996).

notification must take place either before or when the employer commences formal negotiations with the employees.[80]

Secondly, the Industrial Registrar must have advised the secretary or chief executive of the State peak labor and employer council, as well as the secretary or chief executive of any trade union or employer organization that is a party to an award or collective agreement that then applies to the affected employees.[81]

II. INFORMATION RELATING TO TERMINATION OF EMPLOYMENT

In the Commonwealth, Victorian, and New South Wales jurisdictions, obligations to provide information relating to termination of employment largely stem from legislative protection in relation to what is known as unfair and unlawful dismissals. Additional obligations are imposed in New South Wales by the Employment Protection Act 1982 (NSW).

A. Commonwealth and Victoria

1. Unfair and Unlawful Dismissal Provisions

The Workplace Relations Act sets down certain minimum entitlements of employees, in particular, protection with respect to termination of employment at the initiative of the employer.[82] The termination of employment entitlements can be broadly divided into two categories: the right to remedies in relation to unfair dismissals and, secondly, unlawful dismissals.[83] With respect to the former, the Act generally confers rights on certain categories of employees to

80. Industrial Relations Act §§ 36(1), (2) (N.S.W. 1996).

81. *Id.* § 36(3) and Industrial Relations (General) Regulations, Reg. 4 (N.S.W. 1996).

82. While the Act typically uses the phrase "termination of employment," it is defined to mean termination of employment at the initiative of the employer: § 170CD(1). This has been held to occur when an employer's action results directly or consequentially in the termination of employment: Pawel v. AIRC, 94 F.C.R. 231, 237-8 (1999) (adopting Mohazab v. Dick Smith Electronics Pty. Ltd. (No. 2), 62 I.R. 200 (1995)), with respect to the Workplace Relations Act (Austl. 1996). For a discussion of these entitlements, *see* Anna Chapman, *Termination of Employment Under the Workplace Relations Act 1996 (Cth)*, 10 AUSTRALIAN J. LAB. L. 89 (1997) and CREIGHTON & STEWART, *supra* note 2, at 313-20 and 324-29. There have been numerous articles written on the previous legislative regime, which share some similarities with the current one. *See*, *e.g.*, Marilyn Pittard, *International Labour Standards in Australia: Wages, Equal Pay, Leave and Termination of Employment*, 7 AUSTRALIAN J. LAB. L. 170, 170-92 (1994), and Marilyn Pittard, *The Age of Reason: Principles of Unfair Dismissal in Australia*, *in* EMPLOYMENT SECURITY 16 (Ron McCallum, Greg McCarry & Paul Ronfeldt eds., 1994). For a broad comparison of the two legislative regimes, *see* Murray Wilcox, *Dismissal: A Fair Go All Round*, *in* WORKPLACE RELATIONS 79, 79-84 (Margaret Lee & Peter Sheldon eds., 1997).

83. For use of a similar distinction between harsh, unjust or unreasonable dismissals and unlawful terminations, *see* Chapman, *id.* at 91.

apply to the AIRC for compensation and other orders[84] on the ground that his or her termination of employment was "harsh, unjust or unreasonable."[85]

The unlawful dismissal provisions differ in form from those relating to unfair dismissals in that they are cast in terms of prohibitions; infringement of which would give rise to unlawfulness, as well as remedies on the part of the aggrieved party. The most significant of these statutory provisions is that of proscribing an employer from terminating the employment of an employee for a prohibited reason.[86] Prohibited reasons include the employee's trade union membership, race, sex, sexual preference, and disability.[87] Another proscription prevents an employer from terminating the employment of an employee in breach of AIRC orders, which give effect to Articles 12 and 13 of the Termination of Employment Convention.[88]

Not all employees have a right to seek a remedy in relation to unfair and unlawful dismissals.[89] Access to the unfair and unlawful dismissal provisions differ. Subject to restrictions imposed by regulations discussed below, the classes of employees that can access unfair dismissal provisions are limited to:

- Commonwealth public sector employees;
- Territory employees;
- employees employed by corporations;[90]
- employees who are engaged in interstate transport industries and are covered by an award, enterprise agreement or AWA; and,
- employees who have applied to the AIRC with respect to unlawful terminations.[91]

84. The regime governing the enforcement of these rights is complex and will not be discussed in this article. For discussions of this issue, *see id.* at 104-11, and Graham Smith, *A Practitioner's Perspective*, *in* WORKPLACE RELATIONS, *supra* note 82, at 85-6.

85. Workplace Relations Act, Subdivision B, Division 3 of Part VIA (Austl. 1996).

86. *Id.* at Subdivision C, Division 3 of Part VIA.

87. *Id.* § 170CK(2).

88. *Id.* § 170CN.

89. The unfair and unlawful dismissal provisions are confined to the termination of employment of an "employee." It is usually believed that the meaning of "employee" in this context is identical to the common law meaning of "employee." *See*, *e.g.*, CREIGHTON & STEWART, *supra* note 2, at 313-8. The Full Federal Court has, however, interpreted the term "employee" in equivalent provisions of the Industrial Relations Act 1988 (Cth) as being broader than the common law meaning of the term: Konrad v. Victoria Police, 165 ALR 23, 51-2 (1999), per Finkelstein, J. (with whom Ryan and North, JJ. agreed on this point).

90. The restriction of coverage to those employed by corporations results from the use of the corporations power, § 51(20) of the Australian Constitution, to support the unfair dismissal provisions. For a detailed discussion of this issue, *see* Ford, *supra* note 24.

91. Workplace Relations Act §§ 170CB(1), (2) (Austl. 1996).

Victorian employees, however, stand in a special situation with all such employees having a right with respect to unfair dismissals (subject to exclusion by regulations).[92] In contrast with the provisions relating to unfair dismissals, all employees have access to the unlawful dismissal provisions.[93] This again is subject to restrictions on access imposed by regulations. The Workplace Relations regulations[94] exclude certain classes of employees from accessing both the unfair and unlawful dismissal provisions. The excluded classes include employees:

- engaged on fixed-term contracts;[95]
- engaged on task-based contracts;
- engaged on a casual basis for a short period;[96] as well as,
- not covered by an award, enterprise agreement or AWA whose remuneration is more than $71,200 per year.[97]

The unfair dismissal provisions give rise to implicit obligations to provide information. The Workplace Relations Act does not define what is "harsh, unjust or unreasonable,"[98] rather it enumerates a number of matters relevant to determining whether a termination of employment is harsh, unjust or unreasonable. These matters cover both issues of substantive and procedural fairness.[99] The central issue in the question of substantive fairness is whether there is a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking.[100] An implicit requirement to provide information can

92. *Id.* § 492.
93. *Id.* § 170CB(3).
94. *Id.* § 170CC.
95. *See generally* Russell Blackford, *Unfair Dismissal Law and the Termination of Contracts for Specified Periods*, 12 AUSTRALIAN J. LAB. L. 217 (1999).
96. Workplace Relations Regulations, Reg. 30B (Austl. 1996). This regulation also defines being engaged "for a short period."
97. This figure applies only in relation to the 2000/2001 financial year. The applicable figure is adjusted annually according to changes in average weekly earnings: *Id.* Regs. 30BB & 30BF (Austl. 1996).
98. Such an approach has also been followed by the courts. For instance, in Bostik (Australia) Pty. Ltd. v. Gorgevski, 36 F.C.R. 20, 28 (1992), the majority said of the phrase as found in the Industrial Relations Act (Austl. 1988), "(t)hese are ordinary non-technical words which are intended to apply to an infinite variety of situations where employment is terminated. We do not think any redefinition or paraphrase of the expression desirable."
99. Workplace Relations Act § 170CG(3) (Austl. 1996). In Bi-Lo Pty. Ltd. v. Hooper, 34 A.I.L.R. ¶ 283 (1992), the AIRC stated:

> Substantive fairness will be satisfied if the grounds upon which dismissal occurs are fair grounds. Broadly speaking a dismissal will be procedurally fair if the manner or process of dismissal and the investigation lead up to the dismissal is just.

100. Workplace Relations Act § 170CG(3)(a) (Austl. 1996). The Full Bench of the AIRC has stated that, while a "valid reason" is "only one of a number of factors . . . it will often be a very important factor." *See* Windsor Smith v. Liu & Ors, 44 A.I.L.R. ¶ 3-858 (1998). The AIRC

arise from this in that a failure to provide information can be a basis for finding that there is a lack of a valid reason for the termination. Take, for example, the case of a termination of employment purportedly made on the basis of an employee's alleged misconduct. In such a context, a failure to advise the employee at the time of the termination of the allegations might provide an inference that such misconduct did not exist and, hence, there was no valid reason for the termination.[101]

The importance of procedural fairness is evident in the statutory list of relevant factors in determining whether a dismissal was harsh, unjust, or unreasonable. In this, the provision of information at various stages before termination of employment is designated as relevant.

For instance, the Act identifies the question of whether the employee was notified of the reason(s) for his or her termination as relevant.[102] The Full Bench of the AIRC has held that such notification must precede the termination of employment.[103]

Another relevant consideration is whether the employee was given an opportunity to respond to such reasons if they relate to his or her behavior.[104] Thus, in the event of alleged misconduct by the employee leading to the termination of employment, a failure to

has held that "valid reason" in the Workplace Relations Act (Austl. 1996) has the same meaning as under the previous Act in that it means a reason that is "sound, defensible or well founded." *See* Andrews v. Ian Rollo Currie Nursing Home (Old Colonists Society), 41 A.I.L.R. ¶ 3-535 (1997), and Annetta v. Ansett Australia Ltd., A.I.L.R. ¶ 4-377 (2000) (which adopted the definition of "valid reason" stated in Selvachandran v. Peteron Plastics Pty. Ltd., 62 I.R. 371 (1995); 39 A.I.L.R. ¶ 3-216 (1995)). *See also* Container Terminals Australia Limited v. Toby, A.I.L.R. ¶ 4-321 (2000), which held that a termination of employment can still be harsh, unjust, or unreasonable, even if there was a valid reason for the termination. For a discussion of the meaning of "valid reason," *see* ANNA CHAPMAN, ET AL., VALID REASONS FOR TERMINATION OF EMPLOYMENT (1997); CENTRE FOR EMPLOYMENT AND LABOUR RELATIONS LAW, WORKING PAPER NO. 12; Max Spry, *A Valid Reason for Termination*, 11(3) AUSTRALIAN J. LAB. L. 216 (1998). For a discussion of "valid reason" as it relates to operational requirements, *see* Stuart Kollmorgen, *What Remains of Managerial Prerogative in 'Operational Requirements' Dismissals?*, 8 AUSTRALIAN J. LAB. L. 247 (1995).

101. Johnstone, Mitchell and Riekert have argued that the requirement of procedural fairness in relation to unfair dismissal extends beyond the time of dismissal and extends to the general conduct of the employment relationship. For example, in their opinion, the requirement might mean that "the employer will need to demonstrate a work environment in which the employee has been properly briefed about the requirements of the job." R. Johnstone, R. Mitchell & J. Riekert, *Procedural Fairness in Dismissal Cases: What Should be the Approach in Victoria?*, 4 AUSTRALIAN J. LAB. L. 99, 119 (1991).

102. Workplace Relations Act § 170CG(3)(b) (Austl. 1996). It should be further noted that the Commonwealth public sector legislation requires that in relation to the dismissal of a Commonwealth public sector employee, the (written) notice of termination must specify the ground or grounds of dismissal. Public Service Act § 29(2) (Austl. 1999).

103. *Crozier and Palazzo Corporation Pty. Ltd., trading as Noble Park Storage and Transport*, A.I.L.R. ¶ 4-284 (2000).

104. Workplace Relations Act § 170CG(3)(c) (Austl. 1996).

advise the employee of allegations of misconduct or to provide an opportunity for the employee to respond to such allegations would reflect adversely on the employer.[105]

A further relevant consideration is whether there was a warning of inadequate performance issued to the employee before a termination due to unsatisfactory performance.[106] It should be noted that a recent decision of the Full Bench of the AIRC has cast an unduly narrow construction on the term "unsatisfactory performance." According to the Full Bench, this concept referred to the level at which the employee renders performance encompassing factors such as the diligence, quality, and care of the employee's performance. In the case before it, the Full Bench held that the term did not include misconduct constituted by a refusal to perform work.[107]

The unlawful dismissal provisions contain one source of express obligations on employers to provide information to their workforces. The AIRC may,[108] upon application by either an employee or a trade union, make orders giving effect to Articles 12 and 13 of the Convention Concerning Termination of Employment at the Initiative of the Employer.[109] Article 13 requires employers who contemplate terminations of employment for economic, technological, or structural reasons to provide trade union representatives with relevant information, including the reasons for the terminations and the number and categories of workers likely to be affected. It also requires such employers to provide trade union representatives with the opportunity to consult on measures to avert such terminations or

105. *See generally* Hedy Meggiorin, *Proving Misconduct In Order to Justify Dismissal Under the Workplace Relations Act (Cth)*, 10 CORP. & BUS. L.J. 163 (1997).

106. Workplace Relations Act § 170CG(3)(d) (Austl. 1996).

107. Annetta v. Ansett Australia Ltd., A.I.L.R. ¶ 4-377 (2000).

108. The AIRC has signaled that its discretion will be not necessarily be exercised in favor of making such orders. *See*, in the context of making orders with respect to severance pay, Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v. United Milk Tasmania (Unreported, AIRC, Full Bench, Print No. S7351, June 23, 2000).

109. Workplace Relations Act §§ 170FA & FB (Austl. 1996). Article 12 of the Convention deals with severance pay and will not be further discussed. The orders made in this context not only have the same effect as awards, but also can be enforced by injunctions: § 170 JC. For examples of orders made pursuant to § 170 FA, *see Section 170 FB and GB Application for Order Giving Effect to Article 12 and 13 of the Termination of Employment Convention, Flight Attendants' Association of Australia*, 45 A.I.L.R. ¶ 4-052 (71) (1999), and *Application by TCFUA re Textile Industry Award 1994 and Austrim Textiles Pty. Ltd. (Coburg) Knitting Mill Enterprise Agreement 1988*, 47 A.I.L.R. ¶ 4-256(57) (2000). Both the current and previous legislative regime contained this provision in identical terms. For a discussion of this provision as found in the previous legislative regime, the Industrial Relations Act (Austl. 1988), *see* Brad Pragnell & Paul Ronfeldt, *Redundancy Under Enterprise Bargaining and New Federal Laws*, *in* EMPLOYMENT SECURITY, *supra* note 82, at 120-27.

to minimize their adverse effects.[110] However, it should be noted that the Act restricts such AIRC orders to situations where an employer "decides" to terminate the employment of 15 or more employees.[111] This difference seems to reflect the original intention behind this provision and its consultation requirements: they are directed towards managing the process of redundancies and not at determining whether such redundancies should occur. Further, it appears to be the hope of the legislation that consulting workers in event of redundancies will lessen workers' resistance to the dismissals.[112]

In recent cases, the AIRC has considered various factors as relevant in determining whether or not to issue an order under this provision. These factors include:

- the prospect of minimizing terminations and/or mitigating their adverse effects if an order was made;
- the prospect of appropriate consultation without such an order; and,
- public interest factors militating against the making of such an order.[113]

Terminations of employment in breach of these orders will not only render such terminations unlawful (thereby, giving rise to a right to relief on the part of the affected employee/s), but will also expose the employer to a penalty.[114]

2. Remedial Orders in the Event of Redundancies

There is another source of implicit obligations on employers to provide information to their workforces under the Workplace Relations Act. This set of implicit obligations, like those found under § 170FA of the Act, appear to be directed towards managing the process of redundancies.

Assuming that the affected employees have access to the unfair and/or unlawful dismissal provisions, the AIRC is empowered, upon

110. The Termination of Employment Convention is contained in Schedule 10 of the Workplace Relations Act (Austl. 1996).

111. Workplace Relations Act § 170FA(2) (Austl. 1996). This difference in phrasing has not, however, deterred the AIRC from issuing orders in situations when the employer is contemplating the termination of employment of employees. See *Application*, *supra* note 109.

112. This provision, as well as § 170GA of the Workplace Relations Act (Austl. 1996), were derived from the standard clauses, which were adopted by the AIRC in the *Termination, Change and Redundancy Case*, 8 I.R. 34 (1984). For an indication of the reasons for adopting the clauses similar to these sections, *see id.* at 62-3.

113. *See Section* and *Application*, *supra* note 109.

114. This is a combined effect of the Workplace Relations Act §§ 170JC and 178 (Austl. 1996).

application, to make remedial orders when an employer has failed to properly consult the trade union(s) in the event of a decision to terminate the employment of 15 or more employees for economic, technological, or structural reasons. Drawing upon Article 13 of the Termination of Employment Convention, the Act characterizes several situations as representing failures to properly consult. These situations include failures to inform the trade union(s) of the reasons for the terminations, the number and categories of workers likely to be affected, as well as failures to provide an opportunity to the trade union(s) to discuss measures to avert such terminations, and/or minimize the adverse effects of such terminations.[115] The AIRC can issue orders relating to proper consultation if it believes the orders to be in the public interest.[116]

The AIRC has signaled in several cases that the absence of proper consultation does not necessarily mean that it is in the public interest to issue remedial orders pursuant to section 170GA of the Act. The case of *CFMEU v. Newcastle Wallsend Coal Company Pty. Ltd. & Anor*[117] is illustrative of this point. In that case, the Full Bench of the AIRC found that it had the power to make an order pursuant to § 170GA because the company's offer to consult with the trade unions was made a day before an irrevocable decision to terminate the employment of the employees was taken.[118] The trade unions were not given an opportunity to consult with the employer pursuant to the section because such an opportunity was neither real nor meaningful. However, the Full Bench refused to issue an order because it was not in the public interest to do so on grounds including the possible effects of an order on the viability of the employer and the time that had elapsed since the terminations. In a separate but earlier decision, the AIRC has oddly refused to issue such orders on the basis that the orders sought were aimed at examining the employer's reasons for redundancies.[119]

115. *Id.* § 170GA.

116. *Id.* § 170GB. Both the current and previous legislative regime contained this provision in identical terms. For a discussion of this provision as found in the previous legislative regime, the Industrial Relations Act (Austl. 1988), *see* Pragnell & Ronfeldt, *supra* note 109, at 127-9.

117. 45 A.I.L.R. ¶ 4-004 (1999).

118. This was a reversal of Commissioner Harrison's finding, in his first instance decision, that the employer had consulted with the trade unions. *See Section 170GB Application by the CFMEU*, 44 A.I.L.R. ¶ 3-877 (1998).

119. PKIU v. Federal Capital Press of Australia Pty. Ltd., A.I.L.R. ¶ 339 (1994).

B. New South Wales

1. Unfair and Unlawful Dismissal Provisions

The Industrial Relations Act generally confers a right on employees to apply to the NSWIRC for relief[120] in the event of a termination of employment that is harsh, unjust, or unreasonable.[121] This right is not available to two classes of employees. The first class of employees encompasses those whose remuneration is more than $71,200 per annum and are not covered by an industrial instrument under the Act.[122] An industrial instrument under the Act includes awards, enterprise agreements, transport-related contracts approved by the NSWIRC, and determinations the NSWIRC has made with respect to transport-related contracts.[123] Further, the Act provides for regulations to exclude certain groups of employees.[124] The excluded classes of employees include:

- employees employed on contracts for a fixed term of less than 6 months;
- employees employed on task-based contracts; and,
- employees employed on a casual basis for a short period.[125]

Express obligations on employers to provide information are also imposed by standard award provisions. It is the NSWIRC's duty to insert, upon application, various matters into an award. These matters include employment protection provisions and provisions relevant to technological change into an award.[126] Presently, the NSWIRC standard clause triggers a requirement to provide information once an employer employing 15 or more employees has made a firm decision that redundancies may be necessary. In that event, the employer is to

120. Relief includes orders for reinstatement and compensation. *See* § 89.

121. Industrial Relations Act § 84 (N.S.W. 1996).

122. *Id.* § 83(1)(b) and Industrial Relations (General) Regulations § 5A (N.S.W. 1996). The latter provision ties the maximum annual remuneration of employees for whom employment conditions are not set by an industrial instrument under the Act to the maximum found in the Workplace Relations Regulations, Regs. 30BB, 30BF (Austl. 1996). Accordingly, the applicable figure is an indexed amount adjusted annually according to changes in average weekly earnings.

123. The definition of "industrial instrument" is found in § 8 of the Industrial Relations Act (N.S.W. 1996).

124. *Id.* § 83(1).

125. Industrial Relations (General) Regulation § 5B (N.S.W. 1996). The exclusion of employees engaged on a casual basis for a short period does not apply if such an employee has been engaged by an employer on a regular and systematic basis during a period of at least six months and the employee would, but for the dismissal, have a reasonable expectation of continuing employment with the employer. *See* § 5B(1)(d)(ii).

126. Industrial Relations Act § 21 (N.S.W. 1996). Section 24 of the Act defines "employment protection provisions," whereas § 25 stipulates some matters that may be included in provisions relevant to technological change.

provide in writing, to the affected employees and their unions, relevant information about the proposed terminations, including the reasons for the proposed termination, the number and categories of the employees likely to be affected, and the period over which the terminations are likely to be carried out.[127]

Like the Workplace Relations Act, the unfair dismissal provisions in the Industrial Relations Act emphasize procedural fairness as an important consideration. In this, the provision of information at various stages before termination of employment is designated as relevant in determining whether a dismissal was harsh, unjust, or unreasonable. These relevant factors include:

- whether the employee was notified of the reason/s for his or her termination;[128]
- whether the employee was given an opportunity to respond to such reasons if they relate to his or her behavior;[129] and,
- whether there was a warning of inadequate performance issued to the employee before a termination of employment due to unsatisfactory performance.[130]

2. The Employment Protection Act 1982 (NSW)

In addition to the above obligations, the Employment Protection Act imposes upon employers in New South Wales a requirement to provide a notice of intention to terminate employment to the Industrial Registrar at least 7 days before the employer issues a notice of termination to the employee or terminates the employment.[131] This notice is deemed not have been served unless it contains various particulars, including payments to be made as a result of the termination,[132] the date on which the termination is to take effect,[133] the reason(s) for the termination, and the period of notice given to the

127. *Re Clerks (State) Award & Other Awards*, 21 I.R. 29, 47 (1987). This decision essentially adopts into New South Wales state awards provisions accepted by the Commonwealth Conciliation and Arbitration Commission in the *Termination Change and Redundancy Case*, 8 I.R. 34 (1984); 9 I.R. 115 (1984). While this decision is more than 10 years old, this aspect of the decision was not re-examined in the latest test case. *See Re Application for Redundancy Awards*, 53 I.R. 419 (1994); A.I.L.R. ¶ 301 (1994). It should be noted that the AIRC is currently precluded from inserting consultation requirements into its awards. *See* Workplace Relations Act § 89A (Austl. 1996).

128. Industrial Relations Act § 88(a) (N.S.W. 1996).

129. *Id.* § 88(b).

130. *Id.* § 88(c).

131. Employment Protection Act § 7(1) (N.S.W. 1982).

132. *Id.* § 7(2)(e).

133. *Id.* § 7(2)(g).

employee.[134] More importantly, the Industrial Registrar is obliged to provide a copy of such notices to the relevant trade union(s) as soon as practicable.[135]

The scope of these requirements, however, has been hollowed out by extensive exemptions. Firstly, these requirements do not apply to employers employing fewer than 15 employees.[136] Further, the regulations deny the benefit of these requirements to numerous groups of employees including:

- employees who have been employed by an employer for less than 12 months;[137]
- employees not covered by a state award or collective agreement;[138]
- employees covered by a state award or collective agreement that provides for severance pay;[139] and,
- employees who have been paid severance pay equal to or greater than the prescribed rate.[140]

III. INFORMATION RELATING TO HEALTH AND SAFETY MATTERS

Employers in Australia have duties to disclose information to employees regarding health and safety matters that arise in the workplace. This duty exists explicitly under occupational health and safety statutes. In addition, it is required under the law of torts and the contract of employment in certain circumstances. The obligations on employers under the occupational health and safety statutes are examined first.

A. Occupational Health and Safety Statutes

1. Regulatory Framework

Industrial health and safety issues in Australia are primarily regulated through State and Commonwealth occupational health and safety legislation. Each jurisdiction in Australia has one principal

134. *Id.* § 7(2)(h) and Employment Protection Regulations § 7 (N.S.W. 1995). The Employment Protection Regulations contain the prescribed form in Form 1 of Schedule 2.
135. Employment Protection Act § 10 (N.S.W. 1982).
136. *Id.* § 9.
137. Employment Protection Regulations § 5 (N.S.W. 1995).
138. *Id.* § 8.
139. *Id.* § 10(a).
140. *Id.* § 9.

statute.[141] In addition, each has a number of subsidiary statutes of relevance to industrial safety.[142] The focus of this article is on the primary statutes.

The principal Commonwealth occupational health and safety statute applies in relation to Commonwealth government employees, wherever located in Australia.[143] The main statute enacted in each State and Territory in Australia applies to workplaces located within that particular State or Territory, excluding Commonwealth government employees covered under the Commonwealth legislation.[144] The objectives of each statute are broadly similar: to secure the health, safety, and welfare of people at work and to protect persons at workplaces from risks to health and safety.[145] Further, each statute establishes a broadly similar framework of regulation. As such, the various jurisdictions will be discussed together.

The framework found in these statutes comprises three levels of rules and policies: broad general duties, a second level of more detailed regulations, and a third layer of Codes of Practice containing recommended methods of compliance with the general duties and regulations.[146] General duties are imposed on employers, employees, and others, such as occupiers of workplaces and manufacturers of machinery. The general duties require that reasonable care be taken to ensure the health and safety of employees and others in workplaces. The second level of legal rules—regulations—aim to supplement the general duties. Each regulation contains more detailed standards in relation to a particular hazard, such as manual handling or the storage of hazardous substances. The relevant government department or advisory body usually drafts regulations after consultation with interested parties, such as employer

141. Occupational Health and Safety Act (Vic. 1985); Occupational Health and Safety Act (N.S.W. 2000); Workplace Health and Safety Act (Qld. 1995); Occupational Health, Safety and Welfare Act (S.A. 1986); Occupational Safety and Health Act (W.A. 1984); Workplace Health and Safety Act (Tas. 1995); Work Health Act (N.T. 1986); Occupational Health and Safety Act (A.C.T. 1989).

142. *See*, *e.g.*, Occupational Health and Safety (Maritime Industry) Act (Austl. 1993); Factories, Shops and Industries Act (N.S.W. 1962); Dangerous Goods Act (Vic. 1985).

143. Occupational Health and Safety (Commonwealth Employment) Act (Austl. 1991).

144. The statutes apply differently depending on whether the worker is an employee or an independent contractor in the common law sense. Such complexities are not examined in this article. On this issue, *see further*, Richard Johnstone, *Paradigm Crossed? Statutory Occupational Health and Safety Regulations*, 12(2) AUSTRALIAN J. LAB. L. 73 (1999).

145. *See supra* note 143, § 3; Occupational Health and Safety Act § 6 (Vic. 1985); Occupational Health and Safety Act § 5(1) (N.S.W. 2000).

146. *See generally* RICHARD JOHNSTONE, OCCUPATIONAL HEALTH AND SAFETY LAW AND POLICY: TEXT AND MATERIALS (1997); BREEN CREIGHTON & PETER ROZEN, OCCUPATIONAL HEALTH AND SAFETY LAW IN VICTORIA (1997); ADRIAN BROOKS, OCCUPATIONAL HEALTH AND SAFETY LAW IN AUSTRALIA (1993).

organizations, trade unions, and employees.[147] Contravention of a general duty and/or a regulation is an offense and may result in penalties and, in some instances, imprisonment.

In contrast to the general duties and regulations, Codes of Practice comprise non-binding recommended methods of dealing with particular hazards within an industry. They are said to be for the purpose of providing "practical guidance" to employers and others.[148] Non-compliance with a Code of Practice does not itself constitute an offense under the different statutory schemes. However, under the Commonwealth Act, the Victorian statute, and several other State Acts (but not the New South Wales statute), non-compliance with a Code of Practice establishes a rebuttable presumption that a breach of a general duty or regulation has occurred.[149] The New South Wales Act takes a slightly different approach. It provides that evidence of a failure to comply with a Code of Practice is admissible in proceedings for contravention of a general duty or a regulation. Liability will be imposed on an employer unless it can demonstrate that it successfully followed an alternate procedure to ensure safety or that it was not reasonably practicable for it to follow the Code of Practice.[150]

In conjunction with this scheme of general duties, regulations, and Codes of Practice, all Australian occupational health and safety statutes provide for employee involvement in the enforcement of the legislative requirements and in policy development at the workplace level. The main mechanisms through which employee participation takes place is by health and safety representatives and/or health and safety committees established in workplaces.[151] Both these structures impose obligations on employers to provide certain information to employees.

147. JOHNSTONE, *id.* at 282-283.

148. *Id.* at 291-292.

149. *See*, *e.g.*, Occupational Health and Safety (Commonwealth Employment) Act § 71 (Austl. 1991); Occupational Health and Safety Act § 56 (Vic. 1985), discussed in JOHNSTONE, *supra* note 146, at 295.

150. Occupational Health and Safety Act § 44B (N.S.W. 2000).

151. *See generally* JOHNSTONE, *supra* note 146, Ch. 9. Note that state-funded occupational health and safety inspectorates play important roles in initiating and pursuing prosecutions under the various statutes.

2. Obligations to Provide Information Under Occupational Health and Safety Statutes

The obligations on employers arising under occupational health and safety statutes to provide information to employees, and in some cases, trade unions, relate to:

- those arising from the employer's general duty to do what is reasonably practicable to provide and maintain a healthy and safe workplace;
- particular duties to provide information arising from regulations and Codes of Practice; and,
- requirements pertaining to health and safety representatives and committees.

These three categories of employer obligation will be examined in turn.

a. The General Duty on Employers to do What is Reasonably Practicable to Provide and Maintain a Healthy and Safe Workplace

As discussed above, the main general duty on employers under the Australian occupational health and safety legislation is to do what is reasonably practicable to provide and maintain a healthy and safe workplace.[152] The Victorian statute provides guidance on the range of factors to be taken into account in Victoria in determining whether the employer has fulfilled this general duty. These matters include:

- the severity of the hazard or risk;
- the employer's subjective state of knowledge about the risk;
- industry knowledge in regard to the risk; and,
- the cost and availability of ways to reduce or remove the risk.[153]

Broadly speaking, these factors have been considered as relevant in determinations of reasonableness and practicability in other Australian jurisdictions.[154]

The case decisions are replete with examples of employers found to be in contravention of this general duty for reasons including a

152. For example, *see* Occupational Health and Safety (Commonwealth Employment) Act § 16(1) (Austl. 1991); Occupational Health and Safety Act § 21(1) (Vic. 1985); Occupational Health and Safety Act § 8 (N.S.W. 2000).

153. *See*, *e.g.*, Occupational Health and Safety Act § 5 (definition of "practicable") (Vic. 1985).

154. JOHNSTONE, *supra* note 146, at 203-204; CREIGHTON & ROZEN, *supra* note 146, at 60-61.

failure to provide information to employees about risks or dangers. Commonly, the failure to provide information is constituted by a failure on the part of the employer to adequately instruct and, in some cases, supervise the work being conducted. That work might relate to the use of a machine, a process of production, or the use or removal of hazardous material, such as asbestos.[155] In addition, a failure by an employer to provide employees with information about its policies on discrimination and harassment may constitute a contravention of the general duty on an employer to do what is practicable to ensure a healthy and safe workplace.[156]

An illustration of the employer's general duty in relation to instructing and training employees is provided by a prosecution under the New South Wales occupational health and safety statute, *Inspector Stobo v. Kentucky Fried Chicken Pty. Ltd*.[157] In this case, a 15-year-old employee suffered splash burns to his face, an arm, and a leg when he put a 12.5kg block of solid oil into a stockpot that had a layer of burnt oil at the bottom. The burnt oil mixed with the solid block and caused the mixture to erupt. This method of replacing the oil had

155. *See*, *e.g.*, Mauger v. Shaplan Pty. Ltd. (Industrial Relations Court of New South Wales, Fisher, C.J., Sept. 4, 1996); R v. Tyre Marketers (Australia) Ltd. (Melb. Magistrates Court, McLennan, S.M., Dec. 4, 1996); Australian National Railways Commission v. Rutjens (Adelaide Magistrates Court, Harris, S.M., Aug. 29, 1996); Inspector Guillarte v. CSR Humes Pty. Ltd. (Chief Industrial Magistrates Court, Miller, C.I.M., Dec. 18, 1998); Inspector Lyons v. EBS-Ray Pumps Pty. Ltd. (Chief Industrial Magistrates Court, Miller, C.I.M., May 20, 1999); WorkCover (Insp Reynolds) v. Cargo Superintendents (A/SIA) Pty. Ltd. (Chief Industrial Magistrates Court, Miller, C.I.M., Sept. 27, 1999); Inspector Milligan v. Grant (Chief Industrial Magistrates Court, Miller, C.I.M., Oct. 13, 1999); WorkCover Authority of New South Wales (Inspector Ching) v. Hydromet Operations Ltd. (Industrial Relations Commission of New South Wales in Court Session, Maidment, J., Oct. 25, 1999) (a failure to correctly label hazardous chemicals); Port Marine Services—Hulten Engineers Pty. Ltd. v. Merrey (Supreme Court of Victoria, Ashley, J., Dec. 7, 1999); WorkCover Authority of New South Wales (Insp. Guillarte) v. Genner Constructions Pty. Ltd. (Industrial Relations Commission of New South Wales in Court Session, Kavanagh, J., Feb. 23, 2000 and June 7, 2000). These cases are all summarized in CCH, AUSTRALIAN OCCUPATIONAL HEALTH AND SAFETY LAW ¶ 52ff (1996).

156. Discrimination, sexual harassment, and other forms of harassment (often referred to in Australia as bullying) are now increasingly recognized as lying within the purview of occupational health and safety legislation (and tort and contract, discussed below). An employer's obligation to provide a healthy and safe workplace therefore extends to taking appropriate steps to eliminate or minimize the hazard of such conduct. An employer is required to do what is reasonable in this respect. As MacDermott, in a key article points out, this would seem likely to include having active and effective discrimination and harassment policies, and internal grievance procedures. The employer's duty would include an obligation to do what is reasonable to provide employees with information and probably training about such policies and procedures. *See, e.g.*, Therese MacDermott, *The Duty to Provide a Harassment-Free Work Environment*, 37 J. INDUS. REL. 495 (1995); Max Spry, *Workplace Harassment: What Is It, and What Should the Law Do About It?*, 40 J. INDUS. REL. 232 (1998); Jan Lucas, *Sexual Harassment, Current Models of Occupational Health and Safety and Women*, 13 AUSTRALIAN FEMINIST STUD. 59 (1991).

157. Chief Industrial Magistrate's Court, Miller, C.I.M., Dec. 15, 1998 (summarized in CCH, *supra* note 155, ¶ 53-452).

been shown to the young employee by a supervisor. It was revealed that the employer's manual warned against this method of replacing the oil and directed instead that employees were to chop the solid oil up into small pieces before placing it in the stockpot. The injured employee had not been aware of the manual. In addition, the evidence indicated that the employer's training did not specifically address the question of replacing solid oil. The employer pleaded guilty to a charge under § 15(1) of the New South Wales statute and submitted that after the accident had occurred, it had arranged for new signs warning of the dangers of oil burns to be placed on the walls over the cookers. In addition, it was in the process of revising its training program in regard to replacing oil. This case illustrates that a failure on the part of an employer to provide appropriate health and safety information, including training, may result in a contravention of the employer's statutory duty to do what is practicable to secure a safe working environment for employees.

This broad legislative requirement on employers to do what is practicable is supplemented in several statutes by inclusive lists of more specific duties.[158] A number of these more defined obligations relate to the provision of information. They include the following matters:

- Most statutes contain a requirement that employers provide, as reasonably practicable, information and training to employees, in appropriate languages, to enable them to perform their work in a safe manner.[159]
- The Victorian Act requires employers to provide their employees with the name(s) of the employer's representative(s) responsible for health and safety matters.[160]
- The Commonwealth statute contains a requirement that employers covered by the Act consult with trade union(s) and other appropriate persons to develop an occupational health and safety policy to enable continuing cooperation

158. For example, *see* Occupational Health and Safety (Commonwealth Employment) Act § 16(2) (Austl. 1991); Occupational Health and Safety Act 1985, §§ 21(2), (4) (Vic. 1985); Occupational Health and Safety Act §§ 8(1)(a)-(e) (N.S.W. 2000).

159. *See*, *e.g.*, Occupational Health and Safety (Commonwealth Employment) Act § 16(2)(e) (Austl. 1991); Occupational Health and Safety Act § 21(2)(e) (Vic. 1985); Occupational Health and Safety Act § 8(1)(d) (N.S.W. 2000). In addition, most statutes require employers to monitor and keep records relating to the health and safety of employees. *See*, *e.g.*, Occupational Health and Safety (Commonwealth Employment) Act § 16(5) (Austl. 1991); Occupational Health and Safety Act 1985 § 21(4) (Vic. 1985).

160. Occupational Health and Safety Act § 21(4)(e) (Vic. 1985). *See also* Occupational Health and Safety (Issue Resolution) Regulations, Reg. 5 (Vic. 1995).

and consultation between employer and employees.[161] Fulfilling such a requirement would seem to require as a practical matter that the employer provide information to the relevant trade union(s) and employees.

b. Duties to Provide Information Arising from Regulations and Codes of Practice

Numerous regulations and Codes of Practice are relevant when considering an employer's obligation to provide employees with information pertaining to health and safety matters. A comprehensive survey of these documents is not possible here. Rather, some examples of relevant regulations and Codes of Practice follow.

- The National Code of Practice for Manual Handling [National Occupational Health and Safety Commission, 2005 (1990)] provides a model code providing practical assistance in identifying, assessing, and controlling risks associated with manual handling. The Code applies in most States in Australia and to Commonwealth government employees wherever located.[162] The Code requires employers to consult with employees in assessing and monitoring manual handling risks. Victoria has not adopted this national Code, but instead has in place the Occupational Health and Safety (Manual Handling) Regulations (Vic. 1999) and the Code of Practice for Manual Handling (Vic. 2000). These provide for consultation in similar terms as under the national Code. Such requirements for consultation would presumably require employers to provide information to employees in order to ensure that the consultation is meaningful.
- The new National Standard for the Storage and Handling of Workplace Dangerous Goods [National Occupational Health and Safety Commission, 1015 (2001)] and the National Code of Practice for the Storage and Handling of Workplace Dangerous Goods [National Occupational Health and Safety Commission, 2017 (2001)] provide a national framework for the storing and handling of dangerous goods. Victoria is the first jurisdiction to adopt the new standards.[163] Both the national standards and the Victorian provisions require that occupiers of premises

161. Occupational Health and Safety (Commonwealth Employment) Act §§ 16(2)(d), 16(3) (Austl. 1991).

162. CCH, *supra* note 155, ¶ 11-100.

163. *See* Dangerous Goods (Storage and Handling) Regulations (Vic. 2000) and the Code of Practice for the Storage and Handling of Dangerous Goods (Vic. 2000). Both instruments were developed from drafts of the national standards.

where dangerous goods are stored and/or handled, are to inform people on those premises of such information as will enable them to adopt informed health and safety procedures. In addition, the standards require employers to consult with employees and employee representatives who are likely to be affected by dangerous goods stored or handled in the workplace. The provision of information by the employer is expressly required as part of this consultation process. Such information must include the nature of the hazards and properties of the dangerous goods, safety systems in the workplace, and emergency plans for the workplace.

- The Occupational Health and Safety (Incident Notification) Regulations (Vic. 1997) require employers to notify a Victorian government agency immediately after a serious accident has occurred in the workplace. The regulations require the employer to keep a record of such notifications and to make these records available to health and safety representatives, health and safety committees, the injured employee, and a deceased employee's representative.
- The Occupational Health and Safety (Issue Resolution) Regulations (Vic. 1999) include specific requirements on employers to provide information in languages other than English in two circumstances. First, when an employer notifies employees of the management representative who is responsible for dealing with health and safety issues, it must do so in languages that are appropriate. Secondly, where a health and safety issue has been addressed by the management representative and the health and safety representative, details of the resolution must be brought to the attention of employees in any language that is agreed by the parties to be appropriate.
- In 1992, a Code of Practice for the Provision of Occupational Health and Safety Information in Languages Other Than English was issued in Victoria. Other States in Australia have not adopted such an explicit set of principles in relation to workers from a non-English speaking background. This Victorian Code of Practice seeks to assist employers to fulfill their general duties under the Victorian Act, as well as the more particular obligation to provide information and training to employees, in appropriate languages, to enable them to perform their work in a safe manner. The Code of Practice contains recommendations about conducting successful consultation processes in multilingual workplaces, and strategies for assessing and responding to information and training needs in such workplaces.

In addition to regulations and Codes of Practice, occupational health and safety schemes in Australia draw on a range of other standards. The main ones are Australian Standards, issued by the Standards Association of Australia. Some 240 Australian Standards contain technical specifications relating to occupational health and safety matters. Some of these relate to information that employers are obliged to provide to employees, in the form of warning and identification signs.[164]

c. Requirements Relating to Health and Safety Representatives and Committees

The offices and functions of health and safety representatives and committees impose significant obligations on employers to disclose certain information to employees in their capacity as employee-elected representatives. Most Australian statutes provide for the position of health and safety representatives. Health and safety representatives are employees who have been elected by a designated work group of employees to fulfill a range of responsibilities under the relevant statute.[165] They have power to inspect the employer's premises. Further, employers are required to provide representatives with access to information relevant to health and safety matters in the possession of the employer. Certain information is, however, exempt from this disclosure requirement. Medical information about an employee is not to be disclosed to a health and safety representative unless the employee concerned consents to its disclosure or the information is in a form that does not identify the employee concerned.[166] In addition, there are obligations on employers to

164. *See further*, JOHNSTONE, *supra* note 146, at 301-305. Australian Standards issued by the Standards Association of Australia are distinct from national standards promulgated by the National Occupational Health and Safety Commission. The Australian Standards may be incorporated by reference into regulations and Codes of Practice. Incorporation into a regulation will render the Australian Standard legally binding. In addition, evidence of compliance (or non-compliance) with an Australian Standard is admissible and relevant to the question of whether an employer has satisfied a general duty under an occupational health and safety act. *See* R v. Australian Char. Pty. Ltd., 64 I.R. 386 (1996), discussed in JOHNSTONE, *supra* note 146, at 212-213.

165. *See generally* Occupational Health and Safety (Commonwealth Employment) Act, Part 3 (Austl. 1991); Occupational Health and Safety Act, Part IV (Vic. 1985); Occupational Health and Safety Act § 17 (N.S.W. 2000).

166. On the New South Wales scheme, *see* Occupational Health and Safety Act § 18 (N.S.W. 2000).

consult representatives, where practicable, on proposed changes in the workplace that may have a health and safety impact.[167]

In addition to health and safety representatives, most Australian statutes provide for the establishment of health and safety committees. Such committees consist of employee representatives and employer representatives. Their functions may include formulating and distributing (in such languages as appropriate) the rules and procedures of the employer relating to health and safety at the workplace. In addition, committees generally have power to obtain information from the employer regarding health and safety matters, including information about proposed changes to the workplace that could affect health and safety.[168] The Commonwealth statute provides explicitly that Commonwealth government employers must provide information to the committee on health and safety issues in the workplace. The exception is that the employer must not reveal confidential medical information about an employee to the committee unless the employee concerned has consented, or the information is presented in a way that does not identify the employee.[169]

A more rigorous set of obligations regarding information exists in New South Wales. The Occupational Health and Safety Act 2000 (NSW) contains a separate Division requiring employers to consult with employees for the purpose of enabling employees to contribute to the making of decisions affecting their health, safety, and welfare at work.[170] The legislation states that consultation requires that the employer share relevant information about occupational health, safety, and welfare with employees.[171] The consultation may take place with occupational health and safety committee(s), occupational health and safety representative(s), or through other arrangements agreed by the employer and the employees.[172] The Act requires

167. *See*, *e.g.*, Occupational Health and Safety (Commonwealth Employment) Act §§ 28, 30 (Austl. 1991); Occupational Health and Safety Act § 31 (Vic. 1985); Occupational Health and Safety Act § 16 (N.S.W. 2000).

168. *See*, *e.g.*, Occupational Health and Safety (Commonwealth Employment) Act §§ 34, 35 (Austl. 1991); Occupational Health and Safety Act § 31 (Vic. 1985); Occupational Health and Safety Act, Part 2, Division 2 (N.S.W. 2000).

169. Occupational Health and Safety (Commonwealth Employment) Act § 36 (Austl. 1991). For prohibitions imposed on employers disclosing employee information, *see* Chapman & Tham, *supra* note 1.

170. Occupational Health and Safety Act, Part 2, Division 2 (N.S.W. 2000). Note that at the time of writing, a draft regulation has been prepared. *See* Occupational Health and Safety Regulation (Draft) (N.S.W. 2001). This contains consultation requirements.

171. Occupational Health and Safety Act 2000 § 14(a) (N.S.W. 2000).

172. *Id.* § 16.

consultation to occur when risks are assessed, existing risks are reviewed, or when new risks are introduced into the workplace.[173]

B. Tort and Contract

Australian common law provides that an injured employee may recover damages under an action in tort for breach of statutory duty.[174] The statutory duty of relevance here is the employer's duties under the relevant occupational health and safety legislative scheme. Such a civil action provides an alternative (or additional) means for enforcing an employer's statutory occupational health and safety responsibilities.

In addition to a breach of statutory duty action, the common law imposes a duty on employers to take reasonable care for the health and safety of employees.[175] This arises both in the tort of negligence and as an implied term in the contract of employment. It is a term implied in law that employers will exercise reasonable care for the health and safety of their employees.[176] Although the tortious and contractual duties are not identical to the requirements imposed on employers under occupational health and safety statutes, they are similar in scope and meaning. For present purposes, it seems likely then that these tort and contract duties impose similar obligations on employers regarding the provision of information to employees. Employers must do what is reasonable in order to maintain a healthy and safe work environment for their employees. This clearly encompasses providing employees with appropriate information. It would also include, in some cases, the provision of appropriate training to employees.

There is no shortage of case decisions illustrating the tortious obligation on employers to take reasonable care.[177] For example, in

173. *Id.* § 15.

174. *See generally* JOHNSTONE, *supra* note 146, ¶¶ 10.22-10.27.

175. *Id.* ¶¶ 10.1 to 10.16; BROOKS, *supra* note 146, at Ch. 2; CREIGHTON & STEWART, *supra* note 2, ¶¶ 14.40-14.46.

176. As Creighton and Stewart note, the implied contractual duty and the tortious duty are indistinguishable and most plaintiffs now base their action on tort alone. *See* CREIGHTON & STEWART, *supra* note 2, ¶ 14.43.

177. *See*, *e.g.*, Parris v. K-Mart Pty. Ltd. (Supreme Court of the Australian Capital Territory, Higgins, J., Aug. 26, 1999); Sing v. Sterlands Pty. Ltd. (Supreme Court of New South Wales, Court of Appeal, Meagher & Powell, JJA., Sheppard, A.J.A., Dec. 14, 1998); Hallmark-Mitex Pty. Ltd. v. Rybarczyk (Supreme Court of Queensland, Court of Appeal, Pincus, J.A., Demack & Chesterman, JJ., Sept. 4, 1998); Zammit v. The Queensland Corrective Services Commission (Supreme Court of Queensland, Muir, J., Sept. 1, 1998). Summaries of these cases are included in CCH, *supra* note 155, ¶ 52ff.

State of Queensland v. Keeys,[178] the State of Queensland was found to be negligent when the Police Commissioner failed to warn a police officer of a threatening letter received a fortnight earlier. The letter made reference to the activities of the police dog squad in a particular area in Queensland. Keeys was shot at in the area referred to in the letter whilst driving in a marked police car used by the dog squad. Although physically uninjured, Keeys suffered post-traumatic stress disorder as a consequence of the shooting. In another case, *Jang v. Australian Meat Holdings Pty. Ltd.*,[179] an employer failed to warn a Queensland meat worker about the risks of contracting Q fever. The employer had known that Q fever was endemic in abattoirs in Queensland and that a vaccine against it was available. The worker developed Q fever and successfully sued his employer in the tort of negligence. The court held that the employer's failure to warn constituted a lack of reasonable care.

In many respects, the common law is of declining practical importance in the area of occupational health and safety, especially regarding compensation for work-related injury and illness. This is largely because most Australian jurisdictions prohibit or restrict common law actions by employees.[180] These limitations apply to actions for breach of statutory duty, the tort of negligence, and breach of contract. Common law actions for work related injury and illness have been abolished in South Australia and the Northern Territory. The Commonwealth, New South Wales, Victorian, Queensland, and Western Australia Parliaments have all restricted the rights of employees to bring common law actions against employers. Only employees in Tasmania and the Australian Capital Territory continue to have an unrestricted right to bring a common law action.[181]

IV. INFORMATION RELATING TO AN EMPLOYER'S DISCRIMINATION, HARASSMENT, AND EQUAL OPPORTUNITY POLICIES AND PROGRAMS

Employers are under a number of legal obligations regarding the provision of information to employees on their policies and programs on discrimination, harassment, and equal opportunity. The main

178. Supreme Court of Queensland, Court of Appeal, McPherson & Davies, J.A., Moynihan, J., Aug. 5, 1997.

179. Supreme Court of Queensland, Douglas, J., Mar. 16, 2000.

180. *See* CREIGHTON & STEWART, *supra* note 2, ¶ 14.45. On Victoria, *see* the Accident Compensation (Common Law and Benefits) Act § 18 (Vic. 2000); Christopher Arup, *WorkCover 1997 and the Abolition of the Common Law*, 11 AUSTRALIAN J. LAB. L. 186 (1998).

181. CREIGHTON & STEWART, *supra* note 2, ¶ 14.45.

requirements arise under two conceptually separate statutory regimes. Although there is a clear conceptual distinction between these two schemes, the labels applied to describe the two differ from commentator to commentator. We identify the first legislative scheme as discrimination legislation and the second as affirmative action/equal opportunity legislation. These are examined in turn.

A. Discrimination Legislation

1. Regulatory Framework

Parliaments in Australia have responded to the issues of workplace discrimination and harassment through a series of Commonwealth statutes and separate State and Territory Acts.[182] There are a number of Commonwealth statutes that prohibit discrimination on certain grounds throughout the whole of Australia.[183] In addition, each State and Territory has its own discrimination statute that applies in that particular State or Territory.[184] Where a Commonwealth statute and a State or Territory Act are inconsistent, the Commonwealth legislation prevails and the State or Territory statute is inoperative to the extent of the inconsistency.[185] An important consequence of this rule is that Commonwealth public sector workers will likely be covered by the Commonwealth discrimination statutes to the exclusion of the relevant State or Territory discrimination statute.[186]

182. More recently, and particularly since 1994, Parliaments have sought to incorporate discrimination objectives into industrial and workplace relations regimes. For the last 100 years or so, discrimination in the workplace and industrial law were seen as separate or discrete areas of regulation and law reform projects. *See* Rosemary Hunter, *Women Workers and the Liberal State: Legal Regulation of the Workplace 1880s-1980s, in* SEX, POWER AND JUSTICE: HISTORICAL PERSPECTIVES ON LAW IN AUSTRALIA (D. Kirkby ed., 1995); Therese MacDermott, *Equality of Opportunity in a Decentralised Industrial Relations System: The Intersection of Minimum Labour Standards and Anti-Discrimination Legislation*, *in supra* note 82 (McCallum, McCarry & Ronfeldt eds.); Margaret Thornton, *Discrimination Law/Industrial Law: Are They Compatible?*, 59 AUSTRALIAN Q. 162 (1987).

183. Racial Discrimination Act (Austl. 1975) (covers race, color, descent, national or ethnic origin); Sex Discrimination Act (Austl. 1984) (covers sex, marital status, pregnancy or potential pregnancy, dismissal on the ground of family responsibilities); Human Rights and Equal Opportunity Commission (Austl. 1986) (provides for conciliation in relation to a list of grounds: age, medical record, criminal record, impairment and disability, marital status, nationality, sexual preference, trade union activity); Disability Discrimination Act (Austl. 1992) (covers disability).

184. Equal Opportunity Act (Vic. 1995); Anti-Discrimination Act (N.S.W. 1977); Anti-Discrimination Act (Qld. 1991); Equal Opportunity Act (S.A. 1984); Equal Opportunity Act (W.A. 1984); Anti-Discrimination Act (Tas. 1998); Discrimination Act (A.C.T. 1991); Anti-Discrimination Act (N.T. 1992).

185. This is a reflection of § 109 of the Australian Constitution.

186. *See*, *e.g.*, Dao v. Australian Postal Commission, 162 C.L.R. 317 (1987); Commonwealth Banking Corporation v. Duncan, E.O.C. ¶ 92-216 (1988).

Although no two Australian discrimination statutes are identical, most follow a broadly similar pattern of prohibiting discrimination by employers against employees on a range of grounds.[187] As such, these statutes will be discussed together.

The statutes apply generally to both employees and non-employees, such as independent contractors.[188] The grounds covered under the different statutory schemes include race, ethnicity, national origin, sex, marital status, family responsibilities, disability, sexual preference, age, and trade union activity. The concept of discrimination is defined in the Australian legislation as including a concept of direct discrimination (disparate treatment) and indirect discrimination (disparate impact).[189]

The Commonwealth and State statutes contain a number of exemptions to the prohibition on direct and indirect discrimination. Where an exemption is applicable, it takes effect to exonerate otherwise unlawful discriminatory behavior. The range and scope of exemptions differs from Act to Act. The provisions containing exemptions are numerous and include:

- unjustifiable hardship in relation to claims of discrimination on the ground of disability;
- steps taken in order to comply with other legislation; and,
- the religious practices of religious bodies.[190]

187. On discrimination legislation in Australia, *see generally* CHRIS RONALDS, DISCRIMINATION LAW AND PRACTICE (1998); ROSEMARY HUNTER, INDIRECT DISCRIMINATION IN THE WORKPLACE (1992); GRETCHEN POINER & SUE WILLS, THE GIFTHORSE: A CRITICAL LOOK AT EQUAL EMPLOYMENT OPPORTUNITY IN AUSTRALIA (1991); MARGARET THORNTON, THE LIBERAL PROMISE: ANTI-DISCRIMINATION LEGISLATION IN AUSTRALIA (1990).

188. The definitions of employment in most of the statutes are defined to include a "contract for services." This phrase means a non-employee type relationship. *See*, *e.g.*, Racial Discrimination Act § 3(2) (Austl. 1975) (definition of employment); Sex Discrimination Act § 4(1) (Austl. 1984) (definition of employment); Human Rights and Equal Opportunity Commission Act § 3(1) (Austl. 1986) (definition of discrimination); Disability Discrimination Act § 4(1) (Austl. 1992) (definition of employment); Equal Opportunity Act § 4 (Vic. 1995) (definition of employment); Anti-Discrimination Act § 4(1) (N.S.W. 1977) (definition of employment).

189. Direct discrimination is based on a model of equality that aims for equal (same) treatment. Direct discrimination is defined to mean less favorable treatment on the grounds of an attribute. Indirect discrimination arises where a requirement, practice, or policy that exists in a workplace has the effect of substantially disadvantaging a group of employees identified by a protected ground in circumstances in which it is not reasonable to impose the requirement. Indirect discrimination provides a framework from which to challenge dominant norms in workplaces where it can be shown that they substantially disadvantage a segment of the workforce. This model is based on an ideal of substantive equality. *See generally* HUNTER, *supra* note 187, at 3-8.

190. *See generally* RONALDS, *supra* note 187, at Ch. 11.

The Equal Opportunity Act (Vic. 1995) contains an additional provision that exempts businesses in relation to hiring decisions where the business employs no more than the equivalent of five full-time employees.[191]

In addition to the provisions relating to direct and indirect discrimination, the Commonwealth Sex Discrimination Act 1984 (Cth) and all State and Territory legislation prohibits sexual harassment in workplaces. Sexual harassment is defined in the legislation in terms of an unwelcome sexual advance or request for sexual favors, or other unwelcome conduct of a sexual nature that a reasonable person would anticipate, in those circumstances, would offend, humiliate, or intimidate the person harassed.[192] The exemptions noted in the previous paragraphs are not applicable in relation to issues of sexual harassment in workplaces.

2. Obligations to Provide Information Under Discrimination Statutes

Australian discrimination legislation renders an employer vicariously liable for the discriminatory and harassing acts of an employee where the employer has failed to take all reasonable steps to prevent that conduct from occurring.[193] In practice, this means that employers who have active and effective discrimination (and harassment) policies and procedures in place may be able to avoid liability by establishing that they have taken all reasonable steps to prevent the discriminatory or harassing conduct from arising. It is clear that encompassed within this requirement of having effective policies and procedures is an obligation to do what is reasonable in terms of informing (and training) employees in relation to the employer's policies and procedures. Just exactly what is required of an employer in order to avoid vicarious liability is shaped by all the circumstances, including the size and financial resources of the employer and the nature of the existing workplace culture.[194]

191. Equal Opportunity Act § 21 (Vic. 1995).

192. *See*, *e.g.*, Sex Discrimination Act § 28A (Aust. 1984); Equal Opportunity Act § 85 (Vic. 1995); Anti-Discrimination Act § 22A (N.S.W. 1977).

193. *See*, *e.g.*, Racial Discrimination Act § 18A (Austl. 1975); Sex Discrimination Act § 106 (Austl. 1984); Equal Opportunity Act § 103 (Vic. 1995); Anti-Discrimination Act § 53 (N.S.W 1977). *See further*, HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, SEXUAL HARASSMENT—A CODE OF PRACTICE (1996). Employers may be liable directly or may be liable for inciting or aiding a contravention of the relevant statute. *See*, *e.g.*, Racial Discrimination Act § 17 (Austl. 1975); Sex Discrimination Act § 105 (Austl. 1984); Equal Opportunity Act §§ 98, 99 (Vic. 1995); Anti-Discrimination Act § 52 (N.S.W. 1977).

194. *See generally* HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION, *id.* at 193; CCH, AUSTRALIAN AND NEW ZEALAND EQUAL OPPORTUNITY LAW AND PRACTICE, ¶ 61-000ff (CCH Australia Ltd., 2000).

A case example illustrates these points. In *Hopper v. Mt. Isa Mines Ltd.*,[195] the complainant, Hopper, was one of the first women apprentices to work for Mt. Isa Mines Ltd. ("MIM"), a large mining interest operating in Queensland. It was clear that there was considerable resistance within the MIM workforce to the women apprentices working underground in the mine. The women were told by management at the outset that they would have to make their own way and accept the existing (male) culture and atmosphere at the mine. The tribunal was satisfied that, over the course of two years, Hopper was subjected to several instances of sexual harassment and sex discrimination prior to her leaving the employment of MIM. Of relevance here was the issue of MIM's vicarious liability for the harassment and discrimination perpetrated by several members of its male workforce. MIM had taken a number of steps that it argued were designed to prevent discrimination and harassment in its workplaces. It had in place sexual harassment and discrimination policies in addition to an action plan to implement those policies. Managers and employees with supervisory roles had attended in-house training sessions on non-discrimination. In addition, memos were circulated to managers, supervisors, and senior officers about discrimination issues and MIM's policies. An article appeared in the company's magazine setting out MIM's discrimination policies. Copies of the magazine were made available to all employees and they were encouraged to read it. There was, in addition, information on MIM's policies in the handbooks distributed to supervisors and also to employees upon their commencement of work. MIM argued that it had placed a clear responsibility on managers and supervisors to take the non-discrimination message to employees under their supervision. Unfortunately, there was no follow up by MIM to ensure that the policy had percolated down to its less senior employees. It clearly had not. The tribunal found that MIM was vicariously liable. Although the company had taken some steps towards establishing a non-discriminatory workplace culture, it had not done all that was reasonable in the circumstances. Importantly, the tribunal determined that MIM had done nothing to prepare the male workforce for the first intake of female apprentices. Information, education, and training ought to have been provided to all in the existing workforce. Secondly, MIM had failed to ensure that its policies were communicated effectively to employees. The tribunal concluded that there was "much more that could and should have

195. E.O.C. ¶ 92-879 (1997).

been done" by MIM, including the provision of information to employees.[196] This case clearly illustrates that employers have an indirect legal obligation under discrimination legislation to provide information and training to their employees, in an appropriate manner, on the employer's discrimination and harassment policies.

B. Affirmative Action/Equal Opportunity Legislation

In addition to enacting discrimination legislation, some Parliaments have passed statutes that impose obligations on employers to develop programs with the objective of addressing structural issues of discrimination and disadvantage in workplaces.[197] In Australia, this legislation has been referred to generally as affirmative action legislation, although quotas and preferential treatment of designated groups have never been part of the Australian legislative mechanisms. Legislation relevant to the private sector exists at the Commonwealth level. In addition, several parliaments have enacted legislation to regulate practices in the public sector. The private sector legislation is examined first. This is followed by an overview of the legislation relevant in the public sector.

1. Commonwealth Legislation Applicable to the Private Sector

The principal Commonwealth statute, the Equal Opportunity for Women in the Workplace Act 1999, applies in relation to gender alone.[198] The Act imposes obligations on several categories of private sector employers, including those with more than 100 employees and higher education institutions, such as universities. The legislation requires these employers to prepare a profile of the gender and occupational composition of their workforce, analyze this profile for the purpose of identifying priority issues to bring about equal opportunity for women, and then to develop, implement, monitor, and evaluate an "equal opportunity for women in the workplace program." The Act provides that in developing such a program,

196. *Id.* ¶ 77-155.

197. *See*, *e.g.*, Equal Opportunity for Women in the Workplace Act § 8(1)(b) (Austl. 1999); Public Service Act § 18 (Austl. 1999); Equal Employment Opportunity (Commonwealth Authorities) Act, Part 2 (Austl. 1987); Anti-Discrimination Act, Part 9A (N.S.W. 1977).

198. This Act replaced the earlier Affirmative Action (Equal Employment Opportunity for Women) Act (Austl. 1986). For a discussion of this new statute, *see* Carol Andrades, *Women, Work & Unfinished Business: Equal Opportunity for Women*, 13(2) AUSTRALIAN J. LAB. L. 171 (2000).

employers must consult with their employees (or their nominated representatives),[199] particularly their employees who are women.[200] One of the explicit objectives of the Act is to "foster workplace consultation between employers and employees on issues concerning equal opportunity for women in relation to employment."[201]

The government agency responsible for the administration of this Commonwealth Act has released draft guidelines for the purpose of providing employers with assistance in preparing their workplace program.[202] These guidelines note that the Act does not specify how an employer ought to carry out the process of consulting with employees. It, however, suggests that surveys of staff and focus groups would be appropriate mechanisms through which consultation could take place. Although the guidelines envisage that the major flow of information will be from employees to management, they clearly anticipate that consultation would usually also include a flow of information from management to the employee level. This might include feedback on survey results, information about the employer's equal opportunity policy, and other information on equality issues in the workplace. In addition, the guidelines note that an employer may need to provide training to its workforce to ensure that the consultation on equal opportunity issues is a meaningful process. Clearly, some information about the objectives of the statutory process and the employer's policy on such matters ought to be provided to employees by the employer. In this sense, the Commonwealth statute indirectly requires employers to provide certain information to employees.

Employers covered by the Equal Opportunity for Women in the Workplace Act 1999 (Cth) are required to submit an annual report to the government agency detailing the outcomes of their program over the previous 12 months. This requirement may be waived by the agency where the employer has complied with the reporting requirement for three consecutive years. Failure to submit a report when one is due leads to the employer being named in Parliament. Further, Commonwealth government policy provides that such an

199. The previous provision explicitly required consultation with each trade union with a member affected by the proposed program. *See* Affirmative Action (Equal Employment Opportunity for Women) Act § 8 (Austl. 1986). Clearly, employees may appoint a trade union as a "nominated representative" for the purposes of the current provision.

200. Equal Opportunity for Women in the Workplace Act § 8(1)(b) (Austl. 1999).

201. *Id.* § 2A.

202. Equal Opportunity for Women in the Workplace Agency, THE WORKPLACE ANALYSIS TOOLKIT: DRAFT (Feb. 2000). *See, in particular*, 10-13.

employer may be ineligible for government contracts and certain forms of industry assistance.[203]

2. Legislation Applicable in the Public Sector

Several parliaments in Australia have enacted legislation to require the development of programs to bring about equal opportunity in the public sector and in public authorities established under legislation.[204] Some of this legislation explicitly requires that employees be provided with information about the program, its development, and monitoring.[205] Other statutes, although not explicitly requiring the provision of information to employees, appear to implicitly embrace such a requirement.[206] These public sector schemes are generally wider in their application than gender alone. For example, the legislation relating to Commonwealth public sector authorities applies to officers and employees of Aboriginal and Torres Strait Islander descent, migrants and their children for whom English is a second language, and people with disabilities.[207] The New South Wales legislation applies in relation to women, members of racial minorities and people with physical disabilities.[208]

V. MISCELLANEOUS INFORMATION

In addition to the regulation of information discussed above, several other areas of law impose requirements on employers to disclose certain types of information to their employees. The main ones are discussed.[209]

203. Andrades, *supra* note 198, at 173.

204. *See*, *e.g.*, Public Service Act, § 18 (Austl. 1999); Equal Employment Opportunity (Commonwealth Authorities) Act, Part 2 (Austl. 1987); Anti-Discrimination Act, Part 9A (N.S.W. 1977). Victoria no longer has legislation in force requiring the development and implementation of programs for designated groups in State public authorities.

205. *See*, *e.g.*, Equal Employment Opportunity (Commonwealth Authorities) Act § 6 (Austl. 1987); Anti-Discrimination Act § 122J(2) (N.S.W. 1977).

206. *See*, *e.g.*, Public Service Act § 10(1)(i) (Austl. 1999).

207. *See*, *e.g.*, Equal Employment Opportunity (Commonwealth Authorities) Act § 3(1) (definition of "designated groups") (Austl. 1987).

208. Anti-Discrimination Act § 122C(b) (N.S.W. 1977).

209. In addition to the areas explored in this article, the Australian Corporations Law imposes obligations on insolvent companies to provide certain information to their employees in their capacity as creditors. *See generally* H.A.J. FORD, THE HON. JUSTICE R.P. AUSTIN & I.M. RAMSAY, FORD'S PRINCIPLES OF CORPORATIONS LAW Ch. 25-27 (1999); P. HANRAHAN, I. RAMSAY & G. STAPLEDON, COMMERCIAL APPLICATIONS OF COMPANY LAW Ch. 23-24 (2000).

A. Employee Records

Both the Workplace Relations Act and the Industrial Relations Act require employers to provide various particulars in employee pay-slips. In the case of the Workplace Relations Act, this requirement applies to employees covered by an award, enterprise agreement, or AWA. The Industrial Relations Act, however, applies to all employees. The required particulars include the period of employment to which the remuneration relates, the gross amount of remuneration, the amount paid as overtime, and the details of deductions, including those for taxation and superannuation purposes.[210]

Both Acts also impose detailed requirements on employers to maintain records with respect to their employees. The contents of these records include details of employees' remuneration, periods of leave, and classifications under the various industrial instruments.[211] In contrast with the Industrial Relations Act, the Workplace Relations Act confers rights on employees and former employees to inspect, as well as obtain copies of their records.[212]

B. Parental and Adoption Leave

Both the Workplace Relations Act and the Industrial Relations Act prohibit employers from employing an employee to replace one who is on parental or adoption leave, unless the employer has advised the replacement employee that his or her employment is only temporary and of the rights of the employee who is on parental or adoption leave.[213] These rights include the right of the employee on leave to resume his or her employment upon return. The Industrial Relations Act imposes further obligations on employers that become aware that an employee has become pregnant or is adopting a child to inform them of their parental and adoption leave entitlements, as well

210. Workplace Relations Act § 353A(2) (Austl. 1996); Workplace Relations Regulations, Reg. 132B (Austl. 1996); Industrial Relations Act § 123 (N.S.W. 1996); Industrial Relations (General) Regulation, Reg. 6 (N.S.W. 1996).

211. Workplace Relations Act § 353A(1) (Austl. 1996); Workplace Relations Regulations, Regs. 131A-J (Austl. 1996); Industrial Relations Act § 129 (N.S.W. 1996); Industrial Relations (General) Regulation, Regs. 7-13 (N.S.W. 1996).

212. Workplace Relations Regulations, Reg. 131L(1)(a) (Austl. 1996).

213. Section 69 of the Industrial Relations Act (N.S.W. 1996) is the provision relating to both parental and adoption leave. The relevant provisions of the Workplace Relations Act (Austl. 1996) are § 170KB, Schedule 1A; §§ 15 & 27, Schedule 14; § 25 (parental leave), Schedule 1A; § 40; and, Workplace Regulations, Reg. 30ZB (adoption leave) (Austl. 1996).

as the notification requirements employees need to meet before being able to access such entitlements. [214]

C. Workplace Surveillance Act 1998 (NSW)

Another situation of relevance to the provision of information to employees is non-covert video recording in New South Wales workplaces. As discussed in the first article of this project, the Workplace Video Surveillance Act 1998 (NSW) prohibits employers conducting covert video surveillance of their workplaces.[215] For video surveillance to be non-covert, the employer is required to provide employees with written notice of the surveillance, in addition to signage to alert employees that they may be under video surveillance. The cameras must also be clearly visible.[216] A Code of Practice has been issued on the use of covert video recording in New South Wales workplaces.[217] The Code is not legally binding. It recommends that employers provide reasonable notice to employees of the intention to use video cameras in the workplace. In addition, it recommends that notices explaining the reasons for the surveillance, and the areas in the workplace to be under surveillance, be displayed in the workplace and given to each employee. It is also recommended that conspicuous signs be displayed informing employees and members of the public that the area is under video surveillance.

D. Information Relating to Change

As discussed above, the NSWIRC is required, upon application, to insert into an award various matters, including employment protection provisions and provisions relevant to technological change.[218] Besides imposing obligations in the event of proposed terminations, the standard clause used by the NSWIRC also imposes requirements in the event of an employer having made a definite decision to introduce major changes in work organization that are

214. Industrial Relations Act § 67 (N.S.W. 1996).

215. More precisely, the Act prohibits covert surveillance at workplaces without an authority from a magistrate: §§ 7, 9 & 10. For an extensive discussion of the issue of electronic workplace surveillance, *see* Julian Sempill, *Under the Lens: Electronic Workplace Surveillance*, 14 AUSTRALIAN J. LAB. L. (forthcoming 2001).

216. Workplace Video Surveillance Act § 4 (N.S.W. 1998).

217. WORKING PARTY ON VIDEO SURVEILLANCE IN THE WORKPLACE, CODE OF PRACTICE FOR THE USE OF COVERT VIDEO SURVEILLANCE IN THE WORKPLACE, *available at* http://www.lawlink.nsw.gov.au/pc.nsf.

218. *Id.* § 21. Section 24 of the Act defines "employment protection provisions," whereas § 25 stipulates some matters that may be included in provisions relevant to technological change.

likely to have significant effects on employees. Such effects, while including terminations, also encompass elimination or diminution of job opportunities and alterations in hours of work. In such situations, employers are required to discuss as soon as practicable with the affected employees and their unions the changes, their effects, as well as measures to avert or minimize any adverse effects. To facilitate such discussion, the employer is required to provide relevant information, including information relating to the proposed changes and the anticipated effects on employees.[219]

E. Trade Practices Legislation

Trade practices legislation largely relates to the sale of goods and services to consumers and transactions between businesses. Its application to employment contracts or, more generally, the sale of labor to employers is limited. Two types of provisions, however, are worthy of mention. The first is § 52 of the Trade Practices Act 1974 (Cth), and its corresponding State provisions, which enact a standard of conduct prohibiting misleading or deceptive conduct in trade or commerce. The other is § 53B of the same Act and its corresponding State provisions, which expressly prohibit misleading or deceptive conduct in relation to the offering of employment.

Section 52 of the Trade Practices Act 1974 (Cth) states that "(a) corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive." Section 42 of the Fair Trading Act 1987 (NSW) and § 11 of the Fair Trading Act 1999 (Vic.) are cast in identical terms, except that they are not confined to corporations, but extend to all legal entities.[220]

The significance of such provisions to the employment context has yet to be definitively resolved. While it is clear that the internal affairs of an employer, in particular, communications between an employee and an employer, or between employees themselves in the course of their employment, do not constitute conduct "in trade or commerce,"[221] such provisions may apply to:

- the negotiation of employment contracts with prospective as well as existing employees;[222]

219. *See supra* note 126-27.

220. Section 52 covers all types of conduct that are engaged through use of postal, telegraphic, telephone services, radio, or television broadcast. *See* Section 6(3) of the Trade Practices Act (Austl. 1974).

221. Concrete Constructions (NSW) Pty. Ltd. v. Nelson, 169 C.L.R. 594 (1990).

222. The debate surrounding the applicability of § 52 of the Trade Practices Act (Austl. 1974), and its corresponding State provisions, to the negotiation of employment contracts is

- the termination of employment contracts;[223] and,
- conduct relating to other contracts made between employees and employers, for instance, a loan contract.[224]

These provisions could very well require employers to provide information to their employees in certain situations. For instance, an employer could be required to provide information to correct an employee's incorrect belief about his or her entitlements under a proposed contract.[225]

Trade practices legislation also contains a more direct prohibition with respect to the negotiation of employment contracts. Section 53B of the Trade Practices Act 1974 (Cth) states:

> A corporation shall not, in relation to employment that is to be, or may be, offered by the corporation or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

As with § 52 of the same Act, there are corresponding State provisions that are identical, save that they cover conduct by all legal entities.[226] In some respects, § 53B is narrower than § 52. It only protects persons seeking employment and is confined to particular types of representations. On the other hand, § 53B extends to conduct liable to mislead, whereas the outer-limit of § 52 is conduct likely to mislead or deceive. It would appear that the former is wider

somewhat unnecessary given the express prohibition contained in § 53B of the Act; *see* the discussion below.

223. The High Court in Concrete Constructions (NSW) Pty. Ltd. v. Nelson, 169 C.L.R. 594 (1990), specifically left these questions open. After concluding that § 52 of the Trade Practices Act (Austl. 1974) did not extend to the internal affairs of a corporation or purely internal communications between employees of a corporation, the majority noted "(t)he position might well be different if the misleading statement was made in the course of, or for the purposes of, some trading or commercial dealing between the corporation and the particular employee." Subsequent Federal Court decisions have been divided on this issue. For decisions supporting the applicability of § 52 to the negotiation and termination of employment contracts, *see* Barto v. GPR Management Services Pty. Ltd., 33 F.C.R. 389, 394-5 (1991); Callinan v. Gilro-E R.G. Pty. Ltd. (Unreported, Federal Court, O'Loughlin, J., Nov 15, 1996); Saad v. TWT, A.I.L.R. 4208 (1995); Chaplin v. Birdogan, 146 F.L.R. 243 (1998); and, McCormick v. Riverwood International Australia Pty. Ltd., 167 A.L.R. 689, 695-6 (1999). For contrary decisions, *see* Mulcahy v. Hydro-Electric Commission, 85 F.C.R. 170, 212 (1998) and Martin v. Tasmania Development and Resources, 163 A.L.R. 79, 97-8 (1999).

224. *See* Lockhart, J.'s *obiter dicta* in Roberts v. Hongkongbank of Australia Ltd., A.I.L.R. ¶ 213 (1993).

225. This was the submission made in McCormick v. Riverwood International Australia Pty. Ltd. (Federal Court of Australia, Weinberg, J., Unreported, ¶ 11, Nov. 26, 1999). Judge Weinberg, however, found it unnecessary to decide this point because his Honor found for the applicant on another ground.

226. Fair Trading Act § 46 (N.S.W. 1987) and Fair Trading Act § 13 (Vic. 1999). As with § 52, § 6(3) of the Trade Practices Act (Austl. 1974) similarly extends the reach of § 53B to cover all types of conduct engaged through use of postal, telegraphic, telephone services, radio, or television broadcast.

than the latter. Secondly, while breach of both provisions gives rise to civil remedies,[227] breach of § 53B is a criminal offense.[228]

It is clear that § 53B and its like provisions are breached by advertising non-existent employment positions[229] or misrepresenting the duties required by an employment position.[230] Breaches of this provision have also been found by a failure to provide information about the actual duties of an employment position in the context of statements misrepresenting the nature of the position. In *Dawson v. Australian Consolidated Reserves*,[231] the defendants advertised for a "Girl Friday" with the advertisement stating that the wages of the position were "(e)nvisaged to (be) $260 pw initially." In reality, there was no such position and no such opportunity to earn the specified income. Judge Toohey found the advertisement, in these respects, to be a breach of § 53B. His Honor also found that the advertisement's failure to indicate that the defendants were seeking an agent to sell certain goods the defendants were handling, and that remuneration was determined by commission on sales, were additional breaches of § 53B.

F. Implied Term of Mutual Trust and Confidence

As discussed in the first article produced in this project, it appears that Australian courts now recognize that there is an implied term in contracts of employment that the employer will not engage in conduct that is likely to destroy or seriously undermine the employment relationship. As noted, the scope and meaning of this implied duty in Australia is far from clear.[232] Given this, it is highly likely that at some stage in the future, an Australian court will determine that in the circumstances before it, the implied obligation requires the employer to provide certain information to an employee. This might arise, for

227. *See*, *e.g.*, Trade Practices Act §§ 80, 82 (Austl. 1974); Fair Trading Act §§ 65, 68 (N.S.W. 1987); and, Fair Trading Act §§ 34 (injunctions), 37 (damages) (Vic. 1999).

228. Trade Practices Act § 79 (Austl. 1974); Fair Trading Act § 62 (N.S.W. 1987); and, Fair Trading Act § 32 (Vic. 1999).

229. Director-General of the Department of Fair Trading v. Sims (New South Wales Supreme Court, Simpson, J., Unreported, Dec. 16, 1999); Wilde v. Menville Pty. Ltd., A.T.P.R. ¶ 40-195 (1981).

230. *See* Holloway v. Gilport; Holloway v. Zygaldo, A.T.P.R. ¶¶ 41-408, 40, 526-8 (1995), where Hunt, C.J. accepted this proposition, but rejected the argument in the matter before his Honor on findings of fact. In McKellar v. Container Terminal Management Services Ltd., 165 A.L.R. 409, 425 (1999), an interesting argument was put that § 53 was breached by a failure to advise prospective employees that they were engaged in a plan to replace union labor. This matter has yet to proceed to trial.

231. A.T.P.R. ¶ 40-374 (1983).

232. Chapman & Tham, *supra* note 1.

example, where a private sector employee seeks access to the contents of his or her personnel file, including any assessments by the employer of his or her work performance. Alternatively, it might conceivably arise where the employer has been the subject of sustained media speculation about future wide-ranging redundancies. In such a situation, the implied term might mean that in order not to seriously undermine the employment relationship, the employer ought to provide its workforce with information about its financial position and projected business targets. The test is likely to be an objective one and directed at whether the employer's behavior has seriously undermined or destroyed the relationship between employer and employee.

Australian courts might very well take their cue from the English courts that have demonstrated a willingness to impose contractual obligations on employers to provide certain information to employees. English courts have recognized implied contractual terms requiring employers to provide certain information to employees about, for example, their legal rights, or the employer's internal grievance procedure. Although in these cases, the term said to be breached was not one of mutual trust and confidence, and Brodie suggests that these cases may be more appropriately seen as instances of the implied term of mutual trust and confidence.[233]

G. Tort of Misfeasance in Public Office

The tort of misfeasance in public office has some application in this context. It renders a public officer personally liable for an unauthorized act done maliciously in the purported discharge of his or her public duties.[234] This tort would apply to situations where a public official has the power to direct an employer to terminate the employment of an employee. For instance, in *Sanders v. Snell*, the plaintiff was employed by a government tourist bureau. The Tasmanian Minister for Tourism was empowered to issue binding directions relating to the conduct of the bureau's affairs. This

233. W.A. Goold v. McConnell, I.R.L.R. 516 (1995); Scally v. Southern Health Board, I.C.R. 771 (1991), discussed in Douglas Brodie, *The Heart of the Matter: Mutual Trust and Confidence*, 25 INDUS. L.J. 121, 123-125 (1996).

234. Northern Territory of Australia v. Mengel, 185 C.L.R. 307 (1996); Farrington v. Thomson & Bridgland, V.R., 286, 293 (1959); Sanders v. Snell, 196 C.L.R. 329 (1998). For a discussion of the latter case, *see* Greg McCarry, *Termination of Employment, Payment in Lieu of Notice, Garden Leave and the Right to Work*, 12 AUSTRALIAN J. LAB. L. 56 (1999).

included the bureau's conduct of employment matters.[235] The High Court found that this power, when exercised to direct the termination of employment of the plaintiff, attracted the requirements of procedural fairness as it clearly affected the plaintiff's livelihood.[236] In the context of allegations of misconduct or incompetence, as alleged in *Sanders*, these requirements would mandate that the plaintiff be advised of the case against him or her, as well as be provided with an opportunity to respond.

Whether the requirements of procedural fairness would attach to a public sector employer's exercise of its power to employ and dismiss employees is less clear. The High Court suggested in *Sanders* that the scope of such power might be interpreted to be equivalent to the scope of the common law power to employ and dismiss.[237] Given that it is well established that the common law power to dismiss is not subject to the requirements of procedural fairness,[238] such an interpretation would exclude the requirements of procedural fairness, despite the fact that the power to dismiss clearly affects the employee's livelihood.[239] Finally, the difficulty in establishing that the impugned act was done maliciously should also be borne in mind.[240]

H. New South Wales' Unfair Contracts Jurisdiction

The New South Wales Industrial Relations Commission has a broad jurisdiction to review unfair contracts.[241] While this jurisdiction

235. Sanders v. Snell, 72 A.L.J.R. 1507 (1998); 157 A.L.R. 491 (1998); 196 C.L.R. 329, 332-37 (1998).

236. 196 C.L.R 329, 347-48 (1998).

237. *Id.* at 347. Heerey, J., in Martin v. Tasmania Development Resources, 163 A.L.R. 79, 98 (1999), implicitly adopted a different view.

238. Ridge v. Baldwin, A.C. 40, 65 (1964); Byrne v. Australian Airlines, 185 C.L.R. 410, 443 (1995).

239. In Kioa v. West, 159 C.L.R. 550, 584 (1985), Mason, J. stated that, "(t)he law has now developed to the point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary intention." The significance of interpreting the statutory power to hire and dismiss employees as equivalent to the common law power to hire and dismiss is that it will establish "clear manifestation of a contrary intention."

240. Upon remission from the High Court, Beaumont, C.J., following Three Rivers District Council v. Governor and Company of the Bank of England, 2 W.L.R. 1220 (2000), identified two situations in which the requirement of malice was met: "targeted malice," where the public officer specifically intended to injure the plaintiff, and knowledge of or reckless indifference to the illegality of the act and its consequences to the plaintiff. *See* Snell v. Sanders (Unreported, Supreme Court of Norfolk Island, Beaumont, C.J., ¶¶ 82-9, Nov. 24, 2000).

241. For a general discussion of this jurisdiction, *see* M. Baragry, *Certain Injustice or Uncertain Justice: Developments in Unfair Work Contract Law*, *in* INDIVIDUAL CONTRACTS AND WORKPLACE RELATIONS (A. Frazer, R. McCallum & P. Ronfeldt eds., 1997); ACIRRT, WORKING PAPER NO. 5, SYDNEY. The Federal Court has a similar jurisdiction conferred by §§

was originally introduced to regulate the growth of contract labor in the milk, bread, and building industries that was undermining the New South Wales award system,[242] its scope extends beyond contract labor and encompasses employees.

This is because the NSWIRC's jurisdiction in this respect extends to "any contract whereby a person performs work in any industry."[243] Apart from the express exclusion of industrial instruments under the Industrial Relations Act (N.S.W. 1996) (for instance, awards and enterprise agreements made under that Act), the term "contract" is broadly defined to mean "any contract or arrangement, or any related condition or collateral arrangement."[244] The authorities make it clear that this definition includes employment contracts.[245] It should, however, be noted that an amendment made in 1998 excludes from the Commission's jurisdiction contracts of employment that are alleged to be unfair for a reason that could be a basis for an application in relation to an unfair dismissal under the Act.[246] The extent of this exclusion is unclear. A recent decision of the Full Bench of the Commission has expressly stated that the provision does not exclude all claims involving dismissals. According to the Commission, a claim is less likely to be excluded if it is directed not at the fairness of the dismissal, but at the fairness of the terms relating to the termination of the contract.[247]

Among others, employees who are parties to the contract, and trade unions whose members are employed in the industry to which the relevant contract relates, are entitled to make an application in relation to an unfair contract.[248] Upon such an application and a finding that a contract is unfair, the Commission has the power to declare the contract wholly or in part void, as well as the power to

127A-C of the Workplace Relations Act (Austl. 1996), which, however, is restricted to independent contractors. Given this restriction, this article does not discuss these sections.

242. Malcolm Holmes, *An Historical Analysis of the Jurisdiction Conferred on the Industrial Court by § 275 of the Industrial Relations Act 1991 (NSW)*, 69 AUSTRALIAN L.J. 49, 51 (1995).

243. Industrial Relations Act § 106 (N.S.W. 1996).

244. *Id.* § 105.

245. *Re* Becker & Harry M. Miller Attractions Pty. Ltd., A.I.L.R. ¶ 320 (1972); Ronan v. University of Wollongong, A.I.L.R. ¶ 9 (1985); Incitec Ltd. v. Barry, A.I.L.R. ¶ 295 (1992); BNY Australia Ltd. v. James, A.I.L.R. ¶ 120 (1992).

246. This exclusion was inserted as § 109A by the Industrial Relations Amendment (Unfair Contracts) Act (N.S.W. 1998). It was aimed at preventing the circumvention of the restrictions of the unfair dismissal regime; *see* Paul Ronfeldt, *Unfair Dismissal in Disguise: Post-Employment Claims Under § 106 of the Industrial Relations Act 1996 (NSW)*, 13 AUSTRALIAN J. LAB. L. 99, 99-101 (2000).

247. Beahan v. Bush Boake Allen Australian Ltd., 39 I.R. 1 (1999). For a good discussion of this case, *see* Ronfeldt, *id.* at 101-105.

248. Industrial Relations Act § 108 (N.S.W. 1996).

vary the terms of the contract.[249] The Commission's declaration or variation can take effect from the commencement of the contract or any other time.[250] The Commission can also make orders for the purpose of preventing further unfair contracts, including orders prohibiting the advertising of positions leading to the formation of unfair contracts.[251]

The Act defines an "unfair contract" to include a contract that is "unfair, harsh or unconscionable."[252] The Commission can find a contract to be unfair on the basis of the circumstances of its formation, as well as events subsequent to the contract's formation, including the parties' conduct and any variation to the original contract.[253]

The grounds upon which the Commission has found an employment contract to be unfair give rise to implicit obligations on employers to provide information. Put differently, an employer's failure to provide information in certain circumstances can expose it to an adverse order by the Commission. For instance, contracts have been found to be unfair under these provisions for failing to provide for a warning of inadequate performance prior to a dismissal on the basis of unsatisfactory performance.[254]

These implicit obligations are further illustrated by the decision of the Full Bench of NSWIRC in *Cukeric v. David Jones*.[255] The employee, Cukeric, was an executive employed by the retail company, David Jones. In October 1994, the company decided to restructure its senior management level. This restructure included the reduction of executive positions from ten to six. Neither Cukeric nor the other executives were advised of the plan to restructure prior to its implementation. Further, the restructure was implemented by summarily dismissing Cukeric without any prior discussion of whether he had the necessary skills for a position under the new structure or whether there would be another position in the company that might be suitable for him. A few days following his dismissal, the company's Deputy Human Resources Director visited Cukeric at home and

249. *Id.* § 106(1).
250. *Id.* § 106(3).
251. *Id.* § 107.
252. *Id.* § 105. There are three other circumstances in which a contract is defined to be unfair. They are, a contract that is against public interest; one that provides for remuneration less than that which would be received by an employee performing the same work; and, lastly, a contract that is designed to (or does) avoid the terms of an industrial instrument.
253. *Id.* § 106(2).
254. *See*, *e.g.*, Walker v. Industrial Court of NSW, 53 I.R. 121 (1994) and Helprin v. Westfield Ltd., 68 I.R. 5 (1996). Whether such findings can be made after the insertion of § 109A is unclear.
255. 78 I.R. 430 (1997); A.I.L.R. ¶ 5-150 (1997).

delivered several documents to him. These documents comprised a letter outlining an offer for certain payments, including substantial severance payments and superannuation payments on a retrenchment basis. This offer was subject to Cukeric executing a document releasing the company from all claims. During this visit, the Deputy Human Resources Director represented to Cukeric that if he did not execute the release, he would be paid significantly less in superannuation payments. These representations were found on trial to be inaccurate. Given the representations, however, Cukeric eventually signed the letter of release. Later, he applied to the Commission for a finding that his contract of employment with David Jones was unfair on a number of grounds. On appeal, the Full Bench found in favor of Cukeric. It made several findings. These included determinations that:

- the contract of employment was unfair because it did not provide for a fair consideration of the issue of whether there was a position suitable for Cukeric under the restructure; and,
- the release contract was unfair because of the inaccurate representations made by the Deputy Human Resources Director.[256]

While the Full Bench did not expressly address the question of the company's obligations to provide information, these two findings can be seen as giving rise to implicit obligations on the company to provide information. Firstly, the duty to give fair consideration to the issue of whether there was a position suitable to Cukeric under the restructure would seem to include a duty to provide Cukeric with a meaningful opportunity to discuss the issue. Such an opportunity could only be meaningful if Cukeric was provided with information in relation to the restructure. Secondly, the misrepresentations made by the Deputy Human Resources Director and their effect on Cukeric's understanding of his entitlements meant that there was a duty on the part of the company to correct Cukeric's misunderstanding by providing the correct information in relation to his entitlements.[257]

256. 78 I.R. 430, 458, 460-2 (1997).

257. For other cases involving misrepresentations, *see* the references in JAMES MACKEN, PAUL O'GRADY & CAROLYN SAPPIDEEN, MACKEN, MCCARRY & SAPPIDEEN'S THE LAW OF EMPLOYMENT 525 (1997).

I. Unions' Rights of Entry and Inspection

Both the Workplace Relations Act and the Industrial Relations Act confer statutory rights on trade unions to enter premises and to inspect documents for the purpose of ensuring compliance with the legislation, awards, and collective agreements. As the schemes found in both Acts are broadly similar, they will be discussed together.

An officer or employee of a trade union gains the rights of entry and inspection through a permit issued by an Industrial Registrar. Under both Acts, it appears that such an officer or employee has, upon application, a prima facie entitlement to a permit.[258] Such a permit, however, can be revoked by the Industrial Registrar if he or she is satisfied that the permit holder has intentionally hindered or obstructed employees or employers. It can also be revoked on the ground that the permit holder has acted in an improper manner, including a failure to provide the required notice to the occupier of the premises to be entered.[259]

Under the Workplace Relations Act, a permit holder may exercise rights attached to the permit only in relation to workplaces that have employees who are members of the relevant trade union.[260] The Industrial Relations Act is more expansive and extends to workplaces that have employees who are eligible to be members of the relevant trade union.[261] Further, a permit holder may only exercise these rights for the purpose of investigating a suspected breach of the legislation or a suspected breach of an award or collective agreement that binds the relevant trade union.[262] Finally, the right to enter premises under the Workplace Relations Act only applies if the permit holder has given the occupier of the premises 24 hours notice.[263] Under the Industrial Relations Act, the required

258. Workplace Relations Act § 285A(1) (Austl. 1996) and Industrial Relations Act (N.S.W. 1996) § 299(1). This is suggested by the absence of stipulated grounds on which the Industrial Registrar is to grant a permit. *See* Richard Naughton, *Sailing in Uncharted Seas: The Role of Unions Under the Workplace Relations Act 1996 (Cth)*, 10 AUSTRALIAN J. LAB. L. 112, 123 (1996).

259. Addison v. Public Transport Corporation of Victoria, 86 I.R. 308 (1998) and Office of the Employment Advocate v. McDonald (Unreported, Full Bench of AIRC, Ross, V.P., Lacy, S.D.P. & Gregor, C., Print 906747, July 19, 2001).

260. Workplace Relations Act §§ 285B(2)-(4) (Austl. 1996).

261. *See* the definition of "relevant employee" in § 296.

262. Workplace Relations Act § 285B(1) (Austl. 1996) and Industrial Relations Act § 298(1) (N.S.W. 1996). For a discussion of this requirement as found in Workplace Relations Act, *see* W. Ford, *Being There: Changing Union Rights of Entry Under Federal Industrial Law*, 13 AUSTRALIAN J. LAB. L. 1, 7-11 (1996).

263. § 285D(2).

notice is 48 hours with the notice to be conveyed to the relevant employer.[264]

The rights that a permit holder has in relation to these workplaces give rise to express obligations on employers to provide information.[265] The permit holder can require the relevant employer to produce documents that are relevant to the suspected breach, including pay-slips and timesheets. Permit holders also have a right to make copies of documents produced.[266] A refusal or failure to comply with these requirements exposes the employer to fines under the Workplace Relations Act.[267] The Industrial Relations Act adopts a tougher attitude by making it a criminal offense for employers to refuse to comply with these requirements without a lawful excuse.[268]

J. Conciliation, Arbitration, and Court Proceedings

Employers may be required in proceedings before industrial tribunals, whether it be the Australian Industrial Relations Commission or the New South Wales Industrial Relations Commission, and in court proceedings to disclose information to employees and trade unions. As discussed above, the AIRC and the NSWIRC have powers to settle industrial disputes. These tribunals firstly attempt to settle an industrial dispute by conciliation.[269] If conciliation is unsuccessful, the tribunals then proceed to arbitrate the dispute. At both stages of conciliation and arbitration, the tribunals have powers to summon persons and to compel production by such persons of documents relevant to the industrial dispute.[270] For instance, in an industrial dispute centering around an employer's plan to outsource part of its business, the employer or its representative(s)

264. § 298(3). This notice requirement may be waived by the New South Wales Industrial Relations Commission or the Industrial Registrar if either body is satisfied that the giving of such notice would defeat the purpose of investigating a suspected breach. *See* Industrial Relations Act § 298(4) (N.S.W. 1996).

265. It is unclear whether there are implied or indirect obligations to provide information stemming from the permit holder's right to inspect documents, work, material, and machinery relevant to the suspected breach (Workplace Relations Act § 285B(3) (Austl. 1996), or the prohibition against employers intentionally hindering or obstructing the exercise of powers attached to a permit (Workplace Relations Act § 285E(4) (Austl. 1996) and Industrial Relations Act § 301(2) (N.S.W. 1996). For a discussion of the position under the Workplace Relations Act, *see* Ford, *supra* note 262, at 11-7, 22.

266. Workplace Relations Act § 285B(4) (Austl. 1996) and Industrial Relations Act § 298(2) (N.S.W. 1996).

267. §§ 285E(3), 285F.

268. § 301(2).

269. Workplace Relations Act § 100 (Austl. 1996) and Industrial Relations Act § 133 (N.S.W. 1996).

270. Workplace Relations Act § 111(1)(s) (Austl. 1996) and Industrial Relations Act §§ 164-65 (N.S.W. 1996).

might be required by the industrial tribunal to produce documents relevant to such a plan.

Further, in court proceedings, employers would be subject to the normal court processes governing pre-trial access to information held by parties. In particular, employers would typically be obliged under the court process of discovery to reveal the existence of relevant information. They would also be typically obliged under the court process of inspection to produce and allow inspection of such information.[271]

V. CONCLUSION

This article has examined employers' obligations to provide information to their workforces in various areas, namely, agreement-making under industrial relations legislation, termination of employment, health and safety, as well as discrimination, harassment, and equal opportunity. In addition, the article has surveyed employers' obligations to provide various types of miscellaneous information.

In our previous article on the disclosure of employee information to employers and prospective employers, we described the pattern of regulation as being a "mosaic."[272] Such a description is equally apt in characterizing the law governing employers' obligations to provide information to their employees and trade unions. This is mainly because obligations imposed on employers to provide information appear to be imposed, not so much because it is recognized that employees have an independent entitlement to such information, but because the provision of such information is necessary for other legislative aims. For instance, information is required to be provided to employees in the area of agreement-making under industrial relations legislation to facilitate genuine consent. In the area of termination of employment, the provision of information is viewed as relevant in determining the fairness of a dismissal. Finally, the provision of information to employees is seen as necessary to ensure the effectiveness of occupational health and safety policies, as well as discrimination, harassment, and equal opportunity policies and

271. For an examination of these processes, *see* MARK ARONSON & JILL HUNTER, LITIGATION: EVIDENCE AND PROCEDURE Ch. 6 (1995).

272. This term has been used to describe the system of voluntary codes of conduct used in the private sector. *See* Christopher Arup & Greg Tucker, *Information Technology Law and Human Rights*, *in* HUMAN RIGHTS IN AUSTRALIAN LAW 243, 261 (David Kinley ed., 1998).

programs. For these reasons, the regulation of the provision of information by employers comprises a patchwork of various laws.