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EMPLOYMENT LAW

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lawbook co. nutshell
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by

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To Mum, Mack & Mitz...

Abbreviations

ABLR	<i>Australian Business Law Review</i>
ABN	Australian Business Number
AC	English Law Reports, Appeal Cases
Adel LR	<i>Adelaide Law Review</i>
ADRJ	<i>Australian Dispute Resolution Journal</i>
AEAP	Australian Federation of Air Pilots
AFULE	Australian Federated Union of Locomotive Employees
AIRC	Australian Industrial Relations Commission
AIRCFB	Australian Industrial Relations Commission, Full Bench
AJLL	<i>Australian Journal of Labour Law</i>
ALJ	<i>Australian Law Journal</i>
ALJR	<i>Australian Law Journal Reports</i>
All ER	<i>All England Reports</i>
ALR	<i>Australian Law Reports</i>
APRA	Australian Prudential Regulatory Authority
Aust Bar Rev	<i>Australian Bar Review</i>
AWA	Australian Workplace Agreement
BCL	<i>Building and Construction Law Journal</i>
BOOT	Better Off Overall Test
CAR	<i>Commonwealth Arbitration Reports</i>
CLQ	<i>Commercial Law Quarterly</i>
CLR	<i>Commonwealth Law Reports</i>
EHRR	<i>European Human Rights Reports</i>
EOC	Equal Opportunity Commission
ER	<i>English Reports</i>
FCA	Federal Court of Australia
FCR	<i>Federal Court Reports</i>
FLR	<i>Federal Law Reports</i>
FL Rev	<i>Federal Law Review</i>
FMCA	Federal Magistrates Court of Australia

FWA	Fair Work Australia
FWAFB	Fair Work Australia, Full Bench
FWO	Fair Work Ombudsman
FWRO Act	<i>Fair Work (Registered Organisations) Act 2009</i> (Cth)
GEERS	General Employee Entitlements and Redundancy Scheme
HCA Trans	High Court of Australia Transcript
HK Law Rev	<i>Hong Kong Law Review</i>
ICA	<i>Independent Contractors Act 2006</i> (Cth)
IR	<i>Industrial Reports</i>
JCLUR	<i>James Cook University Law Review</i>
LQR	<i>Law Quarterly Review</i>
MULR	<i>Melbourne University Law Review</i>
NES	National Employment Standards
NSWLR	<i>New South Wales Law Reports</i>
NSWSC	New South Wales Supreme Court
QB	English Law Reports, Queen's Bench
Qd R	<i>Queensland Reports</i>
QGIG	<i>Queensland Government Industrial Gazette</i>
SDA	<i>Sex Discrimination Act 1984</i> (Cth)
SMULR	<i>Southern Methodist University Law Review</i>
Syd L Rev	<i>Sydney Law Review</i>
TPA	<i>Trade Practices Act 1974</i> (Cth)
TRA	transitional registered organisation
UNSWLJ	<i>University of New South Wales Law Journal</i>
U Tas LR	<i>University of Tasmania Law Review</i>
UWA	University of Western Australia
VR	<i>Victorian Reports</i>
VSC	Victorian Supreme Court
VUT	Victoria University of Technology

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Introduction

This book provides a comprehensive plain English guide to employment and labour law in Australia – along with its key issues and developments.

In terms of defining the subject matter of the book, the phrase “employment law” is sometimes confined to the law governing the (common law) contract of employment and matters pertaining to the ongoing employment relationship; while “industrial or labour law” is sometimes confined to matters involving trade unions and the collective aspects of employment. Most people who study, teach or practise in this area require an understanding of both employment and labour law. Indeed, there is a close relationship between the two given that, eg, trade unions, through enterprise bargaining, often negotiate the terms under which workers will be employed. This book deals with both employment and industrial/labour law in acknowledgment of that fact and, as occurs in practice, uses those terms interchangeably at times. Importantly, more recent terms such as “workplace law” have also been adopted in practice – placing a focus on the law relevant to the workplace relationship. Further, “the law of work” is sometimes used to cover not only the law pertaining to employers and employees but also laws that govern anyone who performs work (eg, independent contractors). Whatever term one chooses to adopt, all of these facets of work, employment and labour are discussed in this book.

Regarding the structure of the book, Chapter 1 (in PART A) answers two of the most important and oft-asked questions in the discipline:

1. Why does labour and employment law change so much?
2. How do I work out my terms and conditions of employment?

The simplicity of those questions belies their importance. While all employment relationships begin with a contract of employment which is privately offered and accepted between

employer and employee, the power imbalance perceived to exist between most employees and their employers has prompted governments to intervene with measures such as legal “safety nets”, below which that contract of employment cannot be negotiated. So, although employment starts with a *private* contract of employment, there are issues of *public law* and *public policy* (ie, government intervention) that exist alongside it. That public policy aspect has seen employment law in this country change with each change in federal government over recent years. It also explains why determining terms and conditions of employment in most cases is more difficult than just reading the contract of employment. The layers of industrial legislation – dealing not only with minimum conditions but, as will be seen throughout the book, with many other topics – mean that determining conditions of employment is a complex task to be methodically worked through.

Chapters 2-8 of this book discuss in further detail the key aspects of employment and labour law.

Chapters 2 and 3 (which comprise the balance of PART A of this book) discuss the preliminary and fundamental issues: determining the difference between employees and independent contractors – as such a determination will have a significant influence on the working conditions of particular workers; and establishing what duties the common law implies into the contract of employment (whether or not those duties expressly appear in the contract).

PART B (Chapters 4-5) deals with minimum conditions of employment and enterprise bargaining; unfair dismissal protections (and the end of the employment relationship); and bodies such as Fair Work Australia which administer the law. In other words, the Part discusses matters pertaining to the ongoing employment relationship and its ultimate conclusion.

PART C (Chapters 6-8) discusses trade union law; constitutional issues, especially the new national employment law system; and the allied areas of the law that deal with employment conditions or special types of employment, such as anti-discrimination law and public service employment.

With the exception of Chapters 1 and 7 (Constitutional Issues) – which, by their very nature, require some discussion of parliamentary speeches and how policy, theory and history have shaped the Australian industrial relations system – this book focuses on case and statute law. It is very much a legal text that shows an understanding of policy – it is not a discourse on politics.