Asia Pacific Labour Law Review

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Workers' Rights for the New Century

Asia Monitor Resource Centre

2003

Asia Monitor Resource Centre Ltd.

AMRC is an independent non-governmental organisation
that focuses on Asian and Pacific labour concerns.
The Center provides information, research, publishing, training, labour networking
and related services to trade unions, pro-labour groups, and other development NGOs.
AMRC's main goal is to support democratic and independent labour movements in Asia and the Pacific.
In order to achieve this goal, AMRC upholds the principles
of workers' empowerment and gender consciousness, and follows a participatory framework.

Published by
Asia Monitor Resource Centre Ltd (AMRC), 444 Nathan Road, 8-B, Kowloon, Hong Kong, China SAR
Tel: (852) 2332 1346 Fax: (852) 2385 5319 E-mail: admin@amrc.org.hk URL: www.amrc.org.hk
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ISBN 962-7145-18-1
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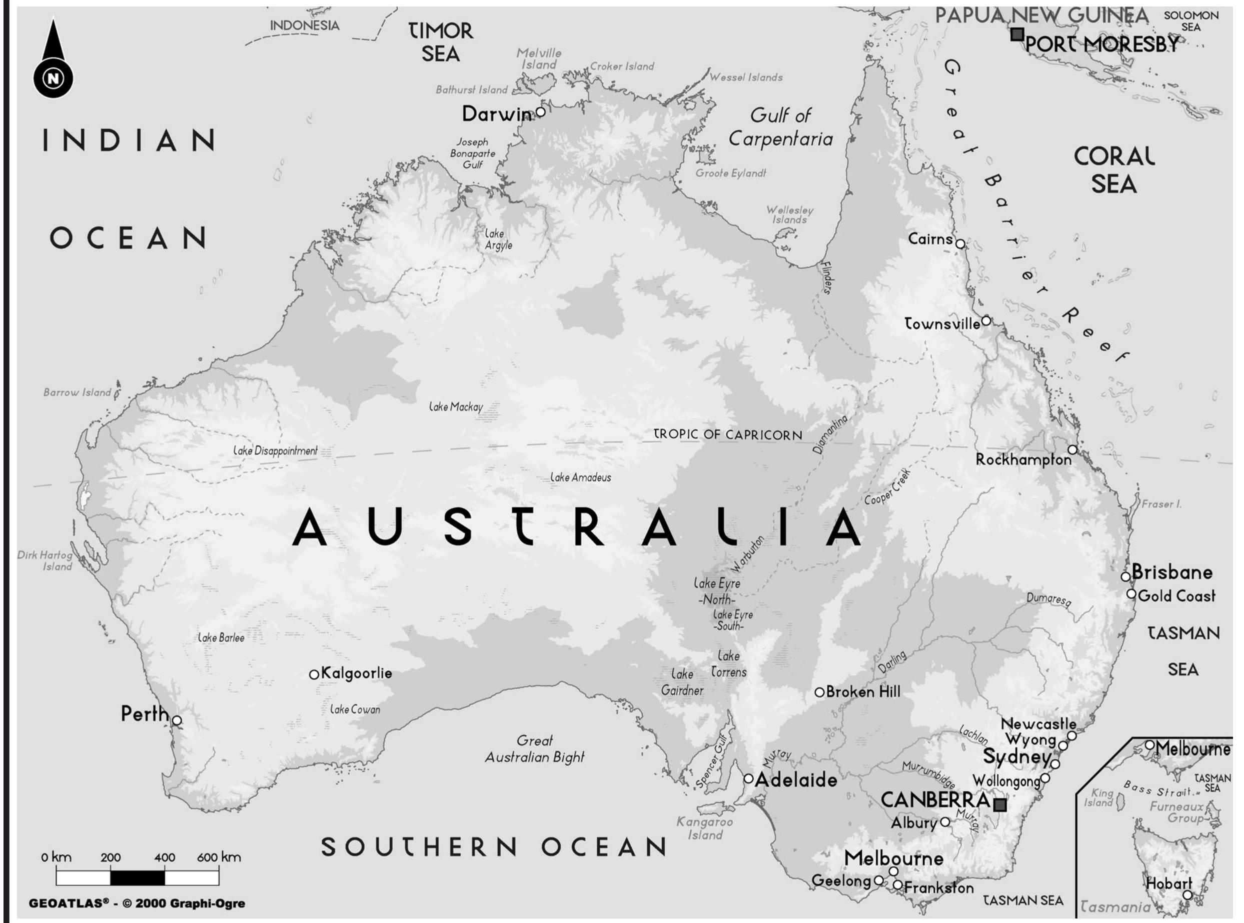
Acknowledgements
AMRC expresses sincere thanks to the following people and organisations for their gratefully received contributions to this book.
Suchada Boonchoo (Pun) is co-ordinator for the Asian Network for the Rights of Occupational Accident Victims. We thank her for all the help in organising our conference of authors in Bangkok.
Thanks to the American Center for International Labor Solidarity, Bangkok, Thailand for a financial contribution towards printing the book.
We are indebted to Oxfam Hong Kong for their financial contribution towards the production costs.
Thanks to the International Labour Organisation for allowing us to use photographs from their library free of charge.
Eugene Kuo, a freelance photographer and designer, a big thank you for contributing photographs and designing the cover free of charge. Look at www.226-design.com for some of Eugene's stunning work and ideas.
To Tom Fenton, co-founder (with Mary Heffron) of AMRC – thanks a lot for advice, maps, and all the time devoted to the layout of the book, free of charge. E-mail: tfenton@igc.org.
Finally, we would like to thank the International Centre for Human Rights and Democratic Development, Canada, for an extremely generous contribution that covered much of the publishing costs of this book. Without their last-minute financial assistance, it is possible that this book would never have proceeded beyond the editing stage. E-mail: ichrdd@ichrdd.ca; URL: www.ichrdd.ca.

Australia 2002

Julian Teicher and Bernadine Van Gramberg

Although Australian labour law retains its collectivist character, legislative changes over the last decade have facilitated the increasing individualisation of the employment relationship. Importantly, these changes have been underpinned by an increasingly comprehensive framework of minimum employment standards. These developments are presented below in three sections. The first provides an overview of the key trade union federations and the framework of employment law in Australia. The second section examines the implementation of labour law through the prism of three key issues: freedom of association, union bargaining fees, and national standard setting. These issues demonstrate the interplay of unions, employers, government, and industrial tribunal. The third section provides a commentary on the state of employment regulation in Australia placing these developments in a political and economic context. In the final analysis, the implementation of the neo-liberal project of globalisation is central to this discussion.



A contemporary snapshot

Australia was founded as a British colony in 1777. Federation occurred in 1901, Australia adopted governance at federal (commonwealth), state, and municipal levels. There are six states, each with its own government (Queensland, New South Wales, Victoria, Tasmania, South Australia and Western Australia) and two territories (Northern Territory and the Australian Capital Territory).

While the states have a wide charter of control over the regulation of business and employment within their borders, in general the Australian Constitution grants the federal Government considerable authority over interstate and international matters. With increasing interstate expansion of businesses and the effects of globalisation, the federal Government has led a number of legislative initiatives to bring the states in line with uniform regulation.

Key trade union federations

Australian trade unions are federated at state and federal levels. The peak union body is the Australian Council of Trade Unions (ACTU), which was formed in 1927, has 46 affiliated unions and covers around 1.8 million workers. Each state has a branch of the ACTU to which most unions operating in that state belong.

Most ACTU policy is made through a consultative process involving firstly, an Executive of around 50 people representing affiliated unions, youth, and indigenous Australians. The Executive meets at least twice each year. An executive committee drawn from the executive is charged with overseeing the implementation of policy. A congress of around 800 delegates representing all the ACTU's affiliates is held every three years.

The current President of the ACTU is Ms Sharon Burrows (elected in May 2000). The current ACTU Secretary is Mr Greg Combet (February 2000). The ACTU has two Assistant Secretaries.

Each state has a trades and labour council affiliated with the ACTU and represented on its executive. Unions are directly represented in state labour councils and in some cases regional councils are also represented. A list of contacts for the ACTU and its state branches is provided in Appendix 1.

Union consolidation

Unions may form independently of either federal or state laws. In practice most unions are registered under relevant federal or state legislation, which confers certain benefits such as rights to engage in bargaining. Despite the easing of restrictions on the minimum number of members required to form a federally registered union (from 10,000 to 100 in 1993 and then to 50 in 1996), there have been no new unions formed. In addition, the national unionisation rate has been falling for over a decade. In 1990, for instance 41 percent of the workforce was unionised and this fell to 26 percent in 1999 (Bray, Macdonald, Le Quex and Waring, 2001:44). According to the Australian Bureau of Statistics, the unionisation rate in 2001 was 24.5 percent (ABS, 2002).

Labour legislation

Labour standards are set through common law, statutory law, and awards. The Workplace Relations Act 1996 (WRA) is the main piece of federal legislation covering employment relations. Most states have also enacted their own statutes; federal and state laws co-exist in a complex set of constitutional arrangements which regulate the division of powers between the two levels of government.

The three sources of employment regulation are not mutually exclusive, rather their interaction reflects the system of labour protection at a particular point in time. For instance, under Australia's constitutional arrangements in the past, legislation regulating labour standards has played a more important role at the state level than federally. At the federal level, employment standards have largely been determined by the system of awards, prescribing the terms and conditions of employment in the occupation or industry to which the award pertains. At the federal and state levels awards are determined by independent industrial tribunals. The federal tribunal is the Australian Industrial Relations Commission (AIRC).

Recent changes to these (previously) comprehensive awards have reduced federal awards to a set of 20 minimum terms and conditions of employment covering entitlements such as hours of work, leave provisions, superannuation and minimum wages. Approximately 30 percent of Australian workers have their wages and conditions of employment directly determined by these minimum awards, also known as a wages safety net. The

advent of wages bargaining in 1991 resulted in a move away from determination of wages and conditions by arbitral tribunals with a further 30 percent of workers being covered by collective agreements which are based on, but typically exceed, the award standard and often regulate a wider range of issues than those addressed by the safety net. Finally, there has been a growth in non-award employment with around 40 percent of workers covered by common law employment contracts (Department of Workplace Relations and Small Business, 2002).

Also important in understanding employment regulation in Australia is that from the 1990s, federal governments have moved away from reliance on the more limited industrial relations power in the Constitution and made novel use of constitutional powers over corporations and external affairs to achieve more detailed regulation of labour standards under the WRA and its predecessor. More recently, with the curtailing of awards as the principle form of labour regulation, the federal WRA in particular has played a greater role and will be the focus of the discussion below.

Workers' welfare

Most provisions for workers' welfare are found in the system of arbitrated awards or in state legislation. Due to constitutional constraints, federal legislation covering many aspects of worker's welfare is limited to federal government employees.

Minimum wage provisions

The WRA empowers the AIRC to set minimum award wages through periodic test cases, now styled as Safety Net Reviews. Minimum wages are enshrined in awards and breaches may incur fines prescribed in sections 178-179 of the WRA.

Overtime

Federal legislation does not directly regulate overtime. Rather, overtime provisions form part of the award safety net, which may be reviewed by the AIRC from time to time.

Paid time off

Public holidays are provided for in state legislation and in awards. Generally, 10 public holidays apply to Australian workers. Awards also provide for the payment for work performed on public holidays, usually paid at time and a half or double time.

Annual leave is also prescribed by awards with the standard of 20 days leave per year with a 17.5 percent loading applying to federal employees generally operating as the national benchmark for other areas of employment. The standard provision for eligibility for annual leave is 12 months employment.

Long service leave is also prescribed by awards and generally takes the federal government employees' standard of 10 weeks paid leave after completion of 10 years service.

Sick leave, domestic leave, and bereavement leave

Personal/carer's leave, including sick leave, family leave, bereavement leave, compassionate leave, cultural leave, and other like forms of leave are provided for under the WRA, where it has been a trend to group them together as family leave. The standard for sick leave is 10 days paid leave for full time workers after 12 months employment with this entitlement applying pro rata for part time workers. Generally, unused leave balances accumulate but cannot be cashed out on termination.

Unemployment benefits

Unemployment benefits are provided under the Social Services Act 1947. In Australia, unemployment benefits are drawn from a public fund rather than taxes levied directly from employees. This means that eligibility for unemployment benefits is related to unemployment rather than previous contributions to unemployment funds.

Collective labour rights

i) The freedom of association provision in the WRA protect workers rights to join or not join a trade union, to engage or not engage in industrial action, to participate or not in union activities, or to hold office in a union. Section 298K also provides that it is unlawful to dismiss an employee for being a member of a trade union.

ii) Collective bargaining is enshrined in the WRA in the form of 'enterprise bargaining' leading to certification of an agreement by the Industrial Relations Commission. The WRA provides for the two main types of certified agreements, relying on two separate constitutional powers. The first is for employers who are defined as

constitutional corporations. These employers may make enterprise agreements utilising the corporations' power (s.51(xx) of the Constitution). The relevant provisions of the WRA are in Part VIB - Division 2 (s.170LH and s.170LI). These employers may make a Division 2 agreement with either a trade union(s) or directly with employees. Additionally, Division 2 allows for agreements designed for a business that is yet to be established, greenfields agreements (s.170LL).

iii) The second type of collective agreement is based on the industrial power of the constitution, s.51(xxxv). The relevant provisions of the WRA are contained in Part VIB – Division 3. These agreements are designed to resolve interstate industrial disputes and while parties to such disputes may include constitutional corporations, these agreements may also cover unincorporated organisations and trade unions registered under the Act. Again, provision is made for employers to make agreements through a trade union or directly with employees.

Employers in Victoria state are able to make Division 2 agreements regardless of whether they are constitutional corporations. This is because Victoria ceded industrial relations' powers to the Commonwealth in 1996. As a result Victorian employers, like those of the Territories, do not have to demonstrate they have an interstate, industrial dispute in order to achieve legal enforceability of an enterprise agreement.

Both Division 2 and 3 agreements allow for employers to make an agreement with one or more trade unions in cases where each union:

- has at least one member employed in the single business, or part of whose employment will be subject to the agreement; and
- is entitled to represent the industrial interests of the member in relation to work that will be subject to the agreement.

Having negotiated an agreement s.170LJ(2) requires that it must be approved by a simple majority of the persons employed at the time whose employment would be subject to the proposed agreement.

iv) The WRA confers legality on industrial action undertaken by unions or employers in restricted circumstances. Such 'protected' action is specified under s.170ML and requires that:

- a bargaining period must be in place. In other words, the parties must have notified the AIRC (and each other) that they intend to engage in a process of bargaining leading to an enterprise agreement (170MI). The bargaining period is defined as seven days following this notification (170MK);
- the party intending to take protected action is required to give at least three days written notice of its intention, except in certain circumstances concerning lockouts (s.170MO);
- negotiations must precede industrial action or a lockout. This requires that there must have been a genuine attempt to reach agreement with the other party. The term genuine agreement is not defined with any precision in the legislation. Additionally, if the AIRC has made an order in relation to the negotiations, the party must have complied with the order (s.170MP);
- if the AIRC has ordered a secret ballot concerning the industrial action, it is not protected until the ballot has been concluded and unless the industrial action has been approved by a simple majority of the votes cast in the ballot (s.170MQ);
- in the case of a union, the management of the union must duly authorise the industrial action and written notice of the authorisation must be given to the Registrar (s.170MR).

v) Each state (except Victoria and the Territories) has its own legislation enabling workplace bargaining and the certification of collective and individual agreements. Certification of state agreements is performed by the relevant state industrial tribunal and in general the process is similar to that of the federal system.

Trade union rights

Trade unions and employer associations are registered as organisations under Part IX of the WRA, which encourages the democratic control of organisations and participation by members in their organisation's affairs. Registration provides trade unions with a number of rights outlined in the WRA but these rights are generally qualified and restricted by the WRA.

The right to trade union membership, participation, and representation

- the right of workers to belong to an independent trade union for the protection of their interests;

- the right of workers to take part in the activities of a trade union outside working hours and during working hours with the consent of the employer;
- the right of workers to be represented by a trade union official in matters relating to their employment;
- the right of recognition by an employer guarantees that union representatives are protected from dismissal or other penalty for trade union activities.

The right to trade union autonomy

- the right of trade unions to organise their internal affairs free from interference by employers or state;
- the right of trade unions to elect their own officials and develop their own programmes free from state interference.

The right to trade union recognition

- the right of trade union access to an employer's premises is restricted to situations where the workplace is covered by an award and where employees have formally requested the union to attend. They must do so only during meal or other breaks;
- the right of a trade union to be recognised as the representative of specified categories of employees for purposes pertaining to the relationship between employer and employee but particularly in relation to industrial disputes and the making of proposed agreements as explained above;
- the right of a trade union to facilities for the purposes of collective bargaining, including the disclosure of information.

The right to strike

There is a notional right to strike in Australia, which is restricted to bargaining periods as provided for above. Where industrial action is lawful workers are protected against discrimination or dismissal by their employer and against civil or criminal actions, except where the industrial action gives rise to some other offence or injury; e.g. acts of violence committed on a picket line. Industrial action, which is not protected by a bargaining period, and all secondary boycotts are unlawful and may be referred to the Federal Court for the imposition of a penalty as appropriate.

Occupational health and safety

The regulation of occupational health and safety (OHS) is primarily a state responsibility, but despite this, a uniform approach has developed among state and federal governments. At the federal level regulation of OHS is restricted to direct government employees.

In general, OHS legislation has attempted to satisfy two aims: the prevention of industrial accidents and health risks. Related legislation provides monetary compensation for employees injured at work and rehabilitation to assist injured workers return to work.

Based largely on the Robens Report in the UK, OHS legislation places a general duty on those parties who can be assumed to have the responsibility for the prevention of work-related injury and disease, normally employers, employees, independent contractors, occupiers of premises, manufacturers, designers importers, and suppliers. Employers have a duty of care to maintain a safe workplace and must take all reasonable steps to protect the health and safety of employees and others in the workplace.

This means that there is an obligation to provide and maintain a working environment that provides adequate facilities for employees' welfare at work. Further, most OHS legislation requires employers to develop, in consultation with any unions involved, an OHS policy reflecting these objectives and to provide employees, in appropriate languages, the information, instruction, training, and supervision necessary to enable them to work in a manner that is safe and without risk to health, e.g. Occupational Health and Safety (Commonwealth Employment) Act 1991 s16).

Workers' compensation legislation provides income maintenance for workers who have been injured at work, so that they do not have to rely on the social welfare system. Some jurisdictions allow compensation for injuries obtained while travelling to and from work. All states have implemented legislation that compels employers to insure against the costs of workers' compensation and common law liabilities. Compensation to injured employees for lost earnings is usually available by making an application to the employer. During the initial period of injury, the worker is usually paid at the rate he or she earned at the time of the accident. After this period, the level of payment depends on whether the worker is classified as totally or partially incapacitated. The duration

of the initial period varies according to the particular state scheme.

Rehabilitation of injured workers has become an important legislative aim in OHS and is seen as a means of decreasing the costs of compensation. For instance, depending on the severity of the injury, employers are encouraged to find light duties for the injured worker. All state legislation makes the employer liable for medical and ancillary costs resulting from an accident, and generally this includes rehabilitation costs. The definition of rehabilitation costs varies between states, but costs which may be recovered usually include artificial aids, travelling expenses to receive rehabilitation treatment, and the cost of home and workplace modifications.

Anti-discrimination laws

Similar legislation to combat discrimination has been enacted by each Australian state. There are three core anti-discrimination laws at federal level. The Racial Discrimination Act 1975 was the first national anti-discrimination law. It makes certain specified areas of discrimination unlawful on the grounds of race, ethnicity, and language spoken. One federal law governs discrimination on the basis of sex, the Sex Discrimination Act 1984. Each state has also enacted gender related labour law. This legislation proscribes discrimination on the grounds of sex, marital status, pregnancy, or potential pregnancy. In addition, it prohibits sexual harassment and dismissal on the grounds of family responsibilities. The Disability Discrimination Act 1992 proscribes discrimination on relating to various physical and intellectual disabilities, as well as proscribing the harassment of people with disabilities.

In addition to the statutes referred to above, the WRA specifies that in performing its functions the AIRC shall, ‘ take account of the principles embodied in the Racial Discrimination Act, the Sex Discrimination Act, and the Disability Discrimination Act relating to discrimination in employment’ (s. 93) The WRA also requires the AIRC to take account of the Families Responsibilities Convention when performing its functions (s.93A).

Administration of the anti-discrimination acts appears under another law, the Human Rights and Equal Employment Opportunity Act 1992, which establishes the Human Rights and Equal Employment Opportunity Commission (HREOC). Complaints under the anti-discrimination legislation may be referred to the HREOC for conciliation in the first instance, and failing that, to arbitration. Enforcement of decisions of HREOC can only proceed through the Federal Court.

Unfair dismissal

Since 1993, industrial relations legislation has provided for unfair dismissal to be dealt with by the AIRC. The Industrial Relations Act 1993 (the predecessor of the WRA) implemented unfair dismissal into federal labour law drawing on the external affairs power in s.51 (xxxix) of the Constitution to give effect to Australia’s international obligations relating to termination of employment. These obligations arose from the International Labour Organisation (ILO) Convention Concerning Termination of Employment at the Initiative of the Employer (Convention 158) which was ratified in 1993. It should be noted that most state governments had previously developed an unfair dismissals jurisdiction for those employers and employees operating under state industrial laws.

Under federal legislation, employees may make an application pursuant to s.170CE of the WRA seeking relief on the grounds that their termination was ‘harsh, unjust, or unreasonable’. Lodging an application requires a fee of $50. On receipt of an application the AIRC ‘must attempt to settle the matter by conciliation’ (s.170 CF(1)). Should conciliation fail to resolve the matter, the applicant may elect to proceed to arbitration (s.170 CFA(1)). Conciliation and arbitration are the two main dispute resolution processes utilised by the AIRC. Conciliation is a relatively informal process in which the AIRC facilitates the dialogue between disputants and makes suggestions and recommendations to encourage agreement. Arbitration is a more formal process in which the commissioner hears submissions by both sides, considers evidence and witnesses, and makes a final ruling including reasons for the decision. Decisions of the AIRC are legally binding whether reached by conciliation or arbitration.

The WRA sets out a range of matters which must be taken into account in determining whether an employee has been unfairly terminated, including a requirement that ‘a fair go all round’ is accorded to both the employee and the employer (s.170CA(2)). The tests applied by the

AIRC during the course of arbitration to assess whether an employer has terminated an employee unfairly are set out in s.170CG(3) of the WRA. They include the requirement to determine whether:

- there was a valid reason for the termination relating to the employee's capacity or conduct, or the operational requirements of the employer's undertaking;
- the employee was notified of the reason;
- the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee;
- the employee had been warned about his/her unsatisfactory performance; and
- any other matters that the AIRC considers relevant.

Not all employees are eligible to utilise unfair termination provisions of the WRA. Section 170CC provides that regulations may exclude specified classes of employees. Regulation 30B(1) excludes the following categories:

- employees engaged for a specified period of time;
- employees engaged for a specified task;
- probationary employees;
- a trainee under a traineeship agreement; and
- non-award employees earning more than a specified amount (currently $75,200).

It should be noted that this list included casual employees engaged over a period of less than twelve months, however in December 2001, the High Court struck down the regulation that embodied this exclusion because it did not give proper effect to the words of the statute.

The federal Government has been unsuccessful in implementing new regulations designed to restrict the access of casual employees to unfair dismissals jurisdiction. For those employees who are ineligible to bring unfair dismissals claims under the WRA, there is the option of recourse through the courts; though this form of action is likely to be prohibitively expensive for all but the best paid workers.

In August 2001 the federal Government introduced a number of amendments to the termination of employment provisions in the WRA to further restrict access to unfair dismissal provisions as follows:

- requiring workers to have been employed for at least three months before being entitled to pursue an unfair termination claim against an employer;
- tighter rules apply concerning unfair dismissal claims by employees who have been demoted;
- a requirement for the AIRC to take into account the size of the business in complying with termination procedures and the degree to which the absence of human resource management expertise is likely to impact on the procedures effecting the termination;
- tighter rules apply to applications for an extension of time to lodge unfair termination applications;
- penalties can be imposed on lawyers and advisers who encourage claims when there is no reasonable prospect of success; and
- expanded cost orders can be made against parties who act unreasonably in pursuing or defending claims.

Proposed amendments currently before the Australian Senate aim to further restrict access to unfair dismissal action by exempting businesses employing less than 20 employees. The Government has previously unsuccessfully attempted to introduce such a small business exemption.

Remedies for unfair dismissal available to the AIRC consist of compensation for lost wages, reinstatement, or compensation in cases where reinstatement is not appropriate.

Analysis of labour law and its implementation

Despite continuing legislative changes and an unfavourable social and political environment for trade unions, two institutions remain central to the Australian system of employment regulation; these are the ACTU and the AIRC. The continuing importance of these bodies in implementing labour law is verified by a number of major events or themes that have occurred since 2000; these are:

Freedom of association

Expanded freedom of association provisions (ss. 298A-298Z) were included in the WRA with the aims of ensuring:

- that employers, employees, and independent contractors are free to join or not join industrial organisations of their choice; and
- that employers, employees, and independent contractors are not discriminated against or victimised because they are or are not members or officers of industrial organisations.

The main federal body charged with the responsibility of policing freedom of association provisions is the Office of the Employment Advocate (OEA) which has the power to initiate investigations to ensure compliance with the freedom of association provisions of the WRA. Unusually, the OEA is also charged with the function of registering Australian Workplace Agreements that conform to the requirements of the WRA. The OEA has intervened on a number of key cases before the AIRC and the Federal Court in pursuit of union breaches of s.298.

Despite the clear intention by the Government that the freedom of association provisions be used against unions attempting to create closed shop conditions, unions have achieved some notable successes in using these provisions against employers. These cases included a series of actions in the Federal Court during the 1998 maritime strike which culminated in a full court decision (and then a High Court decision) upholding the Maritime Union of Australia's (MUA) claim that their members had been unlawfully dismissed by the employer, Patrick Stevedores, because of union membership. More recently, unions were able to use s.298K to prevent the use of individual contracts in the Commonwealth Bank (Finance Sector Union v Commonwealth Bank of Australia [2000] 1372 FCA).

However, a case determined the Federal Court of Australia (Australian Workers' Union and others v BHP Iron Ore Pty Ltd [FCA] 3 unreported) in 2001 may mark the end of the use of s.298K to protect employee rights. The situation which led to this case commenced in November 1999 when BHP, a major mining and steel making company, began offering individual contracts to workers who were previously employed on collectively negotiated certified agreements. The individual contracts offered substantial increases in pay and by mid-January 2000, 40 percent of the workforce had signed up. At this point, the Australian Workers Union (AWU) initiated court action arguing that BHP had engaged in conduct harmful to the employees for prohibited reasons, including trade union activities, and for encouraging employees to leave their union. The Federal Court awarded an injunction against BHP on 31 January 2000.

In an increasing trend by the federal Government, the Minister and the Employment Advocate intervened in this case to urge the court to implement government policy and argued the intention behind the WRA's freedom of association provisions was to restrict union organising. In its decision handed down on 16 January 2001, the Federal Court rejected the unions' submissions, and ordered the injunction against BHP Iron Ore be discharged. The judgement found that while there was an intention by BHP to exclude the union from the process of implementing organisational change, the offer of individual contracts was not made to induce employees to cease being union members and therefore did not breach s.298K. On 15 February 2001, the unions discontinued an appeal against this decision (Noakes and Cardell-Ree, 2001).

Union bargaining fees

Workers employed under enterprise agreements are paid at the rate specified by the agreement regardless of whether they are members of the union that negotiated the agreement. This issue has become pressing for unions in recent times, with membership continuing to decline and facing hostile federal government policies. A union campaign to charge bargaining fees (or union service fees) to non-members who would benefit from a union-negotiated enterprise agreement, has been the subject of a series of court actions. Employers and the federal government view the incorporation of compulsory bargaining fees into enterprise agreements as removing workers' freedom to join or not to join a union and as imposing onerous burdens upon employers.

The campaign spearheaded by unions including the Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union (AMWU), the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU), and the AWU directed claims against several Victorian electrical contractors. Indeed, the National Electrical Contractors Association reached agreement with the CEPU on behalf of its members in Victoria to include Clause 14.3 (below) in over 300 enterprise agreements covering Victorian electrical contractors.

'Clause 14.3 bargaining agents' fee
The Company shall advise all employees prior to commencing work for the Company that a Bargaining Agents' fee of one percent of the employee's gross annual income or $500 which ever is the greater is payable to the [CEPU annually] . . .'

The fee was only to be levied on new (not existing) employees and was to be adjusted against the union fees paid by its members. The agreements containing the clause were approved by the AIRC in mid-2000.

A challenge by the OEA (which intervened in the certification of these enterprise agreements) arguing that the clause breached the freedom of association provisions in the WRA was rejected by the AIRC (re Accurate Factory Maintenance Labour Hire Enterprise Agreement 2000-2003, AIRC, 9 February 2001, PR900919, unreported). The OEA appealed the decision to a full bench of the AIRC, which also found the union fee clause was not objectionable (AIRC Print PR 910205, 12 October 2001). However, the full bench did question whether matters not directly pertaining to the relationship of an employer and employee could be included in an enterprise agreement.

This legal question raised by the AIRC full bench became the subject of appeal by Electrolux to a single member of the Federal Court which addressed whether matters relating to unions (and thus, not directly pertaining to the employer and employee relationship) would attract the status of 'protected action' in the process of bargaining for a new enterprise agreement (Electrolux Home Products Pty Ltd v Australian Workers Union [2001] FCA 1600 (14 November 2001). In other words, the appeal sought to determine if union fees represented an unlawful inclusion in enterprise agreements. Justice Merkel found that bargaining fees were not legitimate matters pertaining to the employment relationship and therefore could not be addressed within an enterprise agreement. He also found that the union claim amounted to agency, where Electrolux was to contract with its employees on behalf of the union as their agent for the benefit of the union.

In separate action on a similar matter in the AIRC, Justice Munro decided not to follow Electrolux, observing that clauses authorising a payroll deduction system for union dues were essentially matters reflecting agreement on the electronic transfer of funds (AIRC Print PR914378 18 February 2002). He found that the inclusion of matters into agreements such as payroll deductions of union fees, while strictly not pertaining to the employer-employee relationship, were not sufficient to prevent the agreements being certified.

More recently, three appeals to the full Federal Court on the issue of union bargaining fees by the AWU, AMWU, and the CEPU were heard simultaneously (Automotive, Food, Metals, Engineering, Printing & Kindred Industries Union v Electrolux Home Products Pty Limited [2002] FCAFC 199 (21 June 2002)). The Minister for Workplace Relations intervened in the appeal, supporting the arguments of Electrolux. The full court found that a claim for bargaining fees constituted a legitimate claim for the purposes of enterprise bargaining and was therefore valid for the purposes of taking protected industrial action.

The Minister for Workplace Relations has pledged to appeal the matter to the High Court of Australia (Norrington, 2002). In the meantime, while matters progressed in the courts, the federal government relaunched its Workplace Relations Amendment (Prohibition of Compulsory Union Fees) Bill 2002, prohibiting union bargaining fees. The Bill had come before Parliament in 2001 and was rejected. Currently, the Senate is deliberating on the Bill and appears set to reject it a second time.

Standard setting

Almost from the inception of the Australian system of employment regulation, tribunals have played an important role in setting minimum standards. These standards emerge through tribunal cases that have had significant public interest and are known as test cases. For instance, the regulation of minimum wages in some form commenced in 1907 and continues today in the form of the periodic Safety Net Review, the most recent of which was concluded in May 2002 (Safety Net Review - Wages PR002002, 9 May 2002). Another important area of standard setting since the inception of the decentralised system of wage fixing has been in relation to various forms of parental leave. In the most recent decision in 2001, 12 months unpaid parental leave was extended to casual employees who had been engaged for periods in excess of twelve months (AIRC, Parental Leave Case, PR904631, 31 May 2001)

The most recent instance of standard setting was the Working Hours Case (Construction, Forestry, Mining and Energy Union and others PR072002 2002). As with the Safety Net Review, the major concern underlying the application was the impact of a globalising economy on the lowest paid workers with the least industrial muscle. In particular the unions expressed concern that Australia, along with the United States and Britain, is exceptional in experiencing both increasing working hours and a rising incidence of unpaid overtime. A secondary concern was to facilitate workers under collective agreements successfully pursuing claims to reduce the incidence of both paid and unpaid overtime.

The unions' claim was threefold: that workers not be required to work unreasonable hours (with 15 criteria provided to determine what are reasonable hours); that employers be able to require workers (other than part time workers) to work reasonable overtime at overtime rates; and that employees who have completed long working hours as specified (for example, an average of 60 hours per week over a four week period) be entitled to two full days' paid leave before resuming work.

After an exhaustive hearing including expert witnesses and various statistical analyses the AIRC found that working time arrangements and patterns of hours have changed significantly, with weekly working hours of full time employees increasing from 38.2 to 41.3 over the twenty years to August 2001. In addition, the tribunal accepted that a significant proportion of employees (at least 17.7 percent) worked unpaid overtime. Significantly, the state governments supported the ACTU position while the federal Government and various employer and employer associations appeared in the case to oppose the union claims. However, the AIRC declined to award a test case standard in the terms sought by the ACTU, instead deciding to make explicit the right of employees to refuse unreasonable overtime. In rejecting the reasonable hours claim, the tribunal emphasised that what was sought was not a reduction in standard hours from 38 to some lesser amount but something vague and imprecise, and less predictable. In awarding the new standard the tribunal provided guidance on the determination of unreasonable hours by reference to:

1.2.1 any risk to employee, health and safety;
1.2.2 the employee's personal circumstances including family responsibilities;
1.2.3 the needs of the workplace or enterprise;
1.2.4 the notice (if any) given by the employer of the overtime and the intention to refuse it by the employee; and
1.2.5 any other relevant matter.

The decision is significant in two respects. First, it provides a further demonstration that, in the absence of a near unanimous position from the parties before it, the AIRC will not engage in radical departures from existing standards. Secondly, while the decision involves little direct advance in standards, it provides the unions with a position from which they can bargain with employers for limits on overtime where these do not already exist. In areas where enterprise bargaining arrangements are not in place, the decision is problematic as it may discourage individual members of the tribunal from including more precise limitations on hours in awards when faced with union applications dealing with working time.

Critical analysis of neo-liberal government policy and effects on labour law

Australia's approach to its economy has traditionally relied on active government involvement. This has been especially so in the area of infrastructure provision, inclusive of the development of roads, railways, and urban services. Further, Australia's unique history of the 1850s gold rush, then massive, crippling strikes in the 1890s led to the development of a highly interventionist, protectionist state. Walker, Ratnapala, and Kasper (1993) described these interventions as "trade protection, central wage arbitration, protection from non-white immigration, all-embracing state paternalism (welfare), and dependence on the Empire" (1993:55). The prevailing view in the early 1980s in light of Australia's poor economic position was that protectionist statism had not worked well and that state efforts to intervene in the economy were "inept or poorly managed" (Head and Bell, 1994:16).

Australia's labour force moved from a position of high protection to what may be one of the least protected by the end of the century (Head and Bell, 1994). A key contributing factor was the integration of Australia into the international economy. This was achieved by float-

ing the Australian dollar and abolishing exchange controls in 1983; removal of import quotas on items such as steel and white goods; the removal and reduction of tariffs; and the push to expand exports (Garnaut and Guoguang, 1992). Following these macro-economic changes, micro-economic reform, including decentralising wage fixing, became the accepted means by which Australian businesses attempted to boost their competitive edge in the global economy.

Driving micro-economic reforms were the principles of economic rationalism and emphasis on the free market: free trade, privatisation, low tax, small government, and financial and labour market deregulation are seen to facilitate business growth. In Australia these neo-liberal ideas have held sway at both state and federal level for most of the last two decades and this has been true regardless of which political grouping held office. The Labor Party, traditionally a social democratic party, held government nationally from 1983 and was replaced by the Liberal-National Party in 1996. In office Labor championed pro-market reforms and, in the process, paved the way for the still more radical reforms of its successor. The primary point of distinction between these governments (and this has been reflected at state level also) is that the Labor Party has not demonstrated overt hostility to unions. In practice, though its policies of labour market deregulation have undercut the position of unions and this has been reflected in declining union membership among other things.

Under the Howard Liberal-National Party (LNP) Government elected in 1996, however as demonstrated above, legislative measures and Government actions went beyond what was required to achieve increased labour market flexibility and enhance global competitiveness, but were directed at trade unions as institutions. This was most graphically demonstrated in 1998 when the Government backed a company, Patrick Stevedores, in its efforts to de-unionise its stevedoring operations. Nor was this an isolated action, but forms part of a pattern of conduct along with other measures such as the establishment and operation of the Office of the Employment Advocate and a Royal Commission into the Building Industry established in 2001.

Australian labour market reforms are commonly referred to as 'deregulation', though these reforms involve a detailed revision of the relevant laws, and are in fact re-regulation designed to achieve more flexible labour. In part governments have pursued this through legislation, which compels a shift from centralised employment regulation under the umbrella of conciliation and arbitration to enterprise- or workplace-based regulation. This has involved detailed regulation of agreement making, industrial action, and in the case of the present government, a range of measures designed to hobble the unions. While these developments have been somewhat controversial, it is important that there has emerged a partial consensus around the need for a safety net to underpin the decentralised system. The WRA, the LNP Government's recasting of the Industrial Relations Act, exhibits substantial continuity with its predecessor, with industry and occupational awards providing a safety net. This safety net may be adjusted by the AIRC from time to time in light of changing circumstances in a particular industry or in order to establish new national standards; for example, the extension of unpaid parental leave to casual workers who had been employed for at least twelve months (Parental Leave Test Case – various awards, Print 904631 2001). The major point of distinction between the political groupings has been over the content of awards, with the LNP legislating to restrict the award safety net to 20 allowable matters. These matters contained in s.89A include: classification of employees, ordinary time hours, rates of pay, overtime and penalty payments, incentive based payment, leave provisions (e.g. annual, sick, and parental), public holidays, notice of termination, pay and conditions for outworkers, and dispute settling procedures.

The issue of the safety net represents a peculiarly Australian response to the inroads of globalisation, which draws off the ethos of the system of conciliation and arbitration established at the beginning of the twentieth century. Following the passage of the Conciliation and Arbitration Act 1904, the federal tribunal (then, the Commonwealth Court of Conciliation and Arbitration) was established to prevent and settle interstate industrial disputes by means of conciliation and arbitration. In practice, the establishment of the tribunal served to regulate industrial relations through the registration of unions and employer associations and their participation in the ongoing operation of the system. In effect, registration institutionalised and encouraged collectivist employment regulation in which the failure of negotiations

would normally lead to a resolution via compulsory conciliation or arbitration.

The power over industrial relations in the Australian Constitution assumed the continued existence of state systems of industrial regulation. In an effort to co-ordinate the duality of industrial regulation in Australia, the AIRC has come to be regarded as the 'pace setter' for its state counterparts in respect of minimum wages and other industrial standards, such as equal pay (1969 and 1972) and working hours (1920, 1927, 1947, and 1983). These decisions were enshrined in the various federal and state awards that regulated the wages and conditions of employment in most occupations. Typically, award provisions constitute a comprehensive (but not exhaustive) regulation of the employment relationship, but they also embody a set of minimum labour standards aimed at protecting individual employees against free market forces. The extent to which awards have operated as a set of minima has varied over time and across industries, though as we have indicated above, globalisation has seen a major recasting of the role of awards.

It has been argued that the significance of award regulation derived from its role in impeding 'downward' variation in wages and conditions (Campbell & Brosnan 1999). In this sense, awards offered a series of protections to workers, particularly as they established a floor of minimum labour standards underpinning the wages and conditions of most employees. Generally, these award conditions were then applied by state tribunals to employees covered under the corresponding state award, resulting in similar wages and conditions for employees undertaking similar work in different regions of Australia. The egalitarianism of Australian industrial relations was compounded by the internal operations of tribunals, specifically the tendency of wage-fixing decisions to compress differentials, particularly when compared with the UK and the USA (Machin, 1996).

As explained above, since the 1980s successive Australian governments have sought increased labour flexibility (utilisation and remuneration) through lowering the locus of employment regulation, while at the same time recasting the role of industrial tribunals to the articulation of a safety net of wages and conditions. In effect a major role of the tribunals is to moderate the impact of globalisation, particularly in respect of those workers with the least bargaining power, and also to ensure adherence to core labour standards which have been largely derived from ILO conventions. Indeed, in 1994 labour law reforms implemented by the Labor Government, enshrined ILO conventions as the basis for provisions regulating minimum wages, equal pay, termination of employment (including unfair dismissal), parental leave and carers' leave, and the amended Industrial Relations Act 1988, included various ILO conventions and recommendations as schedules. This was by way of establishing awards as an "effective framework for protecting wages and conditions of employment… and ensuring that labour standards meet Australia's international obligations" (s. 3(b)).

While this engagement with standard setting and international conventions was qualified under the WRA, it was not removed. The number of schedules referring to ILO conventions and instruments fell from 10 to two. By the same token the objects of the WRA maintain an emphasis on the "award safety net of fair and enforceable minimum wages and conditions of employment" (s.3(d)) and the Act is to "assist in giving effect to Australia's international obligations in relation to labour standards' (s.3(k)). Recently, this essential continuity in the regulatory regime was noted by the eminent international jurist and High Court Judge Michael Kirby (2002).

The decisive contribution of the Liberal-National Party Government elected in 1996 has been in shifting the role of the AIRC away from dispute resolution by conciliation and arbitration. This is substantiated by the fact that there has been a decline in the number of s.99 notifications of industrial disputes (the first stage in the process of conciliation and arbitration) for four years in succession, from 3,696 s.99 applications in 1996/97 to 2,598 in 2000/2001. This phenomenon is also reflected in the decline of Full Bench arbitrated decisions, from 355 in 1995/96 to 249 in 2000/2001 (AIRC 2001). While dispute notifications continue to decline, some of this activity has shifted to s.127 notifications to stop or prevent industrial action; these have risen from 114 in 1996/97 to 444 in 2000/2001. The significance of this development is that, unlike a dispute notification, the purpose of a s.127 application is to initiate a process that may lead to penalties being imposed by the Federal Court.

This apparent increase in recourse to legal remedies against unions is an entirely intentional feature of the recent reforms. Thus a senior member of the AIRC has commented, "… the legislation tends to channel disputes into the courts rather than the Commission. Further, the rules relating to bargaining, dispute settlement and industrial action have become more complicated and legalistic. An increasing amount of time and resources are spent on disputes and litigation regarding the interpretation and application of statutory provisions …" (Boulton 1999: 10).

Apart from increasing litigation, there is evidence of a privatisation of dispute resolution processes, as many Australian workplaces are turning to private third parties such as mediators to help resolve disputes. An examination of the dispute resolution clauses in 1,000 federal enterprise agreements ratified in 1999 and another 1,000 in 2001 (Van Gramberg 2002) found that the inclusion of provisions for the use of private third parties increased from 4.5 percent 10.1 percent of agreements over two years. This indicates a substantial growth of private mediators, although it still represents a minority of workplaces.

Conclusion

The evolution of the Australian system of labour law in the face of a globalising economy places employees at the workplace under far greater pressure to become flexible and competitive. At the same time, we have seen that this development has been partly attenuated by the pervasiveness of the Australian system of standard setting, which has its origins in the early twentieth century. Thus, while union membership continues to decline and a hostile government holds office federally, the system of employment regulation continues to provide a foundation of wages and conditions of employment.

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Appendix 1

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Appendix 2

Significant industrial relations events: 2000-2002

Date	Event	Significance
Early 2000	Collapse of National Textiles	Reinvigorates debate re protection of employee entitlements; Commonwealth Government institutes two measures: a safety net for employees (interim measure) & amends Corporations Law imposing personal liability on company directors that purposively avoid payment of employee entitlements; Scheme provided dilemma for Labor and unions: better than nothing but not adequate, place the burden on taxpayers, should state governments co-operate
September 2000	Independent Report of the Victorian Industrial Relations Taskforce	Recommended substantial re-regulation
2000	Award simplification	High Court rejected a constitutional challenge to the simplification process
2000	Transmission of business	High Court decision provides an authoritative approach, though still leaves many unknowns; Two businesses to have the same character (ie a pharmacy picking up banking work does not have the same character); Leaves open the question of outsourcing public to private sector
2000	BHP Pilbara	Much of dispute played out in Federal Court, consideration of AWAs and injury to union members: grounds for a triable case; ACTU supplies organising NOT industrial resources
2000	Commonwealth Bank	As for BHP: grounds for a triable case
Oct 2000	Unified industrial relations (IR) system	Reith foreshadows use of corporations' powers to achieve a unified IR system
2000	ACTU structure and focus	Implementation of 50 percent female executive; At Congress organising the pre-eminent issue; Endorses bargaining fee claims
2000	Litigation & lockouts	A common response to industrial conflict; Lock-outs: Joy Manufacturing (six months) Conroys abattoirs Peerless Holdings ACI Yallourn Energy Cadbury-Schewppes '2000 the year of the lock-out'
2000	Yallourn Energy dispute	Outsourcing proposed during bargaining Employees locked-out Defeat of traditionally strong union
2000	Building industry campaign to reduce working hours (Vic)	Employers threaten bans and lock-outs and pursuit of damages, but splintered and signed off agreements

2000	Metals Campaign 2000	Common end date of agreements achieved but achieving new agreements difficult; AIG less union friendly; Site by site deals difficult for unions to administer; Some employers refuse to make union agreements; Employers use WRA bargaining provisions to advantage
2000	Unions and organising	Organising a shift to basing union power on internal resources rather than on co-operation with employers or power derived from the state
2000	AIRC changes	New appointments upset convention of alternate union/management appointments; Cutbacks and reduced staffing mean increased delays in cases being heard
2000	NSW Government Taskforce Inquiry into labour hire industry	In response to Government proposed 'deeming" of a class of independent contractors employees
2000	Telstra	Adopted highly confrontationalist IR strategy, pushing for non-union agreements, curtailing union access, litigation to intimidate unions; Jobs cut in record profits; Share-holders demand accelerated cost-cutting programmes
2000	Business Council commissions a study of CEOs	Findings: CEO's work hard Main problems: Middle management Lower level staff Unions, tribunals and legislation
2001	Collapse of several corporate giants: HIH One-Tel Ansett	Precariousness of employee entitlements raised and further administrative solutions introduced: GEERS: covering all pay and leave and up to eight weeks redundancy
2001	Manusafe	Metal industry fund to protect employee entitlements; Metals unions make claims, but not successful
2001	WRA amended	Tallies removed as an allowable matter, and incentive-based payments inserted; Termination provisions: excludes demotion and brings in three month qualifying period
2001	Bargaining Fees	Fed Court determines not a bargaining matter
2001	Minister change	Abbot replaces Reith (AFR article for difference)
2001	Labor Government in WA	Foreshadow major review of IR laws
2001	Outsourcing	Full Bench of Fed Court: differing views whether outsourcing to avoid awards and agreements equates to dismissal for a prohibited reason
2001	Trade unions	Membership growth for the first time in over a decade; Union and Labor Party relationship debated
2001	Royal Commission in the Building Industry	Union claims of political manoeuvre
2001	Disputes	41 percent decrease on previous year
May 2001	ACTU launches reasonable hours case	First major test case on hours since the 1948 8-hour day

2001	Unpaid maternity leave for casuals	Supported by most employer groups
2001	Work and family	Some advances (eg 12 month paid maternity leave at ACU); Some improvements with considerable concessions (Qantas six weeks paid maternity leave for 18 month wage freeze) On the whole patchy and inconsistent and increasing imbalance
2001	Union internal conflict	Workers First in metals Vic Criminal charges re run-through
2001	Employer views	Employer surveys indicate that with the exception of unfair dismissal, a lack of urgency re IR matters
2001	Non-union agreements	Evidence of employer dissatisfaction as a union avoidance strategy as unhappy surprises with mandatory ballots
2001	AWAs	Limited take-up
2001	BHP: Pilbara	Fed Court determines that company had acted legally in offering individual agreements; ACTU strategy to move away form court action and towards industrial action WA tribunal awards pay increases
2001	BHP: Port Kembla	Dispute re individual contracts; Outsource protective services to SERCO who agree to negotiate collective agreement after industrial action and Commission hearings
2001	QANTAS	After dispute staff agree to wage freeze in return for postponement of outsourcing
2001	Call centres	Stellar: first award in the contract call centres industry; Workplace unionism forced abandonment of individual contracts
Feb 2002	Industrial action	Fed Court determines that can take industrial action in support of a claim for matters that are not subject of an existing agreement
Feb 2002	AIRC no power to remove non-complying clauses	The AIRC determined that it does not have the power to remove clauses from proposed CAs that do not pertain to the employment relationship (eg union and bargaining fees)
March 2002	Fed Sex Discrimination Commissioner options paper on maternity leave	Proposes a statutory entitlement to paid maternity leave
May 2002	Living wage case decision	The largest LWC decision (amounting to 4.35 percent)
July 2002	Working hours test case decision	Employees able to refuse unreasonable overtime