



LABOUR LAW TOOL
Australia

Select a topic from the following list to view details:

1. Human Trafficking Legal Framework.....	05
2. Recruitment Fees.....	05
a. Fees paid for work permits or renewal.....	05
b. Fees paid for passports (and/or passport renewals).....	05
c. Fees paid for visas and other travel documents.....	05
d. Fees paid for border crossings.....	06
e. Fees paid for travel from home to work location.....	06
f. Fees paid for work training/orientation.....	06
g. Fees paid to employer for rent.....	06
h. Fees paid for accommodation in the departure location or during transit to the work location.....	07
i. Fees paid for 'placement' 'recruitment' or 'thank you' fees.....	07
j. Fees paid for translation services.....	07
k. Fees paid for document checking and certification.....	07
l. Fees paid for health assessment.....	07
m. Fees paid for vaccinations.....	07
n. Fees paid for travel booking services.....	07
o. Fees paid for guaranteeing future work.....	07
p. Fees paid for on-the-job training.....	08
q. Knowingly charging fees to a worker to secure a job that does not exist.....	08
3. Child Labour.....	08
a. Employing a child below the legal working age.....	08
b. Employing a minor to engage in hazardous work.....	08
4. Wage Deductions.....	10
a. Withholding wages as a bond.....	10
b. Withholding wages as forced savings.....	10
c. Withholding wages as punishment for being late to shift.....	10
d. Withholding wages for refusing overtime.....	10
e. Withholding wages for missing goods.....	10
f. Withholding wages for accommodation (without explicit consent).....	11
g. Withholding wages for bills such as water (without explicit consent).....	11
h. Withholding wages to pay back recruitment fees.....	11

i. Withholding wages for absence/illness (outside of legal terms in employment contract).....	11
j. Withholding wages for uniform/work equipment.....	11
k. Taking control of the workers' bank account.....	11

5. Employment Contracts..... 11

a. Workers do not have necessary legal work permits.....	11
b. Employment contract is not in writing.....	12
c. Employment contract is not signed by the worker.....	12
d. Employment contract is not signed by the employer.....	12
e. Employment contract does not comply with local law.....	12
f. Employment contract is not in the worker's native language.....	13
g. Contract exclusions key elements.....	13
h. Illiterate workers have not been read their contract.....	13
i. Employment contract has been substituted or amended after signing.....	13
j. Workers are not provided a copy of their contract.....	14

6. Payment Issues..... 14

a. Payslips are not provided to workers.....	14
b. Payslips are not compliant with local laws, if any.....	14
c. Payslips are not legible.....	14
d. Workers are not paid the salary agreed in their contract of employment.....	14
e. Workers are paid late.....	14
f. Workers are not paid minimum wage.....	15
g. Workers are paid a piece-rate that is not equal to minimum wage.....	15
h. Workers are not provided with holiday pay.....	15
i. Workers are not provided with sick pay.....	15
j. Workers are paid 'in-kind' through other means (like 'work-for-benefits').....	15
k. Workers are not paid in legal tender.....	15
l. Workers are required to work compulsory overtime.....	15
m. Workers are not paid for overtime work.....	16
n. Overtime work is used to discipline workers.....	16
o. Overtime pay is not in line with legal minimum wage.....	16

7. Withholding of Passports and Documents..... 16

a. Workers' documents (passport, identity documents etc.) are held and they are unable to access them if they want to.....	16
b. Documents are held by employers without express consent.....	16

8. Deprivation of Liberty.....	17
a. Workers are not permitted to leave the workplace (outside of normal working practices)...	17
b. Workers are not permitted to leave their accommodation except to attend work.....	17
c. Workers are not permitted to leave the country without permission from their employer (e.g. Kafala system).....	17
d. Workers require permission to change employer or leave their job (outside of the contractual notice period).....	17
e. Workers are assigned a minder if they wish to leave their accommodation/workplace outside of normal working hours.....	17
f. Workers are physically locked into the workplace.....	17
g. Military/government security guards are used to guard the workplace.....	17
9. Intimidations/Threats/Violence.....	18
a. Workers experience, or are threatened with, physical abuse.....	18
b. Workers experience, or are threatened with, psychological abuse.....	18
c. Workers are threatened with deportation if they do not comply with demands.....	18
10. Isolation.....	19
a. Confiscation of the worker's mobile device.....	19
b. Workers are required to ask permission to contact friends/family.....	19
11. Sexual Harassment.....	20
a. Workers experience, or are threatened with, sexual abuse.....	20
b. Workers are required to take pregnancy/sexual health tests.....	21
c. Workers are required to take contraception.....	21
12. Bonded Labour.....	22
a. Workers have debts (that are unofficial, not in writing etc.) related to their employment....	22
b. Workers have debt that is unethical (such as excessive or illegally high interest rates) related to their employment.....	22
c. Workers are in debt to their employer or recruiter.....	22
d. Workers are in debt due to paying recruitment fees.....	22

1. Human Trafficking Legal Framework

The principal Australian laws that criminalise human trafficking are found within Division 270 of the Criminal Code Act 1995 (Cth).¹ This Division prohibits slavery (including slave trading) and slavery-like offences such as servitude, forced labour, deceptive recruiting, forced marriage and debt bondage. Persons found guilty of such offences may be liable to an imprisonment term up to 25 years.

Relevant offences are also contained in some of the State based Crimes Acts/Criminal Codes².

Additionally, the Modern Slavery Act 2018 (Cth) is a statutory reporting regime that mandates business which have a revenue of over \$100 million per annum to report modern slavery risks in their operations and supply chains. Reporting obligations require businesses to identify all modern slavery risks and outline what steps have been taken to assess and address such risks. Currently, there are no pecuniary penalties for non-compliance with this Act.

2. Recruitment Fees

a. Fees paid for work permits or renewal

A person's right to work in Australia depends on their visa status (see paragraph (c) below).

Under section 325 of the Fair Work Act 2009, it is unlawful for an employer or prospective employer to require an employee to pay for something if the payment is in connection with the employment or potential employment; if the payment is unreasonable in the circumstances; and if the payment is for the direct or indirect benefit of the employer/prospective employer.³ This provision effectively prohibits employers charging employees or prospective employees fees for visas/work permits.

b. Fees paid for passports (and/or passport renewals)

Employees ordinarily pay for their own passports and/or passport renewals in Australia. Employers can agree to cover these costs, if they wish to do so, but are not entitled to recover those costs from the employee.

c. Fees paid for visas and other travel documents

Fees for visas and other travel documents depend on the type of visa the employee has obtained.

If the employer is sponsoring the employee for one of the visas below, the employer is required to pay the costs associated with becoming a sponsor and nominating the employee. This includes fees and costs involved with job recruitment and professional advice and assistance (for example, migration agent and legal fees). These fees cannot be passed on to the employee.

1 *Criminal Code Act 1995 (Cth)*, [Division 270](#).

2 For example, *Crimes Act 1990 (NSW)*, [Division 10A](#) and *Crimes Act 1958 (Vic)*, [s 8F](#).

3 *Fair Work Act 2009 (Cth)*, [s 325\(1\)](#).

The [Migration Act 1958 \(Cth\)](#) outlines the specific visas that the employer must pay for. These include visas such as the Temporary Work (Long Stay Activity) Visa, the Training and Research Visa, and The Temporary (Skilled) Visa (section 140J Migration Act 1958 (Cth)).⁴

If the employee is working in Australia but on another type of visa (for example, a Partner Visa, subclass 820/801), it is usual for the employee to pay the costs associated with that visa.

d. Fees paid for border crossings

Same as above section (c).

e. Fees paid for travel from home to work location

Employers are not required to pay for any costs associated with an employee travelling to Australia to take up a position here. Nor is an employer required to pay the costs associated with an employee commuting to work on a daily basis. However, employers can agree to cover some or all of these costs, including international travel, if they wish to do so. It is also possible for an employee to agree to repay some or all of these expenses.

When travel takes place during an employee's working hours and the employer has required the employee to undertake this travel, the employer is usually required to bear the reasonable costs associated with that travel.

Specific provisions regarding travel and payment of travel related expenses are contained in different Modern Awards set by the Fair Work Commission. [See the Fair Work Commission website for more details here.](#)

f. Fees paid for work training/orientation

A brief work trial can be unpaid if it is utilised to evaluate someone's suitability for the job, and:

- It involves no more than a demonstration of the person's skills, where they are relevant to a vacant position;
- It is only for as long as needed to demonstrate the skills required for the job. This will depend on the nature and complexity of the work, but could range from one hour to one or possibly more shifts; and
- The person is under a direct supervision of the potential employer (or other appropriate individual) for the entire trial.

Any period beyond what is reasonably required to demonstrate the skills required for the job must be paid at the agreed rate of pay. If an employer wants to further assess a candidate's suitability, they could employ the person as a casual employee and/or for a probationary period and pay them accordingly for all hours worked.

⁴ *Migration Act 1958 (Cth)*, [s 140J](#).

g. Fees paid to employer for rent

An employer cannot require an employee to enter into a lease and cannot mandate in an employment contract that an employee pay the employer rent (section 325 of the *Fair Work Act 2009* (Cth))⁵.

Further, an employer cannot deduct money from an employee's wages for agreed rental unless this is permitted by section 324 of the *Fair Work Act 2009* (Cth).⁶ Briefly, this can only happen if the payment is for the employee's benefit and the employee consents to the payment/withholding.

h. Fees paid for accommodation in the departure location or during transit to the work location

See above sections (e) and (g).

i. Fees paid for 'placement' 'recruitment' or 'thank you' fees

These fees are not permitted by sections 324 or 325 of the *Fair Work Act 2009* (Cth).

j. Fees paid for translation services

See section (c) above. Further, these fees may not be permitted by sections 324 or 325 of the *Fair Work Act 2009* (Cth).

k. Fees paid for document checking and certification

See section (c) above. Further, these fees may not be permitted by sections 324 or 325 of the *Fair Work Act 2009* (Cth).

l. Fees paid for health assessment

See section (c) above. Further, these fees may not be permitted by sections 324 or 325 of the *Fair Work Act 2009* (Cth).

m. Fees paid for vaccinations

See section (c) above. Further, these fees may not be permitted by sections 324 or 325 of the *Fair Work Act 2009* (Cth).

n. Fees paid for travel booking services

See section (c) above. Further, these fees may not be permitted by sections 324 or 325 of the *Fair Work Act 2009* (Cth).

⁵ *Fair Work Act 2009* (Cth), [s 325](#).

⁶ *Fair Work Act 2009* (Cth), [s 324](#).

o. Fees paid for guaranteeing future work

Under section 325(1) of the *Fair Work Act 2009* (Cth), it is unlawful to ask an employee to pay something if the payment is in connection with the employment or potential employment of the employee; if the payment is unreasonable in the circumstances; and if the payment is for the direct or indirect benefit of the employer/prospective employer. This includes guaranteeing future work.⁷ Consequently, such fees are not permitted.

p. Fees paid for on-the-job training

An employee may need to complete formal or informal training (including on the job-training or courses) so that they have the right skills and knowledge for their job.

If an employee is required by the employer to undertake training as part of their job, they must be paid the correct pay for the hours worked during that training and the employer must pay the associated training fees. An employer is not entitled to charge an employee for on-the-job training.

It is possible for an employer and employee to agree on other arrangements in relation to other (non-mandatory) types of training.

q. Knowingly charging fees to a worker to secure a job that does not exist

This is not permitted. Section 325(1A) *Fair Work Act 2009* (Cth) prohibits a prospective employer requiring a prospective employee to pay an amount if the requirement is in connection with the potential employment; is unreasonable; and benefits the prospective employer.⁸

This conduct might also involve a criminal offence such as obtaining a financial advantage by deception.

3. Child Labour

a. Employing a child below the legal working age.

b. Employing a minor to engage in hazardous work.

The minimum age of employment and regulation of children in employment varies across each State and Territory.

In **New South Wales** children below the age of 15 can be employed for a restricted number of hours per day, during certain times of the day, and for a limited number of days per week. Hours of work vary according to the age of the child and the type of work. Employers have a range of responsibilities such as ensuring a child works on only one shift per day, does not start work less than 12 hours after previously finishing work, and that appropriate rest breaks are provided.

In **Victoria** children below the age of 13 may not be employed, although exceptions exist for family businesses, the entertainment industry and children above the age of 11 when delivering newspapers, advertising material or deliveries for a registered pharmacist. Any employed child

⁷ *Fair Work Act 2009* (Cth), [s 325\(1\)](#).

⁸ *Fair Work Act 2009* (Cth), [s 325\(1\)](#).

(including children within family businesses) must only perform 'light work', work certain hours, and be granted specified rest periods. There is no minimum age of employment in entertainment or advertising, however there are some additional requirements depending on the child's age and the industries involved.

In **Queensland** the [Child Employment Act 2006 \(Qld\)](#) prohibits the employment of children below the ages specified in the Child Employment Regulation 2016. Generally, the minimum age for employment is 13. This is lowered to 11 where the child carries out supervised delivery work that involves newspapers, advertising material or similar items between the hours of 6 am and 6 pm. On a school day a school-aged child can work a maximum of 4 hours. When they are not required to attend school, children can work a maximum of 8 hours.

In **Western Australia** there are restrictions on the type of jobs and working hours for children under 15. However, children of any age can work in a family business owned by a relative; perform professional work as an actor, musician, entertainer or in an advertisement; or work for charities and other not-for-profit organisations, as long as the work does not prevent school attendance.

In **Tasmania** there is no legislation specifically addressing the employment of children and young people. In practice some limits on the employment of children is achieved through the compulsory education requirements established under the [Education Act 1994 \(Tas\)](#) and the [Youth Participation in Education and Training \(Guaranteeing Futures\) Act 2005](#).

In **South Australia** there is no legislation specifically addressing the employment of children and young people. However, the [Education and Children's Service Act 2019 \(SA\)](#) prohibits the employment of a child of compulsory education age during the hours which they are required to attend school. Additionally, it is unlawful to employ a child at any time in a manner of work that would affect the child's fitness to attend school.

In the **Australian Capital Territory** hours of work are not restricted for young people over 15 years. Employment, however, must not adversely affect a young person's ability to benefit from education. It is an offence to employ a child or young person of compulsory education age (ie under 17) during school hours, if the child or young person is required by the Education and Training Directorate to attend school. Children and young people under the age of 15 may only be employed in light work. Some examples of light work are going on errands, casual work in and around a private home, clerical work and work as a cashier.

In the **Northern Territory** the minimum age for employment is 15 years. Parents and employers have the following joint obligations:

- The child must not perform work at any time after 10 pm and before 6 am;
- The child must not be required to perform any work that is harmful, or likely to be harmful to the child's physical, mental or emotional wellbeing; and
- The child must not perform any work that results in their exploitation.

4. Wage Deductions

a. Withholding wages as a bond

Australian law requires an employer to pay an employee the amount owing to them in full (section 323 *Fair Work Act 2009* (Cth)).⁹ Bonds are not permitted by this provision and by section 325 (see paragraph 2.2 above).

A term of an employment contract has no effect if it: (a) permits the employer to deduct an amount from an employee's wages and this is for the benefit of the employer and is unreasonable; (b) requires employees to make a payment to the employer or someone else if the payment is for their benefit and is unreasonable; or (c) permits the employer to deduct an amount from an employee's wages or requires the employee to make a payment to the employer or another person and the employee is under 18 and the deduction is not agreed to in writing by their parent or guardian.

A deduction is reasonable if goods and services have been provided to an employee by the employer in the ordinary course of the employer's business and the employer provides the goods or services to the public on the same or not more favourable terms and conditions. A deduction would also be reasonable if it is for the purpose of recovering costs directly incurred by the employer as a result of the employee's voluntary private use of the employer's property.

These laws heavily restrict the ability of an employer to withhold any part of an employee's wages or make deductions from those wages, even if the employee consents to this.

The state of **Victoria** has also created various "wage theft" offences under the [Wage Theft Act 2020 \(Vic\)](#). It is an offence to dishonestly withhold employee entitlements (ie A benefit owed by an employer to an employee). Businesses can be subject to an imprisonment term of 10 years or a fine of up to \$991,320 (section 6 *Wage Theft Act 2020* (Vic)).¹⁰

b. Withholding wages as forced savings

See section (a) above.

c. Withholding wages as punishment for being late to shift

See section (a) above.

d. Withholding wages for refusing overtime

See section (a) above.

e. Withholding wages for missing goods

See section (a) above.

f. Withholding wages for accommodation (without explicit consent)

See section (a) above.

⁹ *Fair Work Act 2009* (Cth), [s 323](#).

¹⁰ *Wage Theft Act 2020* (Vic), [s 6](#).

g. Withholding wages for bills such as water (without explicit consent)

See section (a) above.

h. Withholding wages to pay back recruitment fees

See section (a) above.

i. Withholding wages for absence/illness (outside of legal terms in employment contract)

See section (a) above.

j. Withholding wages for uniform/work equipment

See section (a) above.

k. Taking control of the workers' bank account

An employer has no right to take control of an employee's bank account. Doing so and then extracting funds from that account without the employee's consent would involve criminal offences such as theft, which carries a maximum penalty of 10 years imprisonment.

5. Employment Contracts

a. Workers do not have necessary legal work permits

All foreign workers must have work permits (ie visas) to work legally in Australia. Only Australian citizens, permanent residents and New Zealand citizens holding Special Category (subclass 444) visas do not require work permits.

A work permit outlines the type of work, how many hours, and what jobs a worker can do.

Employers who employ unlawful non-citizens to work may be guilty of a criminal offence and may be liable to 2 years imprisonment. Alternatively, employers may be liable to a civil penalty of \$18,900 (section 245AB *Migration Act 1958* (Cth)).¹¹

b. Employment contract is not in writing

Australian law does not require an employment contract to be in writing. Contracts can be in writing or verbal. However, all employees must be provided with a copy of a Fair Work Information Statement which outlines their rights.

However, the *Fair Work Act 2009* and Regulations made under that Act do require an employer to keep a range of employee records including an employee's identifying details, employment classification (for example, full-time, part-time or casual), rates of pay, leave entitlements and superannuation contributions. Employers must also provide their employees with pay slips.

11 *Migration Act 1958* (Cth), [s 245AB](#).

c. Employment contract is not signed by the worker

Australian law does not require an employment contract to be signed by the worker.

d. Employment contract is not signed by the employer

Australian law does not require an employment contract to be signed by the employer.

e. Employment contract does not comply with local law

The National Employment Standards (NES) are minimum entitlements that must be provided to all employees. If an employment contract attempts to modify or exclude such standards, the NES will apply regardless of that modification or exclusion (section 61, *Fair Work Act 2009* (Cth)).¹² Please note that not all of the NES provisions apply to casual employees.

The minimum entitlements of the NES are: maximum weekly hours, requests for flexible working arrangements, offers and requests to convert from casual to permanent employment, parental leave, annual leave, personal (sick and carer's) leave, compassionate leave, domestic violence leave, community service leave, long service leave, public holidays, notice of termination, redundancy pay, provision of a Fair Work Information Statement, and provision of a Casual Employment Information Statement.

A contravention of the NES may result in a prosecution and penalties in excess of \$13,000 (for an individual) or \$66,000 (for a company).

There are a number of other statutes at State and Federal levels which cannot be overridden by employment contracts, including in relation to occupational health and safety, workers' compensation and compulsory superannuation.

Additionally, in most circumstances, employment contracts cannot override an applicable Modern Award (which is an instrument created by the Fair Work Commission which specifies minimum benefits and protections for certain employees) or an Enterprise Agreement (which is an agreement negotiated by an employer and a group of its employees, sometimes referred to as a "collective agreement").

f. Employment contract is not in the worker's native language

Australian law does not require an employment contract to be in the worker's native language. However, if the employee is unable to read or understand the contract, then it is likely they will not be bound by the contract.

12 *Fair Work Act 2009* (Cth), [s 61](#).

g. Contract excludes key elements

- Wages estimates
- Early termination with notice
- Early termination without notice
- Details of mandatory recruitment fees
- Transportation terms (including repatriation costs at end of contract)
- Accommodation terms (if relevant);
- Discipline terms (lateness, illness etc.)
- Standard holiday entitlements
- Illness entitlements

As noted in 5(e) above, an employment contract cannot override an employee's statutory entitlements.

An employment contract can, but is not required to, deal with matters such as termination, transportation, accommodation, discipline and leave entitlements, but not in a way which diminishes a statutory entitlement.

There are no mandatory recruitment fees in Australia.

h. Illiterate workers have not been read their contract

Australian law does not require that illiterate workers have their contract read to them. However, if the employee is unable to read or understand the contract, then it is likely they will not be bound by the contract.

i. Employment contract has been substituted or amended after signing

An employer is unable to change an employee's contract without the employee's consent.

Any attempt by an employer to unilaterally change an employment contract will amount to a "repudiation" of that contract. This would entitle the employee to terminate the contract or elect to continue performance of the contract and sue for damages.

Employers are also prohibited from coercing an employee to enter into an employment contract (section 343 *Fair Work Act 2009* (Cth)).¹³

13 *Fair Work Act 2009* (Cth), [s 343](#).

j. Workers are not provided a copy of their contract

There is no statutory obligation that mandates workers be provided with a copy of their contract. However, employees do have rights to access and obtain copies of records which an employer is required to keep (see paragraph 5(d) above).

Further, if there is a flexibility arrangement in place (per the NES), then a copy of that flexibility arrangement must be given to the employee (section 144(4)(f) *Fair Work Act 2009* (Cth)).¹⁴

A contravention of the NES may result in penalties in excess of \$13,000 (for an individual) or \$66,000 (for a company).

6. Payment Issues

a. Payslips are not provided to workers

Australian law requires employers to give employees a pay slip within one working day of paying the employee (section 536(1) *Fair Work Act 2009* (Cth)).¹⁵ Contravention of this section could attract a prosecution and penalty of up to \$12,600.

b. Payslips are not compliant with local laws, if any

The law requires pay slips to be in a form prescribed by the regulations (section 536(2) *Fair Work Act 2009* (Cth)).¹⁶ The pay slip must specify the employer and employee's name, the period to which the pay slip relates and the date it was made, the gross and net amounts of payment, any extra amounts paid to the employee, and the employer's Australian Business Number. If relevant, the pay slip must also include the employee's hourly rate, annual rate, any deductions made and any superannuation contributions. (Fair Work Regulations, reg 3.46).¹⁷ Contravention of this regulation could attract a prosecution and penalty of up to \$12,600.

c. Payslips are not legible

All records required to be kept by an employer, including payslips, must be in a legible form and in the English language¹⁸.

d. Workers are not paid the salary agreed in their contract of employment

A failure to pay an agreed salary would be a breach of contract. An affected employee would be entitled to seek damages (ie compensation for financial loss) caused by any such breach

e. Workers are paid late

Modern Awards and Enterprise Agreements usually set out the required frequency and timing of payments. If they do not, then an employer must pay wages at least monthly (section 323 *Fair Work Act 2009* (Cth)).¹⁹ If an employer is not paid by the date specified in the relevant workplace agreement or at least monthly, they may be subject to a prosecution and fine.

14 *Fair Work Act 2009* (Cth), [s 144\(4\)\(f\)](#).

15 *Fair Work Act 2009* (Cth), [s 536\(1\)](#).

16 *Fair Work Act 2009* (Cth), [s 536\(2\)](#).

17 *Fair Work Act Regulations 2009* (Cth), [reg 3.46](#).

18 *Fair Work Act Regulations 2009* (Cth), [reg 3.31](#).

19 *Fair Work Act 2009* (Cth), [s 323](#).

f. Workers are not paid minimum wage

An employer must pay an employee the applicable minimum wage.

Minimum wages are set out in the employee's Modern Award or Enterprise Agreement. If there is no applicable Award or Enterprise Agreement, the minimum wage is the National Minimum Wage, which is set each year by the Fair Work Commission.

Failing to pay an employee the applicable minimum wage could be subject to a prosecution and fine.

g. Workers are paid a piece-rate that is not equal to minimum wage

Employees can be paid piece rates provided this is done in compliance with an applicable Modern Award or Enterprise Agreement.

An employee who is paid piece rates and who is not covered by a Modern Award or Enterprise Agreement is entitled to receive at least the minimum wage.

h. Workers are not provided with holiday pay

Holiday pay is provided for in the NES. The minimum entitlement is 4 weeks per year.

A contravention of the NES may result in a prosecution and imposition of penalties in excess of \$13,000 (for an individual) or \$66,000 (for a company).

i. Workers are not provided with sick pay

Sick pay is provided for in the NES. The minimum entitlement is 2 weeks per year.

j. Workers are paid 'in-kind' through other means (like 'work-for-benefits')

Australian law requires workers to be paid in full and in money, not in kind²⁰.

k. Workers are not paid in legal tender

Australian law requires workers to be paid in cash, other legal tender, or by electronic funds transfer.

l. Workers are required to work compulsory overtime

An employer must not request or require an employee to work overtime if the hours to be worked are unreasonable. When determining whether overtime is reasonable there are many things that are taken into account. These include whether there is a risk to the employee's health and safety from working the extra hours, the workplace's needs, the employee's personal situation, and if the employee is entitled to receive overtime payments or penalty rates for working extra hours (section 62, *Fair Work Act 2009* (Cth)).²¹

²⁰ *Fair Work Act 2009* (Cth), s 323(1).

²¹ *Fair Work Act 2009* (Cth), [s 62](#).

m. Workers are not paid for overtime work

Modern Awards and Enterprise Agreements usually provide for payment of overtime rates. If an employer does not pay the overtime rate required of them, they may be subject to prosecution and fine.

Some Awards and Enterprise Agreements may also allow an employee to take paid time off instead of being paid overtime pay. This is known as “time in lieu”.

Employees not covered by an Award or Enterprise Agreement might not be entitled to overtime rates - this will depend on the terms of their contract of employment. However, they should at least be paid for each extra hour worked at their usual rate.

n. Overtime work is used to discipline workers

Overtime work cannot be used to discipline workers. See further paragraph 6.14 above.

o. Overtime pay is not in line with legal minimum wage

See paragraphs above.

7. Withholding of Passports and Documents

a. Workers’ documents (passport, identity documents etc.) are held and they are unable to access them if they want to

Improper use or possession of an Australian travel document by an employer is an offence under Australia law. Doing so attracts a maximum imprisonment term of up to 10 years or a substantial fine (section 32, the *Australian Passports Act 2005* (Cth)).²²

Dishonestly obtaining Australian travel documents (such as passports) is also an offence. Doing so has a maximum imprisonment term of up to 10 years or a substantial fine (section 35, the *Australian Passports Act 2005* (Cth)).²³

It is also an offence to improperly possess or use a foreign travel document (such as a foreign passport) if the person knows that document was not issued to that person. This offence has a maximum imprisonment term of up to 10 years or a substantial fine (section 21(4) *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth)).²⁴ Employers are, therefore, unable to withhold such documents.

b. Documents are held by employers without express consent

See paragraph 7(a) above.

22 *Australian Passports Act 2005* (Cth), [s 32](#).

23 *Australian Passports Act 2005* (Cth), [s 35](#).

24 *Foreign Passports (Law Enforcement and Security) Act 2005* (Cth), [s 21\(4\)](#).

8. Deprivation of Liberty

a. Workers are not permitted to leave the workplace (outside of normal working practices)

It is an offence to confine, detain or otherwise deprive a person of their liberty. If this occurs, then the persons responsible may be subject to a criminal prosecution and imprisonment. For example, section 355 of the Queensland *Criminal Code 1899* (Qld) makes it an offence to unlawfully confine or detain another in any place against the other person's will.²⁵ This offence is punishable by an imprisonment term of up to 3 years.

Australian law also prohibits servitude and forced labour. Forced labour includes a situation in which a person is unable to leave the place where they provide labour or services due to coercion, threats or deception. Servitude is forced labour which also involves a significant deprivation of personal freedom. Employers who do not allow workers to leave their workplace and force their employees to work may be subject to an imprisonment term of up to 20 years (sections 270.5 and 270.6A, *Criminal Code Act 1995* (Cth)).²⁶

b. Workers are not permitted to leave their accommodation except to attend work

See section (a) above.

c. Workers are not permitted to leave the country without permission from their employer (e.g. Kafala system)

This situation may involve a deprivation of liberty. It may also involve slavery or servitude. See above.

d. Workers require permission to change employer or leave their job (outside of the contractual notice period)

This situation may involve forced labour. See above.

e. Workers are assigned a minder if they wish to leave their accommodation/ workplace outside of normal working hours

This situation may involve forced labour or a deprivation of liberty. See above.

f. Workers are physically locked into the workplace

This situation may involve slavery, servitude, forced labour or a deprivation of liberty. See above.

g. Military/government security guards are used to guard the workplace

This situation may involve slavery, servitude, forced labour or a deprivation of liberty. See above.

²⁵ *Criminal Code 1899* (Qld), [s 355](#).

²⁶ *Criminal Code Act 1995* (Cth), [s 270.6A](#).

9. Intimidations/Threats/Violence

a. Workers experience, or are threatened with, physical abuse

b. Workers experience, or are threatened with, psychological abuse

Physical and psychological abuse may amount to coercion such that a situation of servitude or forced labour arises.

Physical and psychological abuse may also be considered bullying or harassment under workplace and occupational health and safety laws.

Anti-bullying laws cover all Australian workplaces. These laws also cover outworkers, students gaining work experience, contractors, sub-contractors and volunteers.

A worker is bullied at work if an individual or group of individuals repeatedly behaves unreasonably towards the worker (or a group of workers of which the worker is a member) and that behaviour creates a risk to health and safety (section 789FD, *Fair Work Act 2009* (Cth)).²⁷

Whilst Australian States differ in the particulars of Work, Health and Safety (WHS) laws, uniform WHS laws have been implemented in Australian Capital Territory, New South Wales, the Northern Territory, Queensland, South Australia, Tasmania and the Commonwealth.

These uniform laws use the following terms:

- Workplace Bullying is defined as repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety. It can include any physical, verbal, social or psychological abuse by an employer, or any other person or group of people at work.
- Health is defined as both physical and psychological health.
- Repeated behaviour refers to the persistent nature of the behaviour and can involve a range of behaviours over time. A single incident of unreasonable behaviour is not workplace bullying. However, it may be repeated, or escalate, so should not be ignored.
- Unreasonable behaviour means behaviour that a reasonable person, having considered the circumstances, would see as unreasonable. It includes behaviour that victimises, humiliates, intimidates or threatens someone.
- Failure to take steps to manage the risk of workplace bullying can result in a breach of these WHS laws.

c. Workers are threatened with deportation if they do not comply with demands

This situation involve slavery, servitude, forced labour or a deprivation of liberty. See above.

Further, under the *Fair Work Act 2009* (Cth), in certain circumstances an employer is prohibited from coercing (section 343) or placing undue pressure (section 344) on an employee to, for example, not exercise a workplace right.²⁸ An employer faces prosecution and pecuniary penalties under the Act if they are found to have breached such sections.

27 Fair Work Act 2009 (Cth), [s 789FD](#).

28 Fair Work Act 2009 (Cth), [s 343](#); [s 344](#).

10. Isolation

a. Confiscation of the worker's mobile device

An employer does not have a right to confiscate an employee's personal phone or other device. Such behaviour would amount to theft of that phone or device.

An employer can only inspect an employee's phone or device if they have a right to do so under:

- An employment contract; or
- A workplace policy (e.g. An acceptable IT use Policy, or Investigations Policy, or Code of Conduct); or
- A direction which is "lawful and reasonable".

Whether a direction to hand over a personal device is a lawful and reasonable direction will depend on the nature of the circumstances that confront the employer/employee relationship. Such a direction might be lawful if the employee has been using the device for work related purposes.

Different rules apply to employer owned devices which have been provided to employees for use in their employment. The employer's rights will then usually be expressed in the contract of employment or a relevant policy. Usually, an employer can require an employee to hand over any such devices at any time.

b. Workers are required to ask permission to contact friends/family

Australian law does not expressly address situations where workers are required to ask permission to contact friends/family. This requirement might be a lawful requirement in some situations, particularly if the restriction is limited to contact during working hours. It would not be if the restriction applied to after-hours contact for purposes unrelated to the employment relationship.

11. Sexual Harassment

a. Workers experience, or are threatened with, sexual abuse

Sexual harassment is defined differently around Australia, but generally involves unwelcome sexual conduct which makes a person feel offended, humiliated and/or intimidated and where that reaction is reasonable in the circumstances.

Sexual harassment in employment is unlawful under s 28A of the *Sex Discrimination Act 1984* (Cth)²⁹ and under the various anti-discrimination statutes that apply in the States and Territories.

Some types of harassment may also be offences under the criminal law. These include:

- Physical molestation or assault;
- Indecent exposure;
- Sexual assault;
- Stalking; and
- Obscene communications (telephone calls, letters etc).
- The legal test for sexual harassment has three elements under the *sex discrimination act 1984 (Cth)*:³⁰
- The behaviour must be unwelcome;
- It must be of a sexual nature; and
- It must be such that a reasonable person would anticipate in the circumstances that the person who was harassed would be offended, humiliated and/or intimidated.

Whether the behaviour is unwelcome is a subjective test: how the conduct in question was perceived and experienced by the recipient, rather than the intention behind it.

Whether the behaviour was offensive, humiliating or intimidating is an objective test: whether a reasonable person would have anticipated that the behaviour would have this effect.

Employers will be held legally responsible for acts of sexual harassment committed by their employees unless they took all reasonable steps to prevent the sexual harassment.

29 *Sex Discrimination Act 1984* (Cth), [s 28A](#).

30 *Sex Discrimination Act 1984* (Cth), [s 28A](#).

b. Workers are required to take pregnancy/sexual health tests

Generally speaking, employers cannot compel employees to take pregnancy or sexual health tests. A direction to that effect would not be regarded as a “lawful and reasonable” direction and, consequently, would not be permitted by the employment contract.

Further, to carry out such tests without the employee’s consent would amount to the criminal offence of assault.

It is possible that in some (limited) circumstances an employment contract agreed to by an employee could confer on the employer a right to mandate such tests.

Employers taking action against employees because of the results of such tests might infringe Australia’s anti-discrimination laws.

c. Workers are required to take contraception

Employers cannot compel employees to take contraception. A direction to that effect would not be regarded as a “lawful and reasonable” direction and, consequently, would not be permitted by the employment contract.

Further, to force contraception on an employee would amount to the criminal offence of assault.

12. Bonded Labour

a. Workers have debts (that are unofficial, not in writing etc.) related to their employment

It is not necessarily unlawful for an employee to incur a debt to the employer and for the employer to have a right to sue to secure repayment of that debt. However, such a debt must be evidenced in writing. Further, as noted above (see section 4), there are restrictions on an employer's ability to secure repayment of a debt by withholding moneys due to an employee.

Australian law (by the *Criminal Code Act 1995* (Cth)) prohibits debt bondage. This occurs when a person pledges their services (or the services of another person) as security for a debt and (i) the debt is manifestly excessive; or (ii) the reasonable value of the victim's services is not applied to liquidate the debt; or (iii) the length and nature of the required services are not limited and defined.

It is an offence if a person engages in conduct that causes someone else to enter into debt bondage. The penalty is imprisonment for 4 years and, if it is an aggravated offence, an imprisonment term of 7 years (section 271, *Criminal Code Act 1995* (Cth)).³¹

b. Workers have debt that is unethical (such as excessive or illegally high interest rates) related to their employment

This situation could, but does not necessarily, involve debt bondage. If it does not, other (non-employment) laws relating to unethical debts might be available to protect the debtor (employee).

c. Workers are in debt to their employer or recruiter

See section (b) above in relation to debts owed to employers.

Other laws might also be available to protect individuals who have incurred unethical debts to recruiters.

d. Workers are in debt due to paying recruitment fees

See section (c) above.

31 *Criminal Code Act 1995* (Cth), [s 271](#).



Contact us at:



info@themekongclub.org



www.themekongclub.org

Follow us on:



[@themekongclub](https://www.facebook.com/themekongclub)



[@themekongclub](https://twitter.com/themekongclub)



[@themekongclub](https://www.linkedin.com/company/themekongclub)