

# Post COVID-19 and the rights of workers in a time of *flexible work*

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## *COVID-19 let the genie out ....*



**mass transition to flexible work is possible .....**

- 2019 – less than a third Australians regularly worked from home
- 2020 – 46 % worked from home between April and May 2020

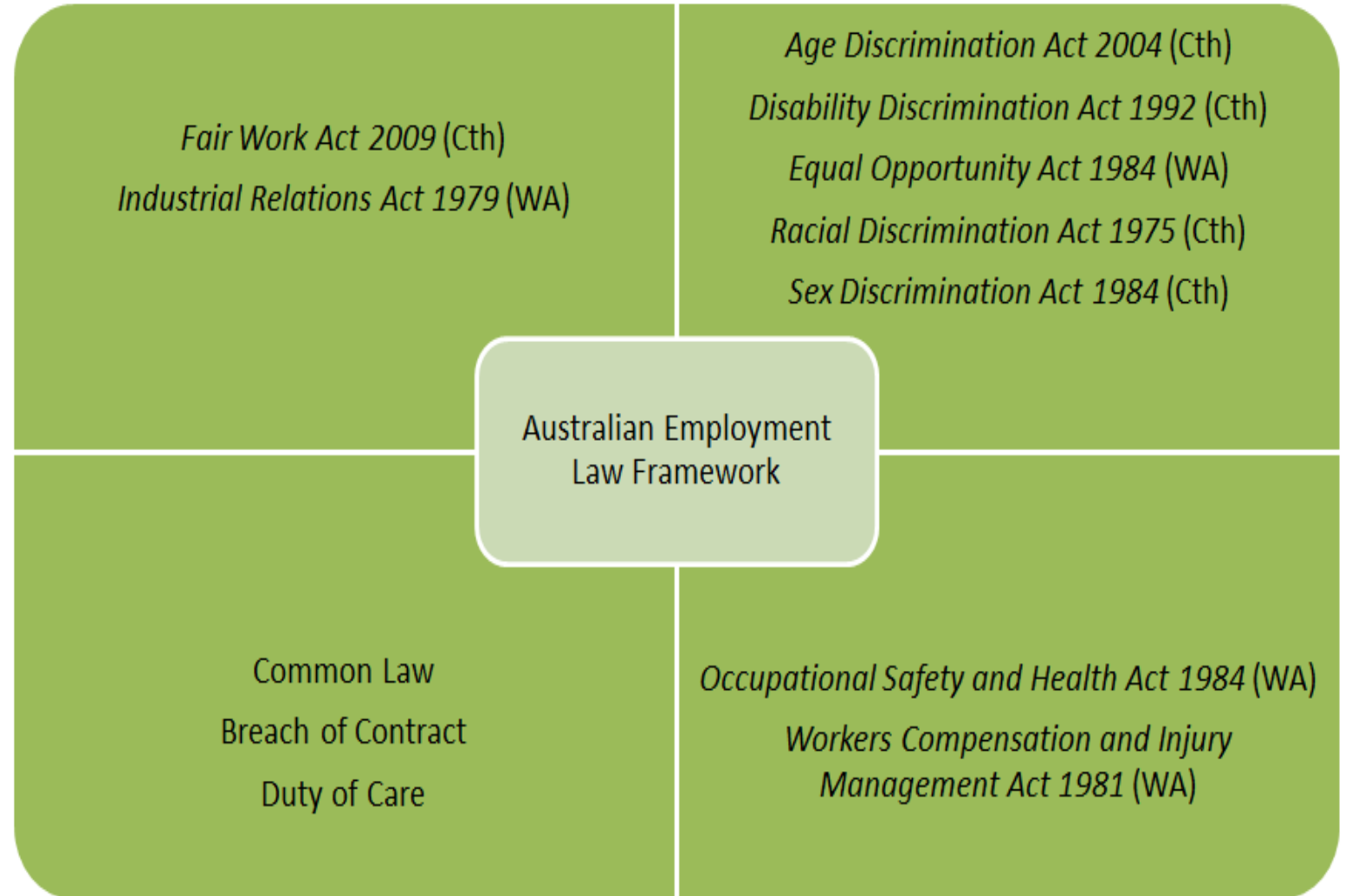
# Outline

- The Australian Industrial Relations Framework
- National and State system coverage
- The pyramid
- National employment standards
- Flexible work and right to request
- Why is this important?
- Research findings
- Challenges
- Regulatory consequences
- Questions

# Breadth of Legislation



wairc.wa.gov.au



## Background and context

- There are dual industrial relations systems within Australia:
  - National system which is established under the *Fair Work Act 2009* (FW Act) (Cth); and
  - State systems which are established under the respective *Industrial Relations Acts*

## National coverage

### Covers Constitutional Corporations

Defined in section 12 of the [Fair Work Act 2009](#) and paragraph [51\(xx\) of the Commonwealth](#)

What is a non-constitutional corporation?

Includes

- sole traders
- partnerships
- trusts
- certain state government public sector employers, and
- corporations whose main activity is not trading or financial.

**National System covers the majority of Australian employers and employees.**



## State coverage

- State system potentially covers between 21.7% to 36.2% of employees in WA.
- There are state laws which apply to national system employees and employers – such as the *Long Service Leave Act 1958* and laws around where children can work.
- Certain national laws which apply to state system employers and employees – such as provisions on notice of termination and parental leave.

## Other coverage

If you are not covered by the national system you are covered by the applicable state industrial relations system.

If you :

- Work in the state public sector or for a non-constitutional corporation in either local government or private industry in **Western Australia**
- Work in the state public sector or local government in **New South Wales, Queensland** or **South Australia**
- Work in the state public sector in **Tasmania**

# Entitlements

Common law contracts

Enterprise agreements

Modern Awards – entitlements and relate  
to particular occupations/industry  
121 modern awards

National Employment Standards

Fair Work Act, 2009

National Employment Standards

11 entitlements

Maximum weekly hours – 38 hrs

**Requests for flexible working arrangements**

Parental leave and related entitlements

Annual leave

Personal/carer's leave, compassionate leave and unpaid family and domestic violence leave

Community service leave

Long service leave

Public Holidays

Notice of termination and redundancy pay

Fair Work Information Statement and Casual Employment Information Statement

Offers and requests to convert from casual to permanent employment



## Flexible Working arrangements



Include changes to:

- hours of work
  - (changes start and finish times)
- patterns of work
  - (split shifts or job sharing)
- locations of work
  - (working from home or remote work)

# Poll

Indicate YES/NO if you belong to one of these groups:

- Parent, or have responsibility for the care of a child who is school aged or younger
- Carer (under the Carer Recognition Act 2010)
- Have a disability
- 55 and older
- Experiencing family or domestic violence
- Provide care or support to a member of their household or immediate care and support due to family or domestic violence

## Flexible Work Requests

Employer should respond within 21 days

To request flexible work arrangements an employee (other than casuals) – working for 12 months must meet the following criteria:

- Parent, or have responsibility for the care of a child who is school aged or younger
- Carer (under the Carer Recognition Act 2010)
- Have a disability
- 55 and older
- Experiencing family or domestic violence
- Provide care or support to a member of their household or immediate care and support due to family or domestic violence

## What happens if an employee does not fit into one of those categories?

“Your rights to flexible working arrangement are likely to be set out most strongly in your favour in an enterprise agreement. Or, if you don't have one of those, an industry award. Or possibly an individual contract. Provisions will differ.

If you aren't covered by any of those, you're out of luck.”

Dayaram, et al, 2020 Conversation

*“It was common within our HR department. Like certainly I noticed that when I joined our organisation, I thought my goodness, this is flexible, like I really love the flexibility that was offered to me. And I think that managers had a degree of flexibility, but I don't believe that was extended to all the teams.”*

## Reasonable business grounds

If the request for flexible work is rejected on business grounds

Ledge???

The employee has the right to request but if it is rejected – the burden falls on the employee to challenge the reason.

*Are reasonable business grounds too broad?*

What constitutes "reasonable business grounds" is broad.

- Too costly
- Can't be made to fit with the working arrangements of other employees
- "Would not be practical" to accommodate
- Will result in a "significant loss of productivity" or "significant negative impact on customer service".

Fair Work Commission has power to adjudicate a complaint of refusal.

But

This generally only happens if the parties to the dispute have agreed in an employment contract, enterprise agreement or other written agreement for that to occur.

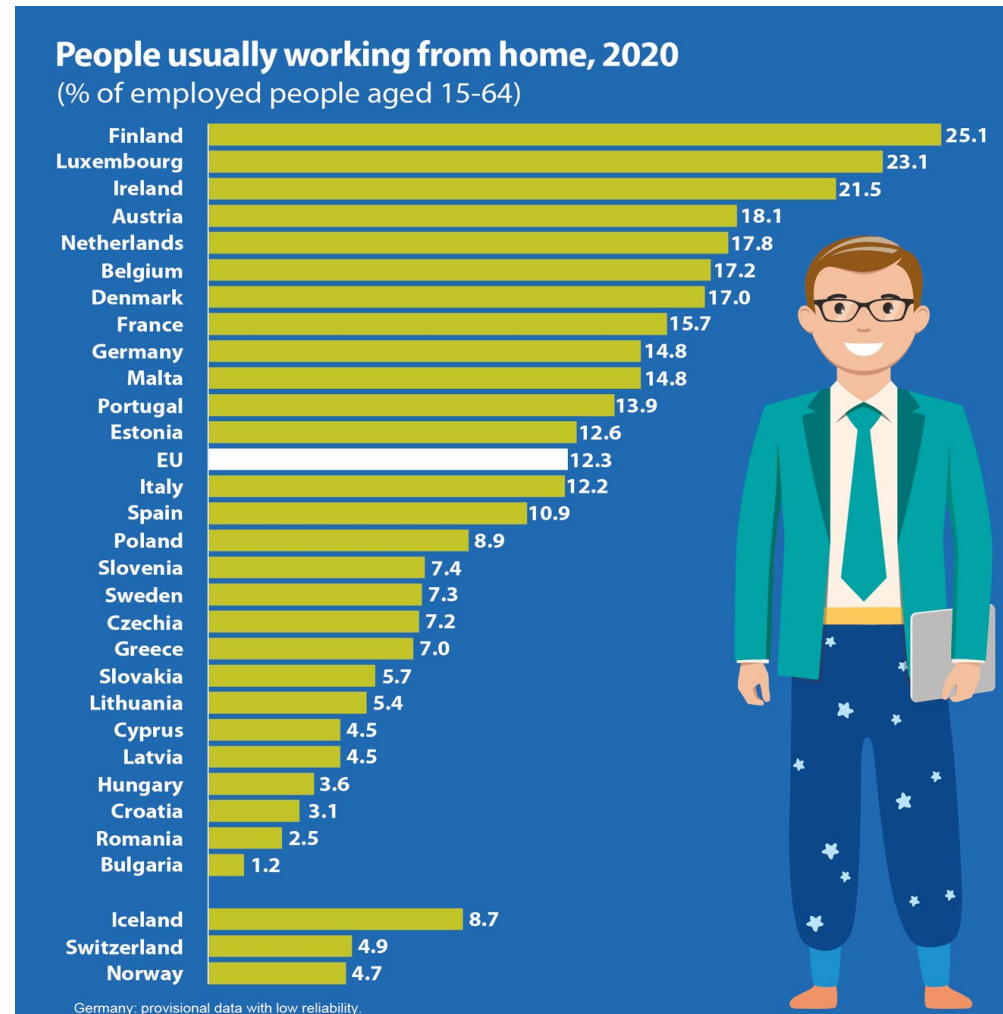
# COVID-19 showed that mass transition is possible

2020 – 46 % worked from home between April and May 2020<sup>2</sup>

*Why is this important?*

*Is the minimum employment laws a privilege for a few?*

2. ABS (2020)



*"I don't have kids and before I did not think about working from home. Now I would like to do it at least for one day a week and definitely see I can 100 per cent get my work done from home."*

**Senior HR Manager**

# Benefits

Flexible work preferences have been associated with:

- Remote work
- Greater flexibility in time allocation
- Supporting work-life balance
- 7.5% more Australian women chose to return to work<sup>1</sup>
  - Enhances talent retention
  - Contributes to women's economic independence
- Allows for mature age workers to continue working
- Increased personal time away from a central office
- Reduced real estate costs for the employer
- Reduced commute times
- Reduced traffic and environmental impacts

<sup>1</sup> (Cassells & Duncan, 2019)

*“Remote work will have a higher uptake, because people have seen it happen. Organisations are going to see substantial savings on real estate. There will be access to a broader talent pool, rather than having a limited central workplace.”*

# Challenges

- Work intensification
- Longer working hours
- Intrusiveness
- Insecurity and
- Under payment
- Free labour
- Signalling behaviours – career jeopardy

(Crosbie and Moore, 2004; Felstead and Henche, 2017; Berg et al, 2018).

*“In my previous place of employment which was very averse to working from home because they were worried that people were just sitting at home watching TV. In my experience, working from home was most productive day of my week. Because I wasn't getting a cup of sugar every five seconds then I could concentrate without being annoying.”*

***“I don't know what the proportion is but my workload increased. I worked more.”***

*“I have a concern with remote work and expectation to work whilst sick.”*



April 2020 survey by the Institute for Employment Studies (UK)

48% reported working long and irregular hours.

*“We need to redesign work to reduce presenteeism. What they [workers] do at work they still will do at home and still be productive at their located space.”*

*“About under-performers that needs managing?”*

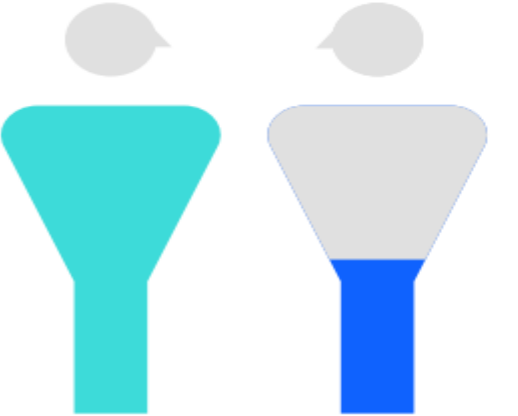
Trust  
Protection



# Employees and executives don't see eye to eye

## *Working from home*

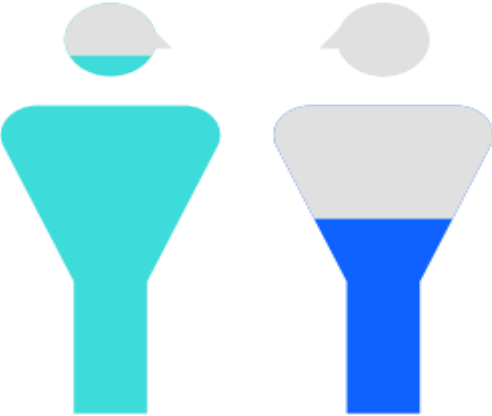
The view from the top is very different from what workers are seeing on the ground.



**74%**      **38%**

**Employers**      **Employees**

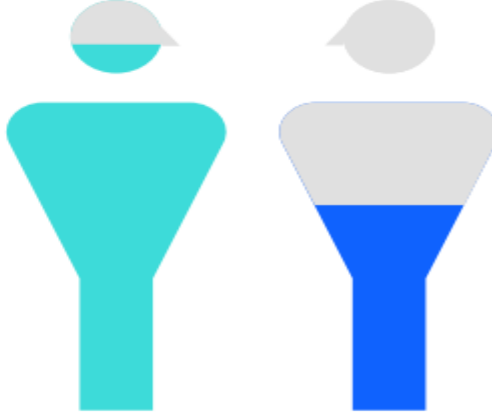
Believe the organization is helping staff learn the skills needed to work in a new way



**80%**      **46%**

**Employers**      **Employees**

Believe the organization is supporting the physical and emotional health of its workforce



**86%**      **51%**

**Employers**      **Employees**

Believe the organization is providing clear guidelines and expectations for how our organization will work

# Poll

1. How many of you use your smart phones to **check** work emails outside of work hours - such as evenings and weekends?
2. How many of you **respond** to work emails outside of work hours?
3. How many of you are '**expected**' to check work emails outside of work hours?
4. How many of you respond to work emails outside of work hours because **your colleagues respond** and you feel you have to?
5. How many of you check work emails outside of work hours because you feel you are **missing out?** *FOMO*

# Right to Disconnect legislation

France (2017)

Spain (2019)

Ireland (2021)

Singapore (2020)?

*Spain - Employees' right to disconnect from digital devices during off-work hours to ensure respect for their rest time, holidays and privacy*

In 2017 France legislated that

Organisations with at least 50 workers must negotiate agreements with unions allowing employees to disconnect from work technology after hours.

If the parties don't reach an agreement, the employer must establish a right-to-disconnect policy on after-hours technology use.

BBC (2017), Shrm.org

## France's high court ruling – failure to respect the 'right to disconnect':

French wing of UK pest control firm was ordered to pay former employee who was regional director 60 000 euros (93,332.87 AUD) for requiring him to leave his phone on around the clock - **compensation for being on call**

<https://www.telegraph.co.uk/news/2018/08/01/british-firm-ordered-pay-60000-french-court-breaching-employees/>

# Right to Disconnect legislation

## IRELAND

April 2021

Minister for Enterprise and  
Employment [Leo Varadkar](#)

“...the right to disconnect would give employees the entitlement to “switch off” from their jobs outside of normal working hours, including not having to respond immediately to emails, telephone calls or other messages.”

(WRC) [com/news/magazine-28786117](#)

For instance, in 2014, the German vehicle-maker Daimler set up an optional service for workers going on holiday; instead of sending an out-of-office reply, they could opt to have all new emails automatically deleted while they were away.

It's not pure altruism though, [as the company explained when the policy was launched](#): "The aim of the project is to maintain the balance between the work and home life of Daimler employees so as to safeguard their performance in the long run."

## SINGAPORE .... (2020)

“Government is observing how such laws are working out in the countries that have implemented them, and may consider whether they could be applied in Singapore.” Senior Minister of State for Manpower

<https://www.todayonline.com/singapore/right-disconnect-laws>

## REFERENCES

### Additional Reading

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# Questions?

Thank you for your time