



nsw commission for  
children & young people

# **Making the working world work better for kids**

A Report for the NSW Commission for  
Children and Young People

by Professor Andrew Stewart

December 2008

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## Foreword

Over my last ten years as New South Wales Commissioner for Children and Young People, kids have told me that they enjoy working, it is important to them and it contributes to their sense of well-being.

These last ten years have also seen important changes to the world of work, including major reforms of workplace relations laws.

The impact on children and young people from these reforms has been largely overlooked in broader debates.

There are now a myriad of state and federal laws and awards which are difficult for employers and often too complex for young people or their parents to understand.

These laws do not comprehensively clarify the best aspects of work, nor protect children from the worst aspects.

The nature of work is also changing for children.

Australia faces a skills shortage and an ageing population so the labour of young people is required by employers now more than ever.

The traditional Thursday night/Saturday morning jobs of the past have been replaced by extended weekend trading hours in retail and very late trading in the fast food industry.

Meanwhile, the extension of children's formal education well into their late teens, coupled with the need for many young people to help fund their studies, creates added pressure for families.

So where does that leave the kids? Still loving the independence and 'life lessons' brought about by their participation in the paid workforce, but often working late hours and sometimes too tired to get up for school.

The changes in the world of work for children led me to ask Professor Andrew Stewart to prepare a discussion paper on relevant laws around Australia. I asked Professor Stewart to make recommendations about the best ways to balance the protection of children at work with the promotion of their well-being.

Professor Stewart makes recommendations for a consistent system of laws to regulate those areas of work where children may need specific protection. This could be achieved by having similar legislation in each state and territory, or by a single federal law.

Professor Stewart argues that a more consistent system would mean more employers will understand the rules and give kids a fair go in their first working experiences. Consistent laws would also help children and young people remain protected as workplace reforms continue. Professor Stewart also

emphasises the importance of adequate advocacy services to assist young workers to identify and assert their rights.

This paper provides an important framework for discussion about issues we need to think about to give kids a fair go, such as:

- At what age should a child be allowed to undertake paid work?
- What hours are possible for a school aged child to work without affecting their sleep patterns, physical and cognitive development, education, recreation and interaction with their families and friends?
- How much work is too much?

We have a long way to go to come to agreement about many of these issues.

This paper is a first step in a process of moving towards making the working world work better for kids.

A handwritten signature in black ink that reads "Gillian Calvert". The signature is written in a cursive, flowing style.

**Gillian Calvert**  
**Commissioner**

## Introduction and Overview

The purpose of this report is to explore the potential for the development of a national regulatory framework for the employment of children and young people. The New South Wales Commission for Children and Young People is an independent agency whose functions include promoting the safety, welfare and well-being of children and young people in the community, and making recommendations on legislation, policies, practices and services that affect them.

For convenience, the terms *child*, *children* and *young people/workers* are used interchangeably in the report to indicate anyone under the age of 18. Likewise the term *employment* is generally used to indicate any type of working arrangement, rather than the narrower and more technical notion of an arrangement that involves a 'contract of employment'.<sup>1</sup> However, as appropriate, differentiation is made between more formal arrangements, similar to what would be considered employment in an adult context, and informal arrangements, such as children helping out at home or doing odd jobs for neighbours and friends.

The report is a follow-up to the Commission's 2005 *Children at Work* study. The results of that study are summarised in **Chapter 2**, together with other research as to the scope and nature of working arrangements for Australian children. What emerges is that a substantial number of young people undertake formal work for an employer, that they are generally satisfied with their working arrangements, but that there are nonetheless various risks or problems associated with such work.

**Chapter 3** reviews the existing laws and processes for the regulation of child employment in Australia. These systems, which are summarised in more detail in the Appendix, are highly fragmented. The rules regarding the employment of children differ dramatically from jurisdiction to jurisdiction. Some States or Territories have detailed regimes, which were introduced with positive intentions, and after detailed research and consideration. But it is unclear how much is actually known about them in the community or in the business sector, or how widely they are complied with in practice. There is also a lack of integration between the current State and Territory regimes and the federal workplace relations legislation that now covers at least 75% of the workforce.

Against that background, it is appropriate to consider the adoption of a more nationally consistent approach to regulation. It is no criticism of any one

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<sup>1</sup> More is said about the concept of a contract of employment and its legal significance at the beginning of Chapter 3.

jurisdiction's laws to suggest that such an approach would better serve the interests of young people and those who employ them.

In **Chapter 4**, various options are discussed for creating national laws on child employment. The Commonwealth could use the mix of legislative powers that currently supports the federal workplace relations system to pass its own laws about work performed by children for constitutional corporations, for Commonwealth agencies or for other persons or organisations in a Territory. But such a law would not apply to work done for sole traders, partnerships and other unincorporated organisations. Alternatively, the Commonwealth could base a truly national law on certain international instruments that regulate child labour, although any law would need to be closely based on the instrument(s) in question.

A more likely basis for national regulation of child employment would be co-operation between the Commonwealth and the States. Intergovernmental discussions are presently being held as to the co-operative establishment of a national workplace relations system, though there is no sign at present of any interest in dealing with child employment as part of that process.

At any event, it would be possible to create national regulation of child employment either by the States referring the necessary law-making powers to the Commonwealth, or by the States agreeing to harmonise their laws. On the first option, there would be a single federal law. The second option would mean a different law in each State, enforceable only by State courts and agencies.

**Chapter 5** sets out some suggestions as to what constitutes 'best practice' in regulation, then highlights a number of objectives that are of particular importance in the context of regulating child employment. These include drafting any rules in clear and simple terms, and seeking to achieve an appropriate degree of integration and consistency with general labour laws.

As far as this last is concerned, it is proposed that child employment laws should be limited to dealing with those aspects of working arrangements which are either distinctive to young people, or which cannot be more effectively addressed through general labour laws. At the very least, child employment laws should:

- set a minimum age for the performance of certain types of work;
- protect the integrity of the educational system, by minimising conflicts between working arrangements and schooling obligations;
- set other limits on working hours in order to protect a child's welfare and development; and
- impose special duties on those for whom work is performed, in relation to matters such as supervision.

Other matters, by contrast, should ordinarily be left to general labour laws - though that would not rule out adopting particular rules or strategies for regulating child employment that operate within the framework of those laws. For example, national occupational health and safety standards (OHS) might be developed in relation to work performed by young people.

There are also certain issues which at present are not adequately addressed through general labour laws. Dealing with such matters through child employment legislation is better than not addressing them at all. Issues in this category include unpaid trial work, the engagement of children as independent contractors, and the provision of information about employment status and conditions.

Chapter 5 also discusses the problems that may arise in enforcing child employment laws, and notes some strategies for dealing with them. A lack of awareness of rights, for instance, may be addressed by imposing informational obligations on employers, or through effective advertising, or by the development of codes of practice. Similarly, specialised agencies (such as young workers' legal services) may be able to alert workers to their ability to demand certain entitlements, while proactive government agencies with both investigative and prosecutorial powers may be a potential answer to the unwillingness of young workers to 'take on' their employers while still in a job.

It is also important that child employment laws be realistic. Any prohibitions need to accord with community values and expectations, not defy them. Required procedures need to be workable and not impose undue costs or delays, especially where small businesses are concerned. In particular:

- outright prohibitions should be reserved for work that is clearly unacceptable for children;
- any requirement to go through the process of seeking an official permit should be limited to situations that require some form of official judgement or scrutiny, and that cannot be encompassed by a generally worded exception;
- parental consent should not be a general requirement, though there are circumstances in which it should be demanded; and
- there are various types of work (for example in family businesses, or babysitting, or voluntary work for the likes of community organisations) that should be subject to less detailed or intrusive regulation than work performed in other contexts.

On the basis of these various principles, **Chapter 6** offers some broad suggestions as to the nature, scope and operation of a new national framework:

1. The stated objective should be to safeguard children, in particular by ensuring that any work does not interfere with their schooling, endanger them, or harm their physical, mental, moral or social development.

2. The term 'employment' should be broadly defined (as it currently is in most jurisdictions) to include all forms of work performed for a business or organisation, whether paid or unpaid, and whether pursuant to an employment contract or not. However, a distinction might still be made between more formal and informal types of work, consistent with the need for different levels and types of regulation.
3. There should be a set age below which all employment should be prohibited, with limited exceptions. Those exceptions might include work in family businesses and in the entertainment industry.
4. For children over that age, but who are still of compulsory school age, there should be no permit system. There should be strict regulation (for children of all ages) on the kinds of work that can be performed, limits on the number of hours that may be worked and, particularly on or before school days, limits on the times of work. This should include restrictions on the use of unpaid trial work, and also on work as an independent contractor.
5. Various codes of practice should be developed, including a general one for employment relationships (in the strict sense), and one that is specific to the entertainment industry. But these should endeavour to avoid conflicting with or usurping the role of other legal instruments or regimes. For example, issues such as wage rates should be left to awards and/or general legislation on minimum wages.
6. Safety issues should be addressed primarily through the existing Occupational Health and Safety regulatory frameworks. But that should not rule out (a) prohibiting children from being employed to do specific types of work on safety grounds, (b) encouraging the development of one or more general OHS standards on the employment of children, or (c) ensuring that OHS responsibilities are emphasised in any information provided to both employers and children.
7. The regulation of work that is performed in connection with some form of structured training or educational course (including school-based training) should likewise be left to the training legislation that currently exists in each State and Territory. Again, this would not rule out having special rules within those regimes for apprentices or trainees who are under 18.
8. A business or organisation that engages a young worker as an employee should, with limited exceptions, be obliged to provide them with a written statement (based on a government-provided template) that makes clear the basis on which they have been engaged and provides general information as to their rights and entitlements, and where they can get advice.

9. Governments should provide or fund advisory services that are specifically directed to the needs of young workers.
10. There should be one or more government agencies that are properly resourced and given a specific mandate to monitor compliance and undertake enforcement.

In conclusion, **Chapter 7** sums up the arguments for a new approach to regulating child employment, one based on rules and processes that are nationally consistent, that can be readily understood, that do not unnecessarily duplicate or overlap with other legal regimes, and that are backed by appropriate informational and enforcement strategies. A system that has those features is more likely to be understood and observed. That does not just mean greater levels of practical protection for young workers, but reduced compliance costs and a more level playing field for the businesses that employ them.

## Child employment in Australia: A Snapshot

A substantial number of young Australians provide their labour to others. According to the Australian Bureau of Statistics, more than 10% of children between the ages of 10 and 14 are engaged in some form of work, with over half being employed.<sup>2</sup> The rate of formal participation in the labour market rises to around 60% for those aged from 15 to 19.<sup>3</sup>

There has been a significant increase in recent years in the formal participation rate of those still attending school.<sup>4</sup> Teenagers are also far more likely now to be in part-time than full-time employment.<sup>5</sup> More than two-thirds of those who are in employment have casual positions.<sup>6</sup> By contrast, teenagers are less likely to be members of trade unions. The proportion of union members amongst 15 to 19 year olds, which in 1993 was over 20 per cent had fallen to just 11 per cent a decade later.<sup>7</sup> With the general decline in union membership, it is almost certainly now below 10 per cent.<sup>8</sup>

These statistics represent only formal employment as defined by the Australian Bureau of Statistics labour force study. The NSW Commission for Children and Young People's *Children at Work* report<sup>9</sup> found that children often have a broader understanding of work, and that their experience and understanding of work changes across a child's life course. 'Work' develops from informal work in a family context, gradually extending out to neighbours, then into the community, and finally into the more formal world of work. Such transitions require children to shift their understanding from how the family 'works together' to operating with formal economic and contractual relations.

This research also found that children's work occurs in a number of settings, covers a variety of tasks, is performed under different conditions and, for the

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<sup>2</sup> *Child Employment Australia, June 2006*, Cat 6211.0, ABS, Canberra, 2007.

<sup>3</sup> *Year Book Australia, 2008*, Cat 1301.0, ABS, Canberra, 2008, Table 8.4.

<sup>4</sup> See *Children at Work? The Protection of Children Engaged in Work Activities: Policy Challenges and Choices for Victoria*, Issues Paper, Industrial Relations Victoria, Melbourne, 2001 ('Victorian Issues Paper'), pp 7–8; *Queensland Review of Child Labour*, Discussion Paper, Commission for Children and Young People and Child Guardian, Brisbane, 2004, pp 9–10.

<sup>5</sup> See J Abhayaratna et al, *Part Time Employment: The Australian Experience*, Staff Working Paper, Productivity Commission, Melbourne, 2008, p 90.

<sup>6</sup> *Forms of Employment Australia*, Cat 6359.0, ABS, Canberra, 2008, p 15 (using the absence of paid leave entitlements as a proxy for casual employment).

<sup>7</sup> 'Trade Union Membership' in *Australian Labour Market Statistics, April 2004*, Cat 6105.0, ABS, Canberra, 2004.

<sup>8</sup> Overall union membership is now down to just 19 per cent overall, and 14 per cent in the private sector: *Employee Earnings, Benefits and Trade Union Membership, Australia, August 2007*, Cat 6310.0, ABS, Canberra, 2008.

<sup>9</sup> *Children at Work*, NSW Commission for Children and Young People, Sydney, 2005. The report is based on a survey of nearly 11,000 children in Years 7–10 in 22 New South Wales schools.

majority of children who are attending school, might best be described as temporary, fragmented and shifting.

The transitory and temporary nature of work may be beneficial for children by facilitating exploration of their world and their own personal potential within it. Flexibility in work, informality and easy accessibility may also be important parts of their working conditions.

The Commission's research also found that:

- most work is performed for an employer, though a substantial minority of children work for their own family;
- the most common types of work are babysitting, sales work, leaflet and newspaper delivery, farm or gardening work, and cleaning;
- there is clear evidence of gender segmentation in the work young people perform, with boys more likely to do delivery work or manual labour, and girls more likely to be involved in sales work;
- most children work in order to have money for discretionary spending, and/or to gain experience with an eye to developing their prospects for later employment, though a minority rely on the income they earn to support themselves or their family;
- for 12 year olds, the most common work is umpiring or refereeing sports games or delivering newspaper;
- by 13 years, delivering newspapers and pamphlets becomes the primary work and teaching (including tutoring and coaching) appears as a form of work, although the critical turning point appears to be at the age of 14 years;
- by age 16, there are substantial proportions of young people working with a degree of formality, and they work primarily in fast food preparation and sales (those are also the only occupations where the work is likely to be described by the children as being on 'fixed days at a fixed time').

It is clear from this and a variety of other studies that children are generally very satisfied with the work that they perform. It appears that they 'value highly the opportunity to develop new skills, exercise more responsibility and self-reliance, earn money and make a contribution'.<sup>10</sup> The great majority of those combining part-time work with study also believe that their job does not adversely impact on their homework or educational performance.<sup>11</sup>

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<sup>10</sup> *Children at Work*, p 70.

<sup>11</sup> Abhayaratna et al, above, pp 94–5, reporting on data from the Longitudinal Surveys of Australian Youth (LSAY); and see also *Children at Work*, ch 6.

At the same time, there is evidence of other problems that confront young people. The *Children at Work* report found that 40 per cent of the workers surveyed had sustained some form of work-related injury, with half of those requiring treatment. Just under half had suffered some form of verbal harassment, while one in five had to put up with physical harassment.

Other surveys have found that children have little awareness of their legal rights and frequently put up with various forms of exploitation.<sup>12</sup> These may include:

- underpayment of award entitlements;
- being forced to work unpaid overtime;
- being expected to attend with no guarantee of being given any work;
- being engaged for lengthy periods of unpaid 'trial work'; or
- being engaged to supply labour as a self-employed contractor, despite little if any evidence of having their own independent business.

It is important to recognise that these are features of the adult labour market as well. Nevertheless, it can be accepted that children are peculiarly vulnerable to danger, harassment or exploitation at work. As a 2001 issues paper prepared for the Victorian Government put it:

In work situations children inherently face greater risks than adults because of their vulnerability, their level of physical, emotional and cognitive development, and their inexperience in dealing with a range of life situations. Children may not be aware that they are exposing themselves. Where children do experience work problems or are exposed to unnecessary risk of physical or emotional harm, children often find it hard to voice their concerns in an appropriate or effective way.

There are several potential problems relating to children and their capacity to voice concerns. Children tend not to voice their concerns, but if they do, it is usually to their families. This is a problem if they work in a family business. Young people are also less likely to benefit from an organised form of voice within the workplace, such as a trade union, or simply not have the knowledge of the ways and means by which they can voice concerns and gain support to resolve workplace problems.<sup>13</sup>

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<sup>12</sup> See Australian Centre for Industrial Relations Research and Training, *Young People at Work Survey*, University of Sydney, 2005; *Dirt Cheap and Disposable: A Report About the Exploitation of Young Workers in South Australia*, SA Unions, Adelaide, 2005; *You're Gold ... if You're 15 Years Old: The Perceived Impact of WorkChoices on Youth Employment and Education in New South Wales*, Report for NSW Teachers Federation, Sydney, 2007; and see also *Queensland Review of Child Labour*, above, pp 14–15; *Child Employment Principles Case 2007* (2007) 163 IR 41 at [195]; *Vulnerable Workers: Young People*, Fair Employment Discussion Paper 3, Fair Employment Advocate (WA), Perth, 2008, pp 6–21.

<sup>13</sup> Victorian Issues Paper, p 15.

Besides any difficulty in being able to voice concerns, children may also be at risk because of a greater propensity for risk-taking. Studies of brain development suggest that younger people may not only be less adept at assessing risks, but 'more likely to be driven by reward-, novelty-, and sensation-seeking'.<sup>14</sup>

The question is whether, and to what extent, these types of vulnerability justify the establishment of rules and processes that are particularly directed to the employment of young people. That is an issue to which the report returns in Chapter 5.

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<sup>14</sup> I Glendon, 'The Impact of Brain Development on Young People's Safety at Work', YouthSafe Forum, Sydney, 13 June 2007.

## Child employment Laws at Present

### General Labour Laws

The employment of children is subject to general labour laws. The various State and Territory laws that regulate training arrangements have an obvious significance, given the number of young workers engaged as apprentices or trainees.<sup>15</sup> Young workers may also derive entitlements or protection from a number of other sources, including:

- industrial awards;
- registered workplace agreements;
- minimum standards on various types of leave;
- unfair dismissal laws;
- occupational health and safety statutes;
- workers compensation laws; and
- anti-discrimination legislation.

These may in some instances contain provisions that are of particular relevance to young workers. For example, most awards set 'junior' rates of pay, generally on a graduated scale that increases with age. Certain awards also regulate the age at which children can perform certain types of work.<sup>16</sup>

On the other hand, the superannuation guarantee scheme does not apply to any worker under the age of 18 who is working part-time.<sup>17</sup> That means that employers are not obliged to make superannuation contributions on behalf of anyone in that category, though they may still choose to do so.

It should also be emphasised that in many instances, labour laws will apply only where a child is engaged as an *employee* under a contract of employment (or 'contract of service'), not where they work as an independent contractor, or on a voluntary basis.<sup>18</sup> This is generally true, for instance, of the various protections and entitlements offered by the main federal statute, the *Workplace Relations*

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<sup>15</sup> See eg *Apprenticeship and Traineeship Act 2001* (NSW).

<sup>16</sup> See eg the provisions regulating the employment of children in door to door selling in Schedule 6 of the Retail Industry (SA) Award.

<sup>17</sup> *Superannuation Guarantee (Administration) Act 1992* (Cth) s 28. There are also exclusions in relation to workers who perform work 'wholly or principally of a domestic or private nature for not more than 30 hours per week' (s 12(11)), or who are paid less than \$450 in any month (s 27(2)).

<sup>18</sup> As to the legal distinction between an employee and a contractor, and why it matters so much, see A Stewart, *Stewart's Guide to Employment Law*, Federation Press, Sydney, 2008, ch 3.

Act 1996. But OHS laws are an important exception here. They generally impose duties on anyone who arranges for the performance of work, whether by employees or contractors, or who manages or controls any type of workplace.<sup>19</sup>

### *Federal Laws on Child Employment*

In terms of labour laws specifically directed to children, these are almost entirely absent at the federal level. The Workplace Relations Act applies to work performed for any 'federal system employer' - that is, a trading, financial or foreign corporation, a Commonwealth agency, or any other type of employer in Victoria or in the Territories. The Act has virtually nothing to say about children in the labour market. The few exceptions include:

- section 340(1)(c), which requires individual workplace agreements for employees under 18 to be signed by a parent, guardian or other appropriate adult;
- section 222(2), which makes it clear that 'pay scales' - minimum wage instruments predominantly derived from awards - can set differential rates for 'juniors' (employees under the age of 21); and
- Part 23, which provides that where an award does not make specific provision for a school-based training arrangement, an apprentice or trainee who is still at school is entitled to receive the same conditions as a full-timer, but adjusted to reflect the number of hours they work on-the-job.

The Howard Government's 'Work Choices' amendments, which took effect in March 2006, did originally envisage that a special Federal Minimum Wage for juniors would be set by the Australian Fair Pay Commission, to complement the Standard Federal Minimum Wage for adults (currently \$14.31 per hour). But the Commission's plans to conduct an inquiry into junior wages were put on hold by the Rudd Government, and the power to set such a minimum wage has now been removed by the 2008 Transition Act.<sup>20</sup>

The change is nothing to do with juniors as such, but is rather part of the new government's plans to curtail the powers of the Fair Pay Commission, pending its scheduled abolition and replacement by a new agency, to be called Fair Work Australia.<sup>21</sup> Nevertheless, it does mean that any junior performing a type of work that is not covered by a pay scale may for the time being be left without any guarantee as to the amount they should receive. Although most common

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<sup>19</sup> See eg the range of duties imposed by ss 8–11 of the *Occupational Health and Safety Act 2000* (NSW).

<sup>20</sup> *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008*.

<sup>21</sup> As to these and other federal Labor policies on workplace relations, see K Rudd and J Gillard, *Forward with Fairness: Labor's Plan for Fairer and More Productive Australian Workplaces*, ALP, Canberra, 2007; *Forward with Fairness: Policy Implementation Plan*, ALP, Canberra, 2007. Many of these policies are given effect by the Fair Work Bill 2008, which at the time of writing had just been introduced into federal parliament.

types of junior work have traditionally been regulated by awards, and hence are covered now by pay scales, exceptions do occur.<sup>22</sup>

### *The Rudd Government's Policies on Child Employment*

From 2010, when the Rudd Government's new workplace relations system is expected to become fully operational, minimum wages will once again be set by awards. The Australian Industrial Relations Commission (AIRC) has been instructed to create a general award to regulate 'work of a similar nature to that which has historically been regulated by awards'.<sup>23</sup> It is likely that this and other 'modern awards' will prescribe junior rates of pay.<sup>24</sup> Fair Work Australia will also be required to set a general minimum wage for junior employees not otherwise covered by an award.<sup>25</sup>

The ALP did go to the 2007 election with a special policy on 'young workers'.<sup>26</sup> But it contained few substantive commitments. It was predominantly concerned to explain how Labor's proposed changes to the federal workplace relations system would benefit young workers, especially in terms of improving the 'safety net' of minimum conditions and restoring the access to unfair dismissal rights removed by Work Choices. However there were promises that:

- Fair Work Australia would have a Young Worker Liaison Officer in each State to help advise young workers and monitor their treatment;
- a 'Young Workers' Toolkit' would be distributed, providing information about employment rights; and
- a Labor government would 'work with the States and Territories and other stakeholders to develop a National Code of Practice for Young Workers', dealing with matters such as 'rostering arrangements for children during school hours, training and mentoring in the workplace and safety for young people at work'.<sup>27</sup>

The policy also spoke of the need to ensure that 'all young workers [are] protected, regardless of where in Australia they live', and that children should

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<sup>22</sup> See eg the trolley collection work that was the subject of an underpayment prosecution in *Salandra v Risborg Services Pty Ltd* [2008] FMCA 76. The workers concerned were able to assert an entitlement to the standard FMW of (then) \$12.75 per hour, when they had in fact been receiving about half that rate. Had they been juniors, they could not have succeeded.

<sup>23</sup> See Minister for Employment and Workplace Relations, *Request Under Section 576C(1) – Award Modernisation: Consolidated Version*, 16 June 2008, para 4A.

<sup>24</sup> The capacity to set junior rates is specifically envisaged in paragraph 4 of the Minister's request (ibid), which instructs the AIRC to 'have regard to the desire for modern awards to provide a comprehensive range of fair minimum wages for all employees including, where appropriate, junior employees ... in order to assist in the promotion of employment opportunities for those employees'.

<sup>25</sup> Fair Work Bill 2008 cl 294(1)(b)(i).

<sup>26</sup> J Gillard, *Forward with Fairness for Australia's Young Workers*, ALP, Canberra, 2007.

<sup>27</sup> Ibid, p 9.

'not have to rely on their protections at work being determined on a State by State basis'.<sup>28</sup> More is said about this in the next chapter.

### *State and Territory Laws on Child Employment*

At State and Territory level, by contrast with the Commonwealth, every jurisdiction has laws dealing with the employment of children. As the summary in the Appendix reveals, there are considerable differences. The only universal provision is a general ban on employing school-age children during school hours. Even that rule differs in its application, given the different school leaving ages. These vary from 15 in New South Wales to 16 in the other States, though in many instances there are also requirements that 16-year olds be in some form of training if they are not at school. New South Wales is presently considering whether to increase its leaving age to 16.<sup>29</sup>

All States and Territories have regimes that generally apply to child employment, with the exception of South Australia and Tasmania. This may change in South Australia, where the government has indicated an intention to pass new legislation on the subject,<sup>30</sup> although it is unclear when that will be introduced.<sup>31</sup>

Even if attention is confined to the three largest States, there are key variations. For example, while both New South Wales and Victoria have a rule that children under the age of 15 cannot be employed without an official permit or authorisation, they define 'employment' rather differently. The New South Wales legislation applies only to paid work, and the permit requirement currently applies where the 'employment' involves taking part in an entertainment, exhibition or recorded performance, or door-to-door selling.<sup>32</sup> In Victoria, by contrast, a permit is required as a general rule for any type of participation in, or assistance of, a business trade or occupation carried on for profit, whether the child is paid for their work or not.<sup>33</sup> The main exemptions from the permit requirement also differ significantly. Victoria has a general exemption for work in family businesses, while New South Wales exempts short-hours employment for those over the age of 10, subject to certain conditions being met.<sup>34</sup>

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<sup>28</sup> Ibid, pp 9–10.

<sup>29</sup> See *Raising the School Leaving Age*, Consultation Paper, NSW Government, Sydney, February 2008.

<sup>30</sup> See Safework SA, *Proposed Child Employment Legislation for South Australia*, Discussion Paper, August 2008.

<sup>31</sup> The South Australian Industrial Relations Commission had also been considering an application by Unions SA for the making of a general award devoted to the regulation of child employment, pursuant to s 98A of the *Fair Work Act 1994* (SA). It appears, however, that this initiative has been put on hold, pending the possible introduction of new legislation.

<sup>32</sup> See *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 223, though note that the provision may be given a broader operation by regulation. The term 'employment' is defined broadly enough to cover the provision of services for reward: see *Children and Young Persons (Care and Protection - Child Employment) Regulation 2005* reg 4.

<sup>33</sup> See *Child Employment Act 2003* (Vic) s 4.

<sup>34</sup> *Children and Young Persons (Care and Protection - Child Employment) Regulation 2005* (NSW) reg 7; *Child Employment Act 2003* (Vic) s 9(3).

The other populous State, Queensland, adopts a different approach. Like Victoria, its legislation applies to both paid and unpaid work. But although it has a permit system, these are only granted in 'special circumstances', including where parental consent has not been given because the child has no parent or is living away from home. Otherwise there is general ban on working under the age of 13 but with a number of exceptions.<sup>35</sup>

All three States have outright prohibitions on employment in certain occupations or circumstances, and have special rules for work in the entertainment industry - but again, the details differ.

A further point of difference is that two States, New South Wales and Queensland, now have laws that impose particular obligations on trading, financial or foreign corporations ('constitutional corporations') when employing workers under the age of 18. These laws, which were introduced in response to the Howard Government's Work Choices reforms, require such employers to provide employment conditions that are at least as favourable (at least on balance) as State award standards.<sup>36</sup> They also provide young workers with the capacity to lodge an unfair dismissal complaint under State law, even where such a claim would be excluded under the Workplace Relations Act. Similar laws have been proposed in Western Australia.<sup>37</sup>

The New South Wales and Queensland laws take advantage of a special exception introduced by the Howard Government as part of its Work Choices legislation. Section 16 of the Workplace Relations Act states a general intent that the Act is to operate to the exclusion of State and Territory industrial laws as far as constitutional corporations are concerned. That means that State awards and State unfair dismissal laws cannot usually apply to such employers. But an exception is made for State and Territory laws on 'child labour', as well as on other subjects such as OHS and training. Indeed, federal awards and agreements are specifically stated to operate subject to such laws.<sup>38</sup> A similar exemption is granted from the operation of the federal *Independent Contractors Act* 2006, which otherwise prevents State or Territory industrial laws from regulating contracts for the supply of labour by independent contractors.<sup>39</sup>

If a State or Territory child employment law were to come into direct conflict with a particular provision in the Workplace Relations Act, the federal provision would still override the State laws, notwithstanding what is said in section 16.<sup>40</sup>

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<sup>35</sup> See *Child Employment Act* 2006 (Qld).

<sup>36</sup> See *Industrial Relations (Child Employment) Act* 2006 (NSW); *Child Employment Act* 2006 (Qld) Pts 2A, 2B. As to the application of the NSW provisions, and in particular the 'no net detriment' requirement, see the decision of the NSW Industrial Relations Commission in the *Child Employment Principles Case 2007* (2007) 163 IR 41.

<sup>37</sup> See Industrial and Related Legislation Amendment Bill 2007 (WA) Pt 4. The Bill lapsed with the calling of the 2008 State election.

<sup>38</sup> See Workplace Relations Act ss 16(3)(e), 17(2)(d); *Workplace Relations Regulations* 2006 Ch 2 reg 1.6(1).

<sup>39</sup> See *Independent Contractors Act* 2006 s 8(2)(e).

<sup>40</sup> For a suggested example concerning the specification of conflicting wage rates see I Taylor and C Cassimatis, 'Section 16: What State Industrial Law is Still Applicable?', NSW Young Lawyers Annual Employment and Industrial Lawyers Seminar paper, 23 February 2008, p 15.

But in general, it can be assumed that all employers, including those otherwise covered by the Workplace Relations Act, must abide by whatever requirements and restrictions are laid down in the State or Territory in which any work is performed for them by those under the age of 18.

This position is unlikely to change under the Rudd Government's proposed new Fair Work Act, which is intended to replace the Workplace Relations Act as from 1 July 2009. Under clauses 27 and 29 of the Fair Work Bill 2008, State and Territory laws on 'child labour' may continue to apply to what are otherwise 'national system employers'.

### *Problems with the Current Position*

What emerges from the review in this chapter is that the existing systems for regulating child employment are highly fragmented. The rules differ dramatically from jurisdiction to jurisdiction. Some States and Territories have detailed regimes, enacted after detailed research and consideration. It is unclear how much is actually known about them in the community or in the business sector, or how widely they are complied with in practice.

There is also a lack of integration between the current State and Territory regimes and the federal workplace relations legislation that now covers at least 75% of the workforce. This is a problem that is especially evident in New South Wales and Queensland because of the 'anti-Work Choices' laws in those jurisdictions. Those laws were introduced with the positive intention of protecting young workers against a potential for exploitation or harsh treatment that was created by the Howard Government's reforms.<sup>41</sup> But they have created significant practical problems for employers.

Consider for instance the situation faced by any small shop in New South Wales that employs a mix of casuals as shop assistants - some 18 or older, others younger.

If the business is incorporated it is covered by the Workplace Relations Act. That means that for everyone 18 or over, minimum conditions of employment are set strictly by federal law. For those under 18, the employer must comply with both federal *and* State laws. The effect of the New South Wales *Industrial Relations (Child Employment) Act 2006* is that for this latter group, the employer must display a copy of, and comply with, the relevant State award, which would usually be the Shop Employees (State) Award. The employer must also be careful to observe the record-keeping obligations set by both the 2006 Act and the federal *Workplace Relations Regulations 2006*.

So long as the employer is content to engage workers under award standards alone, the practical difficulties are relatively minor. This is because at present

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<sup>41</sup> As to the potential or actual impact of those reforms on vulnerable workers, see eg D Peetz, *Assessing the Impact of 'Work Choices' - One Year On*, Report for the Department of Innovation, Industry and Regional Development, Victoria, 2007.

there is no federal retail award, other than in Victoria and the Territories. New South Wales retailers are generally still covered by the Shop Employees (State) Award, which has effect as a 'notional agreement preserving State awards' (NAPSA) under Schedule 8 of the Workplace Relations Act.

Even so, there are differences between the State award as it applies to the under-18s, and the NAPSA version of the award as it applies to adult workers. While such differences are likely to remain fairly small for the next year or so, it will be a different story when the NAPSA is replaced in January 2010 by what is expected to be a national award for the retail industry.<sup>42</sup> There are bound to be some aspects of the new national award that will differ from the previous standards in each State.

There is also a more immediate problem for any retailer that decides to enter into a workplace agreement under the Workplace Relations Act. Such an agreement will be assessed by a federal agency (currently the Workplace Authority) by reference to a no-disadvantage test. That will ordinarily require a comparison of the proposed agreement with the award that would otherwise apply. If the Workplace Authority passes the agreement, it can take effect. The problem for the retailer is that in relation to any worker under 18 that approval does not guarantee the agreement's validity. It is still open for such a worker, or a union or State inspector on their behalf, to argue that it does not meet the 'no net detriment' requirement under the New South Wales *Industrial Relations (Child Employment) Act* 1996. That requires an assessment against the State award, not the NAPSA, and by reference to principles set by the State Industrial Relations Commission, not the Workplace Authority.

### *A National Approach?*

Against that background, it is appropriate to consider the adoption of a more nationally consistent approach to regulation. This is not to dismiss the idea that there can be virtues in 'the rivalry and demonstration effects that flow from competitive federalism'.<sup>43</sup> Where responsibility for regulation is shared, experimentation in one jurisdiction may inspire another either to follow that jurisdiction's lead, or to learn from its mistakes. As Justice Kirby put it in his dissenting judgment on the constitutionality of the Work Choices legislation:<sup>44</sup>

[D]iversity of legal regulation has permitted a legal and administrative symbiosis. It has resulted in occasional diversity of approach, inventiveness in standards and entitlements and appropriate innovation. Such innovation, by

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<sup>42</sup> The AIRC is presently reviewing award conditions for federal system employees, and is required to make 'modern awards' that do not operate by reference to State or Territory boundaries: see Workplace Relations Act Pt 10A, and in particular s 576T. The retail industry is one of 14 sectors being considered in the 'priority' stage of the review, and the AIRC has released an exposure draft of a Retail Industry Award 2010: see *Award Modernisation* [2008] AIRCFB 717 (12 September 2008).

<sup>43</sup> See eg Productivity Commission, *Review of National Competition Policy Reforms*, Inquiry Report No 33, Canberra, 2005, pp 354-5.

<sup>44</sup> *New South Wales v Commonwealth* (2006) 229 CLR 1 at [534].

which industrial standards determined in one jurisdiction of Australia are tested and sometimes copied in another, constitutes a good illustration of an important advantage of the federal form of government enshrined in the Constitution.

The question, however, is whether the costs and uncertainties associated with retaining different sets of rules and processes in each State and Territory are outweighed by any gains that can be realised from 'rivalry and demonstration effects'. In the case of child employment laws, it can be argued that we have already been through an experimentation phase, and that the time has come to develop a model regime that can work across the country. Such an approach would not discard or ignore everything that has gone before but seek to learn from the experiences in each jurisdiction.

It is no criticism of any one State or Territory's laws to suggest that a national system would better serve the interests of young people and those who employ them. In particular, a nationally consistent framework would make it far easier to ensure both an understanding in the community of what the law requires in relation to the employment of young people, and compliance with those requirements.

That theme is developed further in Chapter 5. First, however, it is necessary to consider the various ways in which national regulation might be developed.

## The Scope for National Regulation

The Australian Constitution does not confer on the Commonwealth Parliament any general power to pass laws about employment relationships or other arrangements for the performance of work, whether involving children or adults. There are a number of ways, however, in which the Commonwealth might seek to pass child employment laws. This chapter examines five different options, the first four of which involve the use of the following law-making powers in the Constitution:

- the industrial arbitration power;
- the current mix of powers used to support the Workplace Relations Act, principally the corporations and Territories powers;
- the taxation power; and
- the external affairs power.

The chapter concludes by examining a fifth and more likely option for creating a genuinely national regime - co-operation between the Commonwealth and the States.

### *Option One: The Industrial Arbitration Power*

Section 51(35) of the Constitution allows the Commonwealth to establish conciliation and arbitration processes for the resolution of industrial disputes, but only where those disputes cross (or threaten to cross) State boundaries. This power was used from 1904 to 2006 as the basis for the establishment of the federal arbitration system. That system in turn produced a network of federal awards that regulated wages and working conditions for a significant number of Australian workers.

The industrial arbitration power could in theory be used to deal with issues concerning the employment of children. But the scope of any system based on the power would necessarily be dependent on the occurrence (or creation) of labour disputes. The Work Choices amendments signalled a decisive move away from the use of this power, and it seems highly unlikely that any future federal government will turn to it again, other than for strictly limited purposes.<sup>45</sup>

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<sup>45</sup> See A Stewart and G Williams, *Work Choices: What the High Court Said*, Federation Press, Sydney, 2007, p 162.

## *Option Two: The Corporations and Territories Powers*

Since Work Choices, the Workplace Relations Act has been mainly underpinned by the Commonwealth's powers to make laws regarding constitutional corporations (section 51(20)) and anything that happens in a Territory (section 122). A variety of other powers is used to cover the Commonwealth's own agencies. The same approach is taken in the new Fair Work Bill 2008.

If the Commonwealth wished, it could use this mix of legislative powers to pass its own laws about work performed by children for constitutional corporations, for Commonwealth agencies or for other persons or organisations in a Territory. Such laws might or might not be limited to work performed by children as employees. The constitutionality of such laws would be hard to assail given the decision of the High Court in upholding the validity of the Work Choices legislation.<sup>46</sup>

The Commonwealth could also, if it chose, adopt no special rules at all for child employment, yet still preclude the States and Territories from regulating work performed for the same range of employers - in other words, abolish the current exceptions that protect State or Territory child labour laws. Again, the High Court has made it clear that a federal law can validly indicate an intention to regulate a particular area to the exclusion of certain State laws, even though the federal law does not directly deal with every issue covered by those State laws.<sup>47</sup>

The Commonwealth could not, on the other hand, use these powers to regulate (or exclude the States from regulating) work performed for sole traders, partnerships and other unincorporated organisations - or at least not without calling on other constitutional powers. Somewhere between 15 and 25 per cent of the workforce is employed by businesses and organisations (including State government departments) that presently fall outside the reach of the Workplace Relations Act.<sup>48</sup>

## *Option Three: The Taxation Power*

One legislative power that might be utilised to support universally-applicable legislation on child employment is the taxation power in section 51(2) of the Constitution. This is currently used to underpin the superannuation guarantee scheme. Strictly speaking, employers are not obliged by that scheme to make contributions on behalf of their workers. Rather, they are taxed if they *fail* to

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<sup>46</sup> See *New South Wales v Commonwealth* (2006) 229 CLR 1.

<sup>47</sup> *Ibid* at [370].

<sup>48</sup> For conflicting estimates as to the coverage of the post-Work Choices federal system, see Queensland Government, *The Coverage and Characteristics of the State Jurisdiction under a New Industrial Relations System*, Submission to Queensland Industrial Relations Inquiry into the Impact of Work Choices on Queensland Workplaces, Employees and Employers, Appendix 1, Queensland Government, Brisbane, 2006; and 'Jurisdictional Coverage of Pay-Setting Arrangements', *Australian Labour Market Statistics, January 2008*, Cat 6105.0, ABS, Canberra, 2008.

make such contributions. Despite the fact that the object is not to raise any tax, there is High Court authority for the proposition that such a law can still be regarded as one that relates to taxation.<sup>49</sup> On the same basis then, a law might be constructed that taxed employers if they employed someone under a certain age, or failed to provide certain working conditions. But any creative use of the taxation power in this way would almost certainly be politically controversial.

### *Option Four: The External Affairs Power*

A more obvious option would be the 'external affairs' power in section 51(29) of the Constitution. This allows the Commonwealth to legislate (among other things) to implement obligations that Australia has accepted under international treaties or conventions. To be valid, however, a law enacted in this way must be 'reasonably capable of being considered appropriate and adapted to implementing the treaty [on which it is based]'.<sup>50</sup>

There are three international instruments concerning child employment that are potential candidates for implementation. One is the United Nations Convention on the Rights of the Child. The other two are instruments produced by the International Labour Organisation (ILO): Convention No 138 on the Minimum Age for Admission to Employment, and Convention No 182 on the Worst Forms of Labour.

Clause 32 of the UN Convention requires nations to 'recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'. More specifically, it speaks of the need to provide for:

- 'a minimum age or minimum ages for admission to employment';
- 'appropriate regulation of the hours and conditions of employment'; and
- 'appropriate penalties or other sanctions to ensure ... effective enforcement'.

One potential problem with basing national child employment laws on the Convention on the Rights of the Child is its very general nature, which might lead to arguments as to whether particular provisions in any national law could legitimately be regarded as having a sufficient connection to the Convention.

However, the idea of basing a specific law on a fairly general treaty is not without precedent. For example, in 1996, the High Court upheld the validity of federal provisions imposing an obligation on employers to provide unpaid

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<sup>49</sup> See *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, upholding the validity of a similar scheme, since repealed, to encourage expenditure on training.

<sup>50</sup> *Victoria v Commonwealth* (1996) 187 CLR 416 at 487.

parental leave.<sup>51</sup> It did not matter that the treaty being implemented, the ILO's Convention No 156 on Workers with Family Responsibilities, made no reference to parental leave as such, but rather spoke in general terms about assisting workers to balance their work and family commitments and re-enter the workforce after a family-induced absence.

As for ILO Convention 182 on the Worst Forms of Labour, which was ratified by Australia in December 2006, this has a more limited reach. As the name suggests, it is concerned primarily with practices such as slavery, child prostitution and child pornography, though clause 3 does also refer more broadly to the regulation of work that is physically or psychologically 'hazardous'.

A further possibility might be for the federal government to ratify the more comprehensive Minimum Age Convention (No 138), and then use that (or that in combination with ILO 182) as the basis for a national law. The problem though with ILO 138 is that it is premised on an objective of 'achieving the total abolition of child labour', something that does not sit well with the current tolerance in this country for many existing working arrangements for children. Furthermore, it has been interpreted by the ILO to require that any regulation developed for employment arrangements should also strictly apply to work performed in the home, or for family businesses. For these reasons, among others, it has been argued that ILO 138 is unsuitable for ratification by Australia, or indeed most other developed countries.<sup>52</sup>

### *Option 5: A Co-operative Approach*

Given the various problems that exist with the Commonwealth using the powers outlined above, a more likely basis for national regulation of child employment would be co-operation between the Commonwealth and the States.

In the more general context of workplace relations, the Rudd Government has accepted the need to seek such co-operation as a way of delivering on its commitment to introduce a single, national system of regulation for the private sector.<sup>53</sup> Ideally, it would like the State Parliaments to refer their law-making powers over unincorporated businesses to the Commonwealth.<sup>54</sup> The Commonwealth would then be free to legislate on a truly national basis.

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<sup>51</sup> *Victoria v Commonwealth* (1996) 187 CLR 416.

<sup>52</sup> See B Creighton, 'Australian Law and Practice Relating to Child Labour and ILO Convention No 138' in M Jones and L A Bassar Marks (eds), *Children on the Agenda: the Rights of Australia's Children*, Prospect Media, Sydney, 2001.

<sup>53</sup> See *Forward with Fairness*, above, p 6. The government has accepted that particular States may choose to retain their own systems for regulating public sector and/or local government workers.

<sup>54</sup> The referral of powers by one or more States is contemplated by section 51(37) of the Constitution. Such a referral is not permanent in nature - a State Parliament remains free to revoke a reference at any time.

In January 2008, the New South Wales government released a report commissioned from constitutional expert George Williams.<sup>55</sup> It contains detailed recommendations as to how a national system of workplace regulation might be created. Among other things, it envisages an intergovernmental agreement that would establish a process for drafting the text of a national law, as well as a Ministerial Council to provide ongoing oversight of the national system. Once the text was agreed, each State would then have the option either of referring power to the Commonwealth to enact a law in those terms, or of enacting its own statute.

Since then, discussions have been proceeding at an intergovernmental level as to whether and how to implement these proposals.

In May 2008 the Workplace Relations Ministers Council released a communiqué affirming the willingness of the federal, State and Territory governments to create a 'uniform and stable national workplace relations system for the private sector' to be based on the principles outlined in the federal ALP's Forward with Fairness policies.<sup>56</sup> The communiqué clearly envisages that the new workplace relations legislation that the Rudd Government is currently drafting will form the basis of the national regime. Proposals for any changes after 1 January 2010 (the date the new legislation is expected to become fully operational) will then be the subject of some form of process for intergovernmental assessment overseen by the Ministerial Council. But there is evidently a lack of agreement at this stage both as to some of the details of the new legislation, and as to the precise basis on which States will participate.

In any event, even if this initiative bears fruit, there been no mention (at least in public) of any desire to tackle the issue of child employment in the same way. It is true that, as noted in the previous chapter, Labor's election policy on young workers expresses a desire to ensure that all young workers in Australia are appropriately protected, regardless of where in Australia they live. But this should probably be understood in context as simply meaning that the existence of laws in some States protecting young workers should not be seen as a reason not to reform the federal system of workplace bargaining. What the policy envisaged, and what the 2008 Transition Act has subsequently achieved, was the restoration of a no-disadvantage test for workplace agreements that would protect vulnerable workers of any kind from being forced to bargain away important award entitlements.

It seems likely that, even if a national system is created for general industrial purposes, the Commonwealth will leave it to the States and Territories to deal with child employment in their own way, just as is currently the case with workers compensation, discrimination, OHS and training. As noted in the

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<sup>55</sup> *Working Together: Inquiry into Options for a New National Industrial Relations System - Final Report*, New South Wales Government, Sydney, 2007.

<sup>56</sup> See J Gillard, 'Communiqué From Australian, State Territory And New Zealand Workplace Relations Ministers Council', media release, 23 May 2008.

previous chapter, this is specifically contemplated by the new Fair Work Bill 2008.

Of course, even if the Commonwealth does not seek to take over responsibility for regulating child employment, that does not prevent the State and Territories from working together to harmonise their own laws, as indeed is presently being done in relation to OHS legislation.<sup>57</sup> One drawback of retaining a State law-based approach is that as the Constitution stands (or at least as it is interpreted by the High Court), such laws must be interpreted and applied by the courts of each State - jurisdiction to administer or enforce them cannot be conferred on federal courts or agencies.<sup>58</sup> There is also the risk that, over time, what might begin as uniform or consistent laws could be altered in a piecemeal and uncoordinated fashion.

Nevertheless, there is no reason in principle why a national approach could not be pursued through harmonisation. This might be done by the States or Territories either on their own, or with the assistance and support of the Commonwealth. The Workplace Relations Ministers' Council would be an obvious body to oversee the process. While it might be preferable to agree on a 'model law' to be enacted in all jurisdictions, it could also be possible for harmonisation to occur in stages, with each State and Territory progressively amending their laws to implement common standards in key areas.

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<sup>57</sup> See the Inter-Governmental Agreement for Regulatory and Operational Agreement Reform in Occupational Health and Safety, 3 July 2008, available at [www.coag.gov.au](http://www.coag.gov.au).

<sup>58</sup> See Williams, *Working Together*, above, pp 41, 50, 93, noting the effect of the High Court's decisions in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 and *R v Hughes* (2000) 202 CLR 535.

## Regulatory Objectives: Clarity, Consistency and Compliance

This chapter outlines some principles that should inform the design of any regulatory system dealing with child employment. It begins with a look at some suggestions as to what constitutes 'best practice' in regulation, and then highlights a number of objectives that are of particular importance in this context. In the course of the chapter, various suggestions are advanced as to the matters with which national child employment laws should deal.

### *Best Practice Regulation*

According to the Office of Regulation Review, laws that 'conform to best practice design standards' can be characterised by seven principles or features.<sup>59</sup> The checklist is as follows:

- Minimum necessary to achieve objectives
  - Overall benefits to the community justify costs
  - Kept simple to avoid unnecessary restrictions
  - Targeted at the problem to achieve the objectives
  - Not imposing an unnecessary burden on those affected
  - Does not restrict competition, unless demonstrated net benefit
- Not unduly prescriptive
  - Performance and outcomes focused
  - General rather than overly specific
- Accessible, transparent and accountable
  - Readily available to the public
  - Easy to understand
  - Fairly and consistently enforced
  - Flexible enough to deal with special circumstances
  - Open to appeal and review
- Integrated and consistent with other laws
  - Addresses a problem not addressed by other regulations
  - Recognises existing regulations and international obligations
- Communicated effectively
  - Written in 'plain language'
  - Clear and concise
- Mindful of the compliance burden imposed
  - Proportionate to the problem
  - Set at a level that avoids unnecessary costs
- Enforceable
  - Provides the minimum incentives needed for reasonable compliance
  - Able to be monitored and policed effectively

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<sup>59</sup> S Argy and M Johnson, *Mechanisms for Improving the Quality of Regulations: Australia in an International Context*, Productivity Commission Staff Research Paper, 2003, p 6.

The formulation of any national or harmonised approach to the regulation of child employment should be undertaken with these principles in mind.

### *Clarity*

The question of clarity and simplicity is especially important. People are far more likely to comply with regulation if it is cast in terms they can understand, or that can readily be explained to them.

There is clearly an information problem with current Australian child employment laws. It is not so much a question of the various State and Territory laws being too complex, though a degree of simplification would be welcome in some cases. It is rather a problem of fragmentation, not just between jurisdictions but within jurisdictions.

It is difficult enough for (say) the New South Wales government to get the message across about its child employment legislation when there are different laws both north and south of the border. It is even harder when the great majority of the employers within the State are subject to a mix of federal and State labour laws - and the federal laws happen to be incredibly complex and difficult to understand.<sup>60</sup>

### *Consistency*

That in turn raises another issue that is touched on in the checklist above: integration and consistency with other laws. In Chapter 3, mention was made of the practical difficulties faced by corporations that employ young workers, in jurisdictions where there is a requirement to observe both federal workplace laws and State child employment laws. Now that the worst aspects of the Work Choices reforms have been moderated, and with more changes to come to the federal system, it should no longer be necessary for such employers to be required to comply with both federal and State award standards.

It should be sufficient for a federally registered workplace agreement to meet the ordinary requirements set by federal law, unless there is a strong reason to impose additional protections in relation to young workers. Likewise, the restoration of unfair dismissal rights that is proposed under the Rudd Government's new legislation<sup>61</sup> should obviate any need for State unfair dismissal laws to apply to the under-18s.

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<sup>60</sup> See A Stewart, 'A Simple Plan for Reform? The Problem of Complexity in Workplace Regulation' (2005) 31 *Australian Bulletin of Labour* 210. The new Fair Work Bill 2008, by contrast, is framed in more simple and straightforward terms, though it remains complex in its effect.

<sup>61</sup> See Fair Work Bill 2008 Pt 3-2.

## *What Matters Should Child Employment Laws Cover?*

More generally, it is proposed that child employment laws should be limited to dealing with those aspects of working arrangements which are either distinctive to young people, or which cannot be more effectively addressed through general labour laws.

This suggests that at the very least, child employment laws should:

- set a minimum age for the performance of certain types of work;
- protect the integrity of the educational system, by minimising conflicts between working arrangements and schooling obligations;
- set other limits on working hours that are necessary to protect a child's welfare and development; and
- impose special duties on those for whom work is performed, in relation to matters such as supervision.

Other matters, by contrast, can and should be left to general labour laws. The question of wages, for instance, is already addressed by awards, which are likely to continue to set special wage rates for those under the age of 21.<sup>62</sup> Similarly, it is hard to see the need to spell out special rules as to matters such as leave or termination of employment.

### *Work safety*

The question of work safety presents special challenges. As Mourell and Allan note:

Workplaces that are safe for adults are not necessarily safe for children and young people. Equipment and tools designed for adults may not protect children. Children are particularly vulnerable in the workplace as their incomplete physical development makes them especially susceptible to exposure to chemical and biological hazards and musculoskeletal disorders associated with weight-bearing activity. Psychological development issues also make them susceptible to injury due to poor risk assessment, vulnerability to peer or work pressure and poor judgement.<sup>63</sup>

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<sup>62</sup> The last major review of this practice occurred in 1999, when the AIRC concluded that there were no feasible alternatives to the retention of junior rates: see *Junior Rates Inquiry – Report of the Full Bench Inquiring under Section 120B of the Workplace Relations Act 1996* (AIRC, Q9610, 4 June 1999).

<sup>63</sup> M Mourell and C Allan, 'The Statutory Regulation of Child Labour in Queensland' in M Baird, R Cooper and M Westcott (eds), *Reworking Work: Proceedings of the 19th Conference of the Association of Industrial Relations Academics of Australia and New Zealand*, AIRAANZ, 2005, p 395, citing Castillo, 'Occupational Safety and Health in Young People' in J Barling and E K Kelloway (eds), *Young Workers: Varieties of Experience*, American Psychological Association, Washington DC, 1999.

The question nonetheless is whether these factors justify special or different laws for young people, over and above the OHS laws that already apply. Those laws are, after all, designed to impose both general obligations to protect health and safety at work, *and* more specific safety requirements that are framed by reference to particular risks.<sup>64</sup>

Rather than construct legal requirements and processes that operate in parallel (or potentially in conflict) with the general OHS regimes, it might make more sense to address the particular risks associated with child employment through those regimes. An example of this is provided by a code of practice released by Workplace Health and Safety Queensland.<sup>65</sup> It identifies particular workplace hazards for children and young people, and provides guidance as to the kind of control measures that can and should be used to manage those risks.

There would be nothing to prevent OHS authorities developing nationally applicable standards concerning work performed by young people. Those standards might lay down some general principles and requirements in relation to any type of work performed by those of a certain age, as well as standards addressed to particular types of work (such as newspaper or leaflet delivery). The relevant standards could then be monitored or enforced through the usual mechanisms, though this would not rule out developing special audit or compliance processes as part of a strategy to prioritise child safety.

It should also be stressed that OHS laws are concerned to regulate the safety of work that can or should be performed. What is said here about addressing safety issues through the OHS regimes is not meant to rule out the complete prohibition of the performance of certain types of work by those under a particular age, in order to protect the physical, psychological or moral welfare of young people. Obvious examples would include work that involved serving alcohol, wearing indecent clothing or uniforms, heavy lifting, or unduly hazardous activities.

### *Bullying and harassment*

Returning to the more general question of whether a given issue needs to be specially addressed through child employment laws, another matter that can arguably be left to the general legal framework is bullying and harassment. In most cases, a person who either inflicts or allows the infliction of such treatment on a worker will breach a range of common law or statutory duties, including under OHS laws - regardless of the worker's age.<sup>66</sup> Once again, there may be every reason to develop special strategies to promote an awareness of these obligations in relation to young workers, and/or to seek sanctions against those

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<sup>64</sup> See R Johnstone, *Occupational Health and Safety Law and Policy: Text and Materials*, 2nd ed, Lawbook Co, Sydney, 2004, ch 6.

<sup>65</sup> *Children and Young Workers Code of Practice 2006*, Department of Industrial Relations, Queensland Government, 2006. The code has effect under the *Workplace Health and Safety Act 1995* (Qld).

<sup>66</sup> See generally T MacDermott, 'The Duty to Provide a Harassment-Free Work Environment' (1995) 37 *Journal of Industrial Relations* 495.

who fail to observe them. But the question is one of compliance, rather than the need for special rules as such.

On the other hand, there are certain issues that arguably *ought* to be addressed through general labour laws, but which at present are not, or at least not adequately. Dealing with such matters through child employment legislation is better than not dealing with them at all. Three particular issues stand out in this category: unpaid trial work; the engagement of children as independent contractors; and the provision of information about employment status and conditions.

### *Unpaid trial work*

With the exception of an untested and potentially limited South Australian provision,<sup>67</sup> there is little to prevent businesses or other organisations from engaging adult workers on potentially lengthy ‘work experience’ arrangements. An agreement to perform unpaid work would not normally be regarded as an employment contract, even if there were some arrangement to reimburse expenses.<sup>68</sup> In the absence of any status as an employee, a worker in that situation could not take the benefit of any protections offered by or under the Workplace Relations Act, or many other labour laws.<sup>69</sup>

By contrast, the New South Wales Industrial Relations Commission has made it clear that employing children ‘on the basis that they will be “trained”, during periods of work for which they receive no payment at all’ is a practice that would breach the ‘no net detriment’ requirement under the *Industrial Relations (Child Employment) Act 2006 (NSW)*.<sup>70</sup> In Western Australia, legislation recently before Parliament would have explicitly prohibited the engagement of children to do unpaid trial work for more than one day in any calendar year.<sup>71</sup> It would be appropriate to include a similar provision in any national child employment laws.

### *Children as independent contractors*

It is a failing of the current labour law system in Australia that workers can be engaged as contractors without plausible evidence that they are running an

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<sup>67</sup> The Industrial Relations Commission of South Australia has been empowered since 2005 to regulate arrangements for unpaid ‘trial work’: see *Fair Work Act 1994 (SA)* s 98B. But it is unclear whether it can do so in relation to federal system employers.

<sup>68</sup> See eg *Frattini v Mission Imports* [2000] SAIRComm 20 (16 May 2000).

<sup>69</sup> Note that it is different if a person who has clearly been engaged under a contract of employment is required to attend for work, but is not paid for some of that time. This may well breach awards or other legal requirements as to payment of wages: see eg *Smith v A-Mart All Sports Pty Ltd* [2008] FMCA 592 (8 July 2008).

<sup>70</sup> *Child Employment Principles Case 2007* (2007) 163 IR 41 at [283]. The decision appears to assume that an award regulating particular work will necessarily apply to anyone performing such work on an unpaid basis. That may not always be the case, for the reason mentioned in the text above — there may be no employment relationship to trigger the operation of the award.

<sup>71</sup> Industrial and Related Legislation Amendment Bill 2007 (WA) cl 38, proposing the insertion of Division 4 of Part 8 into the *Children and Community Services Act 2004*. As noted earlier, this Bill has now lapsed.

independent business.<sup>72</sup> In some industries, workers are routinely hired under arrangements that are indistinguishable from employment, yet which are carefully constructed to avoid employment status.<sup>73</sup> Despite the repeated concerns that have been expressed over this issue, however, the Rudd Government seems unlikely to take any action to review the legal definition of 'employment' for the purpose of federal workplace laws. Its view, like that of the Howard Government, appears to be that independent contracting arrangements are matters to be regulated by commercial law, not industrial law.<sup>74</sup>

Nonetheless, there is plainly something unsatisfactory about a child doing school holiday work as a labourer and being told to get an ABN (Australian Business Number) so that they can be hired as a contractor - to take just one example that has come to light.<sup>75</sup> It would seem entirely appropriate to adopt an approach that treats any supply of labour by a child as involving an employment relationship, unless there is clear evidence that the child is genuinely running a business.

#### *Information about employment status and conditions*

In many countries, including the United Kingdom and New Zealand, there is an obligation to put most employment contracts in writing, and to address particular issues in those written terms. In Australia, by contrast, there is no such general obligation. The Workplace Relations Act did briefly (from July 2007 to March 2008) require federal system employers to provide their employees with a Workplace Relations Fact Sheet. But this was a standard-form document with fairly limited information about certain aspects of the federal legislation. Although the new National Employment Standards proposed by the Rudd Government will (at least from January 2010) provide for new employees to receive a Fair Work Information Statement, it appears that this will likewise be limited to standardised information about employment rights under the new workplace relations system.<sup>76</sup>

In relation to children, there is a case for going further and requiring employers not just to provide information about general rights and processes, but more

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<sup>72</sup> See A Stewart, 'Redefining Employment? Meeting the Challenge of Contract and Agency Labour' (2002) 15 *Australian Journal of Labour Law* 235.

<sup>73</sup> See eg the evidence noted in House of Representatives Standing Committee on Employment, Workplace Relations and Workforce Participation, *Making it Work: Inquiry into Independent Contracting and Labour Hire Arrangements*, Commonwealth, Canberra, 2005, ch 2. Sections 900 and 901 of the Workplace Relations Act do prohibit a person from recklessly misrepresenting an actual or proposed employment relationship as an independent contracting arrangement. But these can only apply where the relationship actually involves what the common law would regard as employment. By definition, no offence is committed by someone who *successfully* disguises an employment relationship as a commercial contract for services.

<sup>74</sup> See A Stewart, 'WorkChoices and Independent Contractors: The Revolution That Never Happened' (2008) 18(2) *Economic & Labour Relations Review* 53 at 59–60.

<sup>75</sup> See *Vulnerable Workers: Young People*, above, pp 11–12 for this and other examples. ABNs can be obtained from the Australian Taxation Office with minimal or no checking. Contrary to what some believe, however, quoting an ABN does not automatically make a worker an independent contractor as a matter of law.

<sup>76</sup> See Fair Work Bill 2008 cl 124(2).

specific information about the job they have been hired to do. This could include details as to:

- the young worker's employment status (whether their position is permanent or casual, etc);
- the duration of the employment and the basis on which it can be terminated;
- the applicable remuneration, including any penalty rates, allowances, bonuses, details of superannuation contributions, etc;
- whether the young worker is to have set hours of work, or if they are flexible, the basis on which they can be varied; and
- what award or collective agreement, if any, applies.

Requiring the provision of such information would help address concerns about the difficulties young workers often encounter in understanding what they have been hired to do and what benefits they are entitled to receive.

### *Compliance*

The availability of information about rights and entitlements is indeed a critical aspect in relation to another regulatory objective - that of securing compliance with child employment laws.

Enforcement is a perennial problem with labour laws. It is one thing for workers to have legal rights, quite another for those rights to be enforceable in a practical sense. There are a number of reasons why a worker may lack the practical capacity to take the benefit of a law enacted (or judicially developed) for their protection. They include:

- a lack of awareness that the rights in question exist;
- an unwillingness to commence legal proceedings for fear of provoking some adverse response from their employer;
- an inability (whether real or perceived) to afford the cost of litigation, especially if there is a threat of paying some of the employer's costs in the event of losing;
- quite apart from any issues of cost, a fear that any litigation may be protracted and stressful; and
- the lack of a remedy that can be granted to provide appropriate legal redress for the right infringed.

These issues are often magnified for workers who are not members of trade unions. As noted earlier in the report, relatively few young workers can call upon

a union to act for them, bear the cost of any legal proceedings, and stand behind them if there is any question of resistance or reprisals from their employer.<sup>77</sup>

There are a variety of ways, however, in which these problems can be countered or overcome. A lack of awareness of rights, for instance, may be addressed by imposing informational obligations on employers, as noted above, or through effective advertising, or by the development of codes of practice. Similarly, agencies may be specifically mandated to alert workers to their ability to demand certain entitlements. Organisations such as the Young Workers Advisory Service in Queensland and the Young Workers Legal Service in South Australia have performed a tremendously valuable service in assisting young workers to identify and assert their rights.

In the absence of an effective trade union, a proactive government agency with both investigative and prosecutorial powers is also a potential answer to the unwillingness of workers to 'take on' their employers while still in a job. The significant funding granted to the Workplace Ombudsman by both the current and previous federal government has been very important in improving compliance with federal awards and other standards, as has the Ombudsman's aggressive approach both to publicising non-compliance and to seeking sanctions against employers.<sup>78</sup>

It seems clear that child employment laws are far more likely to be observed if there is an agency that is given sufficient resources not just to follow up complaints but to be proactive in auditing employers in selected industries.

### *A Realistic Approach*

A final point about designing child employment laws is that they need to be realistic in terms of what can practicably be achieved. Any prohibitions need to accord with community values and expectations, not defy them. Required procedures need to be workable and not impose undue costs or delays, especially where small businesses are concerned.

This is not to propose a minimalist approach to regulation, or one that gives up on seeking to impose decent working conditions for children. Again, it is a question of promoting the broadest possible compliance. The more targeted and efficient a law, the more likely it is to be observed.

This in turn suggests that:

- Outright prohibitions should be reserved for work that is clearly unacceptable for children.

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<sup>77</sup> As to the significance of unions, for example, in making reinstatement orders effective for dismissed workers, see M R Sherman, 'Unfair Dismissal and the Remedy of Re-employment' (1989) 31 *Journal of Industrial Relations* 212.

<sup>78</sup> See eg *Litigation Policy of the Office of the Workplace Ombudsman*, Australian Government, Canberra, November 2007.

- Conditional prohibitions should be used to cover situations where work is generally regarded as undesirable but where it is possible to conceive of exceptions. For example, work during school hours or under a prescribed age might be generally banned but with the possibility of exceptions for certain work in the entertainment industry.
- Any requirement to go through the process of seeking an official permit should be limited to situations that require some form of official judgement or scrutiny, and that cannot be encompassed by a generally worded exception.
- Requiring parental consent is worthwhile in many instances, especially where work is to be authorised on an exceptional basis for younger children. It may also be an important safeguard, for example, in the context of any request by an employer for a young worker to agree to the variation of an award entitlement.<sup>79</sup> However, older children should not routinely need to obtain parental signatures to secure ordinary jobs.
- Because of its less formal nature, work in family businesses can and should be subjected to less detailed or intrusive regulation than work performed in other contexts. The same can be said of babysitting arrangements, and also voluntary work for sporting clubs, community organisations, schools, churches and the like. It may still be advisable to impose certain basic obligations, such as a requirement to ensure that the child is appropriately supervised,<sup>80</sup> or at least that they have clear instructions about what they are expected to do, where to get help, and so on.

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<sup>79</sup> See eg clause 5(a) of the model 'flexibility clause' approved by the AIRC for inclusion in modern awards, see *Award Modernisation* [2008] AIRCFB 550 (20 June 2008). The clause allows an individual employer and employee to agree on certain variations to award provisions, but only where the employee is not disadvantaged.

<sup>80</sup> See eg *Child Employment Act 2003* (Vic) Pt 2 Div 4.

## Some Possible Features of a Model Law on Child employment

It is not the purpose of this report to offer detailed recommendations as to the content of any national or model law on child employment. If created on a co-operative basis, as suggested in Chapter 4, such a law will need to be the product of extensive negotiations between the federal, State and Territory governments. This is so whether the law is enacted by the federal Parliament, following a referral of power by the State, or whether the States and Territories move to harmonise their existing laws. It is at that stage that it will be necessary to become concerned with specifics, and there will inevitably have to be some compromises as the parties seek to reconcile some of the differences in approach that presently exist.

Nevertheless, on the basis of the principles outlined in the previous chapter, some broad suggestions can be offered as to the nature, scope and operation of a new model law:

1. The stated objective of such a law should be to safeguard children, in particular by ensuring that any work does not interfere with their schooling, endanger them, or harm their physical, mental, moral or social development.<sup>81</sup>
2. The term 'employment' should be broadly defined (as it currently is in most jurisdictions) to include all forms of work performed for a business or organisation, whether paid or unpaid, and whether pursuant to an employment contract or not. This is not to suggest that all forms of work should necessarily be regulated in the same way. As noted in the previous chapter, certain types of work arguably warrant 'light touch' regulation, compared to more formal arrangements. But even in those cases it may still be appropriate to set some limits, or to specify obligations in relation to appropriate supervision.
3. There should be a set age below which all employment should be prohibited, with limited exceptions. Those exceptions might include work in family businesses and (subject to stringent and detailed conditions, including parental consent) in the entertainment industry. The question of newspaper and leaflet delivery is one that warrants careful consideration in this regard.
4. For children over that age, but who are still of compulsory school age, there should be no permit system. But there should be strict regulation (for children of all ages) on the kinds of work that can be performed, and

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<sup>81</sup> This formulation is based on s 4 of the *Child Employment Act 2006* (Qld).

limits on the hours that may be worked. This should include restrictions on the use of unpaid trial work, and also on work as an independent contractor. (It is recognised that compulsory school ages currently differ between jurisdictions, though it is likely that by 2010 the school leaving age will generally be at least 16.)

5. Various codes of practice should be developed, including a general one for employment relationships (in the strict sense), and one that is specific to the entertainment industry. These should endeavour to avoid conflicting with or usurping the role of other legal instruments or regimes. For example, issues such as wage rates should be left to awards and/or general legislation on minimum wages.
6. Safety issues should be addressed primarily through the existing OHS regulatory frameworks. That should not rule out (a) prohibiting children from being employed to do specific types of work on safety grounds, (b) encouraging the development of one or more general OHS standards on the employment of children, or (c) ensuring that OHS responsibilities are emphasised in any information provided to both employers and children.
7. The regulation of work that is performed in connection with some form of structured training or educational course (including school-based training) should likewise be left to the training legislation that currently exists in each State and Territory. Again, this would not rule out having special rules within those regimes for apprentices or trainees who are under 18.
8. A business or organisation that engages a young worker as an employee should, with limited exceptions, be obliged to provide them with a written statement (based on a government-provided template) that makes clear the basis on which they have been engaged and provides general information as to their rights and entitlements, and where they can get advice.
9. Governments should provide or fund advisory services that are specifically directed to the needs of young workers.
10. There should be one or more government agencies (which may either be national or local, depending on the system adopted) that are properly resourced and given a specific mandate to monitor compliance and undertake enforcement.

To repeat a point made earlier in the report, it will be important, in designing any new laws and processes, to learn from the current State and Territory regimes, rather than simply ignore or discard them. There is a wealth of experience as to the administration and enforcement of those laws that can and should be called upon in determining what works best in practice.

## Conclusion: The Need for Change

It seems to be generally agreed that there is a need for special regulation to protect the interests of children when they perform work. What this report has highlighted is that there are problems with the existing law in Australia. In some jurisdictions the regulation of child employment is almost non-existent, in others extremely elaborate. There are no national standards, except in restricting the performance of work during school hours. There are also problems of integration or consistency. Some businesses are required to comply with both federal and State labour laws when employing someone under the age of 18. It is questionable how widely such a requirement is understood or complied with, especially in small businesses.

This report advocates an approach to the regulation of child employment that has four main premises:

- a *national focus*, to be achieved either by the passage of a federal law on child employment, or through harmonisation of State and Territory laws;
- the adoption of *clear and simple* rules and processes;
- a need for those rules and processes to be *consistent* with general labour laws - in particular by dealing only with those matters that cannot or should not be left to those general laws; and
- the adoption of various strategies for informing those concerned of their entitlements and obligations, and for overcoming the problems that many young workers encounter in asserting their rights.

What ties each of these principles together is a common objective - to promote a better *understanding* in the community of what is required when engaging a child to perform work, and hence in turn to achieve a better level of *compliance* with those requirements. Laws are more likely to be observed where they apply on a uniform basis, where they can be readily understood, where they do not unnecessarily duplicate or overlap with other legal regimes, and where they are backed by appropriate informational and enforcement strategies.

The benefits to children obviously lie in achieving greater levels of practical protection for them at work. But there also potential benefits for the many Australian businesses that employ children. A simpler, more streamlined and more uniform set of rules and processes should reduce compliance costs. It should also produce a more level playing field to the extent that it becomes harder for a business to achieve a competitive edge by underpaying or otherwise exploiting young workers.

At a time when Australian governments are generally agreed as to the desirability of stability and uniformity in labour regulation, based on an appropriate balance between fairness and efficiency, there is every reason to extend a similar approach to the laws that govern the employment of children.

# APPENDIX

## State and Territory Laws on Child employment

This Appendix summarises only the main State and Territory laws devoted specifically to child employment. It does not purport to cover every provision dealing with the issue. For example it does not list all the provisions in State industrial laws that may deal with issues such as junior rates of pay, or industry-specific regulations.

### New South Wales

There are two principal sets of laws in New South Wales. One is Chapter 13 of the *Children and Young Persons (Care and Protection) Act 1998*, which is concerned with children's employment. Its provisions are supplemented by the *Children and Young Persons (Care and Protection - Child Employment) Regulations 2005*. The other is the *Industrial Relations (Child Employment) Act 2006*, and the related *Industrial Relations (Child Employment) Regulation 2006*.

Other relevant provisions include ss 22–23 of the *Education Act 1990*, which require children under the age of 15 to attend school at all times when it is open.

#### *Children and Young Persons (Care and Protection) Act 1998*

For the purposes of Chapter 13 of the 1998 Act, s 221 defines a 'child' to mean a child under the age of 15 years.

'Employment' is defined in s 221 to mean 'paid employment or employment under which some other material benefit is provided'. Regulation 4 of the 2005 Regulations further provides that persons are taken to employ children if the persons make payments to (or confer other material benefits on) persons other than the children themselves, but in respect of services rendered by those children.

Section 222 of the Act provides that a person who causes or allows a child to take part in any employment in the course of which the child's physical or emotional well-being is put at risk is guilty of an offence.

Section 223 prohibits a person, other than the holder of an employer's authority (see below), from employing a child:

- to take part in an entertainment or exhibition;
- to take part in a performance which is recorded for use in a subsequent entertainment or exhibition; or
- to offer anything for sale from door-to-door.

Regulation 5 extends this prohibition to cover participation by a child in still photographic sessions.

Section 224 sets out exemptions from the s 223 prohibition. A person who employs a child is not required to hold an employer's authority if:

- the child is employed for the purpose of a lawful fundraising appeal;
- the child is employed for the purpose of an occasional entertainment or exhibition, the net proceeds of which are to be applied wholly for a charitable object; or
- the person is exempted by either the Regulations or the Minister from being required to hold an employer's authority.

Regulation 6 exempts any person who employs a child in connection with the conduct of an entertainment, exhibition or performance under the auspices of the government of a foreign country, though only if the children are nationals of that country.

Regulation 7 also provides an exemption for the short-term employment of children over the age of 10. The employment must be outside school hours and for no more than 10 hours per week. The person concerned must comply with the requirements of the Code of Practice (see below) in respect of the child's employment, and ensure that a copy of the Code is given to a parent of the child.

Section 225 of the Act provides that Schedule 2 of the Act applies to an employer's authority. Schedule 2 details the form in which applications must be made, the basis on which they are granted or refused, the conditions that may be imposed, how long they last, and the circumstances in which they can be varied or revoked.

Regulation 8 sets out the prescribed fees for an employer's authority, while regulation 9 requires the holder of an authority to comply with the Code of Practice, provide a copy of the Code to a parent of each child employed and, on request, furnish the Children's Guardian with any information concerning their employment of children.

### *Code of Practice*

The Code of Practice mentioned above is set out in Schedule 1 to the *Children and Young Persons (Care and Protection - Child Employment) Regulations 2005*.

Part 1 imposes a series of general conditions, several of which relate to hours of work. They include a prohibition on employment during hours of normal school attendance (cl 5). Clause 4 provides that an employer must not employ a child for more than one shift on any one day, or for more than 4 hours on any day on which the child is required to attend school, and regular rest breaks must

be provided. Clause 8 further stipulates that there must be a minimum 12 hour gap between shifts, and no child can be employed to work later than 9:00pm if they are required to attend school on the following day.

Other requirements include the need to:

- keep appropriate records (cl 1);
- notify work locations to the Children's Guardian (cl 2);
- ensure each child is covered by insurance against illness or injury at work (cl 3), and notify parents of any such event (cl 13);
- arrange travel home for the child (cl 7);
- provide food and drink (cl 9), toilet facilities (cl 10) and appropriate protection from the elements (cl 11);
- ensure that no child is subjected to any form of corporal punishment, social isolation, immobilisation or any other behaviour likely to humiliate or frighten them (cl 12); and
- ensure each child can at all times contact their parents or some other responsible person (cl 14).

Clause 15 also provides that the application of the Code to any child is subject to the provisions of any award or agreement in force under the *Industrial Relations Act 1996* (NSW) in relation to the child.

Part 2 of the Code is concerned more specifically with the employment of children in connection with entertainment, exhibitions and photography. Hours of work are tightly controlled (cl 20), with tables attached to the Code setting out detailed restrictions with respect to film and television work, shopping centre performances, still photography and modelling or other exhibitions, and theatrical performances.

Clause 19 provides that an employer must ensure that no child is cast in a role or situation that is inappropriate to the child, having regard to their age, maturity, emotional or psychological development and sensitivity. The child must not be caused distress, and nor must they be employed in any situation in which the child or any other person is naked. There are also strict conditions for the employment of children under the age of 3 (cl 22), and more specifically for babies under the age of 12 weeks (cll 23–29), including in each case the need for a registered nurse or midwife to be present at all times.

Other requirements in Part 2 deal with provision of appropriate recreational facilities (cl 17), access to a private dressing room (cl 18), and provision of appropriate supervision (cl 21).

Part 3 of the Code deals with door-to-door sales. Clause 30 provides that any child employed in such work must be at least 14 years and 9 months old. Once

again, there are restrictions on hours of work (cl 31), including prohibitions on employment for more than 6 hours on non-school days, or for more than 5 days per week. Any employment must also be confined to daylight hours.

No child must be permitted to sell any item to a person in a motor vehicle or to enter a private dwelling (cl 32), while there are strict requirements as to accompaniment and supervision (cl 33).

### *Industrial Relations (Child Employment) Act 2006*

This Act applies where a child (defined in s 3(1) to mean anyone under the age of 18) is engaged to perform work under a relationship that would be regarded as one of employment under the terms of the *Industrial Relations Act 1996* (NSW).

Part 2 of the 2006 Act deals with minimum conditions of employment. The key provision is s 4, which applies where a trading, financial or foreign corporation employs a child. The corporation must ensure that the child's conditions of employment are in accordance with any New South Wales award or industrial laws that are applicable to the work in question, or at least that those conditions do not, on balance, result in a 'net detriment' to the child when compared to those awards or laws.

Section 5 requires a Full Bench of the New South Wales Industrial Relations Commission to establish principles by reference to which the no net detriment requirement is applied. There are also requirements as to the exhibition in the workplace of any relevant State award (s 6), the keeping of records (s 7), and enforcement of the s 4 obligation (ss 8–16).

Part 3 of the Act has a single provision, s 17, which in effect permits a child dismissed by a trading, financial or foreign corporation to bring a claim for unfair dismissal under the provisions of Part 6 of Chapter 2 of the *Industrial Relations Act 1996*. If the dismissal is found to be harsh, unjust or unreasonable, they may seek either reinstatement in their old position, or compensation for any loss occasioned by the dismissal.

### Victoria

Victoria has comprehensive legislation regulating child employment, in the form of the *Child Employment Act 2003*. This is supplemented by the *Child Employment Regulations 2004*. Part 4 of the Act creates a role for child employment officers to promote the legislation and monitor compliance with it.

Section 3 of the Act defines a 'child' as a 'person under 15 years of age'. According to s 4(1), 'a child is engaged in employment if the child takes part or assists in any business, trade or occupation carried on for profit'. This is so whether or not they receive any payment or reward, and whether they are engaged under a contract of service, a contract for services or any other arrangement.

Examples of activities that do not constitute employment are set out in s 4(4) and include:

- participating in a church service or religious program;
- participating in an occasional project or entertainment, the net proceeds of which are applied for the benefit of a church or school;
- performing any activity for a non-profit organisation; and
- participating in a sporting activity (including coaching, refereeing or umpiring).

A further key definition is that of 'light work'. This is defined in s 5 to mean work or any other activity that is not likely to be harmful to a child's health or safety, moral or material welfare or development, nor prejudice the child's attendance at school or their capacity to benefit from instruction. Examples of light work are specified to include:

- going on errands;
- casual work in or around a private home;
- golf caddying;
- clerical work;
- gardening;
- street trading;
- delivering newspapers, pamphlets or other advertising material and making deliveries for a registered pharmacist;
- entertainment;
- farming related chores; and
- working as a sales assistant in a shop.

### *Permissible employment*

Sections 8 and 9 of the *Child Employment Act 2003* make it clear that a child may only be employed in accordance with a permit, in a family business (subject to the requirements sets out below), or in accordance with a work experience arrangement under Part 5.4 of the *Education and Training Reform Act 2006*.

Division 2 of Part 2 of the Act deals with permits. These can only granted if an application is made to the Secretary of the Department of Innovation, Industry and Regional Development in the required form, and after the completion of

certain investigations and police checks. The Secretary (or a child employment officer acting under the Secretary's authority) may only grant a permit if satisfied that:

- the health, education and moral and material welfare of the child will not suffer from the proposed employment;
- the child is fit to be engaged in the proposed employment;
- the child will not be subjected to any form of exploitation;
- the proposed employment is not prohibited employment; and
- the child is of or over the minimum age permitted by s 10 for the proposed employment.

A permit may also impose conditions limiting the nature, location or duration of the employment in various ways.

Section 10 provides that the minimum age for the employment of a child in delivering newspapers, delivering pamphlets or other advertising material, or in making deliveries for a registered pharmacist, is 11 years of age. Otherwise, the minimum age for the employment of a child is 13 years of age, except that there is no minimum age for employment in a family business or in entertainment.

Section 11 provides that a person must not employ a child during school hours on any school day, unless the Minister has granted the child an exemption from attendance at school. Nor must a parent or guardian allow a child to engage in employment, if the nature and extent of the employment is such as to prejudice the child's attendance at school or their capacity to benefit from instruction.

Certain types of employment are completely prohibited by s 12. These include door-to-door selling; employment on a fishing boat, other than a boat operating on inland waters; and employment on a building or construction site (whether commercial or residential) at any time before the buildings on the site are at lock-up stage.

### *Conditions of employment*

Section 20 provides that a child may only be employed to perform light work. Section 21 imposes limits on hours of work. These include a maximum of 3 hours per day and 12 hours per week at any time during school term, or 6 hours per day and 30 hours per week at any time outside school term. Work must generally be performed only between the hours of 6:00am or sunrise (whichever is later) and 9:00pm. There must also be a rest break of at least 30 minutes after every 3 hours of work, and a minimum break of 12 hours between shifts (s 22).

The *Child Employment Regulations 2004* also impose record-keeping obligations, other than in relation to work for an extended family member.

## *Employment in a family business*

Section 24(1) of the 2003 Act makes it clear that while a child may be employed in or in relation to a family business without a permit, they can only be employed to perform light work. Furthermore, they cannot be employed in prohibited employment, or during school hours.

The conditions set out above in relation to hours of work and rest breaks do not apply to employment in a family business (s 25). But there is a requirement that a child be directly supervised by a parent or guardian (s 26).

## *Employment in the entertainment industry*

Entertainment is defined in s 3 of the Act to include:

- singing, dancing or acting;
- playing a musical instrument;
- appearing in a radio, television or similar film program or production not in the nature of a news item;
- modelling;
- appearing in promotional events or advertising;
- working as a photographic subject, whether still or moving;
- working in or in relation to a circus;
- taking part in a performance that is recorded for use in a subsequent entertainment or exhibition;
- working in musical theatre, plays, operas or other live entertainment; or
- performing in a shopping centre.

Section 27 provides that a child may be employed in entertainment in accordance with a permit. The conditions set out by ss 21 and 22 in relation to hours of work and rest breaks do not automatically apply to such employment, though they may be imposed as a condition on a permit (s 28).

Section 29 provides for a mandatory code of practice to be promulgated by the Minister. The Mandatory Code for Employment of Children in Entertainment in Victoria is available from the Business Victoria website ([www.business.vic.gov.au](http://www.business.vic.gov.au)).

## *Restrictions on non-employment activities*

Part 3 of the *Child Employment Act 2003* imposes restriction on certain activities, even though they do not otherwise count as 'employment' for the purpose of the Act. Section 35 provides that a person must not cause or permit a child to engage in any of the following activities, except to the extent that the activity is light work:

- participating in a church service or religious program;
- participating in an occasional project or entertainment, the net proceeds of which are applied for the benefit of a church or school;
- engaging in any activity for a non-profit organisation; or
- participating in a sporting activity (including coaching, refereeing or umpiring).

Section 36 further provides that a non-profit organisation must not cause or permit a child to engage in any activity for the organisation in a public place or engage in door-to-door fundraising outside daylight hours, unless the child is accompanied by an adult.

## Queensland

Like Victoria, Queensland has comprehensive legislation in the form of the *Child Employment Act 2006*, supplemented by the *Child Employment Regulation 2006*.

Section 5 provides that the 2006 Act 'applies to all children'. A note refers to s 36 of the *Acts Interpretation Act 1954*, which defines a child to mean an individual who is under 18. A 'school-aged child' is defined in s 7 of the 2006 Act to mean a child who is under 16 years of age and is required to be enrolled at a school under the *Education (General Provisions) Act 2006*. The Schedule to the *Child Employment Act* also defines a 'young child' as a child who is not yet of compulsory school age.

'Work', in relation to a child, is defined in s 8 to mean:

- work under a contract of service;
- work under a contract to perform work, for labour only or substantially for labour only;
- work under a contract to perform work, whether or not the contract is a contract of service, unless:
  - the child is paid to achieve a stated result or outcome, has to supply substantially all of the plant, equipment or tools needed to perform the work, and is liable for the cost of fixing a fault with the work performed; or

- a personal services business determination is in effect for the child under s 87-60 of the Income Tax Assessment Act 1997 (Cth);
- work that includes the supervision of other workers, whether or not the child is known as a supervisor, leading hand or other title;
- participating or assisting in any business carried on for profit, whether or not the child receives payment or other reward; or
- unpaid or voluntary work.

Work does not generally include domestic chores, collections work, work experience (within the meaning of the *Education (Work Experience) Act 1996*), or work that is part of an apprenticeship, a traineeship or a vocational placement.

### *General restrictions on child work*

Section 8A of the 2006 Act prohibits an employer from requiring or permitting a child to work while the child is nude, or while their sexual organs or anus are visible, or (in the case of a female who is at least 5) while their breasts are visible. This does not apply to work in the entertainment industry by a child under 12 months, as long as a parent is present.

Section 9 further provides that an employer must not require or permit a child to do work in breach of a restriction prescribed by regulation.

Regulation 4 of the *Child Employment Regulation 2006* provides that a school-aged child must generally be 13 years old to perform work, or 11 years old for delivery work, except in the case of voluntary work, work in the entertainment industry and work for a family business.

Regulation 5 deals with working hours. Except in the case of work in the entertainment industry or in a family business, a school-aged child must not work:

- for more than 12 hours during a school week, or 38 hours during a non-school week;
- for more than 4 hours on a school day, or 8 hours on a non-school day;
- for more than 4 consecutive hours without a break of at least one hour;
- for a second shift within 12 hours, or on the same day; or
- between 10:00pm and 6:00am, or 6:00pm and 6:00am in the case of delivery work.

Similar restrictions apply to work by a young child, except that the daily and weekly limits are set in all cases at 4 hours and 12 hours respectively.

There are further detailed requirements in relation to supervision (reg 6), parental contact (reg 7), safety and training (reg 8) and record-keeping (reg 9). Regulation 8 includes a requirement to display a copy of a child employment guide produced by the government, in a place where it can be easily read by any children.

Section 10 of the 2006 Act also provides that an employer must not require or permit a school-aged or young child to perform work unless the employer has either a consent form signed by a parent, or a special circumstances certificate (see below).

Both a consent form and a special circumstances certificate must indicate the times at which a school-aged child is required to attend school. Section 11 specifically provides that an employer must not require or permit a school-aged child to perform work at such times. While a failure to comply with this provision is not treated as an offence, s 230 of the *Education (General Provisions) Act 2006* does make it an offence for a parent to permit a school-aged child to be employed when required to attend school.

Special circumstances certificates are dealt with by s 12 of the *Child Employment Act*. They can be obtained on application from the chief executive of the Department of Employment and Industrial Relations, and may authorise the performance of work in circumstances that would otherwise contravene the restrictions imposed by the regulations. The application must be made or supported by the child, the proposed employer and also a parent, unless the child does not have a parent or lives independently from their parents. The chief executive must be satisfied that the work in question will not interfere with the child's schooling, and will not be harmful to their health or safety or physical, mental, moral or social development.

Conversely, s 13 permits the chief executive to issue a notice prohibiting a child from doing particular work or limiting the work a child may do.

### *Work in the entertainment industry*

Part 3 of the *Child Employment Regulation 2006* sets out a series of rules that apply to work performed by a school-aged or young child in the entertainment industry. They are similar in many respects to those in the New South Wales Code of Practice.

### *Work for trading, financial and foreign corporations*

Part 2A of the *Child Employment Act 2006* applies where a child is employed by a trading, financial or foreign corporation. As with the equivalent provisions in the New South Wales *Industrial Relations (Child Employment) Act 2006*, an employer must ensure that the child is not 'disadvantaged' by reference to any entitlements or protections that cover an employee performing similar work under either a State award or Chapter 2 of the *Industrial Relations Act 1999*. A

child who is dismissed may likewise bring what is in effect an unfair dismissal complaint against the corporation under Chapter 3 of the 1999 Act.

## South Australia

South Australia currently has no comprehensive laws on child employment, though there are two general provisions of significance.

One is s 78 of the *Education Act* 1972. This provides that no person shall employ a child of compulsory school age or cause or permit such a child to be employed during the hours at which they are required to attend school, or in such a way as to render the child unfit to attend school or obtain the proper benefit from the instruction provided to them. This is subject to any ministerial exemption granted under s 81A.

The other is s 98A of the *Fair Work Act* 1994, which provides that the Industrial Relations Commission of South Australia may, by award:

- determine that children should not be employed in particular categories of work or in an industry, or a sector of an industry, specified by the award;
- impose special limitations on hours of employment of children;
- provide for special rest periods for children who work;
- provide for the supervision of children who work; or
- make any other provision relating to the employment of children as the Commission thinks fit.

The Commission is also required to review any existing awards applying under the Fair Work Act that may be relevant to the employment of children to ensure that they reflect appropriate standards. In so doing, the Commission must give priority to those awards that relate to industries (or sectors of industries) where the employment of children is most prevalent.

## Western Australia

Section 29 of the *School Education Act* 1999 provides that a person must not employ or permit to be employed a child of compulsory school age during the hours when the child is required to attend school. A child is taken to be 'employed' if they are engaged in work for the purpose of gain by a person, even if the child is not paid for the work done. This is subject to a ministerial exception being granted under s 11G.

There are also provisions regarding the employment of children in Part 7 of the *Children and Community Services Act* 2004 (WA). Employment is defined in s 188 to mean engaging a child to carry out work, whether or not the child receives payment or other reward for the work, and whether under a contract of service, a contract for services or any other arrangement.

Section 190 of the 2004 Act provides that a person must not employ a child under 15 years of age in a business, trade or occupation carried on for profit. There is a similar prohibition on parents allowing such children to be employed. Section 191 sets out exceptions for children who are employed:

- in a family business;
- in a dramatic or musical performance or other form of entertainment, or in the making of an advertisement;
- in the case of a child who has reached 10 years of age but is under 13, to carry out delivery work between 6:00am and 7:00pm, provided they are accompanied by a parent, or an adult authorised in writing by a parent;
- in the case of a child who has reached 13 years of age, to carry out delivery work, or work in a shop, other retail outlet or restaurant, or any other work of a kind prescribed by regulation, provided the work is performed between 6:00am and 10:00pm and with the written permission of a parent.

Regulation 21A of the *Children and Community Services Regulations 2006* provides that this last exception extends to work that involves the collection of shopping trolleys at or in the vicinity of a shop or other retail outlet.

Section 192 of the 2004 Act makes it an offence to employ a child to perform in an indecent, obscene or pornographic manner in the course of participating in an entertainment or exhibition or in the making of an advertisement. The chief executive of the agency administering the Act may also issue a notice prohibiting or limiting the employment of a particular child (s 193).

## Tasmania

There are only limited provisions of general application in Tasmania concerning child employment.

Section 82 of the *Education Act 1994* provides that a person must not employ or permit to be employed a school-aged child during the hours when they are required to attend a school or undertake home education, except as authorised by the Secretary of the relevant government department.

Section 94 of the *Children, Young Persons and Their Families Act 1997* also provides that a person must not procure or induce a child who has not attained the age of 11 years to offer anything for sale in a public place. A similar prohibition applies in relation to children aged under 14, though only between the hours of 9:00pm and 5:00am. The prohibitions do not, however, cover taking part in a sale whose proceeds are for the benefit of a school or a charitable purpose.

## Australian Capital Territory

Section 13 of the *Education Act 2004* makes it an offence to employ a child or young person under school-leaving age at a time when they are required to attend school, except as authorised under s 14 by the chief executive of the agency administering the Act.

Chapter 21 of the recently enacted *Children and Young People Act 2008* also deals with the employment of children and young people. When proclaimed to take effect, it will replace Chapter 10 of the *Children and Young People Act 1999*.

For the purpose of the 2008 Act, a 'child' is a person under 12 years of age (s 11), while a 'young person' means someone who is 12 or older, but not yet an adult (s 12). (An 'adult' is defined by the Dictionary in the *Legislation Act 2001* to mean someone who is at least 18 years old.)

'Employment' is defined in s 781 to cover performance of work under a 'contract for services', an apprenticeship or training arrangement, or a form of work experience, other than work experience undertaken at an educational institution that has successfully sought an exemption under Part 21.2 of the Act. It does not matter whether the child or young person receives payment.

On its face, this definition is in certain respects narrower than that contained in s 368 of the 1999 Act, which (subject to certain exceptions) covers any arrangement to 'take part or assist in a business, trade, calling or occupation carried on for private profit'. In particular, the new definition makes no reference to 'employment' in the ordinary common law sense — that is, being hired to do work as an employee under a contract of service. The term 'contract for services' is generally understood to refer to a contract to work as an independent contractor, rather than as an employee.<sup>82</sup> There is no indication, however, that the new legislation intended to exclude work performed as an employee, and it appears that this is just a drafting error. It remains to be seen whether it will be corrected before the new provisions take effect.

In any event, there is a general prohibition in s 795 of the 2008 Act against the employment of children and young people under school-leaving age. But this does not apply where the work is 'light work', and the employment is in a family business, or is for less than ten hours per week, or is for more than ten hours a week but the employer has notified the chief executive of the relevant agency at least 7 days before the start of the employment (ss 796–797).

'Light work' means work that is not contrary to the best interests of a child or young person and that falls within a category to be prescribed by regulation (s 793). Work is taken to be contrary to a child's or young person's best interests if it contravenes the restrictions in the *Education Act 2004* on performance of work during school hours, or prejudices the child's ability to benefit from any education or training in which they are engaged, or is

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<sup>82</sup> See eg *Marshall v Whittaker's Building Supply Co* (1963) 109 CLR 210 at 219.

otherwise likely to harm their health, safety, or personal or social development, including by sexual or financial exploitation (s 782).

The chief executive is empowered to prohibit the employment of a particular child or young person (s 788), or to prescribe particular conditions for them (s 790). The chief executive may also declare employment in a particular industry, occupation or activity to be 'high risk employment', if satisfied that it is likely to harm a child or young person's health, safety, or personal or social development, including by sexual or financial exploitation (s 798). It is an offence to employ someone under school leaving age in anything declared to be high risk employment, unless the employer obtains a permit from the chief executive and complies with any conditions on it (ss 799–804).

A final power given to the chief executive is to declare 'standards' for the employment of children and young people. An employer must comply with any such standards (s 792).

### Northern Territory

Section 30(1) of the *Education Act* 1996 prohibits a person from employing or permitting to be employed a child of compulsory school age during the hours at which they are required to be at school, or in such a way as to be likely to render the child unfit or unable to attend school during those hours or to understand the instruction provided for them, except where there is a ministerial exemption.

There are also provisions regarding child employment in Part 3.2 of Chapter 3 of the *Care and Protection of Children Act* 2007. Although these provisions have not yet been proclaimed to commence, they will replace the equivalent provisions in Part XI of the *Community Welfare Act*.

Section 13 of the 2007 Act defines a 'child' as a person under 18 years of age. 'Employ' is defined in s 200 to mean engaging a child to perform work under a contract of employment or any other contract or arrangement (whether written or unwritten and whether for a reward or not).

The Act does not engage in detailed regulation of child employment. But it is an offence under s 203 for an employer to require, or for a parent to require or permit, a child to perform work:

- at any time after 10:00pm at night and before 6:00am in the morning, where the child is less than 15 years of age;
- that is harmful, or likely to be harmful, to the child's physical, mental or emotional wellbeing; or
- that involves the exploitation of the child.

Section 201 empowers the chief executive of the agency administering the Act to issue a notice restricting the employment of a child in a particular way. There is also a prohibition on a parent giving, or permitting their child to give, misleading information about a child's age to an employer (s 202).



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