



## Right to work and other work-related rights (s.27B)

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Section 27B of the *Human Rights Act 2004* says that:

- (1) Everyone has the right to work, including the right to choose their occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.
- (2) Everyone has the right to the enjoyment of just and favourable conditions of work.
- (3) Everyone has the right to form or join a work-related organisation, including a trade union, with the objective of promoting or protecting their economic or other social interests.
- (4) Everyone has the right to protection against acts of anti-union discrimination in relation to their employment.
- (5) Everyone is entitled to enjoy these rights without discrimination.

Note 1: Section 28 sets out what must be considered in deciding whether a limit on rights is reasonable.

Note 2: Aspects of rights under this section are considered at international law to be subject to an obligation of progressive realisation.

Note 3: An international law relevant to interpreting progressively realisable rights is Article 8 (4) of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights. That article provides for consideration of the reasonableness of steps taken to progressively realise rights and notes that a range of possible policy measures for the implementation of rights may be adopted.

*This factsheet is not intended to be a substitute for legal advice.*

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### Scope of the Rights

Section 27B of the *HR Act* proclaims the right of everyone to work and to just and favourable conditions of work. It also protects the freedom to form and join trade unions and other work-related organisations. Everyone has the right to enjoy these rights without discrimination, including on the basis of union membership or association.

While many aspects of workplace activity in the ACT are governed by the Commonwealth's *Fair Work Act 2009*, the rights protected in s 27B are nevertheless applicable where they are engaged by relevant ACT laws or where the Territory undertakes actions as an employer.

#### **Right to work**

The right to work in s 27B(1) derives from Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In its General Comment on the right to work, the UN Committee on Economic, Social and Cultural Rights (CESCR) has described the right to work as 'essential for realising other human rights and an inseparable and inherent part of human dignity'. This recognises the significance of earning a living and adopting a trade, occupation or profession to a person's role in society and their family.

The right to work, however, is not an unconditional guarantee of employment. Rather, it requires government to undertake particular actions to facilitate employment. This includes safeguarding the right of everyone to the opportunity to gain their living by work which they freely choose or accept. Such work must not be forced; it must be voluntarily accepted and not entered into under threat of penalty. This right also implies that people not be unjustly deprived of work, and so requires adequate protection from unfair dismissal.

The definition of work includes all forms of work, whether independent work or salaried work, and encompasses work in both the public and private sectors. The CESCR has said that all forms and levels of work must be available, accessible and acceptable.

### ***Rights in work***

The right to just and favourable conditions of work in s 27B(2) derives from Article 7 of the ICESCR and guarantees basic minimum conditions for *all* workers, including:

- i) *Fair wages and remuneration* without distinction for work of equal value, including women being guaranteed equal pay and conditions for equal work. Fair remuneration is that which is sufficient for a decent living for the worker and their family.
- ii) *Safe and healthy working conditions* ensured by laws and policies aimed at minimising, as far as reasonably possible, occupational and health hazards in the working environment, including mechanisms for appropriate investigation of workplace accidents. Safe and healthy working conditions specifically assure freedom from violence and harassment, including sexual harassment and discrimination within the workplace (eg on the basis of pregnancy, disability etc).
- iii) *Equal opportunity for promotion to an appropriate higher level*, subject only to considerations of seniority and competence; and
- iv) *Rest, leisure and reasonable limitation of working hours*, including periodic holidays with pay as well as remuneration for public holidays.

### ***Right to form or join work-related organisations***

Section 27B(3) derives from Article 8 of the ICESCR and complements the right to freedom of association protected in s 15(2) of the HR Act. It is a means for guaranteeing the rights to work and to safe working conditions. The right to form and join trade unions is also protected in ILO Convention No 87, to which Australia is a party.

The right to form or join work-related organisations extends to all professional, employer and employee associations and is not restricted to trade unions. The right is generally considered to also encompass a negative right not to associate.

## **Obligations of progressive realisation and obligations of immediate effect**

Unlike other rights in the HR Act, all of which must be given immediate effect, some aspects of the rights protected under s 27B may be realised on the basis of progressive realisation (see note 2). The explanatory statement to the Human Rights (Workers Rights) Amendment Bill 2019, which introduced s 27B into the HR Act, notes that:

The concept of ‘progressive realisation’ is drawn from article 2(1) of the ICESCR under which each State Party undertakes:

*‘to take steps individually and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights [contained in the ICESCR] by all appropriate means, including particularly the adoption of legislative measures.’*

Certain aspects of the rights in s 27B, however, are capable of immediate realisation and may not be qualified on the ground of progressive realisation. These aspects are intended to operate as rights of direct entitlement and include the following:

- the right of every person to enjoy these rights without discrimination, including protection against anti-union discrimination. While the guarantee of non-discrimination is already established in s 8 of the HR Act, its inclusion in s 27B serves to clarify that the prohibition against discrimination operates as an immediate entitlement and cannot be deferred on the ground of progressive realisation;

- the right to form or join a work-related organisation with the objective of protecting a person’s economic or social interests; and
- the (implied) right not to be subject to forced labour.

The CESCR has also clarified that, notwithstanding obligations of progressive realisation, all necessary steps toward fully realising the right to work and countering unemployment must nevertheless be taken at the earliest opportunity. Such positive steps must include having specialised employment services (whether public or private) to help individuals identify and access available employment, enabling and supporting access to technical and vocational education and promoting public awareness of the right to work.

Retrospective measures (ie measures considered as backward steps) may only be taken if all alternatives have been considered and justified as reasonable in accordance with the limitation criteria in s 28 of the HR Act. Similar to other rights in the HR Act, the rights in s 27B may also be subject to reasonable limitations under s 28 of the HR Act.

## **Examples of when this right could be relevant in practice**

The actions of public authorities can both promote and limit rights. Section 27B could be engaged by activities relating to:

- Any aspect of employment or workplace relations that is regulated by the ACT;
- Conditions or requirements, such as licensing arrangements, for working in a particular occupation or profession;
- Technical and vocational education, including the development, approval or delivery guidance, training programmes and policies, which are designed to promote employment;
- Mechanisms that compensate of people in the event of loss of employment or ability to work;
- Arrangements pertaining to recruitment, advancement, probation and retirement;
- Collective bargaining and negotiation of enterprise agreements;
- Long-service and parental leave, work, health and safety and labor hire processes;
- Discriminatory employment action by ACT public authorities;
- Use of overt and covert surveillance in workplace environments;
- Providing reasonable adjustments and flexibility for people with disability, women and other groups (including in relation to physical accessibility of workplaces);