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IRSSA INC. TRADING AS
AUSTRALIAN LABOUR & EMPLOYMENT RELATIONS ASSOCIATION SA

MARCH 2024 NEWSLETTER

SECRETARIAT

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COMMITTEE OF MANAGEMENT

Note: The views of the contributors are not necessarily those of ALERA SA

Patron:

Greg Stevens

PRESIDENT'S MESSAGE

Dear Members

We are pleased to present our March 2024 newsletter outlining the latest developments in industrial relations. You will have noticed that the consequences of federal government's legislative reforms are starting to hit our desks and our intention to provide you with the experts and resources to navigate your practice through this time.

I attended the ALERA National conference in Hobart in October 2023. The conference was an immense success, drawing members from all corners of the country to gather and exchange insights and in particular debate the future of IR in Australia with an emphasis on tripartism between government, unions and employers. The feedback we received from attendees was overwhelmingly positive, highlighting the invaluable opportunity to hear from the best and brightest minds in the field. The conference was also an opportunity for the ILERA World Congress organising committee to move a motion that the Australian conference will be held in Sydney in 2027.

Sadly, this is my last newsletter as President. I thank Simon Bourne for stepping up to fulfill my duties as President and I look forward to contributing to the ALERA agenda as a committee member.

Abbey Kendall, President – ALERA SA

Contents

New Members

Jonathon Sale, Uni SA

Danae Fleetwood, HDR Student

Dina Houssos, Moloney & Partners

Wendy Wakefield, SAET

Chelsea Knott, Veolia

Graham Hall, Registered Industrial Agent

Jessie O'Neill, Public Service Association

Shivani Gandhi, Andreyev Lawyers

Past and Upcoming Events

2023 Patron's Event

On 13 December 2023, our Patron Gregory Stevens hosted the Association's annual Parton's Event at Electra House. The Association was this year honoured to hear from the Hon. Attorney General and Minister of Industrial Relations & Public Sector, Kyam Maher MLC. Members were provided with a rare opportunity to hear from the Attorney General in a small and informal setting with respect to the South Australian Government's industrial relations platform and priorities for the coming year.

The Association extends its thanks to both our Patron Gregory Stevens and the Hon. Kyam Maher MLC for enabling us to host this event.

From left to right: Association President Abbey Kendall, Patron Gregory Stevens and the Hon. Attorney General and Minister for Industrial Relations & Public Sector Kyam Maher MLC.

Paris Dean & Patrick McCabe, The Return to Work of Injured Workers: Flourishment and Frustration

On 14 November 2023, Paris Dean and Patrick McCabe addressed our members on the complexities faced by both workers and employers regarding the return to work of workers with work-related injuries. The seminar explored the potential for such difficulties to lead to paralysis and considered what help was provided by the various rights and obligations legislated under workers compensation law, work health and safety legislation and industrial legislation as those conferred by common law. Paris and Patrick helped members consider the interaction between these rights and obligations to address issues arising in the management of workplace injury, legislative rights associated with claiming injury and being injured through work.

The seminar also looked at the implications of performance management and the provision of duties under a return to work plan and section 18 of the Return to Work Act 2014 and how absence due to injury can affect the calculation of service for the purposes of long service leave and other accruals.

Professor Andrew Stewart, Closing Loopholes: But How Many, When and to What Effect?

On 20 February 2024, the Association hosted Professor Andrew Stewart to deliver a seminar on the Government's latest round of industrial relations reforms to the *Fair Work Act 2009* and related legislation. Andrew spoke to a packed out crowd (filling up most of the second level of Elektra House) with erudite precision, mixed with hilarious interludes.

ALERA FWC Advocacy Course

On 8 December 2023, the Association again ran its ever-popular FWC Advocacy Course. With the help of the four Adelaide-based Commission Members and eight experienced local employment/IR practitioners, a group of budding industrial advocates came to 'learn the ropes' in a full day of challenging (but fun) skill building, ensuring the workers and employers in our jurisdiction will remain well represented before the Commission for the years to come.

If you missed out this time, be sure to keep an eye out in the newsletter and our event emails for the next course.

Exploring Australia's New Right to Disconnect: Taking Charge of What You Can Leave Behind

12:30pm, Tuesday 16 April 2024

Australia's new right to disconnect is poised to reshape work dynamics in our constantly connected society. Dr Gabrielle Golding will leverage her scholarly expertise to scrutinise the right from an Australian perspective, juxtaposing it with similar rights in international jurisdictions. She will delve into Australia's recent legislative development of the right, emphasising its necessity for both employers and employees. Practical strategies will be examined to facilitate the effective implementation of the right in Australian workplaces, which commences operation on 26 August 2024 (or 26 August 2025 for a small business employers).

Dr Gabrielle Golding is a Senior Lecturer in Law at The University of Adelaide whose research focuses on the intersection between employment and contract law. Her latest research includes her 2023 monograph, 'Shaping Contracts for Work' (Oxford University Press), as well as publications concerning menstrual leave and the right to disconnect from work. She is a regular media commentator on topical employment law matters, having been interviewed by the BBC, ABC, SBS, Guardian, and Australian Financial Review, as well as commissioned to write for The Sydney Morning Herald, The Age, The Australian, and The Monthly.

Electra House, 131-139 King William Street, Adelaide, SA, 5000

Register to attend the in person seminar HERE

Register to join online via zoom webinar HERE

Save the Date: Tuesday, 28 May 2024 at 5:00pm;
Issues Emerging from the Work and Care Select Committee, and the Right to Disconnect

ALERA South Australia is pleased to invite you to hear from Senator Barbara Pocock who will speak about the recent right to disconnect reform, and further reforms on the horizon emerging from her work as Chair of the Select Committee on Work and Care.

Barbara Pocock is an Emeritus Professor at UniSA Business at the University of South Australia and has been researching work and employment in Australia for more than thirty years. She founded and was Director of the Centre for Work + Life at the University of South Australia 2006-2014, and prior to that was employed in various academic roles at The University of Adelaide in the social sciences. She has worked in many different jobs - in shearing sheds, the Reserve Bank, on farms, in factories, in unions, advising politicians, for governments, in universities - and as a mother and carer.

Most recently, Barbara is an Australian politician who was elected at the 2022 Australian federal election to become a Senator representing South Australia from July 2022.

Keep an eye on your inbox for registration details!

Seriously Injured Workers and the Obligation of Mutuality

By John Walsh, Director, and Tiffany Walsh, Senior Associate, DW Fox Tucker Lawyers

The decision of the Court of Appeal of the Supreme Court of South Australia, *Department for Child Protection v Morris* [2022] SASCA 131, has significant implications for the scheme, especially for seriously injured workers and/or workers who are totally incapacitated for work.

An object of the RTW Act is to compensate workers to the extent that they have an incapacity for work. The Court of Appeal's decision emphasises the fact that the RTW Act was not intended to create a pension scheme for seriously injured workers and prevent those workers from suffering any penalty for conduct which violates the necessary degree of co-operation required between worker and employer.

In accordance with the *Return to Work Act 2014* (SA) ("**RTW Act**"), a person who has sustained a work injury which has caused them to be permanently impaired to such a degree that they are determined to be a 'seriously injured worker' is entitled to receive weekly payments in respect of that incapacity until they reach retirement age.

The RTW Act set outs the circumstances in which a person's weekly payments may be discontinued. One such circumstance in which a person's weekly payments may be discontinued is if they have breached the 'obligation of mutuality'.

Obligation of mutuality

Until recently the Courts had restricted the application of the mutuality obligation to injured workers with capacity to perform work. This stood in contrast to other obligations contained in Section 48 of the RTW Act (and its predecessors), which apply to a worker whether, or not, they had any capacity for work.

This definition meant that injured workers who had no capacity for work but otherwise breached their employment obligations (in circumstances where it was not possible for their employment to be terminated for serious and wilful misconduct) were still entitled to receive weekly payments. An example of this might be an injured worker who reaches an agreement with the employer to terminate the employment relationship, but then breaches one of their ongoing obligations such as to keep their employer's confidential information confidential. In a situation such as this, employers (either directly for self-insured employers, or through their premium for registered employers) were still required to pay weekly payments to injured workers who had breached their employment obligations.

Background

In *Morris*, the worker had been designated as a seriously injured worker, (the worker had been assessed prior to the commencement of the RTW Act as having sustained a 64% whole person impairment as a result of a work injury sustained in 2002). In 2017 and 2018 (respectively) the worker separately pleaded guilty to trafficking in methylamphetamine and attempting to dissuade a witness from giving evidence. The worker also used a Department for Child Protection ("**Department**") ID in the commission of the latter of these offences. Accordingly, her employer (the Department) discontinued her weekly payments pursuant to Section 48(3)(g) of the RTW Act on the basis that she had breached mutuality.

The worker disputed the discontinuances (there being two separate determinations discontinuing the worker's weekly payments) through the South Australian Employment Tribunal, and at first instance the Tribunal found in her favour on the basis that in order for the worker to have breached the obligation of mutuality, she was required to have some capacity to work. This was despite the Tribunal finding that:

"… it is difficult to imagine a more graphic example of an employee's conduct that is utterly inconsistent with the necessary degree of co-operation required of a contract of employment. The circumstances of this offending also constituted a breach of mutuality."[1]

This decision was upheld on Appeal to the Full Bench of the South Australian Employment Tribunal, before the Department appealed to the Court of Appeal of the Supreme Court of South Australia.

The Decision of the Court of Appeal

The Court of Appeal found that the obligation of mutuality as encapsulated in the RTW Act in Section 48(3) has significantly expanded on the historical definition of the obligation and that the worker's:

*"… convictions for drug trafficking and attempting to dissuade a witness from giving evidence represented serious breaches of the obligation of mutuality because her criminal conduct was "**utterly inconsistent with the necessary degree of co-operation required of a contract of employment**" of a public servant"*[2] *(emphasis added),*

thus accepting the Department's characterisation of mutuality as "***the necessary degree of co-operation as between worker and employer***". Such a definition requires that **both parties do all things necessary to maintain an effective employment relationship**.

A worker therefore breaches the obligation of mutuality if they have conducted themselves in a manner which is "*fundamentally destructive of the required mutuality between and employee and employer which enables the conclusion that the employee is not ready, willing or able to undertake or adhere to the responsibilities and duties of employment.*"[3] This can include circumstances unconnected with the worker's employment, such as criminal conduct on the part of the worker, which undermines their employability.

Their Honours found that such an obligation was no longer restricted to only those who had a partial capacity to work, but that:

"… there is nothing in the text or context of these provisions, or the [RTW] Act as a whole, to suggest that these provisions have no application to workers who are totally incapacitated. None of these provisions is necessarily confined in operation to workers with some capacity for work."[4]

Not only that but, their Honours found that criminal misconduct, as was committed by the worker, "*provides a stark example of a case where both the employability of the [worker] and the required element of mutuality have both been undermined*"[5] and that it is "*not unjust to require that a totally incapacitated worker, including a seriously injured worker, abide by the requirements of that worker's employment.*"[6]

Their Honours concluded that:

"The designation of a worker as "seriously injured" is an important aspect of the [RTW] Act. That designation carries with it valuable entitlements that may be life long or, in the case of weekly payments, that may subsist until normal retirement age. ***As important as the entitlement to weekly payments is, it does not amount to a statutory sinecure which is to be enjoyed regardless of criminal misconduct by a worker which is both inimical to and destructive of the mutuality required in an effective employment relationship****" (emphasis added).*

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[1] *Morris v Department for Child Protection* [2020] SAET 92, [46].
[2] *Department for Child Protection v Morris* [2022] SASC 131, [131].
[3] Ibid, [75].
[4] Ibid, [155].
[5] Ibid, [106].
[6] Ibid, [169].

Their Honours ultimately found that the Tribunal and the Full Bench should have found that Section 48(3)(g) of the RTW Act does have application to a worker who is totally incapacitated for work.

Practical impact of decision and recommendations

The practical impact of this decision is that injured workers must be mindful of all their employment obligations at the relevant time in order to preserve their entitlement to weekly payments.

In addition to this, Compensating Authorities and particularly Self-Insured Employers, ought to be undertaking a review of their ability to provide suitable employment in respect of any seriously injured workers. Providing suitable employment to a seriously injured worker will benefit both injured workers (who will remain engaged in the workforce) and Compensating Authorities who will see a significant reduction in their liability for weekly payments.

Clearly there remains a distinction to be drawn between:

1. workers with capacity;
2. seriously injured workers with capacity; and
3. injured and seriously injured workers with no capacity.

The unique circumstances of each case will be important in determining whether the obligation of mutuality has been breached. In particular, Compensating Authorities will need to consider what is required for the necessary degree of cooperation between the employer and worker, having regard to all the circumstances of the employment relationship. As an example, it could not reasonably be asserted that there is a breach of mutuality if the employer and worker have agreed to the terminate the employment relationship.

While it was not directly an issue for the Court of Appeal, it was a necessary finding that seriously injured workers remain subject to section 48 of the RTW Act. As such, although the RTW Act makes it clear that a Compensating Authority cannot compel a seriously injured worker to perform work as part of a recovery/return to work plan, a seriously injured worker remains subject to the requirement to:

- undertake work that is offered and the worker is capable of performing (section 48(3)(e)); and
- participate in assessments of the worker's capacity and/or employment prospects (section 48(3)(f).

This expanded definition of mutuality also means that seriously injured workers with no capacity for work need to remain mindful of their employment obligations, such as maintaining confidentiality and not bringing their employer into disrepute.


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Considering implementing a four-day work week? Read this.

John Love, Partner, Ben Smith, Senior Associate, and Maida Mujkic, Solicitor – Mellor Olsson

The concept of a four-day work week has gained considerable traction in recent years, following successful trials in Europe, the United States, Canada, New Zealand, and now Australia. Advocates claim it can lead to improved productivity, increased employee well-being and a better work-life balance.

Most four-day work week trials in Australia have adopted the "100:80:100" model, whereby workers receive 100% of their pay, while only working 80% of the time, as long as they maintain 100% productivity.

Implementing a four-day work week is not without its challenges for employers.

Consultation requirements

Modern awards and enterprise agreements generally require employers to consult with employees when a definite decision has been made to introduce a major workplace change, particularly if it affects employees' rosters or hours of work.

Employers must ensure that they carefully follow any consultation requirements under the relevant industrial instrument/s before moving to a four-day work week.

This usually involves:

- providing employees with information (other than confidential information) about the proposed change; for example, information about the nature of the change and its anticipated commencement date
- encouraging employees to express their perspectives on how the proposed change might affect them, encompassing any potential implications for their family or caregiving commitments; and
- genuinely considering employees' views before implementing the change.

Employers who fail to follow the relevant consultation requirements above, may breach the *Fair Work Act 2009* and potentially be liable for significant financial penalties imposed by the Court.

Enterprise bargaining

Employers could consider implementing a four-day work week via an enterprise agreement (EA). Subject to passing the "Better Off Overall Test" and procedural requirements, EAs can simplify employment conditions set by a modern award.

However, drafting, interpreting, and negotiating enterprise agreements can be complex and overwhelming. The bargaining process can be long and take critical resources away from your business.

We recommend employers carefully consider how to best implement and intergrade a four-day work week within their organisation and seek professional advice and assistance when drafting and negotiating EAs.

Workload management

One of the primary challenges faced by employers is effectively managing workloads with a reduced work schedule. While most four-day work week trials have not reported a decrease in productivity, employers may find that reducing the work week by one day could potentially lead to a decrease in overall productivity. This may require employers to manage underperformance, which can be a challenging process.

Employers need to carefully assess their staffing requirements and consider hiring additional personnel to ensure operations are not adversely affected, especially in customer-oriented businesses that need to remain accessible to clients throughout the week. It may also be impractical for employers in certain industries such as disability services, health care or other industries with irregular hours to implement a successful four-day work week practice.

How Federal and State Governments are getting tougher on wage theft

By Lawrence Ben, Johnston Withers

The term 'wage theft' has become an increasingly common phrase used throughout media, political and legal settings.

High profile examples that have spurred national debate range from 7-Eleven and Melbourne University to celebrity chefs' restaurants and even the Reserve Bank of Australia.

A recent analysis of Fair Work Ombudsman audits estimated that Australian workers lose approximately $850 million per year due to wage theft.

What is wage theft?

The term wage theft is used to refer to a broad range of different contraventions of workplace laws, most commonly the *Fair Work Act 2009* (Cth) ('FW Act').

In many instances wage theft concerns a blatant underpayment of wages. For example, an employer pays a worker $10 per hour when an industrial instrument requires that the minimum wage for that worker is $24 per hour.

In other scenarios, wage theft will refer to a broader set of contraventions. For example, a failure to pay workers penalty rates or shift allowances for working weekends or other hours outside of their regular roster. The University of Melbourne, for instance, conceded, among several contraventions, that it failed to pay casual staff for weekend work and overtime, totalling more than $22 million.

Wage theft can also refer to a failure to pay other entitlements owed under an Award or Enterprise Agreement, such as rest breaks, higher duties allowances or allowances for meals, travel and special clothing.

These instances will usually be captured by s 45 of the FW Act (contraventions of an Award) or s 50 (contraventions of an Enterprise Agreement). Other relevant provisions of the FW Act include s 44 (non-compliance with the National Employment Standards) and s 323 (non-compliance with method and frequency of payment obligations).

While the contraventions listed above will generally be captured by the FW Act, it should be noted that the concept of 'wage theft' also extends to a failure to make payments owed under other state and federal legislation including superannuation and long service leave obligations.

A recent high profile example is the Victorian Wage Inspectorate filing charges against Woolworths for failing to correctly pay over 1,000 employees their entitlements under the Victorian *Long Service Leave Act 2018* (VIC).

Jurisdiction

Australia's national workplace relations system, or the Fair Work system, covers the majority of private sector employees and employers in Australia.

While these employees and employers are predominantly regulated by the federal FW Act, underpayment matters, including both money claims and pecuniary penalty claims, can usually be initiated in either federal or state courts.

Accordingly, applicants often have the **choice** to initiate proceedings in either the Federal Court of Australia ('FCA'), the Federal Circuit and Family Court of Australia ('FCFCOA'), or an eligible State or Territory Court.

In South Australia, the eligible State Court vested with jurisdiction is the South Australian Employment Tribunal (constituted as the South Australian Employment Court) ('SAET').

Underpayment claims up to $100,000 arising under the federal FW Act can be initiated as a small claim in the Fair Work Division of the FCFCOA. The monetary cap for small claims was increased from $20,000 to $100,000 under the recently enacted *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth). These changes commenced on 1 July 2023.

Important considerations for applicants seeking to commence small claims proceedings in the FCFCOA include the fact that pecuniary penalties will **not** be available for relief, parties need to obtain leave to be represented, and there is a requirement to pay a filing fee. Currently, there is no filing fee for initiating underpayment proceedings in the SAET.

There is the option to initiate a general application in the Fair Work Division of the FCFCOA or the FCA, or to proceed in the SAET. The FCFCOA and FCA have concurrent jurisdiction. It should be noted that claims in the FCA are typically large and complex matters.

Both state and federal jurisdictions impose a six year time limitation in which to initiate a claim (per s 545(5) of the federal FW Act). It should also be noted that state public sector and local government employees in South Australia will fall outside the national workplace relations system.

Pecuniary Penalties

The FW Act imposes various obligations characterised as 'civil remedy provisions', which provide for pecuniary penalties. These penalties effectively operate like a fine and are intended to serve as an enforcement and deterrence mechanism.

Part 4-1 of the FW Act sets out the procedures for enforcing civil remedy provisions.

Section 539 of the FW Act helpfully contains a table which sets out all of the civil remedy provisions available under the FW Act, the persons who have standing to initiate proceedings, the courts in which proceedings may be initiated, and the maximum penalties.

Currently, a court may order a penalty of up to $18,780 per contravention for an individual and $93,900 per contravention for a body corporate. In the case of a 'serious contravention' (per ss 557A and 557B of the FW Act), a court may order a penalty of up to $187,800 per contravention for an individual and $939,000 per contravention for a body corporate.

Under s 546 of the FW Act, the court may order that the pecuniary penalties be paid to the Commonwealth, a particular organisation (such as a union), or a particular person (for example the employee subject to the wage theft).

Legislative Reform

The current Federal Government recently passed *the Fair Work Legislative Amendment (Closing Loopholes) Act 2023*, which contains a number of significant reforms, including the introduction of a criminal offence for **intentional** underpayment of employees' wages and other entitlements.

The offence will apply to entitlements under the FW Act; modern awards and enterprise agreements; and superannuation contributions required under the FW Act or a Fair Work instrument. The offence will not apply to solely contractual entitlements.

The wage theft offence will attract a maximum of ten (10) years' imprisonment and/or a maximum fine the greater of either three (3) times the amount of the underpayment (if determinable by the court), or 5,000 penalty units for an individual ($1,565,000) or 25,000 penalty units for a body corporate ($7,825,000).

The wage theft offence will apply to intentional underpayments that take place after the offence commences, which is on the later of 1 January 2025, or the day after the *Voluntary Small Business Wage Compliance Code* is declared by the Minister.

In recent years, State governments in Victoria and Queensland have a taken steps to criminalise wage theft with the *Wage Theft Act 2020* (VIC) and amendments to the *Criminal Code Act 1899* (QLD), respectively. The current South Australian Labor Government committed to an election policy to introduce criminal offences for wage theft although it has not yet introduced a bill to State Parliament.

Won't Somebody Think of the Children! – A Minimum Working Age for Children

By Michael Kay, Partner and Practice Leader, Employment, and Celeste Craggs, Senior Associate, Employment, Wallmans Lawyers.

In recent weeks, the minimum working age for children in South Australia (or a lack thereof) has attracted much publicity. Industries such as fast food, hospitality and retail continue to be heavily reliant on a young workforce. So, what is the status of child employment laws in Australia, and are our most vulnerable workers protected?

What is the minimum working age?

The minimum working age depends on the State or Territory the person is working in. There is no minimum working age in South Australia, which means that a child of any age may undertake paid employment. There are, however, restrictions on when a child of compulsory school age can be employed during school hours.

Children who want to work during school hours, generally need to be of minimum school leaving age or have completed the minimum required years of school. In South Australia, students aged 15 and 16 can apply for a permanent exemption from school for employment reasons. Importantly, a parent or employer could be prosecuted if they ask a child of compulsory school age to work in a way that interferes with school.

Private businesses may set their own minimum working age, whilst certain industrial awards and regulations may also restrict the type of work that a person under 18 years old can do, such as driving a forklift.

The *Work Health and Safety Act 2012* (SA) (**WHS law**) has an indirect role in regulating the age that children can work. Although WHS law does not mandate a minimum age, there will be situations where a child will be too young to perform certain roles safely.

However, when considering WHS law obligations, exactly what is an appropriate age for a particular employee to perform their role safely could remain open to reasonable debate. This is why clarity for all employers (as to what a minimum age might be) must be considered.

The broader regulatory framework

The Fair Work Act contains clauses for "junior" employees such as for rates of pay, however, there is an express exemption for children under 18.

This means that it is left up to the states and territories to develop their own regulation. Currently only Australia Capital Territory, Queensland, Victoria, Western Australia, and New South Wales have child employment legislation. South Australia has considered child employment legislation; but it has not eventuated. Given the increasing discourse on this topic, this could well change.

In June 2023, the Commonwealth Government ratified an international treaty which sets out a framework for the minimum age a young person can start employment to work safely and without interfering with their schooling. Australia will declare a minimum age of 15 years, and children under that age can only perform light work in certain circumstances. However, this is unlikely to form part of Australia law until it is legislated by the States and Territories.

Should we introduce a minimum age?

There is little doubt that, at least for the sake of clarity and protecting vulnerable minors, fixing a minimum age for employment would be prudent and reasonable.

But should there be exceptions? Many fondly recall informal engagements like a paper route, mowing lawns or babysitting to earn pocket money in their early teens. Certain laws already recognise a "carve out" for arrangements that are arguably more domestic or familial in nature: domestic cleaning (not being covered by workers' compensation legislation) being one example.

But is it time to regulate these traditionally informal arrangements as well? Arguably, there is an even stronger impetus to recognise a formal employment relationship for younger (and more vulnerable) workers given the associated protections that arise from the employment relationship (including WHS, workers compensation and minimum entitlements).

Further, should there be a "no exceptions" minimum age? For example, in Queensland, a child under 11 is not able to perform work for any reason. And parental permission will always be relevant, but from what age? In Western Australia for example, 13 and 14-year-olds can work in retail or hospitality with parental consent.

Of course, applying a fixed age across every single workplace is not realistic. Although many commentators suggest that 14 or 15 is a reasonable age to commence work, numerous exceptions immediately come to mind: a person must ordinarily be 18 to serve alcohol, whilst children (as young as infants) can work in film and television (albeit with parental consent).

These are all important questions requiring continued discussion by employer bodies and unions (and eventually, it is hoped, by Parliament). At this point in time, although the Fair Work Ombudsman and SafeWork SA websites provide general guidance for employers wanting to employ young people, there are limited resources and agencies responsible for monitoring child employment, particularly in the context of WHS law, when "assessing risk" can be easier said than done for less sophisticated workplaces.

Conclusion and recommendations

There is little doubt that Australia (or at least South Australia) could benefit from consistent, uniform laws to help protect young people at work.

In the opinion of the writers, this could be addressed by:

- Fixing a presumptive minimum age (say, 15 years of age);
- Clarifying exceptions to the presumptive age for certain types of employment (such as being 18 for licensed premises);
- Clarifying exceptions for individual circumstances (say, 14 years of age with parental consent);
- Clarifying potential exceptions for certain industries that traditionally (and validly) engage younger workers (like Victoria where a child only needs to be 13 to work in retail); and
- Fixing a "no exceptions" minimum (say, 12 years of age).

These are indicative ages. The precise age is not just a question for lawyers, but a question for labour, education and medical experts. Even if a fixed age were agreed, younger people will vary in terms of their development and maturity. As but one example, cognitive development, resilience and/or coping mechanisms (or perhaps a lack thereof) in our younger workers could well increase the risk of psychosocial harm.

One thing is clear: *somebody ought to think of the children* sooner rather than later. Affording reasonable protections to our vulnerable workers must remain a paramount consideration in any discussion of labour law and related policy.

Former employees found to be entitled retrospective wage increases

By Sathish Dasan, Principal, Anastasia Gravas, Senior Associate, and Annabelle Narayan, Solicitor, Norman Waterhouse

Employers may now be required to backpay employees who resign or retire before the approval of an enterprise agreement which includes retrospective wage increases, depending on the drafting of the relevant clauses of the enterprise agreement.

In *Murtagh v Corporation of the Roman Catholic Diocese of Toowoomba* [2023] FCAFC 172, the Full Court of the Federal Court of Australia (the Full Court) overturned the decision of the single Judge of the Federal Court (the Single Judge) handed down earlier this year. Our analysis of the Single Judge's decision can be found here.

Facts

Two former teachers (the Appellants) were employed by different educational institutions (the Respondents) operated by Toowoomba Catholic Education. The Appellants were covered by separate enterprise agreements which were set to expire on 30 June 2019 (the Previous EAs).

The Fair Work Commission consequently approved new enterprise agreements for each of the Respondents which came into operation in December 2020 (the New EAs). The New EAs relevantly provided for staged salary increases to be operative as of the first full pay period after 1 July 2019, with subsequent salary increases to be offered on 1 July for each year thereafter until 2022.

The Appellants had both resigned from their employment in December 2019 but claimed they were entitled to backpay in accordance with the salary increase specified in the New EAs for the period 1 July 2019 until their resignations in December 2019.

Decision

As set out in our earlier article, the Single Judge found that, on the construction of the relevant provisions of the *Fair Work Act 2009* (Cth) (FW Act) and the commencement clauses within the New EAs, both enterprise agreements did not apply to employees who were no longer employed at the time the agreements came into operation.

On appeal, the Full Court interpreted the construction of the relevant provisions and clauses differently. The FW Act distinguishes between when an enterprise agreement 'covers' and 'applies to' employers and employees. An enterprise agreement may be said to 'cover' an employee even though it does not 'apply' to that employee. In this instance, the Previous EAs ceased to 'apply' in December 2020 when the New EAs came into operation. However, the New EAs retrospectively 'covered' the Respondents from 1 July 2019.

This, the Full Court found, was consistent with the 'practical bent of mind' and noted that '*the obvious intent is that, once the enterprise agreements become operative, there will be a seamless transition between old pay rates thereby made forever inapplicable and new pay rates, applicable for teachers in respect of work performed on and from 1 July 2019.'*

The Full Court also found that there was no overt intention to differentiate the coverage of the New EAs for employees whose employment ceased after 1 July 2019 but before the New EAs came into operation. In the absence of any such intention, it was unfair to read the coverage clauses in such a manner.

Take home messages

While the Full Court has overturned the Single Judge's decision, our view on this matter remains the same: the precise drafting of the enterprise agreement is paramount. Had the New EAs been drafted to expressly prevent the retrospective application of the pay increases, the Respondents may not have been required to backpay wages.

While the Appellants in this case sought only modest backpay, there is the possibility that employers may be liable for substantial retrospective wage claims where enterprise agreement clauses are not carefully drafted.

Sexual Harassment – Record Payout of $268K

By Jodie Bradbrook, Principal, Bradbrook Lawyers

By now, you're probably aware that the laws on sexual harassment in Australia have been significantly tightened.

Legislative amendments

Amendments to the *Sex Discrimination Act 1984* (Cth) impose new obligations and prohibitions that place a positive duty on employers and persons conducting a business or undertaking (PCBU) to take reasonable steps to eliminate:

- sexual harassment
- sex-based discrimination
- hostile workplaces
- acts of victimisation at work.

The amendments also address enforcement with expanded powers granted to two key bodies:

1. The Australian Human Rights Commission can now assess and enforce this positive duty. It can also investigate systemic unlawful discrimination.
2. The Fair Work Commission can issue *stop sexual harassment orders* and deal with sexual harassment disputes.

These laws have been designed for a common purpose: to prevent harm in the workplace and ensure all workers are protected from this kind of behaviour.

Introducing this positive duty means that employers can no longer turn a blind eye to sexual harassment. They must take active steps to eliminate it. Failing to do so may result in significant fines or awards of damages against the employer or PCBU.

Recent sexual harassment case

In the decision, *Taylor v August and Pemberton Pty Ltd* [2023] FCA 1313, Justice Katzmann of the Federal Court recently handed down a decision on the new sexual harassment laws, ordering record damages of $268,000 against an employer. She found that the employer had:

- Badgered his employee with unwanted advances, and
- Engaged in victimisation after the employee complained to the Human Rights Commission in 2020.

For several years, the employer had expressed romantic feelings to the employee and made repeated advances, despite the employee telling him she was not interested. The employer's conduct included comments about her appearance, inappropriate text messages and lavish gifts. He was also found to have slapped her on the buttocks.

The judgment amount included:

- $140,000 in damages for hurt feelings
- past and future lost wages
- aggravated damages
- out-of-pocket expenses
- $40,000 for suffering victimisation at work.

The employer was also ordered to pay the employee's legal costs.

The award of $140,000 for hurt feelings is a clear message that the courts are willing to impose significant penalties against employers or PCBUs who allow or perpetrate behaviour of this kind.

What's next?

If you're an employer or PCBU, it's time to stand up and take this seriously. Previously, these types of claims may have been "settled" for a few thousand dollars, but those days are long gone.

It is critically important to conduct risk assessments to:

1. Identify risks.
2. Decide how to manage risks.
3. Implement control measures to manage the risks.
4. Check that adequate policies and procedures are in place.
5. Implement sexual harassment awareness and complaints procedure training for all employees (including the boss).

The training must be regular; doing it once is not enough.

Employees who engage in sexually harassing behaviour are a liability for your business. If it cannot be corrected with training, you need to consider whether they should continue to be employed.

Be vigilant. You must regularly review your organisation's systems for training needs and risk assessment. Implement changes as necessary.

Sexual Harassment disputes in the Commission and the new laws

By Kaye Smith, Principal, Partner, and Director, EMA Legal

Recent disputes in the Fair Work Commission (the Commission) have tested the new provisions in the *Fair Work Act 2009* (Cth) (FW Act) that prohibit sexual harassment in connection with work. We provide a summary of these disputes below.

LINDSAY SWIFT V HIGHLAND PINE PRODUCTS PTY LTD [2023] FWC 1997 (10 AUGUST 2023)

A former employee lodged an unfair dismissal claim in the Commission following the termination of his employment for serious misconduct. The nature of the alleged misconduct was sexual harassment and a failure to communicate respectfully and appropriately with work colleagues. Ultimately, the Commission upheld the dismissal but held that the employer should have done more to prevent sexual harassment in the workplace.

BACKGROUND

The employee was employed as an electrician. During the course of his employment, he allegedly engaged in sexual harassment behaviour over a period of time towards other employees which included, making sexual jokes and comments, showing female employees inappropriate photos of a sexual nature, telling other employees about his sex life, regularly swearing and yelling in the workplace, and acting in an intimidating behaviour.

The employee admitted to some of the allegations but argued that the comments he made were reciprocated and conventional conversations in the workplace. He was sacked for serious misconduct.

DECISION

The Commission held that the employee did engage in conduct of a sexual nature. The Commission noted that the witnesses confirmed they were uncomfortable with the way the employee interacted with them, including the way he looked at them. The conduct was 'unwelcome,' such that a 'reasonable person would have anticipated the possibility that each of these employees would be offended, humiliated, or intimidated.'

The employee argued that employees swearing and yelling in the workplace was common. The Commission held that it is irrelevant to the issue of sexual harassment and emphasised that sexual harassment conduct may be sexual in nature even if the person engaging in the conduct has no sexual interest in the person towards whom it is directed.

The Commission determined that the dismissal was not unfair, unjust or unreasonable. The employee's conduct occurred on an ongoing basis over a period of years and to consider this amounted to consensual conduct lacked insight – employees have a reasonable expectation that they will be safe.

Even though the employer had a policy which required employees to report misconduct, the workplace culture did not encourage employees to report inappropriate behaviour. Accordingly, the Commission expressed observations to the effect that the employer would need to do more to meet its duty to prevent sexual harassment in the workplace to meet its legal obligations under the relevant legislation. This included providing a training for managers and employees and the notion that only 'formal' complaints could be acted on in relation to sexual harassment.

APPLICATION BY AB [2023] FWC 2183 (30 AUGUST 2023)

A stop sexual harassment order was recently issued by the Commission in relation to a dispute concerning an inappropriate video recording of the Applicant in circulation. The Applicant made an application in the Commission to deal with a sexual harassment dispute by making a stop sexual harassment order and by otherwise dealing with the dispute.

Under the new sexual harassment laws, s 527J of the FW Act empowers the Commission to issue stop sexual harassment orders if the Commission is satisfied that the aggrieved person has been sexually harassed by one or more persons and there is a risk that the aggrieved person will continue to be sexually harassed. The Commission may make any order it considers appropriate (other than an order requiring payment of a pecuniary amount) to prevent the aggrieved person from being sexually harassed.

In this dispute, the Commission issued a stop sexual harassment order requiring the Respondent to delete copies of an inappropriate video of the Applicant and to prohibit any discussion of that video in future.

IMPLICATIONS FOR EMPLOYERS

The Commission's decisions in the above disputes reiterate the need to take proactive steps to meet the positive duty to take reasonable and proportionate measures to prevent sexual harassment, sex-discrimination, and victimisation. A policy together with other measures should be considered, implemented and reviewed for its effectiveness as part of the employer's undertaking.

Probationary periods in peril

Paul Dugan, Principal, and Lachlan Chuong, Associate, DMAW Lawyers

It is often assumed that an employer need not have or give any reason for terminating an employee's employment during a probationary period.

However, a recent High Court decision against Qantas highlights the importance of employers exercising caution when making decisions that may have the effect of depriving employees of their ability to exercise future rights in relation to their employment.

A common situation where employers may be at risk is in terminating an employee's employment during a probationary period, which has the consequence of preventing the employee from accruing the necessary period of service to qualify for statutory or contractual protections against termination of employment (such as protection against unfair dismissal).

Background to the Qantas decision

In late 2020 during the COVID-19 pandemic, Qantas decided to outsource its ground handling operations at ten airports to third-parties (the Outsourcing Decision). Thousands of Qantas employees were made redundant, many of whom were members of the Transport Workers Union (TWU).

When the Outsourcing Decision was made, affected Qantas employees did not have any right to engage in protected industrial action or enterprise bargaining under the Fair Work Act 2009 (Cth) (FW Act), either because at that time the enterprise agreement that applied to their employment had not yet passed its nominal expiry date, or because the procedural steps for protected industrial action mandated by the FW Act had not yet been followed.

It was anticipated (by both Qantas and the TWU) that those rights would exist in 2021 and that affected employees would elect to exercise those rights at that time.

The TWU challenged the Outsourcing Decision on behalf of affected employees, arguing that Qantas made the decision in order to prevent affected employees from exercising their future right to engage in protected industrial action, and in doing so Qantas had engaged in unlawful adverse action.

Beware of future rights

The High Court confirmed that it is unlawful for an employer to take adverse action to prevent an employee from exercising a 'workplace right' – even if that right is not in existence or held when the adverse action is taken, and even if the employee's capacity or eligibility to exercise that right is contingent upon some future event. It is enough if the employer takes action in order to deny an employee the ability or opportunity to exercise a workplace right in the future. The employee need not have proposed to exercise the right.

Perils for probationary periods

Most businesses prudently choose to include a probationary period in their employment contracts as a tool to assess the suitability of a newly hired employee.

The implication of the High Court decision is that, in exercising the right to terminate employment during a probationary period, employers must beware of claims that they are doing so to prevent the employee from becoming entitled to future workplace rights or protections.

This risk may be especially acute where the length of the probationary period is similar to or the same as the minimum employment period for an employee to qualify for unfair dismissal protection (six months for businesses which are not small business employers under the FW Act) and the decision to terminate is made close to the end of the probationary period.

Dismissed employees might choose to pursue adverse action claims, arguing that the decision to terminate their employment was made so as to prevent them from exercising their future right to bring an unfair dismissal claim. Employers would then bear the onus of proving that the substantial and operative reason for termination was not to deprive the employee an opportunity to pursue an unfair dismissal claim.

How to mitigate the menace

The timing of the decision to terminate, and having an objectively supportable reason for dismissal, will be important to the employer's ability to resist a claim.

One way to mitigate this risk is to shorten the length of the probationary period in employees' contracts (for example, to three months). Doing so will make it easier for employers to show that the decision to terminate was unrelated to the employee's eligibility to bring an unfair dismissal claim. Of course that will mean that the employer will need to pro-actively manage and assess suitability of the employee during that shorter period.

It is also important for employers to have a documented assessment process in relation to the employee's suitability for the role to support the reasons for the decision to terminate during the probationary period.

Working From Home: How Flexible Do Employers Need To Be?

Balancing the interests of employees and the needs of the business in this post-COVID era of ongoing flexible work;

By Emily Haar, Partner, Emily Slaytor, Special Counsel, and Aneisha Bishop, Law Graduate, Piper Alderman

It seems not a month goes by without a dispute involving employees wishing to continue to perform their jobs from home and resisting an employer's reasonable attempts to have them return to the office.

Employees regularly working from home has become the new norm for many industries since the COVID-19 pandemic. However, employers continue to face challenges with managing these arrangements and organisations that require employees to return to the office on a more regular basis garner significant media attention.

This article explores recent developments regarding what employers may face when managing remote workers, managing flexible work requests, and employees that refuse to return to work from the office (even on a hybrid basis).

Employee Flexibility vs Performance and Productivity

The COVID-19 pandemic certainly changed perspectives of working from home (**WFH**), not only in Australia, but around the world. Employees cite WFH as promoting an improved work-life balance, more time with family, fewer distractions, and less time and money spent commuting.

However, employers are understandably concerned about lower productivity, reduced supervision, increased psychosocial risks through isolation, exposure to additional workers compensation claims, and the fact that, anecdotally, WFH is seen to adversely impact employee collaboration and work relationships.

WFH has opened another front for industrial disputes, with significant pushback on hybrid working arrangements, where at the same time employers grapple with the work health and safety implications, and monitoring and privacy concerns when work is being performed remotely.

Many employees may be able to challenge employer decisions not to allow remote working arrangements as a result of recent changes to the *Fair Work Act 2009* (Cth) (**FW Act**).

So what is the current status of an employee's 'right' to WFH and where do employers stand if they would like employees to return to working from the office the majority of the time?

No General Right to WFH

Importantly, the Federal Circuit and Family Court of Australia has confirmed that, generally speaking, there is no inherent 'entitlement' or 'right' for employees to work from home if they want to.

In a recent general protections claim, *Homes v Australian Carers Pty Ltd (No 2)*,[7] an employee sought to argue that she had a 'workplace right' to work from home, and that she was subject to bullying and discrimination by the employer when it refused her request to work from home.

However, the Court confirmed that case law in Australia does not support "a general right or entitlement in an employee to provide their services from home at their election." In this particular case, the employee in question also did not have "either a legislative or contractual right to work from home".

While the *Homes* decision confirms that employees do not have a general entitlement or right to work from home (absent a contractual term to that effect), employers should be aware that employees do have a statutory right to request a flexible working arrangement in the FW Act,[8] and this entitlement may be used to request flexibility in the form of WFH.

Requesting Flexible Work Arrangements

Subject to meeting certain eligibility requirements, individual employees may make a request for a flexible work arrangement (**FWA**) under the FW Act. Particular classes of employees (e.g., those with a disability, parents, carers, etc.) can request changes in their working arrangements relating to those circumstances.[9] Such change might include WFH, but also flexible rostering or job sharing.

Employers can only refuse a request for a FWA if they have first discussed it with the employee and genuinely tried to reach agreement about changes to the employee's working arrangements. Further, the employer must have had regard to the consequences of the refusal for the employee.[10]

Even though employers may still reject a request for FWA on reasonable business grounds, employers must have sufficient evidence of these grounds for refusing a request, and explain these to an employee when refusing a request. The employer should also explain the alternative changes they are willing to make, or why there are no such changes available. Reasonable business grounds may include:

- The cost to the employer;
- Lack of capacity to change the working arrangements of others, or to recruit new employees, to accommodate the arrangements requested;
- The new arrangements would result in a significant loss in efficiency/productivity; or
- The new arrangements would have a significant negative impact on customer service.[11]

Importantly, the FW Act now allows the FWC to deal with disputes about requests for FWA through arbitration, if they cannot be resolved at the workplace level.[12]

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[7] [2023] FedCFamC2G 714.

[8] It may also be the case for some employees that remote or hybrid working arrangements are expressly permitted in their contracts of employment as a role requirement, or might otherwise be permitted by an industrial instrument such as an enterprise agreement.

[9] *Fair Work Act 2009*, s 65A.

[10] *Fair Work Act 2009*, s 65A(3).

[11] *Fair Work Act 2009*, s 65A(5).

[12] *Fair Work Act 2009*, s 65B.

These issues were considered in a decision from late 2023, *Gregory v Maxxia Pty Ltd*,[13] which confirmed an employer's right to refuse a request to work 100% of the time from home, on reasonable business grounds.

In this case, the employee had a condition that required him to use a toilet with more urgency and frequency. The employee was also in the process of negotiating a custody agreement with the mother of his child whereby he would have the care of the child for one week per fortnight.

On this basis, the employee requested to WFH for 100 per cent of his full-time hours.

The employer considered the relevant business grounds, which included that the employee's daily productivity was only at 50 per cent, he needed support to improve this, client expectations for service delivery, and that Maxxia risked financial penalties for not meeting contractual obligations.

While Maxxia refused the request to WFH 100 per cent of the time, it offered the employee a compromise position where he would WFH on the weeks he was to have custody of his child, and additional flexibility with respect to working hours and break times so that the employee could collect his child from school.

The employee referred the dispute to the Fair Work Commission.

Finding in favour of the employer, the Commission accepted the employer had reasonable business grounds to refuse the employee's request and had complied with its procedural obligations in responding to the request. Alternative arrangements to accommodate the employee's circumstances were proposed to him. However, the employee simply did not want to return to the office at all.

The Commission accepted the employer's desire for more face to face contact within its workforce, and that an in-person presence in the office would allow for observation, interaction and coaching to improve the employee's productivity.

Productivity concerns

Understandably, employers have voiced concerns about employee productivity when WFH, particularly given lack of supervision, and all the home-based distractions that exist. Employers wanting to manage this issue, should ensure they collect data about productivity declines, engagement concerns, and have in place workplace surveillance policies and methods of measuring productivity.

These recommendations were demonstrated in *Suzie Cheikho v Insurance Australia Group Services Limited*[14]
where the FWC upheld the dismissal of an employee who had been WFH, when her ongoing failure to properly attend to her duties amounted to misconduct. Insurance Australia Group Services (**IAG**), had a hybrid approach to WFH and was seeking to have employees work from the office more often. The employee in this case preferred to WFH.

An IAG manager met with the employee in November 2022 to discuss concerns about her lack of productivity, including that her failure to complete a task led to IAG being fined by ASIC. A warning

[13] [2023] FWC 2768.
[14] [2023] FWC 1792.

was issued to the employee, and she was placed on a performance improvement plan in January 2023, which included a retroactive review of her cyber activity between October to December 2022.

The review of 49 working days demonstrated that the employee:

- failed to work her designated rostered hours for 44 of those days
- did not start work on time on 47 days
- did not stop at or after her designated finish time on 29 of the days; and
- did not register any work at all on 4 of those days.

When the employee did log on to the IAG system, her keystroke data revealed she was inactive 90% of the time. AIG maintained that "her role required data input and correspondence with various stakeholders" and her keystrokes were drastically below expectation, logging 320 working hours with no keystroke activity between October to November.

The employee was ultimately dismissed.

The FWC held that AIG had a valid reason to dismiss the consultant based on its evidence that she did not work as required for extended periods during the review period. She put "little" forward to support her claim that the cyber records were wrong and "did not adduce evidence as to the work that she actually performed."

The FWC found that the employee's failure to attend to her duties in that period was "on a scale and at a sufficient level of seriousness to constitute misconduct."

Lawful and reasonable direction to return to the office

Employees are legally obligated to comply with lawful and reasonable directions from their employer. This means that employers *may* be able to direct their employees to return to the office, and a failure to comply with such a direction *may* provide a valid ground for dismissal.

Regard should *always* be had to the terms of an employee's contract of employment or applicable industrial instrument (discussed further below). The Fair Work Commission has held an employee cannot simply elect to WFH, thereby unilaterally varying their work location as specified in their employment contract.[15] If an employee's contract of employment specifies that their location of employment is the office, an employee can be lawfully directed, and is contractually obliged, to attend the workplace to undertake their duties if their contract specifies a place of employment. Specific advice should always be sought by an employer about the organisation's particular circumstances.

This issue was considered in the case of *Jason Lubiejewski v Australian Federal Police*,[16] where the FWC upheld the dismissal of an employee employed by the Australian Federal Police (**AFP**) in a media marketing role. His employment was terminated after he refused to comply with a direction to cease WFH and return to the office.

In 2017, the employee's desk was moved to a new area within the office, pursuant to medical advice regarding his mental health. In March 2020, he requested alternative seating, and provided a letter from his psychologist recommending he sit "*further from people, in a corner, facing a window, where*

[15] *Matthew Colwell v Wellways Australia* [2022] FWC 1086.
[16] [2022] FWC 15.

a minimum of people need to (or can) walk past." The psychologist also stated that the AFP may consider offering him the opportunity to WFH. Shortly after, the applicant began WFH due to COVID lockdowns. He continued to WFH until he commenced a period of personal leave on 10 August 2020.

Upon his return to work in January 2021, a number of emails were exchanged between the parties regarding his return to work. However, he continued to WFH without approval.

Between January 2021 and March 2021, the AFP made multiple attempts to facilitate his return to work, including:

- offering to return him on a graduated basis;
- attempting to discuss any reasonable adjustments required; and
- requesting relevant, up-to-date medical evidence from his treating practitioners.

The employee did not respond to any of these communications. The FWC agreed that the applicant's conduct in this regard was unreasonable. This information was necessary for the AFP to make a proper assessment as to what support or accommodation was needed to be provided to him.

On 29 March 2021, the applicant was issued with a formal direction to attend the workplace three days per week. Again, he did not attend the office and continued to WFH.

In total, the applicant was given ten directions to return to the office between January 2021 and April 2021. His employment was ultimately terminated on 25 May 2021 for failure to comply with a lawful and reasonable direction.

The FWC found that the AFP had legitimate reasons for requiring the applicant to return to work, including:

- he had been on leave for an extended period of time and the AFP wanted to integrate him back into work;
- the AFP had requested current medical evidence about the duties the applicant could perform so that reasonable adjustments could be made; and
- the return would allow the employee to receive training in new systems used by the team.

Consultation

A requirement on employees to return to the office *may* trigger an employer's obligations to consult with employees about major workplace changes that are likely to have significant effects on employees. This obligation sits within all modern awards and enterprise agreements. Consultation is also required in relation to health and safety matters under State and Federal Work Health and Safety legislation. Even if the obligation to consult is not triggered by the relevant factual circumstances, it is considered best practice and assists with employee morale and engagement.

Consulting must involve more than just advising employees of a change and allowing for questions to be asked.[17] Employers must give prompt and genuine consideration to matters raised about the major change by the relevant employees. However, it does not necessarily give employees the right to veto a change.

[17] *AMIEU v Golden Cockerel* [2014] FWCFB 7447.

This issue has recently arisen in the Commonwealth Bank of Australia (**CBA**) dispute with the Financial Sector Union (**FSU**), which filed a dispute in the FWC following a CBA requirement that employees WFH return to the office for at least half of every month. The FSU asked the FWC to order the CBA to engage in a consultation process in line with its EA.

The CBA has said that the bank started returning employees in non-customer facing roles to the office 18 months ago and met with the FSU in June at the union's request to discuss "hybrid working" including providing a written response to concerns raised by the union. CBA has said it wants employees to have the benefits of a physical workspace, team building, and collaboration, along with the advantages of remote work.

While this dispute has not yet (at the date of publication) resulted in a ruling from the Fair Work Commission, it highlights the importance of consultation with employees when seeking to make a major change such as changes to existing working arrangements.

Work Health and Safety

Another important issue for employers to consider is employee work health and safety (**WHS**) while working from home. Given the range of safety issues that can arise in a home environment, any number of disputes could arise in relation to the WHS implications of WFH. There have already been some novel examples of injuries suffered by workers while performing work from home.

In October 2023, the NSW Personal Injury Commission[18] upheld an earlier ruling that a case worker from the Western NSW Local Health District was entitled to workers' compensation payments for the physical injuries and post-traumatic stress disorder she sustained after being attacked by a dog while working from home.

The worker was originally permitted to WFH with conditions in place to enable the performance of her role in a quiet environment (the employee provided remote counselling sessions).

When she was injured, she was WFH, but also looking after her daughter's new puppy. She tied the puppy up in her front yard to reduce noise distractions. On the day of the incident, the worker heard the puppy crying and went outside to see the puppy being attacked by a neighbour's dog. In trying to help the puppy, she suffered serious hand injuries. She also developed PTSD.

The employer argued that the act of intervening in the attack on her daughter's puppy was not part of, nor was it incidental to, her work duties and she was not directed or expected by her employer to intervene. Therefore, the conduct took the employee outside the ordinary course of her employment.

However, the worker argued the puppy was only outside to keep the environment quiet, and the attack would not have occurred if she had not been WFH because the puppy would not have been tied up outside.

Despite noting the worker's employment "had nothing to do with dogs", the NSW Personal Injury Commission upheld the earlier decision that the dog attack occurred as a result of the worker "being at work and the nature of her employment" because the "puppy was placed outside in order to facilitate the performance of her work".

[18] *State of New South Wales (Western NSW Local Health District) v Knight* [2023] NSWPICPD 63.

How far an employer's liability will extend while working from home remains to be seen. While cases such as the one discussed above are not common, proactive controls should be taken by employers to manage risks around:

- when work will be performed;
- the environment in which the work is performed;
- the equipment being used;
- isolation and support; and
- family and domestic violence.

Cases have confirmed an employer's liability for injuries incurred for activities that employers may assume would never be connected with the employment, such as walking the dog or driving to the shops where an employee was required to be on call, and also for domestic violence injuries suffered while an employee was performing work from home.

What is an employer to do?

Performance and productivity do not need to be sacrificed for flexibility.

Employers should have processes in place which can be used to guide operational decisions about the level of flexibility that can reasonably be accommodated. While the steps taken will depend on the unique features of the workplace, such as the industry and type of work performed, at a minimum, employers should consider:

- ensuring workplace surveillance policies takes into consideration the WFH context;
- collecting data about productivity level, staff engagement, and staff turnover;
- keeping records of all matters in existence that could reasonably be used to support reasonable business grounds for refusing a request for a flexible work arrangement; and
- ensuring that any flexibility measures are suitably flexible, that is, fit for purpose and not unnecessarily broad-brush in their approach.

Depending on the circumstances, generally speaking, employees can be directed to work from a location as required by the employer, and employers should consider:

- consultation obligations before issuing a blanket direction to return to the office;
- employees are required to comply with lawful and reasonable directions given by their employer;
- employees do not have a general workplace right to work from home (unless this has been previously agreed between the employer and the employee);
- employee rights to request FWAs, and employer obligations when such a request is made; and
- in the case of an employee refusal to return to the workplace, actively engaging with the employee as to the reasons for their refusal and following a procedurally fair processes.

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