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

JUNE 2023 NEWSLETTER

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COMMITTEE OF MANAGEMENT

PRESIDENT'S MESSAGE

Dear Members

It is my privilege to update you on some significant developments in the realm of federal industrial law reform that have been shaping our profession.

One of the major focal points of federal industrial law reform in recent times has been the critical issue of sexual harassment in the workplace. It is an unfortunate reality that many employees continue to face harassment, which undermines their dignity and has a profound impact on their well-being. Employers now have an express obligation to prevent sexual harassment (although one might argue this was always the work health and safety case) and we have a new Fair Work Commission jurisdiction dealing with sexual harassment disputes.

Another major focal point has of course been the reform of our enterprise bargaining and agreements which are likely to improve access to bargaining and extend the circumstances for multi-employer bargaining. These changes will certainly keep our membership busy and we will be alert to points of interest, law and policy that will keep our members cognizant of these developments.

I am also delighted to congratulate Emma Thornton on her appointment as a Commissioner in the Fair Work Commission. Emma has been an active member of ALERA for two years demonstrating exemplary dedication and expertise in the field of employment relations. Her appointment is a testament to her skills and the trust placed in her by the industry. We congratulate Emma wholeheartedly on this remarkable achievement.

As we look ahead, I am pleased to share the details of the upcoming National ALERA conference, scheduled to take place in Hobart, Tasmania, from 27- 28October 2023. This event will be an exceptional opportunity for us to gather as a community and engage in robust discussion about the industrial challenges and opportunities that lie ahead. You can find more information about that conference here: https://www.alera.asn.au/alera-conference

We look forward to seeing you at the next seminar.

Abbey Kendall, President – ALERA SA

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New Member Profiles

Mahan Poorhosseinzadeh is a senior lecturer in Industrial Relations and Human Resource Management at the Australian Institute of Business (AIB). Before joining AIB, she worked as a researcher and academic in the Department of Employment Relations and Human Resources and as a research fellow at the Centre for Work, Organisation, and Wellbeing at Griffith Business School. Her research efforts revolve around the domains of women and career progression, focusing on women's underrepresentation in senior positions. Her diverse research interests encompass equal opportunity in the workplace, gender dynamics in professional settings, entrepreneurship among women and minorities, Indigenous employment, and inclusive leadership. Mahan actively publishes her findings to contribute to the academic discourse in these areas. Her research has been published in reputable journals such as the British Journal of Management and Labour and Industry.

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Joseph Hyde is an Associate at Piper Alderman Lawyers working with Erin McCarthy and Emily Haar. Prior to this, Joseph worked for the Fair Work Ombudsman as a lawyer in their Compliance and Enforcement Branch, an associate of the Fair Work Commission, and an associate at the South Australian District Court. Joseph's time at the Fair Work Commission was his first foray into employment and industrial relations and he was fortunate enough to work with all three Adelaide members at various times, and as a relief conciliator helping with COVID unfair dismissal applications.

Joseph has a particular interest in litigious employment and industrial matters, and complex advice that requires deep thought and application of superior court authority – he is especially grateful to be able to pick up the phone to Piper Alderman consultant, Prof Andrew Stewart, as to the latter.

Joseph is also the editor of the ALERA SA newsletter, if you have any suggestions, submissions, or complaints, please email me at jhyde@piperalderman.com.au

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Implementation of the Fair Work Commission's expanded sexual harassment jurisdiction

By EMA LEGAL

The amendments to the *Fair Work Act 2009* **(the Act)**, introduced as part of the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* **(SJBP Act)**, include new provisions that prohibit sexual harassment in connection with the workplace and expand the Fair Work Commission's **(the Commission)** jurisdiction to deal with contraventions of the Act. The amendments implement further, the recommendations of the Respect@Work Report, published in March 2020.

Key changes

- It is now unlawful for a person to sexually harass:
    - A worker in a business or undertaking; or
    - A person seeking to become a worker in a business or undertaking; or
    - A person conducting a business or undertaking; and
- Employers may be found liable for the sexual harassment committed by their employees or agents.
- The changes encompass sexual harassment committed by third parties, such as customers and clients, towards workers, prospective workers or those who conduct a business or undertaking.
- If a person alleges that they have been sexually harassed in connection with work, they may make an application for the Commission to either make a stop sexual harassment order or otherwise deal with the dispute, or both.
- These changes apply to all Australian workers.

The amendments are now in full effect.

Applies to all Australian workers

Importantly the implementation of the new sexual harassment protections will be extended to all Australian workers, whether they are a 'national system employer' and covered by the national employment system of regulation or not.

The **prohibition** on sexual harassment (see section 527D of the Act) expands the definition of who a 'person' is in relation to sexual harassment in connection to work, and now includes prospective employees, such that:

A person (the first person) must not sexually harass another person (the second person) who is:

1. A worker in a business or undertaking,
2. Seeking to become a worker in a particular business or undertaking, or
3. A person conducting a business or undertaking,

if the harassment occurs in connection with the second person being a person of one of the above kinds.

The provisions will protect all workers, whether employees or prospective employees from sexual harassment by third parties, including customers or clients of a business, in connection with work.

Expanded sexual harassment jurisdiction

The Commission's jurisdiction is now expanded to deal with disputes and contraventions of the Act, supported by a new power to make one or more of the following orders to deal with a sexual harassment dispute:

- A 'stop sexual harassment order' in accordance with section 527J of the Act.
- An order for the payment of compensation to an aggrieved person in relation to the dispute, in accordance with section 527S(3)(a)(i) of the Act.
- An order for payment of an amount to an aggrieved person in relation to the dispute for remuneration lost, in accordance with section 527(3)(a)(ii) of the Act.
- An order requiring a person to perform any reasonable act, or carry out any reasonable course of conduct, to redress loss or damage suffered by an aggrieved person in relation to the dispute, in accordance with section 527(3)(a)(iii) of the Act.

The Commission may also express one or more of the following opinions in relation to a sexual harassment dispute:

- An opinion that a respondent has sexually harassed one or more aggrieved persons in contravention of Division 2 of the Act.
- An opinion that a respondent has contravened Division 2 of the Act because of the operation of subsection 527E(1) (vicarious liability of employers for the acts of their employees or agents who sexually harass and be held liable where there is a failure to take all reasonable steps to prevent the sexual harassment from occurring).
- An opinion that it would be inappropriate for any further action to be taken in the matter.

At the time of writing the Commission was called on to deal with its first case dealing with a sexual harassment dispute (*Application SH2023/1*) an outcome is pending.

Summary

The changes create an obligation for persons conducting a business or undertaking to take all reasonable steps to ensure sexual harassment does not occur in connection with work. With new avenues for redress available to workers, businesses and employers should be taking additional steps as soon as possible to review policies, training programs, and consultation mechanisms with workers, to ensure compliance and most importantly work to eliminate the risk of sexual harassment.

Incoming changes to the Professional Employees Award 2020.

By Nicholas Linke, Joshua Schultz and Jana El Omr Fandi, Dentons Australia

Key points

- *Changes to the Professional Employees Award 2020 will come into effect on 16 September 2023.*
- *Employees' hours of employment, overtime entitlements and record keeping obligations will be changing.*
- *Employers who have employees covered by the Professional Employees Award 2020 should prepare now for the changes.*

Fair Work Commission introduce changes to the Professional Employees Award 2020

On 16 March 2023, the Fair Work Commission (**FWC**) released its determination to vary the *Professional Employees Award 2020* (**Award**), giving effect to a January decision that determined the Award needed amendment in order to provide clarity as to coverage under the Award and to introduce entitlements to employees covered by the Award in respect of overtime and penalty rates.

To provide clarity as to who is covered under the Award, the FWC has emphasised that an employee covered by the Award is an employee performing professional engineering duties, professional scientific duties, professional information technology duties, or quality auditing, provided that the employee is not employed in a wholly or principally managerial position.

Presently, there are no clear or enforceable overtime or penalty rate entitlements for employees covered by the Award who work in excess of 38 ordinary hours per week. Instead, the Award provides that employees who work excess hours may be compensated through the grant of special additional leave or grant of special additional remuneration. Employers usually cover these entitlements through an above-Award salary.

On 16 September 2023, the following variation to hours of work and overtime clauses in the Award will come into effect:

- ordinary hours of work to be set to 38 hours per week which amends the current ability to average hours;
- an employer may request or require an employee to work in excess of 38 hours per week, provided that the additional hours are reasonable (per s 62 of the *Fair Work Act 2009* (Cth));
- an employer and employee may agree to accumulate time off in lieu rather than pay overtime;
- a penalty rate of 125% is payable to employees for work conducted before 6:00am or after 10:00pm on Monday to Saturday;
- a penalty rate of 150% is payable to employees for work conducted on a Sunday or public holiday;
- employers will be required to keep records of hours worked by employees in excess of the ordinary 38 hours per week, before 6.00am or after 10:00pm between Monday to Saturday, and on a Sunday or public holidays.

Employees paid in excess of 25% above the Award minimum rate will not be entitled to payment for overtime, penalty rates or the accumulation of time off in lieu, so employers can buy themselves out of those provisions.

Employers should review their employment arrangements for employees who are covered by the Award now to:

1. ensure that management employees are properly identified as such in their contracts, with the managerial nature of their work clearly stated;

2. identify which employees are not currently being paid 25% above the minimum rate and consider increasing their remuneration to avoid calculating overtime etc;

3. update employees' contracts and any relevant policies (such as any TOIL policy); and

4. implement systems and operations to facilitate adequate tracking and payment of overtime or penalty payments for employees who will be impacted by the changes.

Countdown to the end of Zombie Agreements: Is Your Business Compliant?

By Ben Duggan and Nicholas DePasquale, DW Fox Tucker Lawyers

Late last year, the Albanese Labor Government secured the passage of the *Secure Jobs, Better Pay* reforms[1] to the *Fair Work Act, 2009* (the **Fair Work laws**).

An aspect of the reforms is a sunset date of 7 December 2023 for industrial instruments approved prior to the commencement of the Fair Work laws, at which time these old instruments will terminate.

The union movement has long campaigned for a sunset date for these industrial instruments, many of which were made during the Work Choices era, that are now all older than a decade.

Earlier, the Labor Government under Prime Minister Rudd resisted pressure to include a sunset date for these industrial instruments when they enacted the Fair Work laws.

The Labor Government's introduction of a sunset date for these industrial instruments, referred to as 'zombie agreements' under the reforms, shall remove one of the last vestiges of Work Choices.

An ability has been provided under the reforms for the Fair Work Commission (the **FWC**) to extend the operation of a zombie agreement beyond the sunset date in certain limited circumstances.

Employers are also required to provide their employees covered by a zombie agreement with information about the agreement, including its sunset date, before 7 June 2023.

What are zombie agreements?

A zombie agreement is an old industrial instrument between an employer and its employee(s) which was entered into before the commencement of the Fair Work laws.

Many of these industrial instruments are dormant created under earlier workplace laws that were repealed many years ago.

The most common types of zombie agreements include the following:

- Collective agreements;
- Workplace agreements; and
- Australian Workplace Agreements.

Australian Workplace Agreement or AWA's as they became known were an individual form of industrial instrument that could be entered into between an employer and a single employee under WorkChoices.

Do you have a zombie agreement?

Many employers have employees who are still bound to zombie agreements. Some employers might not even know of the existence of an old industrial instrument applying to their workforce.

[1] Formally the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022*.

Obtaining information about zombie agreements can be challenging as they are not always accessible to the public. However, the FWC has published a list of potential zombie agreements that can be found here[2]. Please note that it is not an exhaustive list, but the FWC is updating it weekly to ensure the list is as comprehensive as possible. Therefore, employers with concerns regarding agreements pertaining to their workers are advised to seek guidance well before the 7 June 2023 deadline.

What lies ahead?

Before introducing the *Secure Jobs, Better Pay* reforms, a zombie agreement could only cease to apply if it was either replaced by a new enterprise agreement or terminated by order of the FWC.

The recent lack of interest in bargaining for new enterprise agreements has meant many of these agreements continue to apply at workplaces across Australia.

Currently, the FWC has identified over 100,000 zombie agreements that will automatically terminate on 7 December 2023 unless an extension is approved by the FWC.

Without an extension or a replacement enterprise agreement, employees covered by zombie agreements will automatically revert to being covered by the relevant Modern Award.

What are employers obligations under the *Secure Jobs, Better Pay* reforms?

Employers must provide a written notice to each employee covered by the zombie agreement before 7 June 2023.

The written notice must notify the employee of the following information:

1. The employee is covered by a zombie agreement;
2. The zombie agreement shall terminate, unless an application to extend the agreement is made to the FWC, within 12 months of the commencement of the *Secure Jobs, Better Pay* reforms; and
3. The date of commencement of the *Secure Jobs, Better Pay* reforms is 7 December 2022.

An employer that fails to notify relevant employees in this manner will breach the Fair Work laws.

Applying for an extension

Employers, employees and industrial associations are all permitted to request an extension of a zombie agreement under the *Secure Jobs, Better Pay* reforms.

A party which seeks an extension must submit an application to the FWC which will approve it where either:

(1) 'it is reasonable in the circumstances'; or

(2) the following general circumstances exist:
   - Bargaining is taking place for an enterprise agreement; or
   - An employee or the workforce would be better off overall under the zombie agreement than the Modern Award (which would apply if the agreement was to terminate).

The FWC has not yet provided any guidance on the criteria it will use to determine if the circumstances outlined in an application to terminate a zombie agreement 'are reasonable'.

A starting point is likely to be a comparison between the terms and conditions of the zombie agreement and those of the Modern Award that would apply of the agreement was to terminate. Other factors could

[2] https://www.fwc.gov.au/agreements-awards/enterprise-agreements/sunsetting-zombie-agreements/our-list-possible-zombie

be the history of bargaining between the employer and the workforce and the extent to which the zombie agreement refers to industrial concepts, rights or obligations from earlier workplace laws that have been repealed.

In the absence of such guidance from the FWC, employers will need to wait for the publication of decisions to gain better clarity as to what will be ‘reasonable in the circumstances’ to justify an extension of a zombie agreement.

If the FWC does grant the application, the zombie agreement may be extended for up to 4 years.

To keep or not to keep – Retention of Employee COVID-19 Vaccination Information

By Paul Dugan, Kylie Dunn and Lachlan Chuong, DMAW Lawyers

It was not that long ago that many businesses were legally required to verify the COVID-19 vaccination status of employees in order to comply with pandemic laws which mandated that only fully or partially vaccinated workers could attend certain workplaces. Some businesses, whilst not subject to those laws, chose to implement their own workplace policies as a means of complying with work health and safety obligations, which often involved collecting vaccination evidence from staff and other visitors to the workplace.

Almost all of the pandemic laws which previously required businesses to collect vaccination information have now ceased operation, and many businesses have discontinued their previous practice of asking people to verify their vaccination status.

But what have businesses done with the information that was collected from employees and third parties? Has that information been destroyed, or has it been retained on employees' personnel files or within other business records? This article considers business' legal obligations with respect to the retention of COVID-19 vaccination information that was collected during the course of the pandemic.

No specific pandemic laws requiring destruction of vaccination information

In South Australia, there are no longer any specific pandemic laws which require businesses to retain vaccination information for a particular period of time, or to destroy that information within a particular timeframe.

Privacy Act requirements

Vaccination information about an individual constitutes 'personal information' under the *Privacy Act 1988* (Cth) (**Privacy Act**).

For those organisations that are covered by the Privacy Act:

- vaccination information about employees will generally be treated as an exempt employee record, meaning that the requirements in the Privacy Act concerning retention of the information will not be binding. However, best practice is to abide by the Australian Privacy Principles (**APPs**);

- vaccination information about non-employees, such as visitors to the workplace or contractors, must be dealt with in accordance with the APPs.

Organisations that are not covered by the Privacy Act should also consider adopting the practices set out in the APPs.

Is there still a need for vaccination information

Relevantly, APP 11.2 requires an organisation to take reasonable steps to destroy, or alternatively de-identify, information that constitutes 'personal information' if the organisation no longer <u>needs</u> the information for the purpose (or purposes) for which the information was originally collected by the organisation.

Most businesses initially collected vaccination information in order to comply with a specific pandemic law, or to comply with general work health and safety duties.

Noting that in South Australia there are no longer any specific pandemic laws in place which require businesses to collect vaccination information, it can no longer be said that a business needs that information in order to comply with those now defunct laws. Accordingly, it will only be lawful for a business to retain vaccination information if it can demonstrate that it still has a need for the information in order to comply with its work health and safety obligations.

Relevant considerations with respect to whether there is a need for a business to retain vaccination information include:

- the industry in which the business operates;
- the demographic of vulnerable people, or people with medical contraindications, who are present in the business' workforce;
- COVID-19 vaccination rates of the general public in the locations where the business operates;
- the prevalence of COVID-19 cases in those locations;
- current medical advice in relation to COVID-19; and
- the relevancy and accuracy of the vaccination information.

It is not permissible to retain the information on a "just in case" basis, and in most cases it will be difficult for businesses to be able to demonstrate a need to retain what may well be out-of-date information.

Destruction of vaccination information

Businesses that take steps to destroy vaccination information in their possession should take particular care to ensure that destruction results in the information being no longer capable of being retrieved.

Any hard copies of the information should be securely shredded, and in the case of electronically stored information, care should be taken to ensure that any back-ups are also destroyed. It may also be necessary to seek verification from offsite or cloud-based storage providers that the information has been effectively destroyed.

Recent Federal Court decision reminds businesses that employees must be asked whether they want to work on public holidays

By Kylie Dunn and Lachlan Chuong, DMAW Lawyers

A recent decision handed down by the Full Court of the Federal Court has clarified the process that businesses must follow in relation to working arrangements on public holidays.

In the case of *Construction, Forestry, Maritime, Mining and Energy Union v OS MCAP Pty Ltd* [2023] FCAFC 51, the employer was a labour hire company which supplied workers to businesses in the mining industry who conducted 7-day operations. Its employment contracts contained a clause to the effect that employees might be required to work on public holidays. Employees were then rostered to work on one or more public holidays through the course of the year.

The CFMMEU commenced proceedings on behalf of 85 employees of the labour hire company arguing that the employer's practices were in breach of the Fair Work Act.

What does the law say?

Public holidays are dealt with in the National Employment Standards contained in the Fair Work Act. Modern awards and enterprise agreements also often contain terms which relate to working arrangements on public holidays.

Relevantly, section 114 of the Fair Work Act states that:

- an employee is entitled to not work on a public holiday;
- an employer may ***request*** an employee to work on a public holiday, provided that the request is reasonable in all the circumstances;
- if such a request is made, the employee may only refuse the request if:
    - the request is not reasonable; or
    - the employee's refusal is reasonable.

The need for a 'request'

The key issue in the case was the practical meaning of 'request' in section 114. The employer asserted that it had complied with the requirement that it request employees to work on public holidays by virtue of the clause in employees' contracts of employment referred to above. The CFMMEU argued that a specific 'request' needed to have been made, but wasn't.

The Full Federal Court's view was that:

- the word 'request' in section 114 requires that employees have an actual choice whether or not to work on a public holiday;
- the clause in the employees' employment contracts therefore did not constitute a 'request'.

The employer was consequently found to have breached the Fair Work Act.

Takeaways

The court's approach to the meaning of section 114 means that employees must be presumed to be absent from work on public holidays unless and until such time as they are specifically asked to work, and agree to work.

Including a generic clause in employees' contracts informing them that they may be required to work on public holidays from time to time is not enough to comply with section 114. Nor is it enough to simply roster employees to work on a public holiday and rely on the employee's attendance for their rostered shift as evidence of their consent to work.

The recent decision of the Federal Court does not prevent businesses from requiring employees to work on public holidays. Provided that an employer makes a request, the request is reasonable, and an employee has no reasonable basis for refusing the request, an employee can be required to work on a public holiday.

The reasonableness of an employer's request and an employee's refusal must be assessed on a case-by-case basis having regard to a number of factors prescribed in the Fair Work Act, including:

- the nature of the employer's business, its operational requirements, and the industry in which it operates;
- the nature of the work performed by the employee;
- the employee's personal circumstances, including their family responsibilities;
- whether the employee is entitled to receive overtime payments or penalty rates for working on public holidays; and
- the amount of notice provided to employees in advance of the public holiday.

Overview of Federal Commission Activities

By Deputy President Peter Anderson

Given that the Fair Work Commission (FWC) and its predecessors is a statutory institution of more than a century, 2023 has seen more change than usual – with more forecast. This overview for ALERA SA members references key impacts of recent changes on the federal Commission.

Law and Jurisdiction

With the incoming Albanese government and a new parliament, the *Fair Work Legislation Amendment (Secure Jobs Better Pay) Act 2022* was enacted. Important amendments to both national law and the Commission's jurisdiction were made. These came into effect in three tranches: 7 December 2022, 6 March 2023 and 6 June 2023. Major impacts on the Commission have been:

- Amended statutory objects (job security and gender equality added);
- Statutory limits on renewal of certain fixed contracts (with disputes referable to FWC);
- Expanded equality and anti-discrimination protections in employment and industrial instruments;
- New statutory equal remuneration jurisdiction (including expert panel on pay equity);
- Aged and community care sector pay equity provisions and expert panels;
- Revised minimum wage objects (and expert panel);
- Former Registered Organisations Commission abolished and operations returned to the Commission;
- Former ABCC abolished and role subsumed into FWO;
- New and revised FWC jurisdiction to dealt with stop sexual harassment orders and deal with sexual harassment disputes (with FWC arbitral powers);
- Expanded statutory right to request flexible work (with disputes referable to FWC);
- New statutory provisions concerning pay advertising and pay secrecy; and
- Revised bargaining and agreement-making provisions (below).

Bargaining and agreement making

Amongst the most significant of recent changes are those to bargaining and agreement-making, which largely came into operation from 6 June 2023. Major impacts are:

- Protected action ballot changes (requirement for bargaining representatives to attend FWC conference during the ballot period; amendments concerning eligible ballot agents; and protected action in multi-enterprise bargaining);
- Revised bargaining streams (single enterprise agreements and multi-enterprise agreements);
- Revised provisions concerning 'genuine agreement' including FWC Statement of Principles;
- Revised operation of better off overall test (BOOT) including new FWC jurisdiction to 'reconsider' BOOT after approval;
- Revised FWC powers to amend, vary, correct and terminate agreements;
- Statutory sunsetting of old transitional agreements (with FWC jurisdiction) (commenced 7 December 2022); and
- Limits on FWC jurisdiction to terminate certain enterprise agreements (including full bench references) (commenced 7 December 2022).

A Statement of Principles on Genuine Agreement was issued by a full bench of the FWC on 12 May 2023.

The new requirement for bargaining representatives to attend FWC conferences during a protected action ballot period is significant. The obligation commenced on 6 June 2023 and applies to all bargaining representatives, not just those that sought a ballot order.

FWC Resources

The Commission has placed high importance on communication about these changes. Practical, interactive and clearly expressed information is available in writing and by modules on the Commission website at fwc.gov.au. New information resources have also been produced on the unfair dismissal and sexual harassment jurisdictions. These are interactive and highly recommended viewing. More such material can be expected over future months. The May 2023 federal budget provided a resource basis for these communication initiatives.

Commission membership and roles

Commission President Justice Iain Ross AO resigned from office in November 2022. His distinguished service has been widely acclaimed by the industrial relations community. After an interim period, on 9 February 2023 former Vice President and now Justice Adam Hatcher was appointed President. A ceremonial welcome sitting addressed by the federal Minister was held on 6 April 2023.

Five new appointments to the FWC were made by the federal government on 30 March 2023 and a further eight on 12 May 2023. Dates the new appointees commence varies. Former Deputy President Ingrid Asbury was appointed to the vacant Vice President position.

In South Australia, Emma Thornton has been appointed a FWC Commissioner and will commence in Adelaide from 18 September 2023. Emma is a well-known practitioner in the South Australian industrial relations community and her appointment has been welcomed.

Also important to the State's standing is that on 31 October 2022 Peter Hampton was promoted to Deputy President of the Commission, an appointment also widely acclaimed.

In a Statement published on 4 April 2023, the FWC President announced Deputy President Hampton as the Commission's National Practice Leader for Bargaining. Peter's role encompasses oversight of all bargaining matters, continued coordination of the (re-named) Collaborative Approaches Program and public consultation and engagement in this area. Deputy President Ian Masson continues to oversee the agreement approval jurisdiction and engagement with stakeholders on those changes. These are important leadership positions in the Commission, especially in light of recent legislative changes.

Expert panel appointments have also been announced by the federal government.

Commission operations

Amidst the myriad of changes to law, jurisdiction and personnel, the federal Commission continues to administer a heavy workload and does so in an efficient, accountable and independent manner as required by law. Applications currently exceed 20,000 per year across all jurisdictions, with approximately half of these in the unfair dismissal jurisdiction. The former statutory review of modern awards, which required substantial resource allocation, has concluded.

Significant recent decisions including of full benches continue to inform the Commission's work including the Statement of Principles on genuine agreement, wage decisions in the aged care sector, application

of the High Court decisions on employee and independent contractor issues, and the 2023 minimum wage review.

Advocacy training

In April 2023 and jointly with ALERA SA, South Australian members of the FWC conducted a day-long advocacy training workshop for those appearing in Commission proceedings (conferences or hearings). The workshop was over-subscribed and feedback positive. The Commission appreciates the support of both ALERA SA and the South Australian legal profession in making the initiative a success. It is hoped that a further workshop can be conducted as time, resources and demand permit.

Further changes to the *Fair Work Act* in 2023: What else is in store?

By Professor Andrew Stewart, Emily Haar and Aneisha Bishop, Piper Alderman

The final weeks of 2022 were significant within the industrial relations landscape. In December, both the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**SJBP Act**) and the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* came into force, with large implications for employers.

Commencement dates for key SJBP Act amendments

Provision(s)	**Commencement**
Secure Jobs, Better Pay Act	
Pay secrecy Gender pay equity Extension of anti-discrimination provisions Initiating bargaining for replacement agreements Termination and sunsetting of enterprise agreements Advertisement of pay rates Repeal of special rules for bargaining and industrial action in the building industry	7 December 2022
New Expert Panels for FWC Prohibition of sexual harassment within the FW Act and FWC jurisdiction to deal with complaints	6 March 2023
Single interest employer authorisations and supported bargaining Changes to the processes for making and varying enterprise agreements Protected industrial action Resolution of intractable bargaining disputes Abolition of the ABCC Abolition of the ROC and new compliance powers for FWC in relation to registered organisations	6 June 2023
Flexible working arrangements Unpaid parental leave extensions	7 June 2023
Small claims proceedings National Construction Industry Forum	1 July 2023

Restrictions on the use of fixed-term contracts	To be fixed by proclamation, but no later than 6 December 2023 (the Government has indicated that an earlier date will not be proclaimed)
Respect at Work Act	
Prohibition of hostile working environments Positive duty on employers Inquiry into systemic unlawful discrimination Civil action for victimisation Applications by unions and representative bodies	13 December 2022
AHRC investigation powers re compliance with positive duty	12 December 2023

However, more changes are coming. A second set of amendments, contained in the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Bill 2023* (**Protecting Worker Entitlements Bill**), are currently before parliament. Finally, a third group of amendments is expected later in 2023, with 11 consultation papers having been released by the Department of Employment and Workplace Relations (**DEWR**). They can be found at www.dewr.gov.au/2023-workplace-reform-consultations.

Protecting Worker Entitlements Bill

Superannuation

The Protecting Worker Entitlements Bill includes Labor's promise to confirm a "right to superannuation." The Bill currently before parliament proposes to include the entitlement to superannuation in the National Employment Standards, and would expressly provide in the *Fair Work Act 2009* (**FW Act**) that employers make superannuation contributions. While the current law sees superannuation underpayment issues as primarily the responsibility of the ATO, the proposed reforms would provide employees, unions and the Fair Work Ombudsman (**FWO**) with legal standing under the FW Act to directly pursue any unpaid or underpaid compulsory superannuation.

Unpaid parental leave

The Bill also proposes to strengthen access to unpaid parental leave and help families share work and caring responsibilities. The proposed changes seek to complement changes already made to the *Paid Parental Leave Act 2010* by the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023*. They would increase flexibility for working parents by allowing them to take up to 20 weeks of their 12-month unpaid parental leave entitlement flexibly, including as single days. Pregnant employees could access some of the 20-week flexible entitlement up to 6 weeks before the expected birth date of their child. The Bill would remove restrictions that prevent employees who are married or in a de facto relationship from taking more than 8 weeks of unpaid parental leave at the same time. Finally, the changes would ensure that both parents can take up to 12 months' unpaid parental leave, regardless of the amount of leave the other parent takes. Further, both parents would be able to request an extension of up to 12 months, without impacting the amount of leave available to the other parent.

Employees would still be required to comply with the existing notice requirements in the FW Act when taking flexible unpaid parental leave.

Other proposals

An express interaction rule for workplace determinations and enterprise agreements has been proposed for inclusion in the FW Act. This change would confirm that an enterprise agreement would cease to apply when the Fair Work Commission (**FWC**) settles a bargaining dispute by making a workplace determination that covers the employees in relation to the same employment.

The Bill includes an amendment that a breach of the *Migration Act 1958* would not affect the validity of a contract of employment or contract for services for the purposes of the FW Act. This would make it explicit that a migrant worker is entitled to the benefit of the FW Act, regardless of their migration status.

The amendments would also amend s 324 of the FW Act to allow employees to authorise their employers to make salary deductions that are recurring and are for amounts that vary from time to time, but only if they are principally for the employee's benefit. This change would ease the administrative burden on employees and employers, as the current provisions do not allow for varying deductions and require a new written authorisation each time the deduction amount changes.

Finally, the Bill would make changes to the statutory scheme for long service leave in the coal mining industry to ensure that casual employees are treated no less favourably than permanent employees for the purposes of their entitlements under the scheme.

Proposals for third tranche of FW Act changes

Same Job, Same Pay (SJSP)

The Government is considering amending the FW Act to introduce a direct entitlement for labour hire workers to receive at least the same pay as directly engaged employees. A positive obligation on labour hire providers and host employers to take reasonable steps to ensure the direct entitlement is paid to the labour hire worker would also be included. The entitlement would apply subject to relevant 'same job' criteria being met.

The consultation paper issued by DEWR considers the merits of identifying a 'same job' with reference to the following criteria, relating to when a labour hire worker is performing:

- duties that align to a classification, job, or duties set out in or covered by an enterprise agreement that applies to the host employer and directly hired employees; and/or
- the same duties as an employee covered by the modern award; and/or
- the same duties as a specific directly employed employee working in the host.

The Government is considering an approach to "same pay" such that any conditions set out in the host's enterprise agreement (**EA**) that are captured by the meaning of 'full rate of pay' within s 18 of the FW Act will be payable to the labour hire worker, so long as those conditions are enlivened by the 'same job' being performed.

The intention is that even if some conditions (e.g., an allowance) in an EA fall within the meaning of 'full rate of pay', they will not be payable to the labour hire worker unless they would also be payable to a directly engaged employee doing the same job (i.e., the allowance will only be payable to the labour hire worker where they are actually performing the work to attract the allowance).

Further, the current FWC powers to deal with disputes could be extended to apply, allowing the FWC to deal with a dispute as it sees fit (e.g., mediation, conciliation, potentially making orders). The FWO would also likely be given enforcement powers consistent with existing practice. Finally, the Government is considering the scope of anti-avoidance measures: a general anti-avoidance provision, and whether the general protections in Part 3-1 of the FW Act could create specific protections to support or supplement SJSP entitlements and obligations.

Criminalising wage underpayments and reforming civil penalties in the FW Act

The Government has proposed reforms to address underpayment and non-payment of wages, and record-keeping misconduct. This would extend to monetary entitlements beyond wages.

Three options for the criminal offence are being considered:

- Option 1: Knowledge-based wage underpayment offence only
- Option 2: Recklessness-based wage underpayment offence only
- Option 3: Tiered approach

If Option 2 were implemented, it might be necessary to set out a number of defences, because the offence would cover a broader range of conduct. All options would cover instances where an employer is required to pay an amount to a third party on behalf of an employee (e.g., to a superannuation fund), and to apply to officers of bodies corporate (including directors) if they are covered by the ancillary liability provisions of the Commonwealth Criminal Code.

It is intended that the maximum penalty would be comparable to maximum penalties for similar offences in other Commonwealth laws, such as the *Corporations Act 2001* or the *Competition and Consumer Act 2010*.

Other relevant penalty proposals include:

- permitting courts to order the higher of the maximum penalty units available or up to three times the amount of the underpayment arising in the particular matter (if that amount can be calculated)
- introducing offence-specific course of conduct charging rules for underpayment and record keeping offences (with penalties to reflect the serious/systematic nature)
- attributing liability to bodies corporate or officers (including directors) of bodies corporate, and
- increasing the maximum penalties for a variety of contraventions, or inserting a new provision into the FW Act which would increase the maximum penalty available for a contravention of any civil remedy provision that involves underpayment.

Finally, the defence to the sham contracting prohibition in s 357 of the FW Act may be reformed to employ a more objective test to reduce ambiguity and more effectively deter sham contracting. This would not change existing laws about what does or does not qualify as a sham contract under the FW Act, nor the existing rules about when a worker should be classified as an employee or a contractor.

"Employee-like" forms of work and independent contractors

The Government intends to empower the FWC to set minimum standards for workers in 'employee-like' forms of work, including in the gig economy. The FWC could consider applications and make an order or decision setting enforceable minimum standards for defined cohorts of workers in 'employee-like' forms of work. This would be limited to work-related matters like minimum rates of pay, workplace conditions, record keeping, etc.

The FWC could be empowered to exercise its functions in a broad way but balanced by 'guardrails' set by Parliament (e.g., legislation setting out the scope of workers covered and functions the FWC should exercise, or an 'objective' or set of factors that the FWC should have regard to in making its decisions).

It is suggested that the FWC process might be similar to other functions, like setting and reviewing modern awards. This means that it could be commenced on application, or by the FWC on its own accord.

A framework to allow the FWC to approve consent agreements reached between individual businesses and groups of independent contractors that supply services to them is also being considered.

A dispute resolution function of the FWC may also be implemented relating to minimum standards orders.

Additionally, the Government is considering improving avenues for independent contractors to challenge unfair contractual terms. A low-cost jurisdiction may be introduced for the FWC to deal with unfair contract disputes, through information and support, conciliation, mediation and arbitration, or a combination of those processes.

Protections for workers against discrimination

The consultation paper issued by DEWR has identified a number of ways in which the FW Act's anti-discrimination framework could be better aligned with Federal anti-discrimination laws to improve consistency and clarity, and to modernise the FW Act.

Some proposed changes to the FW Act include:

- expressly prohibiting indirect discrimination
- providing a definition of "disability"
- amending the inherent requirement exemption to clarify the requirement to consider reasonable adjustments
- extending the protection for characteristics that a person with a protected attribute (such as pregnancy) is assumed to have, or might have
- a new complaints process requiring all complaints about discrimination under the FW Act to be handled in the first instance by the FWC via conciliation
- vicarious liability for employers (consistent with the new sexual harassment prohibition)
- reconfiguring/redefining the "not unlawful" exemption contained in s 351(2)(a), as it can create inconsistency in the application of the FW Act across Australia
- repealing the unlawful termination provision
- broadening s 351 to cover all employees
- inserting "family and domestic violence status" as a protected attribute, and
- prohibiting discrimination on the basis of a combination of attributes (rather than proving each individually)

The Government is also considering improvements that could be made to the general protections to clarify protections for a person engaging, or not engaging, in industrial activity, in response to the High Court's decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.

Casual employment

Labor has committed to reversing the Coalition's amendments to the definition of a casual employee, which were echoed in the High Court's decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23. Currently, the definition in s 15A of the FW Act provides that a casual employee is one who accepts an offer of employment with *"no firm advance commitment as to the duration of the employment or the days (or hours) the employee will work."*

The Government intends to legislate in favour of an objective test to determine when an employee can be classified as casual. This would require courts to focus less on what the documented employment contract states, and instead shift to a broader test, considering *all* aspects of the working relationship and pattern of work. This approach would likely see an increase in the number of disputes heard by the Courts over whether an employee is genuinely a casual or permanent employee.

Other proposals

Consultation papers have also been issued on several further proposed reforms:

- allowing the FWC to set minimum standards for work in road transport to ensure that the industry is “safe, sustainable and viable”
- introducing a national licensing regime for labour hire providers, which would replace the existing schemes in Victoria, Queensland, South Australia and the ACT
- considering the operation of the small business redundancy exemption in winding up scenarios, where employees who would otherwise have been entitled to redundancy pay may lose their entitlement if they are the last ones to lose their job
- permitting the FWC to issue model terms for EAs rather than having them prescribed by regulations, and allowing employers who had previously been granted single interest authorisations to continue to have access to that form of bargaining under the provisions introduced by the SJBP Act, and
- repealing the demerger provisions for registered organisations introduced by the *Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act 2020*.

Are secretly recorded disciplinary meetings admissible evidence in Unfair Dismissal proceedings?

P N Moloney Principal Moloney & Partners Lawyers

Within Australia, the legislation on secret recordings differs from state to state. For example, in Western Australia, only one party to the recording ought to consent to the recording. That is, if an employee wishes to record a disciplinary meeting, they can do so without gaining the consent of the employer.

However, in South Australia, the *Surveillance Devices Act 2016* (SA) ("the Act") prohibits the use of covert recordings of private conversations without the consent of all parties (s4 of the Act). There are however certain exceptions. The exceptions are if the use is to protect a person's *lawful interests*, or if the use is in the *public interest* (ss 9 & 10 of the Act).

What constitutes a recording being one that protects a person's lawful interests turns on the facts of each case. The Act stipulates that using, communicating or publishing the information can only be done in specific circumstances. Examples of specific circumstances include, showing the information to someone who was a party to the conversation, showing the information to an investigating agency, using the information in the course of **particular** legal proceedings, showing the information to the media or using the information in accordance with an order from the Supreme Court.

Whilst these circumstances can be read as quite wide, the Courts have determined that each case will turn on its individual facts. Most notably, the then Chief Justice Doyle held in *Thomas & Anor v Nash* [2010] SASC 153 that it is not ordinarily considered to be a lawful interest to use a device for the purpose of gaining an advantage in civil proceedings. Chief Justice Doyle relevantly noted at [45] that

> *I do not consider that a person makes a recording to protect his lawful interest simply because he has a hope in contemplated litigation the recording might be used to his advantage.*

The case of Nash was a wills and probate matter, however it has nonetheless paved the way of the admissibility of covert recordings in civil matters.

Another more recent South Australian Supreme Court case discussed the admissibility of covert recordings. Nanosecond Corporation & Anor v Glen Carron Pty Ltd & Anor [2018] SASC 116 involved an employment dispute wherein the plaintiffs sought that 20 secret recordings be admitted as evidence. The defendants in this case did not object to the Judge listening to the recordings and he therefore did so. However, Judge Doyle assessed each recording on its merits and permitted the use of 6 recordings in the proceedings. His Honour relevantly stated at [101] that

> *Drawing all of the above threads together, it remains the case that the concept of "lawful interests" is of uncertain content. While some general propositions hold true, and some guidance may be gained from a consideration of the authorities, the issue of whether a recording was made for the protection of a person's lawful interests remains one very much anchored in the facts of the particular case.*

As evidenced by the relevant case law, there is no clear-cut answer as to whether covert recordings will be admitted as evidence in Unfair Dismissal hearings. There is a considerable amount of case law on this matter in the Fair Work Commission, all of which yield different results based on the case's individual facts.

Summary

A perceived potential advantage in a possible unfair dismissal claim would not generally amount to a lawful interest. I would therefore ordinarily counsel any employee/employer seeking advice on the question not to secretly record any disciplinary meetings as to do so would prima facie be in breach of the Act.

Employee or independent contractor? ATO releases draft guidance

By Ben Smith, Senior Associate, Mellor Olsson

On 12 December 2022, the Australian Taxation Office released a draft ruling and practical compliance guideline clarifying the Commissioner of Taxation's views and approach to worker classification after the High Court decisions in *Jamsek* and *Personnel Contracting.*

The High Court's approach in those cases involved a focus on the terms of the written contract to establish the character of the relationship between a business and its workers. You can read our previous article about those decisions here.

Previously, the nature of an employment relationship was determined by the "multi-factorial test" which involved an analysis of the totality of the relationship, including the post-contractual conduct of the parties, not just the terms of the written contract.

Businesses must take care in correctly determining the character of the relationships with their workers.

ATO draft ruling and draft practical compliance guideline
In the draft ruling, *'Income tax: pay as you go withholding – who is an employee?'* (link here), the Commissioner provided a definition of 'employee' for the purposes of income tax under the *Taxation Administration Act 1953* **(TAA).**

This draft ruling also *"aids in understanding the ordinary meaning of an 'employee'"* under the *Superannuation Guarantee (Administration) Act* 1992 **(SGAA)** but "is not binding on the Commissioner" in that regard.

The draft ruling relevantly provides that:

- "Whether a person […] is an employee of an entity […] is a question of fact to be determined by reference to an objective assessment of the totality of the relationship between the parties";
- "[…] the contract of employment must be […] construe[d] and characterise[d] at the time of entry into it.";
- "Where […] a written contract [exists] and the validity of that contract has not been challenged as a sham nor have the terms of the contract otherwise been varied, waived, discharged or the subject of an estoppel or any equitable, legal or statutory right or remedy, it is the legal rights and obligations in the contract alone that are relevant in determining whether the worker is an employee of an engaging entity."; and
- "However, evidence of how a contract was actually performed may be considered for other purposes consistent with general contract law principles, including to:

1. establish formation of the contract;
2. identify the contractual terms that were agreed to; for example, where the contract is wholly or partially oral;
3. demonstrate that a subsequent agreement has been made varying, waiving, or discharging one or more of the terms of the original contract;
4. show the contract was a sham; or
5. establish evidence of an estoppel, rectification or other legal, equitable or statutory rights or remedies."

The Commissioner also issued a draft Practical Compliance Guideline (link here) outlining the Commissioner's approach to investigating compliance for businesses that engage workers and classify them as employees or independent contractors. Businesses can use this resource to "self-assess [and] understand the likelihood of the ATO applying compliance resources to review their arrangement."

Risks of incorrectly classifying employees/contractors

The ATO's draft ruling provide helpful guidance in determining whether a worker is engaged as an employee or independent contractor for the purposes of income tax and superannuation.

If an employee is incorrectly classified as an independent contractor, a business may be liable for (amongst other things):

- superannuation contributions;
- Pay As You Go (PAYG) withholding;
- payments under a modern award (ie for overtime, penalty rates and allowances);
- annual and long service leave;
- financial penalties under the Fair Work Act 2009 (Cth); and
- payroll tax (including penalties and interest).

Workers risk missing out on employee entitlements if they are incorrectly classified as an independent contractor. To recover unpaid entitlements, proceedings may need to be issued in the SA Employment Tribunal or the Federal Court.

Recommendations

The ATO's draft ruling reinforces the critical importance of the written contract when assessing the relationship between a business and its workers.

To provide greater certainty and minimise risk, we recommend businesses review their arrangements with their workers and consider reviewing and updating (or replacing entirely) the contracts to properly reflect the nature of the relationship. Workers should ensure that they understand the nature of the relationship they are entering into and ensure it is documented in writing.