

SECRETARIAT

PO Box 2062
Port Adelaide DC, SA, 5015
Email: irssa@adam.com.au
Internet: www.irssa.asn.au
Phone: 1300 918 207
Fax: 08 8125 5631

COMMITTEE OF MANAGEMENT

President

Kaye Smith

Vice President

Justin Ward

Immediate Past President

Craig Stevens

Secretary

Rodger Prince

Treasurer

Glen Seidel

Committee Members

Kylie Dunn

Trevor Evans

Commissioner Peter Hampton

Sharaze Pentland

Sandra Dann

Darryl Anthony

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

Patron:

**Hon Trevor Olsson, LL.B, AO MBE,
GCSJ, RFD, ED**

Print Post Approved: PP535216/00024

PRESIDENT'S MESSAGE

Dear Members

Thank you to all those members who were able to attend our Christmas / networking drinks held in December last year. These were a great success and a welcome opportunity for members to network ahead of the holiday season.

2017 is shaping up to be a busy year for the Association.

To date we have heard from Kaz Eaton (Barrister – Flinders Chambers) educating us all on the topic of “Is it also a Crime?”, promoting discussion around all of the issues that can arise in the instance of alleged employee misconduct that might also amount to a criminal offence. The information was so valuable that we pressured Kaz on the spot to return to the Police Club and hold a further seminar to carry on those discussions. This will happen after our convention in June 2017. Further details will follow closer to the time. Thank you Kaz for continuing to support the Association.

On 20 April, Justin Ward (Vice President) and I attended the University of South Australia’s School of Management Prize and Awards Ceremony. The Association sponsors a prize, awarded to the undergraduate Human Resource Management student with the highest grade point average for the major upon completion of the program. The recipient of the 2016 Industrial Relations Society of South Australia Prize was Matthew Taylor. Matthew was presented with a certificate, a year’s membership to the Society, cash and a book voucher. Congratulations Matthew, well deserved. We look forward to seeing you at future events and seminars.

Continues over

PRESIDENT'S MESSAGE (CONT)

What's ahead?

- The Industrial Relations Society of NSW is holding their annual convention in Leura in NSW on 19 May 2017. Details are available from their website industrialrelationsocietyofnewsouthwales.wildapricot.org
- The South Australian Convention will be held on 23 June 2017 at the Adelaide Oval. Planning is well underway and is shaping up to be a great day. If you haven't already registered, please register now – you won't be disappointed. We will be hosting representatives from the Australian Labour and Employment Relations Association (ALERA) for the day. These are representatives of our parent body, and also committee members from other Societies/Associations in other States and Territories. A meeting of ALERA representatives will immediately follow the close of our Convention.
- As noted previously, we will be holding a further seminar with Kaz Eaton, the details of which will be announced closer to the date, but likely in July.
- In August we hold our usual Patron's Breakfast, attended by a Guest Speaker. This is usually held on a Wednesday, and is held in recognition of the importance that Life Members have had, and continue to have, in the field of industrial relations.

Discussions at Committee continue to progress:

- 1) *An oral history by professionally produced video recording of the experiences and achievements of our Life Members.*

This will be a significant and important record for the Association, which we are proud to support;

- 2) *The development of a new logo for "ALERA SA", to reflect our new trading name.*

As always, we look forward to seeing all of you at our events and thank you for your support.

Kaye Smith, President ALERA SA

DID YOU KNOW?????

The South Australian Law Society has confirmed that all ALERA SA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an ALERA SA seminar.

ALERA SA STATE CONVENTION

FRIDAY 23 JUNE 2017 WORKPLACE CHANGES - THE FUTURE

We are proud to host the 2017 State Convention, **Workplace Changes - The Future** on Friday 23rd June 2017 at the **Adelaide Oval Cathedral Room**.

This is an event and networking opportunity not to be missed.

The Management Committee has engaged prominent guest speakers who will address a range of contemporary issues and challenges in workplace relations, from a variety of perspectives.

Topics include:

- The detail and effect of changes proposed by the *Statutes Amendment (South Australian Employment Tribunal) Bill 2016*
- Penalty rates in 2017 and beyond
- Effective advocacy in the Federal Circuit Court
- Drug and Alcohol in the Workplace and Testing
- Status of Migrant Workers Taskforce Process
- Work Health and Safety – Fatigue Management, Issues and Plans
- Domestic and family violence leave – trends in bargaining and effect on employment relations and workplaces
- Overview of significant cases

What is included?

- Lunch and refreshments across the day
- Course materials, presentations or papers
- Post Conference Drinks & Networking opportunities following convention

To view ALERA SA Convention 2017 Program, please [click here](#).

Booking: Register now by clicking **HERE** to confirm your place

When Your Casual Relationship Isn't So Casual

By Peter Healey, Associate, Cowell Clarke Lawyers

The Courts and the Fair Work Commission continue to grapple with the definition of casual employment, and in particular the importance of substance over form in determining the nature of the relationship.

In *Telum Civil (Qld) v CFMEU* [2013] FWCFB 2434, the Full Bench of the Commission held that the definition of “casual employee” for the purpose of the *Fair Work Act 2009* drew upon definitions adopted in Modern Awards. The rationale being that Parliament’s intention must have been that terms be used consistently across Modern Awards, Enterprise Agreements and the *Fair Work Act 2009*. The Bench noted in particular that most Modern Awards refer to two core criteria: the employee being engaged as a casual (i.e. having the label applied) and paid as a casual (receiving a casual loading).

The approach emphasises the importance of ‘form’ in that the label and payment arrangement will often be significant when determining the relationship. It is an approach that has been again approved by the Fair Work Commission¹ and has even received recognition from the Federal Court.²

Of course a complicating feature of this approach is that many of the Modern Awards use slightly different wording in defining a “casual employee”. As an example: some Modern Awards adopt a definition that takes into account whether the employee is engaged on an hourly basis;³ other Modern Awards appear to adopt a definition based solely on how the employee is engaged (without reference to payment arrangements);⁴ and others appear to adopt what might be described as the general law approach of considering whether the relationship involves intermittent, irregular or uncertain hours.⁵ A further complicating issue is where an employee is award-free and not covered by an enterprise agreement in which case there is no underpinning instrument which provides a relevant definition.

Recently, in *Skene v Workpac* [2016] FCCA 3035, the Federal Circuit Court expressly rejected a definition of “casual employee” that relied upon definitions in Modern Awards. The Court holding that there was “no warrant to interpret the phrase casual employee in s.86 of the Fair Work Act in a way that draws upon the definitional provisions of various industrial instruments according to the “industrial history of those instruments”.” The approach is fundamentally different to that of the Commission.

The Court in *Skene* went on to determine the nature of the relationship by looking at its ‘substance’: whether work arrangements were regular and predictable, whether employment was continuous, whether there was an expectation of ongoing work, and fluctuations in working hours.

The Court’s approach also has its difficulties though because the outcome is that an employee could be casual under a Modern Award or Enterprise Agreement but at the same time not under the *Fair Work Act 2009*. Obviously this creates a tension as industrial instruments and the *Fair Work Act 2009* go hand-in-hand in providing minimum entitlements and protections for Australian employees.

¹ *Il Migliore Pty Ltd v McDonald* [2013] FWCFB 5759

² *FWO v Devine Marine Group* [2014] FCA 1365.

³ See eg, *Aboriginal Community Controlled Health Services Award 2010*, clause 10.4(a).

⁴ See eg, *General Retail Industry Award 2010*, clause 13.1

⁵ See eg *Cleaning Services Award 2010*, clause 12.5

For completeness, the Commission in *Telum* had specifically addressed the relevance of the employee working regular and systematic hours (similar considerations to those adopted in *Skene*). The Commission noted that various sections of the *Fair Work Act 2009* refer to casual employees who work on a regular and systematic basis, and that the use of that phrase throughout the *Fair Work Act 2009* highlights that being a casual and working on such a basis are not mutually exclusive.

The decisions in *Telum* and *Skene* highlight potentially different approaches adopted by the Fair Work Commission and Federal Circuit Court in relation to “casual employees” under the *Fair Work Act 2009*. The Commission might be seen as focussing on ‘form’ (namely the label and the payment arrangement), while the Federal Circuit Court on ‘substance’ (the substantive nature of the relationship). The difference is significant as both bodies have important roles in enforcing the *Fair Work Act 2009*.

The definition and regulation of casual employment presents as an area of significant uncertainty and one in which industrial relations professionals should keep an eye on in the coming months. Until further clarification is provided by the Courts and/or the Commission, industrial relations professionals should be mindful that there are currently authorities suggesting different/conflicting approaches to “casual employment” in the context of ” in the context of the *Fair Work Act 2009*.

The ‘Gig Economy’ – new approaches to minimum working conditions

By Kaye Smith
President ALERA SA

The growth and value of the ‘Gig Economy’ has been questioned from a range of perspectives. It is a term used to describe a labour market characterised by freelance work or short term contracts, flexible and responsive to demand. The gig economy has posed a significant challenge for businesses trying to remain competitive and at the same time, meet obligations that flow from direct employment regulated by the *Fair Work Act 2009*, Awards and minimum employment conditions.

Collaborative efforts between the company Airtasker and Unions NSW resulted in the recent announcement of a working conditions agreement designed to introduce changes that improve the rights and conditions of workers offering services to consumers via an online platform. Airtasker describes itself as “a Sydney-based Australian company which provides an online and mobile marketplace enabling users to outsource everyday tasks”. Users describe the task and indicate a budget, community members then bid to complete the task.¹ Airtasker has provided this online platform, accessible through any smart-phone, since 2012. The service is offered for traditional odd-jobs such as gardening, cleaning or handyman work extending to more novel tasks such as waiting in line for a new Iphone. It operates according to a model similar to Uber and Airbnb.

Because people offering their services are viewed as contractors, minimum entitlements prescribed for employees, including base rates of pay, do not apply. This understandably led to concerns about the erosion of labour standards as jobseekers bid and undercut one another to perform the posted tasks - sometimes for as low as \$7 an hour. Airtasker recently came under fire from consumer group “Choice” for making statements that could be misleading about the potential for earnings by workers using the site.²

¹ Source: Wikipedia, 2 May 2017

² Source: Sydney Morning Herald, 22 August 2016

The new agreement introduced by Airtasker reportedly achieves the following:

- i. Providing rates comparative to award rates for job posters and recommending rates of pay at or above those of the relevant award;
- ii. Offering an affordable and flexible personal insurance taking the place of workers compensation in the event of injury and illness when or from performing the job;
- iii. Commitments to work with Unions NSW to implement best practice workplace health and safety standards;
- iv. Independent dispute resolution processes to be voluntarily overseen by the Fair Work Commission.

This new agreement has been hailed as a 'world first' in an attempt to bring a degree of regulation to the gig economy, and is a significant step toward re-defining rights in the digital labour economy.

The Labour History Society SA

Invites you to hear

Andrew Stewart

talk on

The Right to Strike in Australia: A Brief History

2.00pm, Sunday 18 June 2017

at the Box Factory, 59 Regent Street South, Adelaide

Professor Stewart will trace the development of laws that restrict the right of workers to take industrial action. He will show how the treatment of collective action in the nineteenth century moved from repression to reluctant tolerance and argue that the introduction of conciliation and arbitration systems decisively changed the relationship between trade unions and the state. In spite of the Keating Government's legislation for the right to take industrial action in 1993, the incidence of such action has plummeted. The question now is whether there is any future for the right to strike. What might the past tell us about the struggle to reclaim one?



Andrew Stewart is the John Bray Professor of Law at Adelaide University, President of the Australian Labour Law Association and Co-Director of Adelaide Law School's Work and Employment Regulation research group. He is one of Australia's leading experts in employment and workplace relations.

All welcome – FREE EVENT – no booking necessary – afternoon tea provided. Enquiries:
jude.elton@internode.on.net

CALL FOR PAPERS, ABSTRACTS AND STREAMS

“Jobs and Change in Uncertain Times”

7 – 9 FEBRUARY 2018 ADELAIDE, SOUTH AUSTRALIA

The Association of Industrial Relations Academics of Australia and New Zealand (AIRAANZ) is pleased to invite IR scholars worldwide to present their research at its Annual Conference. The conference features a Doctoral Colloquium on Wednesday, 7 February. This is followed by the opening of the conference for all conference attendees, and then two days of concurrent presentation sessions on 8 - 9 February, hosted by the University of Adelaide Law School.

AIRAANZ WELCOMES:

Streams:

Proposed streams may relate to the conference theme, or to any other IR or HRM issue. Proposals should be emailed to airaanz@con-sol.com by 2 June 2017. Proposals should include the title, the organisers' names and e-mail addresses, and a brief (1 page maximum) outline of the stream proposed. If a proposal is accepted, the organisers will be expected to use their own networks to encourage papers/participants, and to help organise refereeing of papers.

Abstracts:

An abstract should set out the title and authors. The main body of the abstract (max 250 words) should then follow. It should succinctly set out the research questions, the methods used, the theoretical focus and the major conclusions. Please include references. Submission details can be found at <http://www.airaanz.org/airaanz-conference-2018.html>

Refereed Papers and Non- Refereed Papers:

The paper should be between 3,000 and 5,000 words in length (including references, endnotes, tables, appendices and abstract). Submission details can be found at <http://www.airaanz.org/airaanz-conference-2018.html>

DEADLINES AND KEY DATES:

Stream proposals due: 2 June 2017

Abstract and paper submissions open: 5 June 2017

Confirmation of streams: 30 June 2017

Submissions close: 15 September 2017

Acceptance notification: 29 September 2017

Early bird registration closes: 8 December 2017

ORGANISING TEAM:

Andrew Stewart (*Conference chair*) andrew.stewart@adelaide.edu.au

Deb King deb.king@flinders.edu.au

Eileen Willis eileen.willis@flinders.edu.au

Conference Solutions:

Greg Vickers and Mandy Winter airaanz@con-sol.com www.airaanz2018.org.au