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AUSTRALIAN LABOUR & EMPLOYMENT RELATIONS ASSOCIATION SA

OCTOBER 2023
NEWSLETTER

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

Patron:

Greg Stevens

PRESIDENT'S MESSAGE

Dear Members

I am thrilled to welcome you to our October 2023 newsletter. In September, we welcomed new committee members of whom we will introduce to you through our newsletter and events.

In this issue, we introduce Commissioner Rogers and discuss the intersection of tech and workplace relations, the loopholes bill and the latest updates from the Fair Work Ombudsman.

We are in the process of planning our FWC Advoccacy course in December and a lineup of interesting speakers in between.

I look forward to seeing you at the next in person ALERA event.

Abbey Kendall, President – ALERA SA

Contents

ALERA NATIONAL CONFERENCE

AUSTRALIAN INDUSTRIAL RELATIONS – WHAT'S NEXT?

27–28 OCTOBER 2023

HOTEL GRAND CHANCELLOR | HOBART TASMANIA

alera Australian Labour and Employment Relations Association

JOIN US IN HOBART

The Australian Labour & Employment Relations Association invites you to join us in Hobart to explore this years' conference topic: *Australian Industrial Relations – What's Next?*

WHAT TO EXPECT

The 2023 program is filled with thought-provoking panel discussions with participating representatives from across Australia.

- Political and key stakeholders vision for IR
- IR Case law and future implications
- Case study on workplace systems breakdown
- Equality at work in 2023 and beyond
- Multi Employer Bargaining
- The rise of the Red unions

THERE'S STILL TIME TO REGISTER!

www.aleraconference.com.au

New Committee Member – Jess Rogers

Jess Rogers entered the world of industrial relations 15 years ago when she commenced working at the CEPU SA Branch. Initially a Trainee Receptionist, she quickly became the first woman to hold the position of Industrial Officer in the Branch. She spent more than a decade representing workers in the Equal Opportunity Commission, Fair Work Commission and South Australian Employment Tribunal and quickly became an expert in industrial relations. Her decision - Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Go Wasp Pty Ltd, Box & Wake [2018] SAET 24 paved the way for significant penalties being awarded in the SAET and after spending several years providing training to advocates on how to run penalty proceedings, she commenced as a Commissioner at the South Australian Employment Tribunal in January 2023.

New Member Profiles

Member – Bradley Cagney, In-house Counsel, Wilson Group

Brad has worked for the Wilson Group since April 2021 and is currently one of the Group's Workplace Relations / Commercial Legal Counsel advising the parking, patient transport, storage and security business units from their office on North Terrace.

Prior to his employment with the Wilson Group, Brad was a Senior Associate and Special Counsel from 2019 to 2021 at HMB Employment Lawyers, a dedicated employment, industrial relations and occupational health and safety law practice based in Melbourne.

Originally from South Australia, Brad started his career in labour and employment relations working for the SDA (SA/NT Branch) as an organiser, industrial officer and lawyer from 2010 to 2019.

Annual General Meeting

Guest Speaker: Deputy President Katherine Eaton

By Simon Bourne, Firm Principal, SMB Workplace & Employment Law

The Association held its Annual General Meeting on Tuesday, 22 August 2023.

Members who attended were lucky enough to hear from Deputy President Katherine Eaton of the South Australian Employment Tribunal. Given the nature of the evening's proceedings - being primarily to conduct the business required of an AGM - it represented an opportunity for Deputy President Eaton to speak to members without having to ensure they could all go away having *notched up* an additional point on their continuing professional development records.

Deputy President Eaton took the opportunity to take members through the aspects of her career which she considered had been valuable to her and which had assisted to see her where she is today.

The first pointer Deputy President Eaton provided was a suggestion to listen to others and give things a go. She noted this had been the case for her from very early on when she decided to put her hand up to become a workplace delegate in her public sector workplace, something which then led to her commencing an Associate Diploma in Labour Studies. During that period of study, it was suggested to Deputy President Eaton that she should continue her studies by taking a Bachelor of Laws, which she did. She then listened to encouragement from the then Dean of the Adelaide University Law School, Rosemary Owens, to become admitted as a barrister and solicitor of the Supreme Court of South Australia, even though Deputy President Eaton had no real intention of practising law at that time. But as Professor Owens put it, "*do it for the doors it will open*" - and indeed it did.

The second tip to be provided by Deputy President Eaton was the importance of finding workplaces where you can pursue your interests and passions. Places where you are able to get the best out of yourself and which is ultimately of benefit not just to you, but to your employer as well. Deputy President Eaton noted that she could look back with appreciation on her time completing her GDLP placement with Lieschke & Weatherill Lawyers and then in practice with Bourne Lawyers and Boylan Lawyers. Deputy President Eaton reflected on the opportunities she was given to broaden her practice and pursue her interests in the law, and she reflected on the benefit that those opportunities provided to her when she went to the bar.

Lastly, Deputy President Eaton noted the importance of mentoring. She identified that she had found herself a number of mentors throughout her career – some intentionally, some unwittingly – and said she could not just see now but had recognised some time ago the importance that good, supportive mentors played in the development of one's career. Deputy President Eaton pointed out that she had, as a result of that, always endeavoured to make herself available to mentor others in a similar way. She encouraged members to consider both receiving and providing mentoring opportunities as part of their own career progression.

I am sure that all members who attended the Association's AGM would agree they were lucky to have the opportunity to hear such insights and reflections from a speaker such as Deputy President Eaton.

The Association thanks her for her time and contribution.

Liability for Employment Discrimination by Artificial Intelligence

By Paris Dean, Victoria Square Chambers and William Fay, Lieschke & Weatherill Lawyers

"a computer can never be held accountable therefore a computer must never make a management decision"
- presentation by the IBM corporation, 1979

Background

In the last six months much of the "future of work" discussion in the mainstream media has been dominated by the rise of artificial intelligence (AI), thanks largely to the popularity of the new "AI powered language model" ChatGPT. However, even before the recent explosion in discussion about AI generally, its use to make decisions about employment (and in particular shortlisting hiring decisions) was well and truly mainstream.

As of September 2023, Forbes reported that one AI hiring platform alone had been used by more than 110 million job seekers and 2.8 million businesses. The Guardian Australia has reported that one in three Australian organisations has already used an AI tool at some point in their hiring process.[1] Given the significant benefits advertised by these tools, the relatively low cost of accessing them and their uptake overseas, it can be expected their use will increase further in Australia in the coming years.

AI recruitment platforms assert that their systems engage in advanced pattern recognition to find hidden connections and thereby identify new candidates that might not ordinarily have fallen within the contemplation of human recruiters. The promise of AI recruitment is an apparently data driven (and therefore perhaps uniquely "objective") approach to employment decision making.

On the other hand, there has been increasing academic commentary about the potential for AI systems to engage in or enable systemic employment discrimination. A recent paper by the University of Pennsylvania Law School's Policy Lab on AI and Implicit Bias titled "the Elephant in AI" suggested the potential for significant racial bias in AI assisted hiring.[2] In our country, the Australian Human Rights Commission has identified algorithmic bias as a key AI risk in its call for urgent regulation of the sector.[3]

The dangers are already more than theoretical. In 2018 Reuters reported that tech giant Amazon dumped its AI recruiting tool because of concerns it was engaging in systemic bias against women.[4] The Guardian reported that the tool had "*systematically downgraded women's CVs, penalising those that included phrases such as "women's chess club captain", and elevating those that used verbs more commonly found on male engineers' CVs, such as "executed" and "captured".*[5]

New York City has already passed sweeping regulations aimed squarely at the use of AI in employment. The Automated Employment Decision Tool law requires regular third party auditing of software used to

[1]https://www.theguardian.com/technology/2023/mar/27/robot-recruiters-can-bias-be-banished-from-ai-recruitment-hiring-artificial-intelligence

[2] https://www.law.upenn.edu/live/files/11567-the-elephant-in-ai

[3] https://humanrights.gov.au/our-work/legal/submission/need-human-rights-centred-ai

[4]https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G

[5]https://www.theguardian.com/technology/2023/mar/27/robot-recruiters-can-bias-be-banished-from-ai-recruitment-hiring-artificial-intelligence

make hiring decisions, disclosure to candidates that their application will be vetted by a machine and instructions to candidates as to how they can request reasonable modifications in the assessment of their employment applications.[6]

Whatever the terms of any potential regulatory response in Australia, it is worth considering whether employers or prospective employers could be liable for employment discrimination claims under the architecture of the current Australian anti-discrimination law in connection with the use of AI systems that transpire to have a discriminatory effect.

Prohibited Discrimination under Commonwealth Industrial Legislation

Australian anti-discrimination law largely depends for its efficacy upon the prosecution of individual wrongdoers. In employment, as well as in other areas, the regime requires the nomination of a juristic entity as the putative contravener.[7]

For the purposes of the discrimination provisions of *Fair Work Act 2009*, it is also necessary to establish that the person took the action complained of *because* of a proscribed reason.[8] The words "because of" require an examination of the nexus between the protected attribute and the impugned action.

The task before the court in deciding such claims was explored by the High Court in *Barclay*.[9] In that case it was held that the obligation was to identify the "real" reason(s) that the action was taken rather than any unconscious factors. French CJ and Crennan J held: *"it is not possible in a curial process to plumb the depths of "*[an employer's] *unconscious"*. Heydon J held that *"examining whether a particular reason was an operative or immediate reason for an action calls for an inquiry into the mental processes of the person responsible for that action".*

It might be thought that the use of AI technologies could insulate employers from liability by removing the "mental processes" vulnerable to interrogation in a curial process and which might be susceptible to subjective biases. On this theory, a decision maker could point to the guidance of the system as a defence to allegations that they had engaged in discriminatory conduct.

In our view, this approach ignores the serious risks for employers in outsourcing decision making in this fashion.

The Kodak Problem

Elliott v Kodak Australasia Pty Ltd[10] concerned a circumstance in which a decision maker made a determination concerning who was to be selected for redundancy. The decision was informed by assessments made by colleagues with respect to the worker's competency and performance with reference to particular criteria. It was alleged that the decision was made having regard to prohibited reasons under the relevant industrial statute.

Lee, Madgwick and Gyle JJ held that the inquiry required a more expansive investigation than an analysis of the subjective reasoning of the ultimate decision maker; it involved looking into the intention of those whose assessment materially informed the ultimate decision maker.[11] It was not enough to simply enquire as to whether the ultimate decision maker had been motivated by one or more prohibited reason; where those whose assessments informed the ultimate decision maker were motivated by a prohibited reason, the ultimate decision maker "would have, in effect, inadvertently adopted" the informants' prohibited

[6] https://portal.311.nyc.gov/article/?kanumber=KA-03552.

[7] ie. to our knowledge, a computer has never been held to be susceptible to an allegation of discrimination *per se*.

[8] See s. 351, *Fair Work Act 2009*.

[9] *The Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32.

[10] *Elliott v Kodak Australasia Pty Ltd* [2001] FCA 1804.

[11] Ibid at [37].

motivations "regardless of the lack of any express prohibited reason in the mind of" the ultimate decision maker.[12]

The reasoning in *Kodak* has been applied subsequently to *Barclay.* In 2015, in *Construction, Forestry, Mining and Energy Union v Clermont Coal Pty Limited*[13] Reeves J held that the decisions were consistent.[14] This consistency was recently affirmed by Katzman, Charlesworth and O'Sullivan JJ in *Wong v National Australia Bank Limited*.[15]

Whilst it is clear that *Barclay* requires that this does not involve an investigation into the subconscious reasoning of such people, the use of outsourced decision technologies may call into question the subjective reasons of a perhaps functionally limitless number of people. Could, for example, evidence be called or demanded from AI programmers, those who selected the data sets upon which AI systems were trained, or those who selected AI recruitment systems as to whether they intended that the systems they contributed to engineering have a discriminatory effect?

Indirect Discrimination

Another manner in which employment selection claims based on systemic discrimination by AI systems might be brought is under indirect discrimination provisions. By way of an example, the *Equal Opportunity Act 1984* generally prohibits discrimination on the basis that "a person does not comply, or is not able to comply, with a particular requirement" where the nature of the requirement "is such that a substantially higher proportion of persons" without the protected attribute comply or are able to comply where that requirement is not reasonable.[16]

It would seem arguable that a requirement to undergo automated vetting by an AI system prior to consideration for employment by a human agent constitutes "a particular requirement" for the purposes of the legislation.

Anti-discrimination regimes typically further provide that unlawful discrimination will occur where a person is treated less favourably "on the basis of" a "characteristic" that appertains generally to members of the protected class.[17] It remains to be seen how a court or tribunal will apply these provisions to an employer who, for example, declines to hire a person who does not make a candidate shortlist because they have a characteristic disfavoured by an AI system.

Employers should be aware that liability for indirect discrimination does not depend on establishing a subjective animus towards a protected group. Further, in respect of the imposition of a "particular requirement", the conventional defence of asserting the "reasonableness" of the requirement may prove difficult if the systems utilised are shown to produce a significant discriminatory effect; after all: the AI system cannot take the stand to articulate the reasons for, or benefits of, selecting for particular attributes.

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[12] Ibid at [37].
[13] [2015] FCA 1014.

[14] Ibid at [121] - [122].

[15] *Wong v National Australia Bank Limited [2022] FCAFC 155* [37] - [41]

[16] See in respect of sex, gender identity, sexual orientation or intersex status: s. 29(2)(b), s.29 (2a)(b), 29(3)(b), 29(4)(b); in respect of race: 51(b); in respect of disability: 66(b); in respect of age: s 85(a)(b), in respect of certain other grounds: 85T(2)(b) of the *Equal Opportunity Act 1984* (SA).

[17] See in respect of sex, gender identity, sexual orientation or intersex status: s. 29(2)(c), s. 29 (2a)(c), 29(3)(c), 29(4)(c); in respect of race: s. 51(c); in respect of disability: 66(c); in respect of age: s. 85(a)(c), in respect of certain other grounds: s. 85T(2)(c) *Equal Opportunity Act 1984* (SA).

The Positive Duty

Finally, recent legislative reforms have resulted in certain persons being under a positive obligation to eliminate a limited number of forms of discrimination and related conduct.

The *Sex Discrimination Act 1984* now provides that a person conducting a business or undertaking (PCBU) must take reasonable and proportionate steps to eliminate, amongst other things, discrimination in employment on the basis of sex.[18] This obligation extends not just to stamping out discrimination against employees, but also against prospective employees; it requires that steps be taken to avoid discrimination "in the arrangements made for the purpose of determining who should be offered employment"[19] and "in determining who should be offered employment".[20]

Establishing a breach of this obligation does not require demonstrating that any particular instance of sex discrimination has occurred, nor that there is any antipathy by the PCBU on the basis of sex.

Whilst there is presently no judicial guidance in this area, we consider that the adoption and use of a hiring technology which is discriminatory on the basis of sex would almost certainly fall afoul of the new positive duty.

Conclusion

The use of AI systems in making determinations about hiring is well established and likely to grow. There have been increasing concerns from academic corners regarding the potential for such systems to introduce biases or entrench existing biases, including against groups protected under Australian anti-discrimination law.

Far from insulating employers from legal risk, the use of AI systems exposes new risks and legal uncertainties for employers. Whilst the laws are untested in this regard, aspects of the existing anti-discrimination regime appear to provide avenues to allege both individual and systemic bias.

Unless or until regulatory change occurs, employers should consider the risks of using AI technologies before adopting them as part of their hiring practices. Employers who do make use of such systems (and those advising them) may wish to (i) satisfy themselves as to the efforts made by providers of AI systems to combat discrimination, (ii) audit the results of any candidate parsing systems with an eye to the diversity of the cohort they identify for further consideration[21] and (iii) consider what other measures are being undertaken within their organisation to remedy the potential for employment discrimination that any systems may inject.

[18] See s. 47C(1), 47C(2)(a) in combination with s. 14(1) and 14(2) of the *Sex Discrimination Act 1984* (Cth).

[19] Ibid at 14(1)(a).

[20] Ibid at 14(1)(b).

[21] And if possible, the cohort they exclude.

ChatGPT: The Next Disruption

By Mark Ferraretto, BSc (Math Sc) LLB GDLP, Senior Lecturer in Law at Flinders University South Australia

(This article was first published by the Law Society of South Australia Bulletin in May 2023)

I came to the law relatively recently, after a 20+ year career in Information Technology. I started in 1990 and took part in the emergence of the Internet. It seemed every day there was a new disruption: email, the web, instant messaging, e-commerce, online banking, social media, ride sharing. Our lives, and our work, changed in a fundamental way because of the Internet and everything that it brought with it.

Over time the disruptions slowed. New social media platforms were enhancements of the initial concept. Mobile phone settled into a standard form and software. The last decade or so has been a period of relative stability. However, the next disruption may be right upon us.

Artificial intelligence (**AI**) has been a discipline of computer science for several decades, but recent advancements in Natural Language Processing (NLP) have brought AI into the mainstream. ChatGPT, developed by OpenAI, is an example of a significant step forward in NLP technology, demonstrating the potential for AI to bring about a new wave of disruption not seen for some time.
Let me explain why.

While information technology has certainly made an impact on the legal profession, there are still certain aspects of legal practice that remain largely manual. One example of this is document preparation, which often involves extensive copying and pasting from other documents. In my own experience my first Business Sale Agreement was essentially a customized version of a pre-existing document, and my first Minutes of Orders were based on a combination of two or three other examples that were applicable to my factual circumstances. I constructed documents, sentence by sentence, paragraph by paragraph, over time. And it did take time. Many hours were written off in my generation of legal output.
Then came ChatGPT. I would like to give you two examples of how I used ChatGPT while I was in practice.

The first relates to preparation of a lease associated with a sale agreement I had prepared. By this stage in my career I was reasonably confident with sale agreements, but not so confident with property work. My client asked me to insert a clause in the lease requiring the lessee to maintain the premises' office furniture. Not having prepared such a clause before, my usual path would be to scour leases on our systems for similar clauses with a view to constructing what I needed. Once again, many unbillable hours would be spent on this task.

Instead, I turned to ChatGPT. I typed in these instructions:

> *Generate a lease clause that requires the lessee to keep the office furniture and not dispose of it or sell it.*

and received this output:

> *"The lessee shall be responsible for maintaining and preserving all office furniture provided by the lessor, including desks, chairs, tables, and any other equipment. The lessee shall not dispose of, sell, or transfer ownership of any of the office furniture without the prior written consent of the lessor. The lessee shall be liable for any damages or loss of office furniture caused by neglect or improper use. The lessor reserves the right to charge the lessee for any damages or replacement cost of the office furniture upon termination of the lease."*

The writing style is somewhat American and what was generated clearly needed work. But it gave me a start. I amended the output to suit my needs, added it to the lease and sent it off to be settled. What would have been hours of work was completed in approximately 30 minutes.

My second example relates to an Application for Divorce. My client, the husband, advised us the parties were married overseas and that the marriage certificate had been lost. I applied for an extract from the overseas consulate and discovered that the wife's name had been spelt incorrectly on the certificate. The husband had no documentation to support the correct spelling of his wife's name. This necessitated filing and affidavit along with the Application explaining the circumstances and asserting the husband's belief of the correct spelling of the wife's name.
At the time I had approximately six months' experience as a family law practitioner. I knew what needed to go into the affidavit but was not confident as to how to construct the document. Once again, I turned to ChatGPT. These are the instructions I gave it:

> *Prepare an affidavit that explains that there is a spelling error in the marriage certificate, we can't obtain the original as we can't contact the wife and that we do not have proof of the proper spelling of the wife's name. In the affidavit also state that the couple were married in XXXX on xx/xx/xx and that the husband doesn't have the marriage certificate. Because of the relationship between the husband and wife the husband does not wish to obtain the certificate from the wife. On xx/xx/xx the husband instructed his lawyer to obtain an official extract from the XXXX consulate. On xx/xx/xx the extract was received. On the extract the last name of the wife is spelt XXXXa instead of XXXXb. The husband was told by his lawyer that the lawyer contact the XXX consulate but the consulate will not correct the extract unless it receives photographic evidence of the correct spelling of the wife's name. The husband is unable to obtain this. The husband knows that the spelling is incorrect but the husband does not have any evidence of the spelling error.*

Out came a nice nine-paragraph affidavit. Once again the output needed work but, once again, ChatGPT gave me the assistance I needed. And once again, a task that would have taken many (unbillable) hours was completed in under an hour and sent off to settle.
I want to draw a few points from these examples.

First, at its most basic level, AI, including ChatGPT, has the potential to significantly increase the productivity of junior legal professionals. With the assistance of AI tools, juniors can prepare documents more efficiently and focus their time on refining the output using their legal training. This can result in faster turnaround times and greater efficiency, but it also raises concerns about unrealistic expectations for productivity. Senior practitioners will need to understand the capabilities and limitations of AI systems to ensure that they properly instruct and manage their junior colleagues.

Second, AI has the potential to allow practitioners generally to move away from output *construction*, which is largely mechanical and does not fully leverage a practitioner's special skills, to output *instruction*, formulating instructions in natural language to supply to an AI system and then refine the output. This *does* leverage the special skills of a practitioner by removing the mechanical tedium that is part of producing legal output. This move to instruction has the potential to change the functioning of legal practices in a way not seen since the Internet replaced law libraries. It will allow practitioners, junior and senior alike, to focus on the 'value' of the profession. The result should be a significant increase in efficiency and potentially a decrease in the cost of providing legal services resulting, hopefully, in increased access to legal services to a broader part of society.

Third, note that at no legal practitioners were replaced by AI in my examples. The practitioner remains at the centre of the delivery of advice, but AI is used as a tool to deliver that advice in a more efficient way. As an aside, I can see AI spelling the end of precedents. There are already developments on the horizon that will have AI systems source internal data, such as firm's emails, documents and practice information, to inform the output they produce. Imagine then instructing an AI system to prepare a

document, based on this and that other document, including this and that clause from yet other documents, and to be generated in the style of this particular partner. This is not far away. Software firms such as Microsoft already have such products developed and in testing. This future may only be a matter of months away. Imagine eliminating the need to invest in document automation (which is often poorly used or not used at all) and rely solely on instruction and review.

This brings me to my final point: we are at a critical juncture in the evolution of technology. For the first time, we can instruct rather than construct. This represents a significant shift, not only in legal practice but in our interaction with technology generally. Since the inception of information technology, we have had to master coding, formatting, styling, and search techniques to create outputs with substance. However, we have now reached a point where the mechanics of this process can be automated away from us, leaving us to the instruction and review.

In my view this development is reminiscent of the disruptions seen in the 1990s and 2000s. With the advent of tools such as ChatGPT we may be on the brink of another major upheaval. The potential for growth and innovation is immense, and those who can adapt to this new landscape stand to reap great rewards.

The Future of Resolving Workplace Disputes

Peter Healey, Barrister, Mitchell Chambers

We have all seen them and your workplace probably has one. A workplace policy called something like "Grievance Policy", which prescribes the same standard formula for dealing with issues at work.

Usually something like: first step is to approach the person to raise the issue (if comfortable and safe to do so), the second step is to escalate to your line manager or supervisor, and third step is to bring it to the attention of HR or the CEO. Of course, there always remains the option to escalate the issue externally to bodies such as the Fair Work Commission if the issue is within its jurisdiction.

While there are no doubt benefits to an approach that encourages staff to proactively and respectfully address their issues at the workplace level, there are also flaws and risks. What if a staff member has an issue but lacks the confidence or skills to speak up? What if the line manager or supervisor is technically strong at their work but lacks people skills to sort out issues in their team? What if an employee does not understand something about their wages but feels silly asking it, so lets it fester with an constant underlying concern that they are being underpaid and undervalued? What if a staff member does not trust the HR manager or fears retribution? What if an employee wants confidentiality respected but it cannot be? What if the act of seeking assistance from a union or applying to the FWC is perceived as an escalation that makes it uncomfortable at work. These are all problems that can and do arise with off-the-shelf grievance policies, making them less effective.

It is in everyone's interest to have effective processes for resolving grievances and issues. Each grievance can be hugely costly whether it be time and effort diverted to managing the dispute, cost of staff members being less productive, interpersonal conflict, losing a hard-working member of the team, personal leave and workers compensation costs, and potentially legal or investigation costs. These factors make it highly desirable for employers to more actively think about grievance resolution and implement processes that are tailored to nipping grievances in the bud at the earliest stage.

One option which is proving beneficial is the engagement of an organisational ombudsperson whose function is to provide independent, impartial, confidential and informal assistance to any employee who has a grievance or issue or need for clarification about some aspect of their work.[22]

Organisation ombudspersons can be employees or consultants, and their purpose is to be available to all staff members who have an issue at work. The ombudsperson meets with staff, listens to their grievance or queries, and helps them come up with a solution. The ombudsperson does not decide who is right or wrong but listens and helps the concerned staff member develop options for resolution. These options might include the ombudsperson gather information for the staff member about their wages, providing some training or coaching to the staff member who might lack the skills to raise the concern with their colleague, informal mediations between colleagues, escalating a matter at the request of an employee where that is appropriate, or giving information on external avenues.

The organisational ombuds role is not an extension of the HR department or subject to direction. The specific purpose of the role is to remain neutral and confidential for staff members. The ombudsperson would typically only report to the Board of the employer, and even then the reporting would not be on specific complaints by employees but rather a reporting of any systemic trends noticed which the employer may want to consider addressing moving forward. As an example, if the ombudsperson noticed that there was a spike in the number of employees raising queries about award classifications then this could be the subject of an anonymised report to the Board to address.

[22] See e.g. International Ombuds Association: What Is an Organizational Ombuds (ombudsassociation.org).

The ombudsperson does not act for a particular employee but guides them confidentially and impartially to help them resolve the issue at the earliest opportunity possible. An important feature of the ombuds role is that staff need to have confidence in the neutrality and confidentiality of the position, and so typically there would be a charter or policy framework made available to staff. It is of course vital that the ombudsperson respects these important tenets of the position.

In essence the role is specifically there to be accessed by staff and their function is to proactively help all staff resolve their problems as quickly and effectively as possible. The role achieves this by maintaining neutral, independent and confidential. These features of the position allow staff to resolve grievances without many of the flaws and risks outlined above with standard policies.

There is a great deal of research into the benefits of these types of positions within organisations. That research suggests that organisational ombudspersons provide an effective way to build and improve workplace culture, support employees experiencing issues, reduce arguments about bias, reduce the costs of investigations and litigation, and uncover systematic issues.23

I would encourage any organisation that wishes to have effective grievance resolution processes to consider an organisational ombudsperson type role or at the very least to reflect on whether there are more effective methods of resolving grievances in their particular workplace. Businesses wanting to maximise their productivity into the future need to consider how the costs of grievances impact them and to implement more creative tailored approaches to dispute resolution.

A good text on this area is The Organizational Ombudsman: Origins, Roles and Operations: A Legal Guide by Charles Howard, and the International Ombuds Association website.

[23] International Ombuds Association: Value of Organizational Ombuds (ombudsassociation.org)

The Closing Loopholes Bill 2023: Proposed changes and implications for employers

By Yellow Canary

Over the past four years, the government has been making moves to criminalise wage theft and prevent the risk of employee underpayments.

The *Wage Theft Act 2020* in Victoria and the *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* in Queensland made wage theft a criminal offence in these states, with employer due diligence playing a more crucial role than ever before in compliance.

Closing Loopholes

The *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* was introduced in September. While it remains to be seen what proposed changes will come into effect, directors and employers across Australia are now being urged to make a significant transition in their approach to wage compliance.

The Australian government has proposed unprecedented changes to reshape the industrial relations landscape. This sweeping proposal seeks to eliminate the government's perceived loopholes in employment laws, which they claim are being exploited by businesses.

Although the bill's objective is to promote a fairer balance between workers and employers, in practice, these changes impose intricate and unclear compliance obligations on employers, resulting in substantial time and financial costs. Employers will need to exercise greater caution and devote increased attention than ever before to ensure the compliance of their workforce.

Closing Loopholes Bill 2023: explained

The Yellow Canary team has reviewed the current bill (all 284 pages of it!) and here's what it contains:

Wage theft

Employers who intentionally underpay their employees now face severe consequences, including the possibility of a maximum penalty of 10 years behind bars and fines reaching up to $1,565,000 for an individual and $7,800,000 for a corporation. For those who underpay an amount exceeding this cap, the penalty will be three times the underpayment.

There criminal offences are reserved for intentional conduct and employers who make honest mistakes will not be held accountable for wage theft.

Pathways to avoid criminal prosecution such as safe harbour and cooperation agreements also exist for proactive employers caught in the crosshairs of wage theft allegations. These options are reserved for those who self-report, take diligent steps to rectify wage discrepancies, and have no history of underpayments.

Employers who are party to a cooperative agreement with the Fair Work Ombudsman (**FWO**) can bypass immediate involvement from the Director of Public Prosecutions or the Australian Federal Police.

Implications for employers

Demonstrating due diligence is now more critical than ever to prove that any underpayments were not intentional. Demonstrating due diligence will also be a strong foundation to access safe harbour provisions and engage into cooperative agreement.

Employers will inevitably confront challenges and financial burdens as they endeavour to implement safeguards and demonstrate their commitment to resolving underpayment issues, and persuading the federal authorities that comprehensive preventative measures have been implemented to mitigate future misconduct. In these situations, employers should consider harnessing technology and automation to rectify past issues and showcase their commitment to ongoing compliance.

Heavy civil penalties for contraventions

Employers navigating the new landscape of workplace regulations should be aware of significantly increased civil penalties, now increasing five times to $93,900 and for serious contraventions, $939,000. Non-compliance with compliance notices can incur penalties ten times higher.

In cases involving underpayment, penalties can escalate to three times the underpaid amount where this amount is higher than the maximum. A noteworthy change is that serious contraventions no longer exclusively pertain to intentional acts; they encompass reckless behaviour as well.

Employers are at risk of being deemed reckless when their payroll team, legal department, or directors are aware that their payroll systems are insufficiently compensating employees in accordance with awards and enterprise agreements and failed to address the problem.

Implications for employers

Conventional payroll systems frequently lack the capacity to seamlessly integrate the intricacies of modern awards, necessitating the establishment of comprehensive compliance monitoring systems. Furthermore, directors cannot evade personal accountability by delegating this responsibility; they must play an active role in implementing compliance monitoring systems to mitigate potential risks.

Directors and executives, therefore, must possess timely, precise information to effectively interrogate their payroll team and legal departments. Implementing a continuous compliance monitoring system guarantees regular compliance assessments and equips directors and management with pertinent data to confidently verify that they are meeting their compliance obligations.

Redefining casual employment

The definition of a casual employee is reverting to the pre-*Rossato* decision, which characterised casual employment by the absence of a firm advance commitment to work. This shift in determining casual status considers various factors that transcend the confines of a contract, including mutual understandings, work acceptance or rejection rights, future work prospects, the presence of full-time or part-time counterparts, and regularity of work pattern.

Casual employees will also be granted the ability to notify their employer of their desire to convert to a permanent form of employment after 6 months of continuous service. This right sits alongside the existing provision mandating that employers extend permanent conversion offers to eligible casual employees. The bill introduces a framework for casual employees seeking a transition to permanent employment, detailing the guidelines governing how employers must respond to such notifications from employees seeking a change in their employment status.

Implications for employers

Employers find themselves once more grappling with the uncertainty surrounding the correct classification of their casual employees. As there are also now various pathways for casual workers to shift to permanent roles, employers must stay on top of their obligations to extend permanent conversion offers to casual employees and consistently assess their rostering to ensure that a casual employee does not maintain a regular work pattern.

If possible, roster warnings should be set up within systems to trigger when obligations are being breached, and employers should ensure workforce planning departments communicate with legal and payroll operations teams so that planning decisions don’t impact compliance.

Pay equity for labour hire workers

Labour hire workers and unions now have the power to seek regulated labour hire arrangement orders from the Fair Work Commission (**FWC**), ensuring their remuneration aligns with what direct employees would receive under the host business' enterprise agreement. The FWC maintains the authority to refrain from issuing orders deemed unfair, taking into account input from affected businesses and employees. Host businesses will be obligated to share specified data with labour hire providers to facilitate compliance. Certain exemptions apply for short-term engagements, training programs, and small businesses.

Implications for labour hire companies

Labour hire companies are on the brink of substantial industry transformations, and a notable surge in costs if the FWC implements a regulated labour hire arrangement for their workforce. There will likely be a decline in the utilisation of labour hire companies, as the cost inevitably increases to mitigate the heightened risk and operational expenses tied to ensuring compliance to the host company's rates of pay under their enterprise agreement/s.

This situation may result in a labour hire company managing a workforce subject to numerous and complex enterprise agreement rates of pay, thereby elevating the risk of non-compliance. Consequently, labour hire companies will need to establish robust measures and solutions to effectively uphold and sustain ongoing compliance as they face a revolving door of complex obligations.

Definition of employee and employer

Definitions of employee and employer will be added to the Fair Work Act. The definitions pivot on the genuine nature of the relationship between parties, transcending mere contractual terms. This transformation reverts back to pre-High Court of Australia decisions in *Personnel Contracting* & *Jamsek*, which rejected the multi-factorial test, which will now make a return.

Implications for employers

Much like the challenge posed with the new definition of casual employee, companies relying on contractors will grapple with the uncertainty surrounding their contracting arrangements. The revival of the multifactorial test underscores the importance of caution when structuring and overseeing contractor arrangements, as the contract itself is no longer sufficient to guarantee a contractor's non-employee status.

Seeking legal counsel becomes imperative to ensure that the level of control exerted in these contracting relationships does not lead to a worker being classified as an employee. As demonstrated in cases predating the High Court's decision in Jamsek & Personnel Contracting, companies may find themselves burdened with substantial liabilities to pay out entitlements to contractors that are found to be employees.

Protections for contractors

Contractors are set to benefit from a robust set of minimum standards and additional safeguards. These measures include granting the FWC authority to establish minimum standards orders and guidelines, enabling digital labour platform operators and road transport businesses to forge consent-based collective agreements, empowering the FWC to arbitrate disputes involving employee-like workers unfairly deactivated from digital labour platforms, and permitting independent contractors below a specified income threshold to challenge unfair contract terms through the FWC.

These protections are afforded to contractors who are employee-like workers performing digital platform work and engaged in the road transport industry.

Implications for digital labour platform operators

Once the FWC establishes minimum standards, ride-share and delivery platforms must ensure compliance, just like employers adhering to minimum entitlements under a modern award. With these new changes, the risk of encountering underpayment claims will notably surge, and affected companies need to start implementing processes and solutions now to ensure ongoing compliance and mitigate risks.

When will The Closing Loopholes Bill come into effect?

The bill will make its way through the house and senate and there will likely be changes along the way. However, based on the current drafting, these changes are stated to come into effect as follows:

Wage theft – the earlier of proclamation or 1 January 2025.

Civil penalties – the later of the day after royal Assent or 1 January 2024.

Redefining casual employment – 1 July 2024.

Labour hire changes – The day after this Act receives the Royal Assent.

Definition of employer & employee - The day after this Act receives the Royal Assent.

Protection for contractors – 1 July 2024.

Irrespective of role – be it a director, c-suite executive, legal counsel or payroll manager – the time to ensure compliance is now. A proactive stance will be your shield in a rapidly evolving regulatory landscape.

What's next for employers?

These reforms usher in a new era for employers, necessitating a proactive approach to compliance. It has become increasingly crucial for employers to establish and maintain continuous compliance protocols to effectively adapt to these recent developments. As the expenses associated with compliance are on the rise, leveraging technology to oversee workforce compliance obligations has become vital in building a sustainable compliance framework. Our Closing Loopholes Bill whitepaper provides additional tips for implementing proactive compliance strategies using technology.

Automating proactive compliance in a new era of wage theft prevention

Yellow Canary enables large Australian employers to streamline compliance across employee payments, entitlements and Long Service Leave.

Our Always On Compliance (**AOC**) platform automates regular reviews, comparing what was paid, to what should have been paid, according to the employee's modern award, enterprise agreement or industrial instrument.

The AOC platform generates variance and driver reports which enable our clients to rapidly address any issues, avoid protracted remediation projects, and demonstrate to stakeholders and regulators that payroll compliance issues are being addressed.

In a new era of workforce compliance, Yellow Canary is helping employers do right by their employees, whilst avoiding hefty penalties incurred by unintentional underpayments.

* *This bill is currently before the committee and might be changed. Yellow Canary content is intended solely for the purpose of offering commentary and general knowledge. The content is not intended to constitute legal advice. You should seek legal or other professional advice before acting or relying on any of the content.*

The Closing Loopholes Bill brings more challenges for employers

By Professor Andrew Stewart, Aneisha Bishop, Adam Celik, Dustin Grant, Joseph Hyde, Essi Merivaara – Piper Alderman

The Albanese Government's latest amendments to the Fair Work Act propose important changes in relation to casual employment, independent contracting, labour hire, liability for underpaying workers, and trade union delegate rights, among other topics.

During its short time in office, the Albanese Government has already introduced two major sets of changes to the *Fair Work Act 2009* (FW Act), under its 'Secure Jobs, Better Pay' and 'Protecting Worker Entitlements' legislation. Now comes a third tranche, in the form of the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (CL Bill).

Tabled on Monday 4 September 2023, the Bill proposes important changes to the regulation of independent contracting. These include shifting the line between employment and self-employment; authorising the Fair Work Commission (FWC) to set minimum standards for some gig workers, as well as contractors in the road transport industry and allowing the tribunal to rule on the fairness of contracts for services.

The CL Bill also seeks to fulfil previous Labor commitments to tighten the definition of a casual employee, create new pathways from casual to 'permanent' employment, enshrine the principle of 'same job, same pay' for labour hire workers, and increase the penalties for underpayment of workers, including by making it a criminal offence in certain circumstances.

Other topics dealt with by the Bill, which together with its Explanatory Memorandum (EM) runs to some 800 pages, include a new set of rights and protections for union delegates, expanded protections against discrimination, further changes to the rules for making enterprise agreements, and increasing penalties for breaches of federal work health and safety laws.

In what follows we summarise and explain some of the main features of what is a complex and highly technical Bill. The government hoped to have it passed by the end of the year. But the Senate has established an inquiry into the Bill with a reporting date of 1 February 2024, making that unlikely.

Ultimately, Labor will need the support of the Greens and at least two other Senate crossbenchers. The price for that support may conceivably include not just amendments to the Bill, but reforms on matters currently beyond its scope.

Reducing the number of 'permanent casuals'

In theory, casual employment is meant to be used for short-term jobs, or for work that may be irregular, with no predictable offers of work for the individual. However, in practice, a large portion of casual employees have relatively stable and ongoing jobs. They may undertake the same work as full-time and part-time employees, but without access to the protections and benefits afforded to permanent employees, including personal or carer's leave, annual leave, notice of termination or redundancy pay. These individuals have been referred to as 'permanent casuals'.

The Albanese Government is proposing to address this by amending the current definition of a casual employee to reflect the approach that was taken by courts prior to 2021, clarifying the circumstances in which the status of casual can change, and introducing a new pathway for casuals to move to permanent employment where they wish to do so. These changes are set to take effect from July 2024.

A narrower definition of casual employment

Section 15A was added to the FW Act by the Morrison Government in 2021. It defines a casual as an employee engaged with '*no firm advance commitment to continuing and indefinite work according to an agreed pattern of work*'. This is determined by reference to the terms on which they have been offered work and whether they are paid as a casual, not what actually happens during their employment. Having a regular pattern of hours does not matter, if there is no obligation to provide that. This definition was largely in line with the High Court decision in *WorkPac Pty Ltd v Rossato* [2021] HCA 23.

In opposition, Labor promised to change this to a 'fair, objective definition', which would take account of an employee's actual work patterns. To meet that commitment, the CL Bill is essentially proposing a return to the common law position that had prevailed before the High Court's decision and the 2021 amendments.

The proposed new section 15A will set out a 'general rule' to determine whether an individual is employed as a casual. It is still based on the principle that a casual is someone who has no firm advance commitment to continuing and indefinite work. But in determining whether that commitment exists, the amended definition focuses on the totality of the employment relationship. That can include the conduct of the parties after employment has commenced, to the extent it sheds light on the parties' original expectations.

The new definition will require reference to whether:

- the employer has the freedom to decide whether to offer work and, if they do, whether the employee can choose to accept or reject it (and whether this happens in practice);
- it is reasonably likely that continuing work of the kind performed by the employee will be available in the future;
- there are permanent employees performing the same kind of work and whether the type of work in question can be done on a permanent basis; and
- there is a regular pattern of work for the employee (allowing for fluctuation by reason of, for instance, illness or recreation).

It is also specifically provided that a contract cannot be regarded as creating a casual engagement if it is set to terminate at the end of an identifiable period, other than the end of a shift, or the end of a 'season'. With those exceptions, fixed or contingent term employment cannot be treated as casual.

The new provisions go on to make it clear that if an employee starts performing what from the outset is genuinely casual work, their status will not change automatically just because they reach a point where the original test is no longer satisfied.

This is confirmed by a new subsection 15A(5), which states that under the proposed framework, a person will remain a casual employee until a specific event changes their status to permanent. That event can only be one of the following:

- the employee's status is converted to full-time or part-time employment under the existing casual conversion provisions or the new proposed 'employee choice' pathway, described in more detail below;
- the employee's status is changed by an order of the FWC when resolving a dispute;
- the employee's status is changed or converted to full-time or part-time under the terms of a fair work instrument that applies to the employee; or

- the employer makes an alternative offer of employment and the employee commences work on a basis other than casual employment.

Conversion from casual to permanent employment

Under Division 4A of Part 2-2 of the FW Act, casuals who have worked in the same job for at least 12 months may be entitled to request or be offered conversion to 'permanent' status, with access to entitlements such as annual leave and paid personal leave.

The CL Bill proposes to complement this right by introducing a new 'employee choice' framework, to operate alongside the conversion provisions. It would allow casuals to notify their employer in writing that they believe their job no longer meets the requirements of the definition in s 15A. But that cannot be done until they have been employed for a minimum period of six months, or 12 months if they are working for a small business (that is, a business with fewer than 15 regular employees).

Once an employer receives a notification, it will have 21 days to provide a written response. Before responding, the employer must consult with the employee. If the employer accepts the notification, it must inform the employee of when the change to permanent employment will take effect and what their hours of work will be. If the employer refuses, however, that can only be on one of three grounds:

1. the employee's current employment still meets the requirements of section 15A;

2. accepting the notification would be impractical, because substantial changes to the employee's terms and conditions would be necessary to comply with an applicable fair work instrument (such as a modern award or enterprise agreement); or

3. accepting the notification would result in the employer not complying with a recruitment or selection process required by or under a relevant law (such as in the public sector).

Similarly to the casual conversion provisions, there are to be limitations on how frequently employees can invoke the choice framework.

Dispute resolution

A new section 66M of the FW Act proposes a process for resolving disputes about either employee choice notifications or casual conversion. The parties would first have to attempt to resolve the dispute at the workplace level, before referring it to the FWC. If conciliation was unsuccessful, the tribunal would be empowered to arbitrate the dispute and make a number of orders, including that:

- the employee be treated as a full-time or part-time employee from a specified date;

- the employee continue to be treated as a casual employee;

- the employer make the employee an offer of casual conversion; or

- the employer grant a request made for casual conversion.

Sham casual arrangements

Additional protections against sham casual arrangements, similar to those which already exist in relation to sham independent contracting, are proposed under the CL Bill. These prohibit:

- misrepresenting employment as casual employment (section 359A);

- dismissing an individual in order to engage them as a casual to perform substantially the same work (section 359B); and

- knowingly making a misrepresentation to a current or former employee to engage them as a casual (section 359C).

Each of these sections is a civil remedy provision and contraventions of any could attract penalties. Section 548 of the FW Act will also be expanded to allow individuals to bring proceedings in the small claims division (for claims worth less than $100,000) of the Federal Circuit and Family Court for disputes relating to whether a person was a casual employee at the commencement of their employment.

However, where an employer is found to have misclassified a permanent employee as a casual, whether in breach of one of the new prohibitions or not, section 545A will continue to offer some protection. If the misclassified employee makes a monetary claim for entitlements (such as annual leave) that they should have received, the employer can offset an appropriate portion of any casual loading the employee has received.

Casual Employment Information Statement

This Statement, which must currently be given to all workers when commencing casual employment with a national system employer, will be updated to reflect the new rights and protections proposed in the Bill. It will also need to be given again to any casual employee who completes 12 months' employment, to remind them of their rights.

Which casuals will be caught by these changes?

Beyond the extra paperwork, the changes proposed by the CL Bill should realistically only impact a relatively small number of casual employment arrangements.

The new definition and the sham casual prohibitions are primarily intended to address arrangements where there is an expectation from the outset that the employee, although described and paid as a casual, is to perform regular and ongoing work that is indistinguishable from that of permanent staff, or which can more naturally be categorised as fixed term employment.

This may, for example, affect educational institutions that wish to engage staff for a defined period of time (such as a term or semester) to perform scheduled teaching activities. On the face of it, such employees will need to be engaged on a permanent part-time basis, or given open-ended contracts.

The reforms should not affect the more common situation in practice where someone is initially and quite genuinely engaged as a casual, with uncertainty over whether or to what extent they will be offered work. If such an arrangement settles – whether quickly or slowly – into more stable and regular employment, the Bill makes it clear that the employee does not have to be reclassified. Unless the employer opts to offer a permanent position sooner, the employee must wait until they have completed six or 12 months' service before being able to request that change.

In practice, few long-term casuals tend to want conversion to permanent status, once they understand it involves giving up a pay loading in return for entitlements which they may not expect to use. Given that reality, the government's new approach may do little to reduce the prevalence of 'permanent casual' employment.

Regulating independent contracting

When workers are classified as independent contractors rather than employees, they are not eligible for most of the rights and protections for which the FW Act provides. Many contractors perform skilled work

through businesses of their own. But others may perform low-paid work, with low bargaining power and little autonomy.

In opposition, Labor had promised to empower the FWC to set minimum terms and conditions for 'employee-like' workers in the so-called 'gig economy'. Following the Jobs + Skill summit in September 2022, it also began canvassing the possibility of improving remedies against unfair contractual terms imposed by those hiring contractors.

The CL Bill deals with both of those matters, along with a new regime for regulating contract work in the road transport industry. But it also seeks to change the rules that determine whether a worker is a contractor at all. This is a reform of much broader significance, which may affect any business that uses contractors or consultants.

Modifying the definition of employment

The FW Act does not seek to define who should be classed as an employee, referring only (as in section 15) to the term having its 'ordinary meaning'. That meaning is supplied by judge-made principles that operate as a matter of common law.

The common law approach involves asking a series of questions about a contract to undertake work, weighing up whether the answers point towards or away from employment, and then forming an overall impression.

In two 2022 rulings, *CFMMEU v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2, the High Court changed the way this test is applied. A majority of the court insisted that the question of employment status be determined strictly by reference to the rights and obligations contractually agreed by the parties, not (at least in most cases) the reality of how those terms have been put into practice. This has made it much easier for organisations to engage workers as contractors, even when in practical terms there may be little to suggest the workers have businesses of their own or any real autonomy over how they supply their services.

In response to concerns over these rulings, the Albanese Government is now proposing to return the law to where it arguably stood before February 2022.

There will still be no comprehensive definition of the terms employee or employer. But a new section 15AA speaks of determining the existence of an employment relationship by reference to '*the real substance, practical reality and true nature of the relationship'*. This requires consideration not only of the contractual terms governing the relationship, but of '*other factors relating to the totality of the relationship'*, including '*how the contract is performed in practice*'.

Lest there be any doubt as to the intent, both a note to the new section and the EM explicitly describe the change as a response to the two High Court decisions. The reform is unlikely to require a large number of existing contractors to be reclassified as employees. But it may be advisable to reconsider any arrangements adopted on the basis of those rulings, especially if previous advice had pointed to a risk of a finding of employment.

At the very least, organisations need to be careful of relying on contractual terms that purport to grant freedoms to their 'contractors' that may never in practice be exercised, such as to work for other clients, or to delegate or sub-contract the performance of their duties.

For the time being at least, the proposed change will not affect the likes of sole traders, partnerships or non-trading corporations who can only qualify as national system employers because of a referral of legislative powers in the State in which they operate. But that may change as and when the States update their referrals.

The reality-based approach will also not affect the operation of other federal laws that effectively incorporate the common law test, such as those relating to income tax or superannuation contributions, much less State or Territory laws on matters such as workers compensation or long service leave. In those contexts, the High Court's contract-centric approach will still prevail. But it remains to be seen whether similar changes will ultimately be proposed in those contexts as well.

Sham contracting defence

On a related note, section 357 of the FW Act prohibits an employer from misleading a person who is legally an employee into believing they are an independent contractor. It is currently a defence that the employer did not know, and was not reckless as to, the worker's true status. Under the CL Bill, a more objective test will be used, as a number of inquiries have previously recommended. The employer will only be able to escape liability by showing that they reasonably believed the worker to be a contractor. That will make the defence harder to establish, especially where the employer has not received independent advice supporting their view that the worker was not an employee.

'Regulated work' under digital platforms and in road transport

Various provisions in the FW Act offer protections for independent contractors, for example against bullying or sexual harassment. But aside from certain award provisions in the textile, clothing and footwear industry, the legislation does not seek to set minimum standards for work performed under commercial contracts for services.

Under proposals in the CL Bill that are set to take effect from July 2024, that will change. Under a new Chapter 3A of the FW Act, the FWC is to be given new powers to set minimum wages and conditions for 'regulated work' performed either by 'employee-like' workers using digital labour platforms such as (potentially) Uber or Mable, or by contractors in the road transport industry. The tribunal will also be able to hear and determine what are effectively unfair dismissal claims from these workers.

The proposed new provisions are lengthy and complex. Given their potentially limited application outside the transport sector, the summary that follows deals only with some of the main features.

Definitions

A new set of definitions are set to be added to the FW Act as sections 15B–15S. These refer , among other things, to two types of 'regulated worker', an 'employee-like worker' or a 'regulated road transport contractor', working for one of two types of 'regulated business': a 'digital labour platform operator' or a 'road transport business'.

The first of these streams involves paid work performed by independent contractors that is arranged or facilitated through some form of 'online enabled application, website or system'. To be regulated under the provisions set out below, those contractors must have 'employee-like' features, or (if the contractor operates as a personal company, partnership or trust) rely on someone with those features to do all or a significant majority of the work.

A worker is considered 'employee-like' for this purpose if they satisfy any one or more of four tests:

- they have low bargaining power in negotiating the contract for their services;
- they receive lower remuneration than an employee would for comparable work;
- they have a low degree of authority over the performance of the work; and/or
- they have any other characteristic prescribed by regulations.

This is clearly intended to catch platforms that set the price for the work they facilitate, and/or control the way it is performed – assuming their workers are not found to be employees under the modified definition discussed earlier, which in some instances would seem quite plausible. But even more 'hands off' platforms that do little more than help connect contractors with their clients could still be caught, at least in relation to lower-paid work.

In terms of road transport, the definitions are much broader. They cover contractors (or again individuals operating through personal companies, partnerships or trusts) who do a wide range of road transport work. The sectors covered are primarily those for which modern awards exist, including road transport and distribution, long distance haulage, waste management, cash in transit, and passenger vehicle transportation.

Minimum standards for regulated work

The FWC will be empowered to set what are essentially award-like conditions for specified types of employee-like platform workers or road transport contractors, through a 'minimum standards order'. These orders may be expressed to cover businesses either by name or by reference to a specified class.

The tribunal may make an order either on its own initiative, or on application from a relevant business, a registered union or employer association, or the Minister.

In exercising this power, the FWC must have regard to a 'minimum standards objective' set out in proposed section 536JX. It is also obliged, in the case of road transport work, to go through extensive consultations. This and other features of the legislation (including some mentioned further below) are said by the Minister to be necessary 'to ensure that the mistakes of the Road Safety Remuneration Tribunal are not repeated'. This a reference to the body established in 2012 to set 'safe rates' of pay for the industry, but abolished in 2016 after a backlash against its first proposed determination.

Minimum standards orders may cover a wide range of matters, including payment terms, working time, insurance, consultation and representation. But they are specifically precluded from regulating overtime rates, rostering, matters that are 'primarily of a commercial nature', or work health and safety matters already dealt with by legislation. They must also not deem the workers that they cover to be employees, or otherwise change the form of their engagement.

Instead of making a minimum standards order for particular work, the FWC has the option of formulating 'minimum standards guidelines' instead. Such guidelines are subject to more or less the same rules as orders, except that they do not create legally enforceable obligations. It is possible that some businesses or their representatives may seek to have guidelines put in place as a preferable alternative to a minimum standards order.

Collective agreements for regulated work

The CL Bill provides for a digital platform operator or a road transport business to enter into a 'collective agreement' with a registered union over the terms on which regulated work is performed. The union would need to be entitled under its rules to represent the interests of one or more of the regulated workers to be covered by the agreement, but need not have actual members.

If registered with the FWC, such an agreement would create legally binding obligations. But it could not specify terms and conditions inferior to those set by a minimum standards order. Nor could it deal with matters that are primarily of a commercial nature.

The workers covered would need to have been informed of the negotiations and to have had the agreement explained to them, before it could be approved by the FWC. But unlike an enterprise agreement for employees, there would be no requirement for any vote to occur.

Any disputes over the negotiation of a proposed collective agreement could be referred to the FWC for conciliation. But the tribunal would have no power to arbitrate.

Unfair deactivation or termination claims

The FWC will be able to deal with claims from an employee-like worker that their platform access has been unfairly restricted, suspended or terminated, providing they have regularly worked for the platform for at least six months. Road transport contractors can likewise claim unfair termination of their services contract if they have been providing services to the relevant business for at least 12 months.

To be eligible to seek redress, the worker will need to have an annual rate of earnings that is less than the 'contractor high income threshold', a figure to be set by regulations. Applications would also generally need to be lodged within 21 days of the deactivation or termination.

In determining unfairness, the FWC will consider whether there was a valid reason for the deactivation or termination, and whether the worker was accorded procedural fairness. It must also consider whether the business complied with a Digital Labour Platform Deactivation Code or a Road Transport Industry Termination Code issued by the Minister. Serious misconduct by either type of worker would preclude a deactivation or termination from being treated as unfair.

In terms of remedies, the FWC would be empowered to order the restoration of platform access or the creation of a new services contract, as the case might be. It could also, if appropriate, require the business to compensate the reinstated worker for pay lost as a result of the deactivation or termination. Where reinstatement was not appropriate, road transport contractors could also claim up to 26 weeks of earnings or half the high income cap as compensation. But that option would not be available to digital platform workers.

Road transport contractual chains

The CL Bill allows for regulations to be made to authorise the FWC to make orders regarding 'contractual chains' within the road transport industry and those participating within those chains. The regulation-making power is expressed in broad terms, and few details are given, But the EM suggests that it would 'give the Government flexibility to extend the operation of the new road transport jurisdiction in Chapter 3A to contractual chains, should it become apparent this is necessary to ensure the successful operation of the new framework'.

Institutional arrangements for regulating road transport work

The Bill will establish an Expert Panel within the FWC for the road transport industry, which will need at least one member (who may be an outside expert appointed on a part-time basis) with relevant knowledge and expertise. The Panel will be responsible for setting and varying minimum standards not just for regulated road transport workers, but (through modern awards) for employees within the industry.

In exercising its powers, the Expert Panel will need to have regard to a 'road transport objective' outlined in proposed section 40D. This requires the Panel to consider the safety, sustainability and viability of the road transport industry, whilst also being aware of the need to avoid unnecessary adverse impacts on sustainable competition among road industry participants, as well as administrative and compliance costs.

The Bill also proposes a Road Transport Advisory Group which will advise the FWC on matters relating to road transport.

Unfair contract terms

Independent contractors are currently able to challenge the fairness of the contractual terms under which they are engaged under either or both of two laws.

One set of provisions, in Part 2-3 of the *Australian Consumer Law* (ACL), applies where a contractor qualifies as a 'small business' and wishes to complain about a term in a standard form contract for the provision of services that operates in an unfair and one-sided way. The only recourse at present is to seek a court order invalidating the offending term. But under amendments that will take effect in November 2023, a greater range of remedies will become available, including penalties for merely having an unfair term in a 'standard form' contract.

The other relevant law is Part 3 of the *Independent Contractors Act 2006* (IC Act). It allows the Federal Court or the Federal Circuit and Family Court to vary or set aside certain types of contracts for services that are found to be harsh or unfair. According to the government, this had led to only three court rulings, out of a total of 68 cases launched over the past 17 years.

Instead of making changes to these provisions, the CL Bill will create a third option, in relation to any contracts made after the Bill is passed. It is proposed that, under a new Part 3A-5 of the FW Act, a contractor (or an organisation representing their industrial interests) could apply to the FWC for an order relating to unfair contract terms in a 'services contract', a term to be defined in a similar way to section 5 of the IC Act.

However, an application could only be made if the contractor's annual rate of earnings was less than the contractor high income threshold. This option is targeted at those with lower bargaining power and pay, where the costs of going to court disincentivise or prevent contractors from seeking a remedy, while those above the threshold could continue accessing protections under the IC Act or the ACL.

The FWC would need to be satisfied that the services contract contained one or more unfair terms, which, in an employment relationship, would relate to a 'workplace relations matter'. What constitutes such a matter would, again, largely reflect the approach taken in section 8 of the IC Act.

When determining whether a term is unfair, the FWC may consider:

- the relative bargaining power of the parties;
- whether the services contract as a whole displays a significant power imbalance between the parties' rights and obligations;
- whether the term is reasonably necessary to protect one party's legitimate interests;
- whether the term imposes a harsh, unjust or unreasonable requirement on a party to the contract;
- whether the services contract provides for total remuneration that is less than employees or regulated workers performing similar work would receive; and
- any other matters the FWC considers relevant.

The FWC would need to take into account fairness between the parties in deciding to make an order, and what kind of order to make. The FWC could either set aside all or part of the contract, or vary any parts which, in an employment relationship, would relate to a workplace relations matter.

Labour hire and 'same job, same pay'

Earlier this year, the Albanese Government was consulting over a plan to establish a national licensing regime for labour hire providers, to replace the existing schemes in Victoria, Queensland, South Australia and the ACT. But rather than proceed with legislation, it was decided to give the States and Territories the opportunity to agree on a 'harmonised model', which would require the creation of new systems by those (such as New South Wales and Western Australia) without them.

The government is still, however, pursuing its 'same job, same pay' policy, which seeks to ensure that labour hire workers cannot be paid less than directly engaged employees would have been for the same work. But under the CL Bill, this will only apply where the host organisation has an enterprise agreement or equivalent instrument. Further, the policy is not automatically put into effect – it requires an application to the FWC.

Under a new Part 2-7A of the FW Act, which is proposed to take effect from November 2024, the FWC may be asked to make a 'regulated labour hire arrangement order'. The threshold requirements for such an order are that:

- an employer is supplying its employees, whether directly or indirectly, to work for a host organisation;
- the host organisation must not be a small business; and
- the host must have an enterprise agreement, a workplace determination or a public service determination that would apply to the employees if they were directly engaged by the host to perform the same kind of work.

If each of those requirements is met, the FWC must make an order unless satisfied it is 'not fair and reasonable in all the circumstances' to do so. It is required for this purpose to consider any submissions put to it concerning various specified matters, or any other matters it considers relevant.

The specified matters include the nature of the pay arrangements at both the host and the supplier, the history of their 'industrial arrangements', the nature of any relationship between the host and supplier (who may, for example, be related entities), and the terms of the supply arrangement, including its duration, the location of the work, and the industry involved.

The FWC may also be asked to consider whether the arrangement will be wholly or principally for the 'provision of a service' to the host, rather than the 'supply of labour', together with several related matters. Those include the extent of the supplier's involvement in supervising or controlling the work, or providing systems or equipment for it, and whether the work is of a specialist or expert nature.

If an order is made, its effect must be to ensure that the employees being supplied are paid at least as well as they would be under the host's agreement or determination. The host must, if requested, provide any relevant information to the supplier to help it comply with its obligations.

Importantly, an order will not apply to any supply for a period of three months or less – although that 'exemption period' can be either lengthened or shortened by the FWC on application by any affected party. The stated intent is to exempt labour hire arrangements for 'surge work', or where a short-term replacement is needed. An order will also not apply in relation to employees who are covered by a registered training contract.

There are further and extremely detailed provisions that permit the FWC to clarify or modify the operation of a regulated labour hire arrangement order in various circumstances. It can, for instance, make an 'alternative protected rate of pay order' that draws on the pay rates set by a different but more appropriate agreement or determination applicable to the host or one of its related entitles.

To safeguard the operation of the new regime, there will also be a series of anti-avoidance measures. These prohibit, among other things, any 'scheme' that would prevent the FWC from making a regulated labour hire arrangement order, or the use of a series of short-term engagements to avoid the operation of an order.

In terms of how broadly these new provisions might operate, it seems clear that their primary target is arrangements in sectors such as mining and aviation, where unions have long claimed that employers

have used both external and 'internal' contracting arrangements to escape the effect of union-negotiated pay and conditions.

However, as currently drafted Part 2-7A could apply to a much wider range of situations. Both the Bill and the EM use the language of 'labour hire', and the EM states that there is no intent to regulate 'contracting for specialised services'. Yet there is no mention of labour hire in the provisions that define the FWC's jurisdiction. It is enough that one employer supply employees to 'work for' another. And far from excluding contracts for specialised services, the drafting makes it clear that such arrangements *do* fall within the new scheme. The FWC can choose not to regulate them – but there is no bar to it doing so.

Compliance and enforcement

Given the persistent evidence of workers being underpaid their entitlements under awards or enterprise agreements, various inquiries have recommended that the sanctions available against employers should include criminal liability, at least for more serious or systemic forms of wrongdoing. There have also been calls for higher civil penalties.

Reforms of both those kinds were included in the 2020 'Omnibus Bill' but eventually abandoned by the Morrison Government, despite parliamentary support. It is therefore no surprise to see them resuscitated in the CL Bill, albeit in a somewhat different form. There are also other changes proposed, notably in relation to the concept of 'serious contravention' and the effect of compliance notices.

Criminal liability for underpayments by employers

A new section 327A of the FW Act will make it a criminal offence for a national system employer to engage in intentional conduct that results in a failure to pay a 'required amount' to an employee, or on behalf of them or for their benefit.

The amount must be payable under the Act, a fair work instrument, or a transitional instrument that has effect under the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* (Cth). But certain types of payment are excluded – most notably, a superannuation contribution.

Corporate bodies will be liable for punishment in accordance with Part 2.5 of the Criminal Code. The Commonwealth, but not State or Territory governments, could be held liable for wage theft related offences.

The Fair Work Ombudsman (**FWO**) will be able to investigate the possible commission of a wage theft offence, including the various 'related offences' (such as attempting, assisting or inciting commission) for which section 6 of the *Crimes Act 1914* (Cth) and Part 2-4 of the Criminal Code provide.

However, prosecutions of wage theft offences will not be handled in court by the FWO. Instead, they will be led by the Commonwealth Director of Public Prosecutions (**CDPP**), on information provided by the Australian Federal Police. Prosecutions may commence within 6 years of the offence allegedly occurring.

Punishment for wage theft could attract imprisonment for up to 10 years, or a fine, or both for individuals. Fines could run up to $1.5 million for individuals, $7.8 million for companies, or 3 times the underpayment amount if that would be greater.

Tempering against the gravity of the new provisions is the concept of a 'cooperation agreement' between the FWO and anyone who self-reports conduct that may amount to the commission of a wage theft offence. Self-reporting such conduct and entering into a cooperation agreement, or an enforceable undertaking relating to the underpayments, would provide a 'safe harbour' and prevent subsequent prosecution.

The FWO will be required to consult with the National Workplace Relations Consultative Council in the development of their compliance and enforcement policy, including the circumstances in which they would

be willing to accept an enforceable undertaking or a cooperation agreement in relation to admitted contraventions. Once agreed, the policy would then be publicly available.

Fair work inspectors will also have their powers clearly defined to allow the investigation of suspected ancillary and similar offences, under new 'related offences provisions'.

Effect on State wage theft laws

Both Victoria and Queensland have already introduced criminal liability for wage underpayments, under the *Wage Theft Act 2020* (Vic) and section 391(6A) of the *Criminal Code* (Qld). The Victorian model in particular is very different to that proposed in the CL Bill. It criminalises 'dishonestly' withholding employee entitlements, with the standard of dishonesty determined according to the standards of a reasonable person.

As matters stand, it is far from clear that these laws can validly be used to prosecute a national system employer for conduct that involves a breach of the federal FW Act. Labor had promised before the election that any wage theft laws it created would not override existing State legislation. But there is no mention in the CL Bill of any intent to preserve State laws. Without any explicit provision to that effect, the creation of the new federal offence will greatly strengthen the argument that the State provisions are inconsistent with the FW Act and thus cannot be used to prosecute national system employers.

Increased civil penalties

Civil penalties are set to rise to reflect public sentiment against wage theft. In particular, there is to be a fivefold increase in the maximum penalties for contravening most provisions, including the National Employment Standards (NES), modern awards, enterprise agreements, the rules concerning method and frequency of payment of wages, and employer record-keeping and pay slip requirements.

In addition, where a contravention is 'associated with an underpayment amount' (as defined in a new section 546(2A)), it will be possible for an applicant to seek a maximum penalty that is the higher of either the ordinary maximum penalty for the contravention, or an amount that is three times the value of the amount that has been underpaid.

Serious contraventions

Section 557A of the FW Act deals with 'serious contraventions', which attract civil penalties up to a maximum 10 times that for a standard contravention. The concept will be extended to cover both knowing and reckless contraventions, and the existing requirement of the conduct being part of a systemic pattern relating to one or more persons will be removed.

A person will be taken to have been reckless for this purpose if they are 'aware of a substantial risk that the contravention would occur', and in light of the circumstances known to them it is 'unjustifiable to take the risk'.

Compliance notices and notices to produce

Section 716 of the FW Act will be amended to make it clear that a compliance notice issued by a fair work inspector or the FWO may specifically require a person to calculate (and then pay) an amount that has been underpaid.

There will also be an amendment to section 545 to make it clear that a court's powers to remedy a contravention of the legislation may include requiring a person to comply with a compliance notice, or a notice to produce information issued by an inspector or the FWO. In addition, the maximum civil penalty for failing to comply with a compliance notice is set to increase 10 times.

Union rights of entry

When exercising a right to enter premises to investigate a suspected contravention of the FW Act or a workplace instrument, a union official must normally give at least 24 hours' notice. That requirement can be waived under section 519 of the FW Act where the FWC is persuaded that relevant evidence might be concealed or destroyed.

The CL Bill proposes, as from July 2024, to lower the bar for obtaining such an exemption by enabling it to be granted where the tribunal is satisfied that the suspected contraventions involve the underpayment of members of the official's union. But all other conditions and requirements for exercising a right of entry will remain, including limits on access to employment records.

As a safeguard, where the exemption is misused, the FWC will also be empowered to restrict the future issue of exemption certificates to particular permit holders or their union, or to impose conditions on future entry permits.

A further amendment to section 502 will extend the prohibition on any person hindering or obstructing a permit holder who is exercising entry rights. It will now cover acting in an 'improper manner' towards the permit holder. This will align the prohibition with the standards of behaviour expected of the permit holder under section 500.

Union delegate rights and protections

Part 3-1 of the FW Act prohibits adverse action against union members, including where they assert workplace rights. The CL Bill proposes to go further and create positive rights for workers when acting as workplace delegates for a registered union.

Under provisions to be added to Part 3-1, a person will be treated as a workplace delegate if they are appointed or elected under the rules of a registered union to represent members who work at the same enterprise. Workplace delegates will be provided with rights to:

- represent the industrial interests of members or persons eligible to be members of the union, including in disputes with the employer;
- reasonable communication with current or potential members, in relation to their industrial interests;
- for the purpose of representing those interests, reasonable access to the workplace and any facilities where the relevant enterprise is being carried on; and
- reasonable access to paid time, during normal working hours, to undertake training in their role – unless the employer is a small business.

In determining what is reasonable, regard will be had to the size and nature of the enterprise, the resources of the employer, and the facilities available at the enterprise.

The CL Bill will also create specific protections for workplace delegates, by prohibiting employers from unreasonably failing to deal with them, hindering, obstructing, or preventing the exercise of their rights, or knowingly making misleading representations to them.

From 1 July 2024, each modern award will be required to include a term which regulates the exercise of workplace delegates' rights. This will provide more detail on how the new requirements are to be understood and implemented, whether generally or with specific reference to a particular sector or occupation. For example, there may be some attempt to limit how many delegates can be appointed for a particular enterprise, or how often employers are expected to meet delegates.

An enterprise agreement will be deemed to contain the term on delegate rights from its underpinning award, or the most favourable term if there is more than one such award, unless the agreement itself offers greater rights to delegates.

Compliance with a workplace delegates' right term contained in an applicable industrial instrument will be taken to satisfy the rights afforded to workplace delegates.

Similar rights, protections and processes will apply from July 2024 in relation to delegates for digital platform workers and road transport contractors working for regulated businesses.

Discrimination protections

The reach of the FW Act's protections against discrimination are set to become broader, as subjection to family and domestic violence will be added to the list of protected attributes. This will mean that employers cannot refuse to employ a person or take any adverse action against an existing employee because they are or have been subject to such violence. Awards and enterprise agreements will also be required not to contain terms which discriminate on that basis.

Small business redundancy exemption

Section 121(1) of the FW Act exempts small business employers from having to make redundancy payments under the NES. It is a quirk of that provision that when a larger business becomes insolvent, the last employees to lose their jobs may miss out on redundancy pay, because by that time the business has slipped under the 15-employee mark and become a small business.

To address that anomaly, a complex set of provisions will be added to section 121 to carve out the situation where an employer has only become a small business because of downsizing associated with insolvency.

Enterprise agreements

The government has revisited two features of the new system of multi-employer bargaining it created during its first tranche of reforms. It is also proposing to hand more power to the FWC in relation to model terms for enterprise agreements.

Agreements for franchisees

Prior to the 2022 Secure Jobs, Better Pay amendments, multiple franchisees of the same franchisor could band together to make a single-enterprise agreement. That capacity was removed, as a byproduct of the reforms which expanded the capacity for single interest employer agreements but reconfigured them as multi-enterprise instruments.

Under the CL Bill, franchisees will once again be permitted to make a single-enterprise agreement, while retaining the ability to make a multiple enterprise agreement. Choosing the first option will enable franchisees to conduct a single ballot to approve an agreement, rather than needing a successful vote at every individual enterprise. It will also be possible for unions to obtain a majority support determination on the basis of a single vote or petition, without needing to establish the necessary support at each individual franchisee.

Moving from multi- to single-enterprise agreements

New provisions will allow employers, and their employees, to opt out of an existing single interest employer agreement or supported bargaining agreement by making a single-enterprise agreement, even if the nominal expiry date of the previous instrument has not passed. In such circumstances, the replacement agreement must be compared to the current agreement (not the underlying modern award) to confirm that employees will be better off overall.

Model terms

All enterprise agreements are required to include terms relating to individual flexibility arrangements and consultation. Model terms are set out in the *Fair Work Regulations 2009* (Cth) (Regulations) which, in practice, are inserted verbatim in many agreements. The Regulations also include a model term on dispute resolution which, although not mandatory, is also commonly used.

The CL Bill proposes to remove the model terms from the Regulations, and instead hand the power of determining them to the FWC. The tribunal will be expected to consider 'best practice' and hear from interested parties.

Disamalgamation of unions

The CL Bill proposes to amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to repeal certain amendments made to it in 2020. These permitted a constituent part of a registered union or employer association to 'de-merge' from the organisation outside the normal time period of five years post-amalgamation. Labor supported this change at the time, but subsequently committed to undoing it in the face of union disquiet. A number of minor or technical amendments are also proposed to the de-merger provisions.

Penalties for federal work health and safety offences

The federal *Work Health and Safety Act 2011* applies to Commonwealth departments and agencies, along with a small number of businesses (including Telstra, Optus, John Holland and Linfox) which are self-insured under the Comcare scheme.

The CL Bill proposes to increase penalties for breaching the Act, in line with recommendations from the 2018 Boland Review into the model health and safety laws that operate everywhere in Australia except Victoria. The most notable reform, already introduced or proposed by various States and Territories, will be to add an industrial manslaughter offence, with effect from July 2024. It would apply to any intentional engagement in conduct that substantially contributes to a workplace death, where the person concerned (either an individual or a person conducting a business or undertaking) has been reckless or negligent. Industrial manslaughter would be punishable by up to 25 years' imprisonment for an individual, or otherwise a maximum penalty of $18 million.

Workers compensation for first responders

Proposed amendments to the *Safety, Rehabilitation and Compensation Act 1988* (Cth) would insert a number of deeming provisions to allow 'first responders' employed by the federal or ACT governments, including police officers, paramedics and firefighters, to claim workers compensation for mental health conditions such as PTSD, without having to prove a link to their employment.

Silica related diseases

Finally, the CL Bill proposes to amend the *Asbestos Safety and Eradication Agency Act 2013* (Cth) to address increases in silicosis and other silica-related diseases arising from employment. Among other things, what is now to be called the Asbestos and Silica Safety and Eradication Agency will have expanded functions related to silica safety, coordination and promotion, and monitoring of jurisdictional efforts to eliminate silica-related occupational diseases.

An Update on Underpayments: Key Takeaways from the FWO's August Media Release

By Cassie Burfoot, Director, and Brenna Mackay, Associate, Cowell Clarke

On 1 August 2023, the Fair Work Ombudsman ("**FWO**") provided an update on the national regulator's underpayment recovery efforts last financial year.

Reporting on acting FWO Kristen Hannah's speech to the Policy-Influence-Reform conference in Canberra of the same date, the FWO's media release highlighted the industries and compliance activities which underpinned another significant backpay result.

Here we summarise the three key takeaways from the media release and related speech by Ms Hannah.

1. Last year was no anomaly – another half a billion dollars in wages was recovered

The FWO has confirmed that in 2022-23, it recovered $509 million in unpaid wages and entitlements for workers. This is the second largest figure ever recovered by the FWO, coming behind last financial year's recovery of over $532 million.

The acting FWO described the latest figure as "*a great result for the workers who have been back paid their withheld wages, and also for the businesses that pay correctly and are no longer at disadvantage*". Ms Hannah credited the organisation's recovery of more than $1 billion in wages over two years to "*the consistent work that our agency has done to create an environment that expects large corporates to prioritise compliance and report to us when they have got it wrong*."

The FWO noted that more than half of the recovered wages and entitlements in 2022-23 related to large corporates and the university sector. The majority of these back-payments flowed from self-disclosure processes, with many resulting in enforceable undertakings.

2. The FWO's focus on the hospitality and agriculture sectors is proving to be successful

The FWO had previously indicated that fast food outlets, restaurants and cafes ("**the FRAC sector**") and the agriculture sector would be priority sectors in the context of the regulator's compliance and enforcement efforts last financial year.

In her speech, Ms Hannah discussed the FWO's rolling program of unannounced audits in the FRAC sector, across every capital city and multiple regional centres in 2022-23. The success of this strategy was illustrated with reference to $680,000 in unpaid wages recovered for over 1,000 workers in Melbourne alone, achieved through the use of Compliance Notices.

The FWO has also been active in the agriculture sector, with Ms Hannah referring to current litigation against a tomato and cucumber producer in Victoria, Lotus Farm Pty Ltd, regarding allegations that the company underpaid two Vietnamese-speaking employees more than $28,000 between June 2017 and September 2020.

In this case, Ms Hannah indicated that the FWO will be seeking that the court apply the reverse onus provisions of the *Fair Work Act 2009* ("**the Act**") so that the company should have to disprove the allegations against it.

3. Prosecutions against franchisors are on the rise

Following on from the "Protecting Vulnerable Workers" amendments to the Act in 2017, the FWO has demonstrated its clear focus on franchisors and the obligation to ensure compliance with workplace laws within franchise networks.

Ms Hannah referred to the litigation the FWO has commenced against the head franchisor of the 85 Degrees Daily Café brand, alleging that it is liable for contraventions by eight franchisees located in

Sydney. The FWO has taken the position that the head franchisor should reasonably have known that the franchisees would underpay staff based on a previous enforceable undertaking and proactive audits which confirmed non-compliance in the past.

The FWO has also commenced action against Bakers Delight in connection with extensive underpayments at three stores in Hobart formerly operated by a franchisee. The alleged underpayments are said to total $1.25 million across 142 employees between July 2017 and October 2022.

These cases show that the FWO is actively utilising the responsible franchisor provisions of the Act. Ms Hannah explained "*Holding franchisors to account is important to generate systemic change through franchisor networks that will lead to ongoing future compliance*."

Summary

The FWO continues its focus on ensuring that employers comply with workplace laws, especially as they relate to underpayment of wages and entitlements in the FWO's "target" industries or where vulnerable employees are concerned. In turn, we are now seeing a consistent trend in the significant compliance activity and amount of wages and entitlements the FWO is recovering each year. Proactive compliance has become more important than ever.


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Employee fairly dismissed for unauthorised working from home

By Mellor Olsson Lawyers Employment Law team

On 7 September 2023, the Fair Work Commission (**FWC**) dismissed an unfair dismissal claim by finding that a worker, who worked from home without authorisation, in combination with two other allegations, provided a valid reason for her dismissal.[24]

Chantelle Major was initially employed by Strata Management Group Pty Ltd (**Strata Group**) in a Senior Strata Manager role with flexible working from home arrangements. In late 2022, she moved into a Business Development Associate role coinciding with her relocation to the Sunshine Coast. This role required her to work in the Brisbane office one day a week and the Sunshine Coast office four days a week.

In her previous role, Ms Major worked from home regularly. While undergoing training in her new role (a period of 12 to 18 months), Ms Major was required to request any flexible work arrangements for consideration by HR. Ms Major did not make any such requests.
In March 2023, Strata Group became aware that the Sunshine Coast office had not been used since 24 February, a period of approximately 3 weeks. The managing director attended the Sunshine Coast office and discovered an open notebook with a page titled "*24/2/23 Things to Do*". Ms Major was nowhere to be found.

On 21 March 2023, Strata Group wrote to Ms Major seeking her response to allegations she had:

- forwarded private internal emails to her personal email address and deleted the sent emails – including from the deleted items folder – in an attempt to conceal her actions (**allegation one**);

- not attended the Sunshine Coast office during normal business hours since the date written in her notebook (relying on data obtained from her work mobile phone and the building's access records) (**allegation two**); and

- during work hours, left the office after lunch and not returned to the office for the remainder of the working day, instead working from home (**allegation three**).

After considering Ms Major's response, Strata Management terminated her employment for dishonest conduct in breach of her contract. The termination letter stated her conduct had "damaged their trust and confidence in her ability to perform her duties" and referred to Ms Major's "direct contravention of the directions […] that you attend work at the Sunshine Coast office during your designated work hours, and the agreed working arrangements made between you and SMG regarding work from home."
The FWC ultimately held that:

- Ms Major failed to comply with Strata Group's lawful and reasonable directions to work from the Brisbane and Sunshine Coast offices;

- Ms Major was not entitled to work from home between the dates of 24 February and 13 March;

- the evidence did not disclose "any proper basis for the Applicant to be forwarding work related material to her private email address and the Respondent was entitled to hold serious concerns about the Applicant's conduct";

- despite Strata Group not providing Ms Major with copies of the emails allegedly forwarded to her personal email address and subsequently deleted, she was given a reasonable opportunity to respond to the allegations through the show cause process; and

[24] *Chantelle Major v Strata Management Group Pty Ltd* [2023] FWC 2276.

- together, the allegations provided a valid reason for dismissal.

For employers, this case highlights the importance of maintaining clear policies about flexible working arrangements (and requests for same) and ensuring that employees are given sufficient information about allegations of misconduct to enable them to respond accordingly.

Employees should understand and abide by any policies and procedures relevant to their employment. When faced with allegations of misconduct, employees should aim to preserve the employment relationship by responding to the allegations as far as is reasonably practicable and demonstrating remorse for any wrongdoing, rather than focusing on any alleged deficiencies in the disciplinary process and refusing to respond to allegations.

The FWC's decision in its entirety can be accessed at this link: Austlii – *Chantelle Major v Strata Management Group Pty Ltd* [2023] FWC 2276.

To Adjust or Not to Adjust?

By Simon Bourne, Firm Principal, SMB Workplace & Employment Law

Panazzolo v Don's Mechanical & Diesel Services Pty Ltd [2023] FedCFamC2G 665

The Federal Circuit and Family Court of Australia has recently delivered a judgment in proceedings commenced as a complaint to the Australian Human Rights Commission, whereby the affected employee, Mark Panazzolo alleged that his employer, Don's Mechanical & Diesel Services, breached the provisions of the *Disability Discrimination Act 1992* (Cth) (**Act**) by refusing to allow him to return to work following an injury to his wrist which occurred outside of work hours.

Mr Panazzolo's wrist injury was serious - it required surgery and the insertion of a metal plate and screws to fix a fractured ulnar. The injury was to his left arm, Mr Panazzolo being right hand dominant. Mr Panazzolo was advised that he would be unable to engage in heavy lifting or loading involving his injured arm for a period of about three months following the operation, which occurred on 21 October 2020.

In short, Mr Panazzolo claimed to have been subject to unlawful discrimination when, approximately three months later, his treating medical practitioners stopped issuing medical certificates because he was no longer considered unfit for work and he sought to return to work - but was advised by Don's Mechanical & Diesel Services that he was not allowed to do so until such time as he could furnish medical evidence confirming that he was completely recovered from his injuries and certified fit to perform all of his duties without restriction. Mr Panazzolo advised that he was unable to obtain the evidence that Don's Mechanical & Diesel Services required without arranging a work site assessment and that he could not afford to arrange such an assessment without being allowed to return to work (his leave entitlements by then having been exhausted).

It was not until February 2021 that Don's Mechanical & Diesel Services arranged for an assessment of Mr Panazzolo's capacity to return to work. The report obtained identified that Mr Panazzolo could return to work, albeit positing some restrictions in respect of two aspects of his position. One was to implement a carrying restriction for weight above 25 kilograms, the other was for tasks involving heavy and sustained or repetitive gripping. A further recommendation was made, but not expressed as a precondition to a return to work, to the effect that Mr Panazzolo should engage in a course of physiotherapy in the expectation that such would enable him to be certified fit to return to work without restriction over a period of six to eight weeks. Again, Mr Panazzolo was not in a position to afford that additional treatment without being allowed to return to work and the employer was not prepared to pay for it.

In the end, the Court found that Don's Mechanical & Diesel Services could have reasonably accommodated the restrictions on carrying and heavy and sustained or repetitive gripping tasks if necessary.

The question then became whether an employer is required to make a reasonable adjustment for the purposes of section 5(2) of the Act by allowing a worker who asserts full capacity to return to work to, in effect, find out whether that is the case or not. Or can an employer insist that a worker remain away from work (and without remuneration) until such time as the worker can satisfy the employer that they are fit to perform all of the duties of their role, without restriction or risk of aggravation from '*Day One*"?

The Court recognised that the notion of requiring an employer to make *reasonable adjustments* for an employee seeking to return to work following an injury must be balanced against an employer's protection from claims of unlawful discrimination where a worker is unable to perform the *inherent requirements* of their role. In determining where that balance lay, the Court referred to the decision of *Watts v Australian Postal Corporation* [2014] FCA 370, in particular the passage from that judgment

which states that a *reasonable adjustment* is "an alteration or modification 'for' the person, which operates on the person's ability to do the work she or is employed or appointed to do".

The Court found that rather than making reasonable adjustments for Mr Panazzolo's disability, Don's Mechanical & Diesel Services required Mr Panazzolo to personally adapt to his disability by obtaining the physiotherapy recommended to him in order to accommodate his employer's desire that he be able to return to work without any adjustments at all having to be made.

In determining the matter, the Court weighed the considerations of section 11 of the Act, noting in particular that Don's Mechanical & Diesel Services was a small business, which could not avoid the need for Mr Panazzolo to return to the relatively heavy and hands-on work of a busy diesel mechanics workshop. The Court found that the employer could not justify objecting to the short-term inconvenience to its business which would have been occasioned by allowing Mr Panazzolo to return to work whilst he regained full capacity. Ultimately, the Court found that Mr Panazzolo could have, and should have, been allowed to come back to the workshop to see how he coped with the requirements of his position.

Whilst the Court accepted that Don's Mechanical & Diesel Services' held concerns with respect to safety if Mr Panazzolo did not carry out his duties effectively (eg; by failing to tighten a wheel to the required torque level), it did not accept that this evidenced that Mr Panazzolo was incapable of carrying out the inherent requirements of his role. The Court found that those anxieties were largely subjective in nature and noted that no empirical evidence was put before the Court to demonstrate whether those concerns were well placed or not.

Having found that Mr Panazzolo was subjected to unlawful discrimination, the Court considered and assessed damages in the total amount of $44,000.00. In a jurisdiction where costs generally follow the event, the outcome is no doubt a significant financial impost on the employer. Mr Panazzolo, on the other hand, lost his ongoing remunerative employment - with all of the monetary and non-monetary benefits that gainful employment brings - for a relatively modest monetary outcome.

Compared to two and a half years of litigation in the Federal Circuit and Family Court of Australia, the time and expense of a 6 – 8 week course of physiotherapy and a few potentially unproductive weeks back at work for Mr Panazzolo would have been very modest indeed.