



DECEMBER 2018 NEWSLETTER

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

Patron:

Mr Greg Stevens

PRESIDENT'S MESSAGE

Dear Members

We have come to the end of another busy year for ALERA SA. Thanks must once again go to our Committee members who continue to support ALERA SA in personal time. That support has not only come from present Committee members; for a significant period of time in the history of ALERA SA, Sandra Dann, Craig Stevens (both who have served as past Presidents) and Trevor Evans have assisted and supported initiatives year on year. You are all very much missed at our monthly meetings. We recognise each of you for all you have done over the years.

I am pleased to report that the ALERA National Conference (hosted by ALERA SA) held in the Barossa Valley from 18 to 20 October 2018 was a great success. The Conference was well attended by members with strong turn out by interstate members of other State societies. Highlights of the conference included:

- Discussion by Justice Iain Ross on national issues affecting workplace relations, and the work of the Fair Work Commission;
- A presentation by Professor Andrew Stewart following the *Skene* decision affecting casual employment and employees with 'non-standard hours'. I am pleased that Andrew will update members on this topic in a session to be held in February 2019 (see for interest, [Skene v Workpac Pty Ltd \[2018\] FCAFC 131](#));
- Sex Discrimination Commissioner Kate Jenkins, Australian Human Rights Commission, reported on the national inquiry into sexual harassment in Australian workplaces.
- Digital Disruption and the Gig Economy impact, addressed Frances Flanagan, Research Director, United Voice and Alana Matheson, KPMG.
- The Saturday Workshop – conducted by members of the Fair Work Commission, featuring two mock proceedings – a determinative conference and an appeal.

The Conference Dinner, with entertainment by Andrew Stewart's own music band *Orange Whip* must also feature as a highlight and event in itself. I am also proud to acknowledge the first National ALERA Awards, for significant contribution to the field of Employment Relations was awarded to nominees from each participating State and Territory. For South Australia, this was gratefully received by Professor Andrew Stewart, who himself has been a member of the Association for many years and in that time, also served as President. Thank you Andrew for your tireless support.

Other recipients of the National ALERA Award for their service to

Employment Relations were acknowledged as follows:

- Deputy President Anna Booth, Fair Work Commission – nominated by NSW;
- Commissioner Anna Lee Cribb, Fair Work Commission – nominated by Vic; and
- John Merrell, Barrister at Law – nominated by Qld.

Recognition of our Life Members, and importantly, our long serving and immediate past Patron the Hon Trevor Olsson, was the focus of our Patron's Breakfast in November 2018. The Hon. Peter McCusker reflected upon Trevor Olsson's impact upon industrial relations not only in South Australia, but on a national scale. After many years of distinguished service, Mr Olsson has resigned as Patron of the Society, and has been presented with a commemorative plaque as a token of our thanks for his service. The contributions of fellow Life Members was also acknowledged namely Dolores Costello, John Cross, Greg Stevens and Roy Hegarty. We have also announced our new Patron, Greg Stevens respected and acknowledged in our industrial community as worthy ambassador of our objectives.

Our schedule of events planned for 2019 is shaping well. Exact times and dates will be confirmed but at this stage we have the following scheduled sessions:

- February 2019 – Professor Andrew Stewart (casuals, non-standard working hours and 'life after *Skene*');
- March 2019 – workshop (1 day) – facilitated by Members of the Fair Work Commission (Enterprise Agreements: updates in legislative and approval requirements, processes, tips and traps);
- May 2019 workshop (1/2 – 1 day) – (short course in strategies to avoid anti-bullying applications, followed by preparation of claims and defences when applications are made

I trust we all deserve our summer break and on behalf of the Association I wish you all a safe, happy and peaceful Christmas with family and friends, and a prosperous 2019.

Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018

On 6 December 2018 the *Fair Work Amendment (Family and Domestic Violence Leave) Bill 2018* (the Bill) passed both Houses of Federal Parliament.

When the Bill receives Royal Assent, it will change the *Fair Work Act 2009* to include an entitlement to unpaid family and domestic violence leave in the National Employment Standards (NES).

The new entitlement will apply to all employees (including part-time and casual employees). Employees will be entitled to 5 days of unpaid family and domestic violence leave each year.

Family and domestic violence is violent, threatening or other abusive behaviour by a close relative of an employee that:

- seeks to coerce or control the employee
- causes the employee harm or to be fearful.

A close relative of the employee is a person who:

- is a member of the employee's immediate family, or
- is related to the employee according to Aboriginal or Torres Strait Islander kinship rules.

Employees will be able to take the leave if they need to do something to deal with the impact of family and domestic violence and it's impractical to do so outside their ordinary hours of work.

On 1 August 2018, all industry and occupation awards were updated to include unpaid family and domestic violence leave. This entitlement applies now to people covered by industry and occupation awards.

For more information, you can visit the [Family and domestic violence leave section](#) on the Fair Work Ombudsman website www.fairwork.gov.au

DID YOU KNOW?????

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

ALERA NATIONAL CONFERENCE BAROSSA VALLEY OCTOBER 2018

PRESENTATION BY JUSTICE ROSS, PRESIDENT FAIR WORK COMMISSION

“MEASURING WHAT MATTERS”

Justice Iain Ross, President of the Fair Work Commission, presented at the ALERA National Conference on “Measuring What Matters”. The presentation emphasised the importance of identifying suitable measures by which to evaluate the effectiveness of modern working arrangements in Australia. Within this context, Justice Ross cited some useful resources, including:

- *Lynda Gratton – “The Future of Work is already here”*
- *Lynda Gratton and Andrew Scott “The 100 year life – living and working in an age of longevity”*

Justice Ross then discussed the 2017 independent review of modern working arrangements commissioned by the UK Prime Minister, the [“The Taylor Review of Modern Work Practices in the UK”](#) (the Taylor Review). Mr Matthew Taylor, CEO of the Royal Society for the Encouragement of Arts, Manufactures and Commerce (RSA), authored this review.

Relevantly the Review adopted 6 high level indicators of quality work:

- Wages
- Education and training
- Employment quality
- Working conditions
- Work life balance
- Consultative participation and collective representation

The Carnegie UK Trust and the RSA established the Measuring Job Quality Working Group in September 2017, to respond directly to the recommendation in the Taylor Review that a set of job quality metrics should be developed for the UK. In their “Measuring good work report” released in September 2018 (<https://www.thersa.org/globalassets/pdfs/reports/measuring-good-work.pdf>) they agreed on the following metrics:

- Terms of employment i.e. job security, minimum guaranteed hours, underemployment
- Pay and benefits i.e. pay (actual), satisfaction with pay
- Health, safety and psychosocial wellbeing i.e. physical health, mental health
- Job design and nature of work i.e. use of skills, control, opportunities for progression
- Social support and cohesion i.e. peer support, line manager relationship
- Voice and representation i.e. trade union relationship, employee information
- Work life balance i.e. overemployment, overtime

Justice Ross highlighted the dashboard developed by this Working Group to display the performance of the UK against these metrics. Along similar lines, he spoke of a possible National Report Card for Australia with a broader focus covering the following:

- Equality;
- Health;
- Closing the Gap;
- Homelessness;

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- Sustainability;
 - Poverty;
 - Job Quality.

On the topic of poverty, Justice Ross noted a 2018 Australian Council of Social Services (ACOSS) report, citing that there are three million people living in poverty, one in six children living in poverty, and increasing numbers of elderly that are homeless. Justice Ross also made the point that a lack of social mobility can affect economic growth and that as such, equality of opportunity is critical.

The first question that Justice Ross believes that Australia should consider when deciding on a system for regulating modern working arrangements is *“What do we want the system to deliver”*. As an extension of this question, he said that, in respect of the gig economy *“What is our objective?”*

Consistent with the previously mentioned theme of equality of opportunity, Justice Ross detailed the Fair Work Commission’s plan to increase accessibility and reduce complexity for its clients and stakeholders. Key initiatives of the Commission include the following:

- Additional support to self-represented users;
- Partnering with experts in behavioural insights (an example of this in practice is its introduction of SMS reminders to individuals about upcoming hearings they are a part of – this can increase system compliance by these individuals) ;
- A new case management system;
- Expanded access to free legal advice;
- Developing summaries of key modern awards (extension of plain language project) and improving enterprise agreement processing times.
- Probono services across Australia, starting in February 2019 in Adelaide.

Justice Ross ended by submitting that institutions are only as good as the interactions that they have with individuals. He said that, to address the gap between the have and have nots in Australia, we need to adopt a consensus approach to the question of *“What does good work mean in Australia?”*

PICTURES FROM THE NATIONAL ALERA CONFERENCE

Alana Matheson, KPMG



President Iain Ross, Fair Work Commission



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Orange Whip (feat Professor Andrew Stewart) played at the Conference dinner



Commissioner Peter Hampton presenting Professor Stewart with an ALERA Recognition award



Who are the “other persons” to whom health and safety duties are owed?

By Kylie Dunn, DMAW Lawyers Pty Ltd

A recent decision of the District Court of New South Wales in [Safe Work NSW v Wagga Motors Pty Ltd \[2018\] NSWDC 242](#) has provided some much needed guidance about the persons to whom work health and safety duties are owed under work health and safety legislation.

Background to the case

A horse float was taken to Wagga Motors Pty Ltd (Wagga) to be repaired. In the course of those repairs the oil level in the hydraulic system which controlled the horse float’s tailgate became low. This meant that the tailgate could fall to the ground when the locks on the tailgate were released. Following the repairs, the horse float was returned to its owner without the operation of the tailgate having been properly checked by Wagga. The following day, one of the horse float owner’s employees was killed when the tailgate fell on him.

Wagga was charged with an offence for failing to comply with a health and safety duty under section 19(2) of the *Work Health and Safety Act 2011* (NSW). The issue for the court in this case was whether Wagga owed a health and safety duty to the person who had died.

Primary work health and safety duties

Under work health and safety legislation across Australia (other than in Victoria and Western Australia) the primary work health and safety duty of a ‘person conducting a business or undertaking’ (PCBU) can be found in section 19. That section has two limbs.

The first limb (section 19(1)) obliges a PCBU to ensure, so far as is reasonably practicable, the health and safety of workers who are engaged, influenced or directed by the PCBU while they are at work in the business or undertaking. The second limb (section 19(2)) obliges a PCBU to ensure, so far as is reasonably practicable, that the health and safety of “other persons” is not put at risk from work carried out as part of the conduct of the business or undertaking.

Who are the “other persons” to whom duties are owed?

The court rejected Wagga’s arguments that it did not owe the deceased person a duty under the second limb provided for by section 19(2). Importantly, the court clarified that the second limb:

- extends beyond non-workers who were present at Wagga’s workplace and might be put at risk from the work carried out at that workplace;
- extends to any person who is in proximity to any risks created by the work undertaken by the PCBU.

In this case, the relevant risk was a risk to persons who may come into proximity of the tailgate. The risk was created at the time when the work was undertaken at Wagga’s premises, however other persons could be exposed to that risk after the horse float was returned to the owner. The court concluded that employees of the horse float owner were in proximity to the risk created by the tailgate, and were therefore “other persons” to whom Wagga owed health and safety duties under the second limb of section 19.

Lessons from the case

Businesses should identify what “other persons” might be put at risk by work carried on in their business and determine what measures are necessary to ensure, as far as reasonably practicable, the safety of those persons.