



OCTOBER 2019 NEWSLETTER

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Justin Ward

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Stephanie Gheller

Treasurer

Chas Cini

Committee Members

Commissioner Peter Hampton
Darryl Anthony
Abbey Kendall
Kaye Smith
Craig Stevens
Luke Faulkner
Sharaze Pentland

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

Patron:

Mr Greg Stevens

PRESIDENT'S MESSAGE



Dear Members

Greetings on behalf of the newly elected committee and office holders. The recent AGM saw the departure of Sandra Dann and Rodger Prince and the election of Luke Faulkner and Abbey Kendall. Sandra and Rodger have given many years' service to the association and we thank them sincerely. Welcome Luke and welcome Abbey.

The office holders have been playing musical chairs. Sharaze Pentland has handed the Secretary role to Stephanie Gheller and I, Glen Seidel, have handed the Treasurer role to Chas Cini whilst filling the vacated big shoes of Kaye Smith as President. Kaye has spent much time and energy on matters concerning ALERA nationally and locally. My hope is that with most matters resolved, I will have a less demanding term than did Kaye. Justin Ward retains the VP role and is the editor of this newsletter. Thanks also to Sharaze for her work in the Secretary's role.

As much as the work of the volunteer committee and the paid secretariat are essential for the organising of ALERA functions, it is the ongoing support of the membership which provides the *raison d'être* and the resourcing for the association. Membership fees have not risen in recent years because of the support of the members including at seminars and other events. I take that as a vote of confidence in the work of the committee.

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.

The committee strives to provide seminars and events which meet the professional and networking needs of members. The Patron's annual function at the Mercury Cinema on Monday 28 October is being organised to launch the DVD of the history of the IR Society of SA. A trailer was shown at the AGM. Many thanks are due to Peter Hampton for coordinating that oral history project.

Current issues will ensure a rich smorgasbord for future seminars. IR legislation "reform" is being contested with partisan zeal by the traditional players. We may never work out if we are in favour of freedom of religion or freedom from religion at work. The topic of casuals has suddenly become very serious and formal. Union management is also back/still in the cross-hairs.

Fret not. We will have plenty to unpack at seminars for some time to come.

Glen Seidel, President – ALERA SA



SAVE THE DATE!!!

ALERA SA NETWORKING AND END OF YEAR DRINKS

TUESDAY 26 NOVEMBER 2019

**THE POLICE CLUB
27 Carrington St Adelaide**

Sweet success for Cadbury workers in landmark personal leave decision

By Cassie Burfoot, Cowell Clarke



CADBURYS
BY MOUNTAIN AND SEA
CLAREMONT, TASMANIA

In *Mondelez Australia Pty Ltd v AMWU & Ors* [2019] FCAFC 138, the Full Court of the Federal Court of Australia held that personal leave entitlements are to be calculated based on an employees' actual hours of work as opposed to any notional number of average ordinary hours (eg. 7.6 hours per day).

Employers are now grappling with their potential back-pay liability and what the Federal Court's decision means for the accrual/taking of other leave entitlements.

The facts

Mondelez operates four food manufacturing plants in Australia including the Cadbury plant in Claremont, Tasmania.

The second and third respondents are full-time shiftworkers at the Cadbury plant and members of the AMWU (also being the first respondent in the action).

Mondelez and the second and third respondents are covered by the *Mondelez Australia Pty Ltd, Claremont Operations (Confectioners & Stores) Enterprise Bargaining Agreement 2017* ("EA").

The EA provides that employees working 12 hour shifts are entitled to 96 hours of paid personal leave per annum.

Historically, when the second and third respondents took a day of personal leave, Mondelez's practice was to deduct 12 hours from their accrued personal leave balance. As a result, the shiftworkers' personal leave accrual over the course of a year was only sufficient to cover absence for eight 12-hour shifts (ie. eight days).

The respondents submitted that this approach was inconsistent with the provision of 10 days of personal leave pursuant to the *Fair Work Act 2009* ("FW Act") and that the term "day" in section 96(1) has its ordinary meaning of a "calendar day" or a 24-hour period which ought to be interpreted as allowing every employee to accrue and be absent from work without loss of pay on 10 calendar days per year.

In opposition, Mondelez argued that the personal leave entitlement is based on a “notional day” consisting of an employee’s average daily hours, based on an assumed five-day working week. Mondelez relied upon the Explanatory Memorandum to the FW Act which elaborated on the intended operation of section 96(1), noting that “*the amount of leave accrued over a period is not affected by differences in the actual spread of an employee’s ordinary hours of work in a week*”.

The dispute before the Federal Court therefore was whether Mondelez’s method of accounting of the personal leave is inconsistent with the FW Act.

The Full Court’s decision

The majority of the Full Court decided in the respondents’ favour and held that the second and third respondents’ entitlement to a day’s paid personal leave is to be interpreted as an entitlement to be absent from work for the portion of a 24-hour period that would otherwise be allotted to work, ie. for 10 periods of 12 hours for each year of service.

On this reasoning, the Full Court determined that the employees in question could accrue up to 120 hours of personal leave per year based on the hours they typically worked.

The implications

Given that the *Mondelez* decision involved a detailed consideration of the proper interpretation of the personal leave provisions under the FW Act (in addition to analysing the EA), the outcome affects employees and employers across Australia.

Moreover, it is highly likely that the *Mondelez* decision – if upheld – will have a ripple effect upon the interpretation of other entitlements provided under the FW Act.

Subject to the outcome of a foreshadowed appeal (see further below), employers may need to revisit whether their practices for accruing and deducting personal leave are consistent with the interpretation adopted by the Full Court – especially in cases where their employees work longer than the “standard” 7.6 hours per day, such as in the case of shiftworkers, FIFO workers and in other industries which call for longer work days.

Liability in terms of underpayment and contraventions of the FW Act is a real risk.

The High Court appeal

As at the time of writing this article, it has been confirmed that Mondelez and the Federal Government will be seeking special leave to appeal the Federal Court’s decision in the High Court. Given the potential implications in the event that leave is refused or the appeal fails, the result of this challenge will be one to watch.

THE PUBLIC INTEREST DISCLOSURE ACT 2018 – A SUMMARY

By Craig Stevens, Consultant, Sole Practitioner and Committee Member of ALERA SA and ALERA Nationally

Disclaimer: this article is intended for information purposes only and is not legal advice or opinion nor a substitute for legal advice or opinion.

Introduction

ALERA SA was fortunate to have Mr Michael Riches, Deputy Independent Commissioner Against Corruption present on the *Public Interest Disclosure Act 2018* (“PID Act”) at its Annual General Meeting (“AGM”) on 27 August 2019. This article is intended to provide a summary explanation of the new legislation for the assistance of those unable to attend the AGM.

A summary of the PID Act

The PID Act came into operation on 1 July 2019 and replaced the *Whistleblowers Protection Act 1993* (“WP Act”), which was repealed.

In short, the PID Act provides protection against civil and criminal liability to a person who makes an appropriate disclosure of public interest information. This extends to protection against liability to disciplinary action in respect of the disclosure. Conversely, a person making a disclosure that is not an appropriate disclosure of public interest information is not protected from liability in respect of the disclosure. Further, the PID Act provides that it is a criminal offence to make a disclosure of public interest information knowing it is false or misleading in a material particular, whether by inclusion or omission of a particular.

As was the case with the WP Act, the question of whether or not a person makes/has made an appropriate disclosure of public interest information is an objective matter of fact and law, by reference to the PID Act and Guidelines issued by the Independent Commissioner Against Corruption. A person is not an informant pursuant to the PID Act merely because they believe or assert this to be the case and/or because the recipient of a disclosure believes it to be the case.

A person making an appropriate disclosure of public interest information is called an informant. It is interesting to observe that despite the term ‘whistleblower’ having been used liberally in the past, the term only appeared in the title of the predecessor legislation the WP Act.



Craig Stevens (left) and Michael Riches (right) at the ALERA SA 2019 AGM

The PID Act provides for the making of disclosures of two categories of public interest information:

- environment and health information; and
- public administration information.

Environment and health information is information that raises a potential issue of a substantial risk to the environment or to the health and safety of the public generally or a significant section of the public; where or not occurring before or after the commencement of the PID Act.

Public administration information is information that raises a potential issue of corruption, misconduct or maladministration in public administration, whether or not occurring before or after the commencement of the PID Act. The terms corruption, misconduct or maladministration have the same meaning as defined in the *Independent Commissioner Against Corruption Act 2012* ("ICAC Act").

The PID Act defines environmental and health information as:

information that raises a potential issue of a substantial risk to the environment or to the health or safety of the public generally or a significant section of the public (whether occurring before or after the commencement of this Act);

Public administration information is defined in the PID Act as:

public interest information means—

- (a) *environmental and health information; or*
- (b) *public administration information;*

Any person may potentially be an informant in respect of environment and health information whereas a public officer, as defined in Schedule 1 to the ICAC Act, may potentially be an informant in respect of public administration information.

A person makes an appropriate disclosure of environment and health information where the disclosure is to a relevant authority and where the person making the disclosure:

- a. believes on reasonable grounds the information is true; or
- b. not being in a position to form a belief on reasonable grounds about the truth of the information, believes on reasonable grounds the information may be true and it is of sufficient significance to justify its disclosure so that its truth may be investigated.

A person, who is a public officer, makes an appropriate disclosure of public administration information where the disclosure is to a relevant authority where the public officer reasonably suspects the information raises a potential issue of corruption, misconduct or maladministration in public administration.

A list of relevant authorities, as provided per section 5(5) of the PID Act, is found at the end of this article.

A public officer who is an employee in a public sector agency will likely also have further obligations in respect of reporting pursuant to the Directions and Guidelines issued by the Independent Commissioner Against Corruption under the ICAC Act and/or the Code of Ethics for the South Australian Public Sector.

In limited circumstances, a person may make an appropriate disclosure of public interest information to a journalist or Member of Parliament (not being a Minister of the Crown). This is where:

- they have already made an appropriate disclosure of substantially the same information in accordance with section 5 of the PID Act (i.e. to a relevant authority); and
- they made their identity known to the person to whom the disclosure was made; and either
 - has not received notification within 30 days of making the disclosure as required under section 7(1)(b) of the PID Act; or
 - has not received notification within 90 days after making the disclosure as required under section 7(3)(a) of the PID Act, or such longer period as specified by written notice given within the period of 90 days, by the person required to give such notice; and
 - believes on reasonable grounds the information disclosed is true.

A person to whom an appropriate disclosure of public interest information is made; or a person to whom such a disclosure has been referred; or who otherwise knows a disclosure has been made must not, without the consent of the informant, knowingly divulge the identity of the informant except:

- as far as may be necessary to ensure the matters to which the information relates are properly investigated; or
- in accordance with Guidelines issued by the Independent Commissioner Against Corruption under section 14 of the PID Act, namely:
 - where the recipient of the information believes on reasonable grounds that it is necessary to divulge the identity of the informant to prevent or minimise an imminent risk of serious physical injury or death to any person; and
 - the identity of the informant is divulged to a person or authority that the recipient believes on reasonable grounds is the most appropriate authority or person to be able to take action or prevent or minimise the imminent risk of serious physical injury or death to any person; or
 - the recipient has been issued with a notice by the Office for Public Integrity (“OPI”) advising that the identity of the informant is required by the OPI, in which circumstances the recipient must disclose the identity of the informant to the OPI.
 - if the identity of an informant is disclosed to the OPI in accordance with a notice issued by the OPI, the OPI must not disclose the identity of the informant to other persons without written authorisation of the Independent Commissioner Against Corruption or the Deputy Commissioner.

The obligation under the PID Act to keep the identity of an informant confidential applies despite any other statutory provision or common law rule to the contrary.

Persons designated as responsible officers in public sector agencies for the purposes of the PID Act must undertake training as approved by the Independent Commissioner Against Corruption.

A person designated as a responsible officer in a public sector agency under the PID Act has a variety of responsibilities. They must:

- receive appropriate disclosures of public interest information (which may, or may not, be in writing in any form); and
- make appropriate recommendations to the principal officer of the agency in relation to dealing with such disclosures; and
- provide advice to officers and persons working for or in the agency in relation to the administration of the PID Act¹.

A responsible officer or other officer or employee in an agency who receives an appropriate disclosure of public interest information as a relevant authority must assess the information as soon as practicable following the disclosure and following such assessment, take appropriate action – unless no action need be taken. Where the identity of the Informant is known, the responsible officer or other officer or employee receiving a disclosure must take reasonable steps to notify the Informant that an assessment has been made and advise them:

- of the action being taken in relation to the information; or
- if no action is being taken, the reasons why².

¹ Section 13 of the PID Act.

² Section 7(1) of the PID Act.

Such notification should be made within 30 days of the making of the disclosure by the informant. Where the identity of an informant is known, any officer or employee of the relevant agency responsible for taking action in response to an appropriate disclosure of public interest information in the agency must notify the informant of the outcome(s) of the action.

Such notification should be made within 90 days of the making of the disclosure by the informant or where this period is not applicable in the circumstances, another period as notified to the Informant. Where it is likely or probable that action in respect of the appropriate disclosure of public interest information relating to the agency will not be taken or finalised within 90 days, the officer or employee of the agency responsible for the taking of such action should notify the informant in writing of such longer period as may reasonably be required in the circumstances.

As to the action that may be taken by a responsible officer or other officer or employee in a public sector agency who receives an appropriate disclosure of public interest information as a relevant authority or to whom a disclosure is referred; in accordance with section 7 of the PID Act and the Guidelines issued by the Independent Commissioner Against Corruption under section 14 of the PID Act, appropriate action may be:

- if the content of the disclosure suggests there is an imminent risk of serious physical injury or death to any person or the public generally, the responsible officer should immediately communicate such information as may be necessary to mitigate that risk to the most appropriate agency (i.e. the South Australia Police, SafeWork SA, SA Ambulance, Environmental Protection Authority);
- if the recipient of the disclosure forms a reasonable suspicion that the matter(s) the subject of the disclosure involve(s) corruption in public administration or serious or systemic misconduct or maladministration in public administration, they must comply with their reporting obligations under the ICAC Act and the Directions and Guidelines issued under the ICAC Act³;
- if the recipient of the disclosure assesses the content of the disclosure as requiring further action, they must – unless the matter is reported to the OPI as a potential issue of corruption in public administration, ensure:
 - such action as may be appropriate in the circumstances is taken by them to ensure the matter of the subject of the disclosure is properly addressed; or
 - such information as is necessary to enable action to be taken is communicated to the most appropriate person or relevant authority to take action; unless
 - no action need be taken;
- the recipient of the disclosure must notify the OPI of the appropriate disclosure as soon as reasonably practicable after receipt of the disclosure by making an electronic notification as provided on the Independent Commissioner Against Corruption website and must include in that notification a range of prescribed information.

No action may be taken in relation to an appropriate disclosure of public interest information if:

- the information disclosed does not justify the taking of further action; or
- the information relates to a matter that has already been investigated or acted upon by a relevant authority and there is no reason to re-examine the matter or there is other good reason why no action should be taken in respect of the matter⁴.

The recipient of a disclosure of public interest information or other officer in a public sector agency to which a matter has been referred has responsibilities to make a report to the OPI in respect of action taken following a disclosure.

³ And also consider and comply with their obligations under the Code of Ethics.

⁴ Section 7(2) of the PID Act.

They must notify the OPI as soon as reasonably practicable by making an electronic notification as provided on the Independent Commissioner Against Corruption website and must include in that notification a range of prescribed information.

In addition to ensuring the confidentiality of the identity of informants in accordance with the PID Act, responsible officers and other officers or employees in public sector agencies are to ensure correspondence and other documentation associated with the appropriate disclosure of public interest information is stored with appropriate levels of security and otherwise in accordance with the *State Records Act 1997* and the destruction schedules issued under that Act.

They should also ensure that such documentation is only promulgated in accordance with the *Public Sector (Data Sharing) Act 2016* and the Information Privacy Principles, keeping in mind that the obligations in respect to the confidentiality of the identity of informants under the PID Act apply despite a statutory provision or common law rule to the contrary.

It is an offence to prevent, hinder or obstruct another person from making an appropriate disclosure of public interest information under the PID Act.

A person commits an act of victimisation if they cause detriment to another on the ground, or substantially on the ground, that the other person or a third person has made or intends to make an appropriate disclosure of public interest information. Acts of victimisation may be dealt with as a tort or as if it was an act of victimisation under the *Equal Opportunity Act 1984*. Furthermore, a person who personally commits an act of victimisation is guilty of a criminal offence.

No determinant is to be caused to a person(s) against whom allegations are made in the appropriate disclosure of public interest information merely as a consequence of the fact that disclosure has been made. As is indicated above, the Independent Commissioner Against Corruption has issued Guidelines under the PID Act.

Each public sector agency must issue procedures under the PID Act, consistent with the Commissioner's Guidelines.

Relevant authorities per section 5(5) of the PID Act

Where the informant is a public officer:

- a person who is, in accordance with Guidelines prepared by the Independent Commissioner Against Corruption under section 14 of the PID Act, designated as a person who is taken to be responsible for the management or supervision of the public officer or a relevant responsible officer;

or

- a person who is, in fact, responsible for the management and supervision of the relevant public officer or to the relevant responsible officer.

Where the information relates to a public sector agency or public sector employee:

- the Commissioner for Public Sector Employment; or
- the responsible officer or officers for the relevant public sector agency which is:

(i) a person who is, in accordance with any guidelines prepared under section 14, designated as a person who is taken to be responsible for the management or supervision of the public officer or to the relevant responsible officer; or

(ii) a person who is, in fact, responsible for the management or supervision of the public officer or to the relevant responsible officer;

Where the information relates to an agency to which the Ombudsman Act 1972 applies:

- the Ombudsman.

Where the information relates to a location within the area of a particular council established under the Local Government Act 1999:

- a member or officer of that council.

Where the information relates to a risk to the environment:

- the Environmental Protection Authority.

Where the information relates to an irregular and unauthorised use of public money or substantial mismanagement of public resources:

- the Auditor-General.

Where the information relates to the commission, or suspected commission, of any criminal offence:

- a member of the South Australia Police.

Where the information relates to a judicial officer:

- the Judicial Conduct Commissioner.

Where the information relates to a Member of Parliament:

- the Presiding Officer of the House of Parliament to which the member belongs.

Where the information relates to a person or matter of a prescribed class:

- an authority declared by the *Public Interest Regulations 2019* to be a relevant authority in relation to such information. No such authority(ies) has/have yet been declared.

Other relevant authorities:

- a Minister of the Crown; or
- the Office for Public Integrity; or
- any other prescribed person or person of a prescribed class.

SCENES FROM THE 2019 AGM



Commissioner Peter Hampton

Outgoing ALERA SA President, Kaye Smith

