SQUIRE PATTON BOGGS

Workplace View

December 2017

2017 – The Year in Review

Renae Harg, associate and Anna Elliott, partner

2017 was another busy year for workplace relations. We saw some significant regulatory changes to legislation through the vulnerable workers legislation and labour hire licensing, as well as some controversial changes through the Fair Work Commission's four-yearly review of modern awards. We also saw wholesale changes to migration laws through the continual migration reforms on temporary and permanent work visa programs, which we have outlined later in this edition of Workplace View.

Vulnerable workers legislation: In response to recent incidents of systemic underpayment and exploitation of vulnerable workers, the federal government introduced the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (**VW Act**). The VW Act made a range of changes to the *Fair Work Act 2009,* which were not limited to vulnerable workers and had implications for all employers. These changes included provisions relating to franchisors and holding companies, imposing higher penalties for "serious contraventions", increasing the powers of the Fair Work Ombudsman and expressly prohibiting payments from employees to employers where the payment is for the benefit of the employer. You can find further details of the VW Act in our November edition of Workplace View.

Casual conversion: In July 2017, the Full Bench of the Fair Work Commission determined a casual conversion clause would be included in 85 modern awards. The draft model clause has not been finalised yet, but it currently provides a right for casual employees having worked a regular pattern of hours for 12 months to request they be converted to permanent employment. There is the ability for employers to refuse the conversion on certain grounds, such as if it would require a significant adjustment to the employee's hours of work or if it is foreseeable the employee's position would cease to exist or hours of work would significantly change in the next 12 months.

Reduction in penalty rates: In June 2017, the Fair Work Commission reduced penalty rates in the modern awards covering the retail, fast food, hospitality, pharmacy and restaurant industries. Penalty rates will be phased in over three or four years, with the penalty rates to reduce on 1 July each year from 2017 to 2019 or 2020. Whilst the United Voice and the SDA challenged the reduced penalty rates in the Federal Court they failed to have them overturned.

Labour Hire Licensing: Following recent state government inquiries into the labour hire industry the Queensland and South Australian governments have passed legislation requiring labour hire providers to hold a licence, which is expected to become operational on 18 April and 1 March 2018 respectively.

The legislation also imposes high penalties for clients who engage unlicensed providers and businesses should start considering changes required to commercial contracts. Victoria and other states are expected to follow suit. Whilst the regulations and full details of the Queensland and South Australian legislation (and exemptions) have not yet been released, a summary of the background and the key elements of the legislation can be found in our article, Licence to Skill.

What to Expect in 2018

Whilst 2017 was an interesting year of legislative and regulatory changes, we expect 2018 to be just as busy, if not busier. We set out below some key trends we expect to see in 2018.

- **Sexual Harassment:** Given the recent publicity around sexual harassment claims, including Harvey Weinstein, Don Burke and other high profile figures, we expect to see an increase in sexual harassment complaints across workplaces in 2018. To assist you with these complaints, we are running a seminar in February 2018 on such claims and ways to prevent them occurring in your workplace. For more information, please see the Events Update in this issue of Workplace View.
- **Fair Work Commission reviews:** In 2018, the Fair Work Commission is expected to be drafting and implementing the casual conversion clauses, examining loaded rates in enterprise agreements and how to apply the 'Better Off Overall Test' to these loaded rates and continuing with the four yearly modern award review which it expects to finalise next year.
- **Impact of *Skene v Workpac* case on casuals:** A decision of the Federal Court found a casual employee employed under an Enterprise Agreement (**EBA**) who had worked a regular and systematic roster was entitled to annual leave under the National Employment Standards. Whilst we are presently awaiting the outcome of Workpac's appeal, regardless of the result, this decision has significant ramifications for employers who employ casuals under an EBA.

- **Labour hire licensing:** 2018 will see the commencement of labour hire licensing in Queensland and South Australia. We will also likely see labour hire licensing implemented across other States, with the Victorian government seeking submissions on a labour hire licensing bill and the ACT expected to hand down the recommendations of its labour hire inquiry shortly.
- **Union activities:** If the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017* is passed by the Senate in 2018, we may see a tightening of union activities and increased penalties for unions and union officials who contravene laws.
- **Work Health and Safety:** In Western Australia, a modernised Work Health and Safety Bill was developed in August 2017. However, as the bill is expected to have a two year consultation period and not be introduced into Parliament until mid-2019, we are unlikely to see any changes in 2018.

Employer Reminder

After-party Conduct May Still Be Cause for Dismissal

Employers should not just be concerned with their workers' conduct during the "official" Christmas party. Misconduct that occurs after the official end of the Christmas function may also provide a valid reason for dismissal or complaints of inappropriate conduct.

Two decisions of the Fair Work Commission (**FWC**) this year found that just because the official elements of a function have finished when the misconduct occurs, it does not mean the employee's conduct is not connected with the employment and can be cause for dismissal.

In *Rogers v Allianz Insurance Australia T/A Club Marine Insurance* [2017] FWC 537, after a formal work event had ended, employees moved to the members bar in the same venue, where an incident occurred between a male and female employee. The male employee then caught a taxi to another venue with another female colleague, in which he made aggressive and threatening comments to her.

The FWC held that the conduct by the male employee was connected to the employment as attendance in the members bar was a "continuation" of the work event, there was no specified finish time of the event and the comments made by the male employee were directly in relation to work. The travel from the venue in a taxi after the event was also held to be a necessary part of the work event.

In *Hughes v Momentum Wealth Pty Ltd t/a Momentum Wealth* [2017] FWCFB 759, the employer had paid for food and drinks and sectioned off an area of the venue for a function until 10 p.m. At 11 p.m., the employee was involved in an incident with another patron. The Full Bench held that just because the catering had ceased before the incident it did not mean the work function had ended. As such, the conduct of the employee had occurred at a work function and the employer's usual standards of behaviour applied.

Did You Know?

…the right of an employer to direct an employee to take gardening leave can, in certain circumstances, be implied into an employment contract where there is no express clause?

Leah O'Connell

In the recent case of *Grace Worldwide (Australia) Pty Limited v Stephen Alves* [2017] NSWSC 1297, the New South Wales Supreme Court found that the employer, Grace, had an implied right to direct an employee to serve out the duration of his notice on garden leave.

Mr Alves was employed by Grace as General Manager Operations and, in July 2017, gave notice that he would be leaving to take up a new position as the CEO of one of Grace's principal competitors. Shortly afterwards, Mr Alves was directed to go on garden leave during his three-month notice period. As there was no express garden leave clause in the employment agreement, Mr Alves immediately contested Grace's ability to place him on garden leave.

Grace defended their decision by arguing that pursuant to the employment contract, Grace only had a contractual obligation to pay Mr Alves the agreed remuneration and not to additionally provide him with work. As such, Grace argued the right to send Mr Alves on garden leave was implied into the employment contract.

The court indicated the question of whether an employer is required to provide an employee with work (in addition to remuneration), in each case, will be one based on construction of the particular contract. In this case, the court determined that even though Mr Alves was entitled to earn bonuses, the structure of the bonus scheme meant that, even if Mr Alves had worked out the three months, he would not have completed the six-month appraisal period. Accordingly, the garden leave did not impact on his ability to accrue this benefit. Similarly, Mr Alves' position and the skills of that position were not "unique" and, therefore, did not require continued work to remain current.

As a result, the court determined that in all the circumstances, Grace's ability to direct Mr Alves to take garden leave was *"reasonable and equitable and necessary to give business efficacy to an employment contract, so as to avoid contact between an employee and a competitor"* and could, therefore, be implied.

While it is not recommended that employers rely on such a term always being implied, this decision provides a useful precedent in specific circumstances. To give best prospects, employers should consider including a carefully worded garden leave clause in their employment contracts. This can be a valuable tool for keeping employees out of the market during their notice period and for the protection of an employer's business interests.

OSH Alert

Employer Learns the Importance of Ensuring Employees Are "SunSmart" – As Sunburn During Employment Found to Contribute to Melanoma

Leah O'Connell

As we approach Australia's summer season, a recent Administrative Appeals Tribunal decision, *McKechnie and Military Rehabilitation and Compensation Commission (Compensation)* [2017] AATA 2159, serves as warning to employers that have employees working predominantly outside in conditions where they are continuously exposed to Australia's harsh sun.

David McKechnie, a worker for the Australian Defence Force, sought workers' compensation under the *Safety, Rehabilitation and Compensation (Defence-Related Claims) Act 1988* (Cth) (**Act**) after being diagnosed with a stage four metastic melanoma in his right groin in April 2014, a recurrence of a melanoma on his calf that he had removed in 1996.

Mr McKechnie claimed it was his service with the Australian Defence Force and his continuous exposure to sunlight that caused, aggravated or accelerated the malignant melanoma. In particular, he claimed the continuous exposure to sunlight he received during a six-week exercise in the Northern Territory where he was badly sunburnt numerous times, often leaving his skin lifting off in ribbons from his arms or legs, contributed to a material degree. Whilst there was a medic available to the employees, no one sought any assistance for their sunburns, as the attitude amongst the workforce was that it was a "badge of honour".

Mr McKechnie argued that pursuant to section 7(1) of the Act, his employment contributed in a material degree to the disease, namely the melanoma. The court considered expert evidence from an oncologist and a skin cancer clinician and found that the applicant had suffered infrequent severe sunburns, including on the backs of his legs in an occupational setting and that sunburn was "fairly significant in the development of his melanoma." As a result, Mr McKechnie was able to claim workers' compensation under section 14 of the Act.

Therefore, if your employees are exposed to continuous sunlight during their employment, to avoid workers' compensation liability, it is prudent to ensure adequate sun protection measures are adopted in the workplace, such as providing employees with sunscreen, requiring them to wear hats, long sleeves and pants, and limiting the amount of sun exposure where reasonably practicable.

Migration Alert

Keeping Up to Date With Reforms to Australia's Temporary and Permanent Work Visa Programs

The past six months have seen significant changes in the migration space. We thought it was timely to provide you with an update on the changes being implemented to Australia's temporary and permanent work visa programs. The reforms impact the Temporary Work Visa Subclass 457 visa (**457 visa**), the Employer Nomination Scheme (**186**), Regional Sponsored Migration Scheme (**187**) and the Skilled Independent, Nominated and Regional Visas, (subclasses 189, 190 and 489). We discuss the changes to the 457, 186 and 187 visas below.

What Has Already Changed?

The **occupation lists** for the above visas, now called "Short-Term Skilled Occupations List" (**STSOL**) and "Medium and Long-term Strategic Skills List" (**MLTSSL**), have been reduced significantly, with over 200 occupations culled and some restricted to regional Australia. The lists will be reviewed by the Department of Employment (**DET**) every six months, with any proposed changes announced and interested parties invited to make submissions. Recently, DET proposed the following changes for the STSOL (submissions closed on 1 December 2017):

- **Removal of** Accommodation and Hospitality Managers, Hair or Beauty Salon Manager, Recruitment Consultant and Building Associate
- **Inclusion of** University Tutor, Psychotherapist, Property Manager, Real Estate Agent and Real Estate Representative

Changes for Employers (Standard Business Sponsors) From March 2018

Sponsors nominating Temporary Skills Shortage visa applicants will be required to meet all of the following criteria:

- Complete mandatory labour market testing (unless International Trade Obligations apply)
- Meet market salary rates for the nominated position, in addition to paying above the minimum Temporary Skilled Income Threshold (currently AU$53,900)
- Comply with non-discriminatory workforce tests

New Training Requirements

Sponsors will be required to pay a contribution to the Skilling Australians Fund upon the lodgment of a nomination application, rather than meet a training benchmark. This contribution is set to be:

- For 457 visa applicants:
  - AU$1,200 per year (or part year) for each applicant, for businesses with a turnover of less than AU$10 million
  - AU$1,800 per year (or part year) for each applicant, for businesses with a turnover of more than AU$10 million
- For 186/187 visa applicants:
  - AU$3,000 each applicant, for businesses with a turnover of less than AU$10 million
  - AU$5,000 each applicant, for businesses with a turnover of more than AU$10 million

Transitional Arrangements for Current 457 Visa Holders Eligible to Apply for Permanent Residency Through the TRT Stream

The government's most recent announcement in November 2017 confirmed persons who have either held, or have made, a valid application for the 457 visa prior to the announced changes will not be affected by the amended provisions in relation to the Temporary Residence Transition Stream (**TRT Stream**). This means they will still be eligible for transition to permanent residency after two years, and will not have to satisfy new age or work experience requirements.

Overview of changes applicable to subclasses 457, 186 and 187 visas

Changes Already Implemente	**457 Applicants – STSOL Occupations**	**457 Applicants – MLTSSL Occupations**	**Subclass 186 and 187** Temporary Residence Transition stream **(TRT Stream) and DE Stream**
Period of validity	Two years, with provision for one extension only (no PR transition available)	Two years, with provision for one extension only	Permanent visa
Character requirements	Mandatory Police clearance certificates for all applicants	Mandatory Police clearance certificates for all applicants	Mandatory Police clearance certificates for all applicants
English Language exemptions	Removed	Removed	Removed
Age restriction			Under 45 for direct entry stream applicants only
English test scores (IELTS or equivalent test) *Note, exemptions apply as above*			Overall score of 6, with at least 6 in each test component
Must demonstrate nominated position is "genuine"			Must satisfy
From December 2017			
Demonstrate nominated position is "genuine"	Applicable	Applicable	Applicable
From March 2018			
English test scores (IELTS or equivalent test) *Note, exemptions apply for citizens with certain passports or in some circumstances, if the person has completed a course in English for a period of five years or longer.*	Overall score of 5, with at least 4.5 in each test component	Overall English test scores of 5, with at least 5 in each test component	
Genuine temporary entrant requirement	Must satisfy	Not applicable	
Years of work experience relevant to the nominated occupation	Two years	Two years	Three years
Occupation list	STSOL	MLTSSL	MLTSSL – only for direct entry stream applicants
Age	Not applicable	Not applicable	Under 45 – both direct Entry and TRT Stream
Employer to meet market salary rates for the nominated position	Must satisfy	Must satisfy	Must satisfy
Applicants to transition to Permanent Residency via the TRT Stream	Cannot apply for TRT Stream	Can apply after 3 years	Must have held a 457 visa for three years (MLTSSL occupations only)

Meet the Team

Jane Silcock

We welcomed Jane Silcock as a senior associate to our team last month. Jane is based in our Sydney office. Here are a few facts about Jane to help you get acquainted!

My first ever (cool!) job was… as a cocktail bartender at a resort in Mykonos.

A random fact about me is… I play a mean five-string electric viola.

My favourite quote is… "Give a girl the right pair of shoes and she'll conquer the world." (Marilyn Monroe)

The two rules I try to live by are…. 1. Find a way to laugh every day. 2. Just keep swimming!

My last supper would be… A cold seafood platter with Pavlova for dessert.

Events Update

Labour & Employment Seminar Series 2018

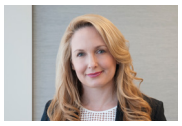
Seminar	Date	Location	Topic
1	Wednesday, 14 February 2018 8:15 a.m.	Sydney	**Not in My Backyard! Are All Workplace Sexual Harassment Claims Coming Out of the Closet?** Following the recent "outing" of Don Burke, Harvey Weinstein and other high-profile figures, we will discuss the rise in sexual misconduct claims, how to deal with them and what you can do to prevent such issues occurring in your own workplace. The seminar **in Perth** (5-6 p.m.) will be: • Preceded with an **optional free employment advice clinic** (limited to 15 places – be quick to register): 4 – 5 p.m. • Followed by networking drinks: 5:45 – 7 p.m.
	Thursday, 22 February 2018 5 p.m.	Perth	
2	Tuesday, 10 April 2018	Perth	**Spotlight on Migration Reforms! Shining a Light on Recent Changes to Australia's Temporary and Permanent Skilled Migration Programs** Following the replacement of the 457 visa with the new TSS visa from March 2018, we will look at how this and other recent migration law changes will impact Australia's skilled migration programs, your ex-pat employees based in Australia and future recruitment for your business.
	Thursday, 12 April 2018	Sydney	
3	Wednesday, 13 June 2018	Perth	**Is My Worker an Independent Contractor or Employee?** Recent cases show many employers are continuing to get this wrong with some serious financial consequences. We will look at what manner of engagement is right for your business, how to ensure your contracting arrangements can withstand scrutiny and recent case law on the issue.
	Wednesday, 13 May 2018	Sydney	
4	Wednesday, 10 October 2018	Perth	**One of My Employees is Stressed/Depressed, Often Absent and My Business Is Suffering – What Can I Do Without Being Subjected to a Claim?** We will look at the potential adverse consequences that can arise from the incorrect handling of mental health issues in the workplace and provide our top tips on how employers can manage unwell employees to mitigate claims and ensure employee wellbeing.
	Wednesday, 17 October 2018	Sydney	

If you wish to register please click on the link below or contact rosalie.cote@squirepb.com or call her on +61 9429 7683

Register: Perth **Register: Sydney**

Contacts

Bruno Di Girolami
Partner
T +61 8 9429 7644
E bruno.digirolami@squirepb.com



Dominique Hartfield (Editor)
Of Counsel
T +61 8 9429 7500
E dominique.hartfield@squirepb.com

Anna Elliott
Partner
T +61 2 8248 7804
E anna.elliott@squirepb.com

Andrew Burnett
Of Counsel
+61 8 9429 7414
E andrew.burnett@squirepb.com