



## Workplace View

October 2019

### Religious Freedoms Weighing Heavily on the Public Mind

**Barnaby Austin, Associate**

Since our July edition of Workplace View, religious expression and discrimination have contributed significantly to public discourse in both political circles and the mainstream media.

The two contributing factors to such scrutiny were Israel Folau's high-profile sacking by Rugby Australia and his resulting proceedings in the Federal Circuit Court, currently on foot, together with the rollout of the Morrison government's broader reform agenda that saw Attorney General Christian Porter release a package of draft bills dealing with religious discrimination for public consultation.

Although the government's consultation period on those draft bills closed on 2 October 2019, public debate is set to continue, with the government preparing to introduce its legislation package to the House and the Senate.

The centrepiece of that package is the draft Religious Discrimination Bill, which seeks to provide comprehensive protection against discrimination because of religious belief or activity and, interestingly, contains a provision that seemingly had the Folau case in mind. It is proposed that businesses with more than AU\$50 million turnover, will need to prove unjustifiable financial hardship in order to prevent employees making statements of belief, even in a private capacity (on social media, for example).

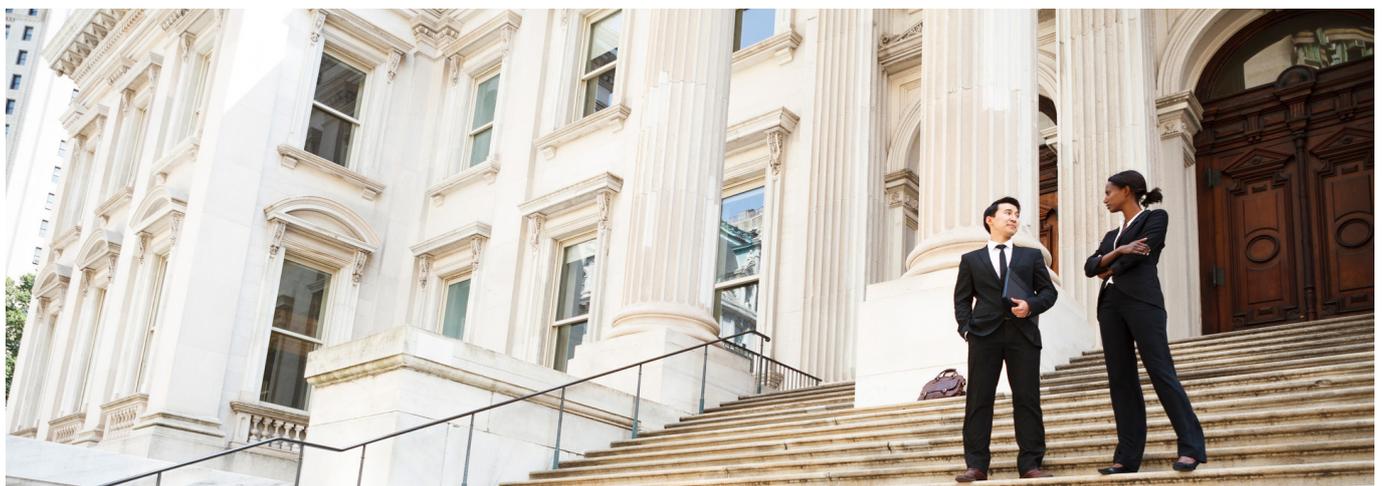
What "unjustifiable financial hardship" entails is anyone's guess, as it implies that there is a level of financial damage caused by expressions of belief that an employer should have to live with, and/or that the bigger the employer, the greater the employees' ability to do it harm without any right of recourse against them. If the bill is passed, these matters will be for the courts to decide, but are likely to have far-reaching implications for businesses.

It will not, however, be for the court to consider such matters in the Folau proceedings, as any new legislation would not be retrospective, and so of no assistance to Folau. A more likely consideration for the court in Folau's proceedings will be last month's Federal Court decision in *Rumble v HWL Ebsworth Lawyers*. In that case, the employer terminated the employee's employment because he continued to criticise the employer's clients in the media, despite repeatedly being told not to do so, which was a clear breach of the employer's media policy.

The court rejected the employee's claim that his employer unlawfully dismissed him because of his political opinion. Instead, the court confirmed that the employer terminated the employee because he repeatedly disobeyed a reasonable direction from the firm to cease criticising its clients.

The similarities in the factual scenarios of *Rumble* and *Folau* are obvious. Both claimants allege that their employment was terminated unlawfully (for their political opinion and religion, respectively) and both employers say that each employee's termination was for continually failing to comply with reasonable directions from the employer (being a media policy and a code of conduct, respectively).

Such similarities may well mean that the decision in *Rumble* is considered in any decision reached in *Folau*, if the proceedings get that far, that is.



## Did You Know?

### The Fair Work Commission Is Significantly Varying “Annualised Salary Clauses” in Modern Awards

**Madeleine Smith, Associate**

The Fair Work Commission has decided to significantly amend the “annualised salary clauses” contained in a number of modern awards, by adopting four “model” clauses. The changes, which will likely come into effect on 1 March 2020, introduce potentially onerous record-keeping and salary calculation requirements, and may considerably alter the way employers implement their payment arrangements.

#### What You Need to Know

A number of modern awards contain a provision that allows an employer to pay an employee an “all-in” annual rate in satisfaction of any award entitlements.

The Fair Work Commission has devised four model clauses that will introduce additional obligations on employers, including to:

- Provide the salary calculation method (including each separate component)
- Advise an employee of the outer-limit number of ordinary and overtime hours covered
- Annually pay any shortfall between the salary and the actual award entitlements
- Keep a record of an employee’s start and finish times, as well as unpaid breaks

In addition, some model clauses will require an employee’s agreement to be paid an all-in salary.

#### What You Need to Do

While the changes are six months away, we recommend that employers who utilise annualised salary arrangements should, as soon as possible:

- Ascertain or review whether a modern award applies to their employees, whether they contain an applicable annualised salary clause, and how the changes will affect the award
- Review their administrative and payroll procedures to ensure they are ready to comply with the applicable award

## WHS Alert

### Industrial Manslaughter Laws Introduced in the Northern Territory

**Barnaby Austin, Associate**

In September 2019, the Work Health and Safety (National Uniform Legislation) Amendment Bill 2019 was introduced to the Northern Territory Legislative Assembly, proposing to establish a new criminal offence of industrial manslaughter to apply to both individuals and corporate bodies.

The bill proposes a maximum penalty of life imprisonment for an individual and a maximum fine of 65,000 penalty units, which is AU\$10 million, for a body corporate.

In introducing the bill, the Northern Territory government said that the bill aims to send a clear message to businesses and employers about community expectations around safety in the workplace.



## Migration Alert

**Madeleine Smith, Registered Migration Agent  
(MARN 1912154)**

### New Regional Visa Regime

Significant changes to the regional skilled migration programme will commence on 16 November 2019. Under the changes, regional applications will benefit from priority processing, the meaning of "regional" will be expanded to include employers operating outside of Sydney, Melbourne, Brisbane, the Gold Coast and Perth, and a broader range of occupations (more than 650) will be available for nomination. Two new visas will become available to regional applicants:

- **Skilled Employer Sponsored Regional (Provisional) visa (subclass 494)** – This employer-sponsored visa will essentially replace the current subclass 187 regional visa, and will work similarly to the temporary TSS visa programme. Sponsoring employers will need to nominate the visa applicant, obtain Regional Certifying Body approval, meet the annual market salary rate and labour market testing requirements, and pay a SAF levy.
- **Skilled Work Regional (Provisional) visa (subclass 491)** – This state or family-sponsored temporary visa will replace the current subclass 489 regional visa.

For both of the new temporary visas, applicants must be under 45 years old, have at least three years' skilled employment experience in their nominated (or similar) occupation and obtain a positive skills assessment (among other criteria). From November 2022, individuals holding either visa, who have lived and worked in regional Australia for at least three years and who have earned above the set income threshold will be eligible to apply to transition to permanent residency on the Permanent Residence (Skilled Regional) visa (subclass 191).

More information on the new visas is expected to be released closer to the commencement date. If you have any queries, please do not hesitate to contact our Business Immigration team.

## Legislation Update

### Offence and Penalty Regime to Stamp Out Deliberate and Systematic Wage Theft

**Barnaby Austin, Associate**

The Morrison government is currently seeking community feedback on a new offence and penalty regime to stamp out deliberate and systematic wage theft. The move advances a commitment made by the prime minister in July, in the wake of the infamous "contrition payment" imposed on high-profile celebrity chef George Calombaris' restaurant empire, after it was found to have underpaid its workers close to AU\$8 million.

In releasing a discussion paper inviting submissions on the thresholds at which certain behaviour should be criminalised and the potential penalties, Mr. Porter said that the government is taking a consultative approach to ensure that any new penalty regime is fit for purpose and avoids any unintended consequences. Mr. Porter used the example that an employer should not end up with a criminal record if they make genuine mistakes and move swiftly to rectify those mistakes.

As the time for submissions has just closed, we expect to see further updates from the government in relation to these proposals shortly.

### New Superannuation Amnesty Proposed

Introduced on 18 September 2019, the Treasury Laws Amendment (Recovering Unpaid Superannuation) Bill 2019 proposes a one-off amnesty to employers who come forward and rectify historical non-compliance with their superannuation guarantee obligations. In moving the bill to be read a second time Michael Sukkar MP told Parliament that "*The amnesty period is proposed to run from 24 May 2018 to six months after the day the bill receives royal assent, and applies to any historical super guarantee debts up to (and including) the March quarter of 2018.*"

To qualify for the proposed amnesty, employers would have to meet two criteria: the employer must come forward voluntarily, without direct prompting from the ATO; and the employer will have to pay all of their employees' entitlements.



## Events Update

### Key Tips in Performance Management and the Termination of Employment, Followed by Festive Season Networking Drinks

This seminar, taking place in our Perth office, will be a workshop focusing on the practical side of performance management and effecting terminations. We will explore common scenarios and provide our top tips for employers to mitigate the risk of legal claims in carrying out performance management and terminating employees. Participants will also have the opportunity to ask our panel questions on any points that may be troubling them in this area.

The seminar will be followed by festive season networking drinks with our Perth Labour & Employment team, to celebrate the 2019 year.

**4 p.m. on Wednesday 20 November 2019** at our Perth office, at Level 21, 300 Murray Street, Perth. Speakers will include Bruno Di Girolami (partner), Andrew Burnett (of counsel) and Sharon Payne (associate).

### Establishing a US Presence – Immigration and Visa Considerations

We recently held a seminar where speakers Gregory Wald (partner) and Rachel Barnett (registered migration agent) spoke on the nuts and bolts of getting executives and key employees into the US after an entity is established. If you would like any assistance on this topic, please do not hesitate to contact Rachel Barnett on +61 8 9429 7493.



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