SQUIRE PATTON BOGGS

Workplace View

Australia – April 2021

This time last year, the world was grappling with COVID-19 and employers were in the throes of office lockdowns, transitioning to working from home arrangements, stand downs and JobKeeper payments. We are still providing a lot of advice to employers arising from the effects of COVID-19 on workplaces, including returning employees to the workplace, responding to flexible working requests, providing leave for COVID-19 vaccinations and restructuring and redundancy advice.

In addition to COVID-19 issues, a number of other employment-related issues are also making headlines in Australia. These include workplace sexual harassment, which is the subject of our upcoming webinar (the details of which are below) and new law that significantly changes how to employ casual employees (see our article below).

In February this year, we welcomed three new lawyers to our Labour & Employment team in Sydney. You can meet Nicola, Erin and Elisa below.

We hope you find this edition of Workplace View an interesting read as it relates to current workplace issues, some of which your organisation may be experiencing.

Labour & Employment team, Squire Patton Boggs AU

New Faces in Sydney Labour & Employment Team

Nicola Martin – Nicola is a highly regarded lawyer with two decades' experience advising clients on the full spectrum of employment relations, industrial relations and HR matters. Nicola's focus is on how she can best support her clients in their strategic objectives, while navigating a heavily regulated environment. Nicola was a finalist for Lawyers Weekly 2020 Partner of the Year Awards for Employment and Workplace Relations Partner of the Year.

Erin Kidd – With extensive employment law experience, as well as qualifications in HR and industrial relations, Erin understands the complexities of people management and provides practical advice and representation in all employment-related matters. Erin enjoys providing the senior management, in-house counsel and HR personnel of her clients with easy-to-understand advice that aims to mitigate workplace risks before they arise.

Elisa Blakers – With experience across all facets of employment law, Elisa provides pragmatic advice to clients operating in a range of industries on both contentious and non-contentious matters. Elisa assists clients to understand their obligations as an employer, and provides support with day-to-day workforce management, including issues in respect of performance, misconduct and restructuring.

Nicola, Erin and Elisa join Carly Corbett-Burns who is currently on parental leave. Each looks forward to meeting and working with the firm's clients, new and old.

Changes to Casual Employment

Elisa Blakers, Associate

The government's much awaited IR Omnibus Bill has passed parliament, albeit in a significantly "gutted" form. Nevertheless, the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021 (the Amending Act), even in its shortened form, brings significant changes to Australia's regime for casual employees and their employers.

The Amending Act brings much anticipated clarity to casual employment, including the rights and obligations of both casual employee and employer. Key changes include:

- The introduction of a statutory definition of casual employees
- The introduction of a statutory obligation for employers to offer "regular" casual employees conversion to full- or part-time employment after 12 months (unless there are reasonable business grounds not to) and a statutory right for casual employees to request such conversion
- Casual employers will not be able to double dip on entitlements
- Casual employees are to be provided with a Casual Employment Information Statement, published by the Fair Work Ombudsman

The changes brought about by the Amending Act largely came into effect on 27 March 2021.

Any employer who employees casual employees currently, or with plans to employ casual employees in the future, will need to ensure that they understand each of the changes and any obligations arising relevant to their workforce.

It is also crucial for employers to now be aware of their obligation to offer conversion to eligible casual employees, and ensure they adhere to the strict deadlines imposed by the changes.

We have published an article that outlines each of the changes in more detail.

Did You Know?

Sexual Harassment Reforms Fast Approaching in Response to Respect@Work

Madeleine Smith, Associate

In the wake of a spate of high-profile sexual assault and sexual harassment allegations in recent weeks, the federal government has announced it will implement a suite of anti-harassment reforms in response to the Sex Discrimination Commissioner's Respect@Work national inquiry report, which was released in March 2020.

The Respect@Work inquiry found that Australia's current legal and regulatory system for addressing workplace sexual harassment is "complex and confusing" for workers and employers. On 8 April 2021, the federal government published its long-awaited response to the Commissioner's landmark report. In agreeing to (in full, in part or in principle) or noting the Commissioner's 55 recommendations, the government confirmed it will introduce legislative amendments designed to simplify and strengthen the national legal framework for combating sexual harassment at work. The proposed changes include:

- Amending the Sex Discrimination Act 1984 (Cth) (Sex Discrimination Act) to expressly prohibit sex-based harassment, ensure greater alignment with model work health and safety (WHS) laws, and ensure the liability of persons who aid or permit sexual harassment
- Clarifying in the Fair Work Act 2009 (Cth) (Fair Work Act) that sexual harassment can be a valid reason for dismissal
- Including sexual harassment within the Fair Work Regulations 2009 (Cth) (Fair Work Regulations) definition of "serious misconduct" warranting dismissal without notice
- Confirming that a "stop bullying order" under the Fair Work Act is available to workers "in the context of sexual harassment"; the government declined to adopt in full the Commissioner's recommendation to introduce into the Fair Work system a separate "stop sexual harassment order"

Although not recommended in the Respect@Work report, the government also confirmed it will introduce changes to extend the scope of the Sex Discrimination Act to judges and members of parliament.

The government stopped short of accepting in full the Commissioner's recommendation to introduce into the Sex Discrimination Act a positive duty on employers to take reasonable measures to eliminate sex discrimination and sexual harassment. The government noted that a positive duty already exists in WHS laws that requires employers to ensure workers are not exposed to health and safety risks, so far as is reasonably practicable. The government confirmed it will "assess whether such amendments would create further complexity, uncertainty or duplication in the overarching legal framework".

The government is aiming to introduce its proposed legislation into parliament by June 2021.

We will be discussing the government's response and the proposed changes further at our upcoming seminar, the details of which appear below.

Upcoming Event: Webinar

Sexual Harassment in the Workplace: Your Responsibilities as an Employer in Australia

Eradicating sexual harassment in the workplace in Australia is firmly on the national agenda. The various high-profile incidents unfolding in the media and the government's response to the Sex Discrimination Commissioner's Respect@Work report (see our article above) has sexual harassment front of mind for a lot of employers, and it is more important than ever before that employers understand:

- Their obligations to employees
- What steps they can take to prevent sexual harassment in the workplace
- How to equip their employees with the tools and strategies to identify and address inappropriate conduct
- How to address concerns and complaints with due process

In our upcoming webinar, Sexual Harassment in the Workplace: Your responsibilities as an Employer in Australia, we will provide a refresher on the legal framework as it relates to sexual harassment and misconduct in the workplace, and your responsibilities as an employer. If you would like to join the webinar, please register here.

Q&A

How Flexible Are You? Responding to Flexible Working Requests

Erin Kidd, Director

Throughout the COVID-19 pandemic, the way we work changed immensely. In a survey conducted by the University of Sydney's Institute of Transport and Logistics Studies, 20% of respondents from Victoria and New South Wales reported working from home on a regular basis before the pandemic, compared to 45% and 39%, respectively, during the pandemic. Three out of four respondents believe that post-COVID-19, their employers are more likely to support working from home more than they did before the pandemic.

These figures reflect what we are seeing in practice, which is an increase in workers making flexible working requests, mainly to continue working from home on a regular basis. Here, we outline the answers to the top five questions we have been receiving about workers making flexible working requests.

Can an employee request to continue working from home?

There is nothing to prevent any employee from making a request for a flexible working arrangement, which can include being able to work from home either all or some of the time. However, only certain employees have a statutory right to request flexible working arrangements under the Fair Work Act. It is, therefore, only in relation to those categories of employees that you have obligations under the Fair Work Act in terms of how and when you respond to the request. Some employers, however, have policies pursuant to which they have expanded the right to request flexible working arrangements to all employees.

What employees have the right to make a request under the Fair Work Act?

Employees who have at least 12 months of continuous service and who require flexibility because they are a parent, or have responsibility for the care, of a child who is school age or younger; are a carer within the meaning of the Carer Recognition Act 2010; have a disability; are 55 or older; are experiencing violence from a member of their family; or provide care or support to a member of their immediate family or household, who requires care or support because they are experiencing violence from their family.

Do I have to agree to a flexible working request?

If the request comes from an employee who has a right to make a flexible working request under the Fair Work Act, you must agree to the employee's request unless there are reasonable business grounds why the arrangement will not work.

What are considered reasonable business grounds for refusing a request?

Whether there are reasonable business grounds for refusing a request will depend on the role, the business, and how the proposed flexible working arrangements would impact costs, productivity and other employees. For example, if a request is received from an employee that has been working from home during lockdown periods, you will need to carefully consider why this cannot continue despite your IT systems being able to facilitate remote working. A holistic view of the employee's role is required. For example, although a person may be able to perform the rudimentary tasks of their position remotely, it may not be reasonable to allow this to continue if the employee needs to be in the office to properly supervise others, or be supervised themselves.

Do I have to respond to the request?

Yes, and it must be done in writing, within 21 days of having received the request from the employee. If you refuse the request, the written response must set out the reasons for the refusal.

Legislation Update

Erin Kidd, Director

Contract Wording Critical to Work Out New Super Payments

On 1 July 2021, the superannuation guarantee percentage will increase to 10% from the 9.5% that commenced on 1 July 2014. Increases to the rate will continue annually, with the rate growing by 0.5% on 1 July each year until it hits 12% on 1 July 2025.

What does this mean for employers? Well the answer will almost always be determined by the wording of the relevant employee's contract of employment.

Employers that pay their employees a wage or salary that does not incorporate an amount of superannuation will be out of pocket, with the additional 0.5% to be borne by the employer. Typically, this will also be the case where a written contract of employment does not exist, or the employee is paid in accordance with the rates set out in the relevant award or enterprise agreement.

Example: Jim earns AU$25 per hour, plus super, for his ordinary hours of work. Currently, Jim's employer must contribute 9.5% of Jim's hourly wage (being AU$2.375 per hour) to his super fund. From 1 July 2021, the employer will need to contribute 10% of Jim's hourly wage (being AU$2.50 per hour) to his super fund.

Employers that pay their employees a wage or salary that is expressed to include compulsory superannuation contributions will need to check the wording of their employment contracts to ascertain whether the employee's "total employment cost" will increase when the super rate goes up, or whether the components of the employee's remuneration can be altered such that the total cost to the employer remains the same.

Example: Joan's annual remuneration package is AU$100,000, which includes her base salary and compulsory super contributions. Her employment contract also notes that any change to the super guarantee rate will not result in an increase to her total remuneration, rather the components of her remuneration will change. Currently, Joan's base salary is AU$91,324.20 and the relevant super contributions are AU$8,675.80. However, from 1 July 2021, when super contributions increase from 9.5% to 10%, Joan's base salary will decrease to AU$90,909.09, while the compulsory super contributions will increase to AU$9,090.91. The cost to Joan's employer remains the same, but Joan will be taking home less money each pay day while greater contributions are being made to her super fund.

If you need guidance on how to implement the increased super guarantee percentage in respect of your employees, including if you are unsure about how your employment contracts should be interpreted on this issue, please get in touch with us for assistance.

Case Law Update

Anna Lee, Associate

External Legal Representation Allowed in Unfair Dismissal Claims

In the recent decision of *Mr Brian Davies* (Mr Davies) *v National Electrical Contractors Association NSW Chapter* (NECA) *[2021] FWC 1081,* although the Fair Work Commission (FWC) found NECA to have sufficient in-house representation, they allowed NECA to have external legal representation in defending Mr Davies' unfair dismissal application.

Mr Davies' argument included:

- He could not afford legal representation and as such, allowing NECA to have legal representation would be unjustified
- He was disadvantaged because NECA is a peak industry body that provides HR and IR services such as representing and defending employers in unfair dismissal claims, as well as offering relevant education, training and support

NECA's argument included:

- NECA provides HR and IR assistance to its members as opposed to the HR/IR issues of NECA itself. This prevents diverting resources away from its member services and a misuse of such services
- The matter would be dealt with more efficiently given the legal representative's understanding of the relevant statutory provisions, the FWC's processes and procedures, and their ability to identify key issues and evidence
- Representation would enable NECA to distil Mr Davies' lengthy case, based on his 40 pages of materials
- Numerous employees would give witness statements concerning Mr Davies' dismissal and disciplinary process; further, given some employees have personal relationships with Mr Davies, it would cause them unnecessary stress or disruption to represent NECA
- The representative would be able to succinctly examine and cross-examine any witnesses required to give oral evidence
- There was substantial disagreement between the parties as to the reasons for the dismissal and the events that occurred

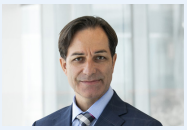
The Decision

The FWC considered the amount of evidentiary material filed, the number of individuals to give evidence (both written and orally) and the substantial differences between the parties' positions in relation to the events connected to the reasons for dismissal, which would need to be dealt with in cross-examination. The FWC determined the matter to be complex and said allowing NECA legal representation would enable the matter to be dealt with more efficiently.

What This Means for Employers

Although an employer may have some expertise in HR and IR matters, it can, in some instances, still be successful in an application seeking external legal representation for unfair dismissal matters. Not only can an external lawyer assist the FWC to deal with the matter more efficiently, having legal representation in such matters can assist an employer to better understand its prospects of success and make appropriate strategic decisions about the case at an early stage.

Contacts



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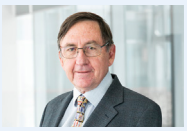

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