SQUIRE PATTON BOGGS

Workplace View

Australia – July 2021

As the last month has shown, COVID-19 still has the potential to wreak havoc in Australia. Once again, we have had to succumb to border closures, lockdowns, vaccination debates and restrictions preventing us from working in our usual (or at least "new COVID-19 normal") ways. We hope that all of our clients are staying safe and well, with as minimal disruption to their businesses as possible.

A number of the articles in this Workplace View follow on from our updates in the April 2021 edition (if you missed that edition, you can find a copy here). For instance, since we reported on the government's response to the Respect@Work Report on sexual harassment, we have seen the introduction of the proposed legislation into parliament. We also provide an outline of the transitional provisions for the new laws that significantly change how to employ casual employees that we reported on in the last edition.

In addition, we look at whether employers can require their employees to receive a flu or COVID-19 vaccination, the requirements for terminating an employee on the basis of redundancy, and a recent decision of the Fair Work Commission that found a food delivery driver to be an employee rather than a contractor as the employer had argued.

We hope that you will join us for our upcoming webinar on termination of employment (the details of which are below).

As always, 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

Sexual Harassment Reforms and Paid Leave for Miscarriage Introduced Into Parliament

Anti-harassment Reforms

In our April 2021 edition of Workplace View, we reported on the federal government's plan to introduce a suite of anti-harassment reforms in response to the Sex Discrimination Commissioner's Respect@Work Report.

As foreshadowed, on 24 June 2021, the government introduced the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the Bill) into parliament. The Bill proposes to amend the Fair Work Act 2009 (Cth) (FW Act) and Sex Discrimination Act 1984 (Cth) (SD Act). The intention of the Bill is to "strengthen, simplify and streamline the legislative and regulatory frameworks that protect workers from sexual harassment and other forms of sex discrimination in the workplace".[1] Among other reforms, the Bill proposes to:

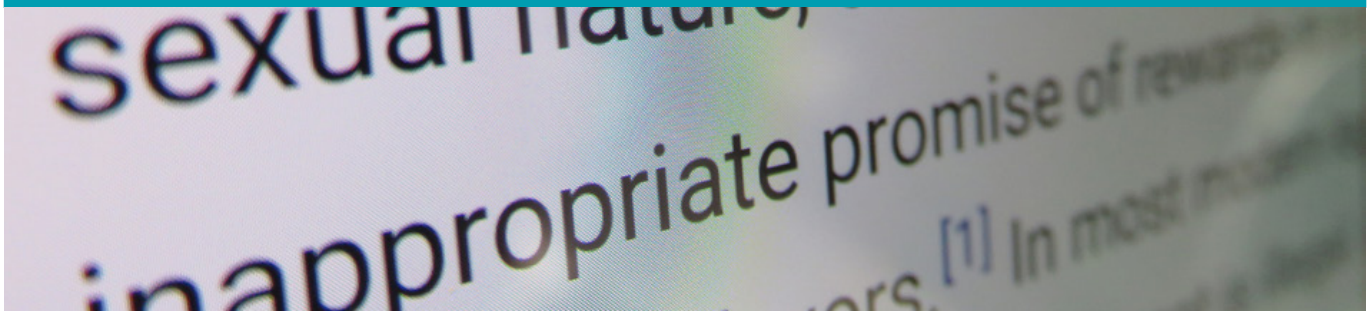
- Amend the SD Act to "make it expressly clear that it is unlawful to harass a person on the ground of their sex"[2].
- Ensure that a person who causes, instructs, induces, aids or permits someone else to engage in sexual harassment can be found to have engaged in unlawful conduct under the SD Act's ancillary liability provision.
- Adopt the concepts of "worker" and "person conducting a business or undertaking" in Australia's model work health and safety (WHS) law within the SD Act, to simplify and streamline the SD Act's protections in alignment with WHS laws.
- Clarify that sexual harassment can be conduct amounting to a valid reason for dismissal for the purposes of the FW Act's unfair dismissal jurisdiction.
- Amend the definition of "bullied at work" in the FW Act to expressly include sexual harassment.
- Clarify that the Fair Work Commission (FWC) can make an "anti-harassment order" within its anti-bullying jurisdiction where it is satisfied workplace harassment has occurred and there is a risk of harassment occurring again. Such orders could include any terms the FWC considers appropriate to prevent a worker from being sexually harassed at work, but cannot include a requirement to pay a pecuniary penalty.
- Modify the application of the FWC's anti-bullying jurisdiction to include single instances of sexual harassment. Currently under the FW Act, workplace bullying must be repeated to fall within the FWC's anti-bullying jurisdiction. Further, under the Bill, a worker applying to the FWC for an anti-harassment order would not need to establish a risk to their health and safety on the basis that "sexual harassment is a known and accepted health and safety risk"[3].
- Simplify the process of unlawful discrimination complaints to the Australian Human Rights Commission (AHRC).
- Amend the grounds on which the AHRC President can terminate complaints, so that a sex discrimination complaint could only be terminated if it is made more than 24 months after the alleged unlawful conduct took place (rather than the current timeframe of six months). This amendment is intended to recognise the barriers that may delay complainants in lodging a sexual harassment complaint.

Compassionate Leave for Miscarriage

After significant lobbying, the government is also using the Bill to expand the FW Act's existing entitlement to compassionate leave to allow employees to take up to two days' paid bereavement leave (unpaid for casuals) if they, or their spouse or *de facto* partner, has a miscarriage within the first 20 weeks of pregnancy. The FW Act currently provides employees two days' compassionate leave when a member of their immediate family or household suffers from a life threatening injury or illness, or dies. Compassionate leave is also available for employees who experience a stillbirth.

This proposed reform comes in the midst of New South Wales becoming the first Australian state to introduce paid special leave for public sector employees who miscarry or have a premature birth, and as debate grows about the adoption of paid menstrual leave and miscarriage leave policies by private sector employers.

[2] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, 1.
[2] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, 7.
[2] Explanatory Memorandum, Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021, 38.



Did You Know?

Top Tips for Navigating Redundancies

Elisa Blakers, Associate

Whether your organisation is looking to reduce employee numbers to withstand the COVID-19 pandemic, or planning a restructure to create greater efficiencies, it is important to be aware of the legal requirements when making an employee redundant. While a redundancy is never entirely without risk, being alert to your obligations, and ensuring you follow the correct process, is the first step to avoiding a successful claim.

We outline below some key tips and tricks to consider when navigating the redundancy process.

Ensure the Redundancy Is a "Genuine Redundancy"

An employee who is terminated as a result of a genuine redundancy is precluded from accessing relief under the unfair dismissal regime. In order to be considered a "genuine redundancy", the employer:

- Must no longer require the particular role in question to be performed by anyone
- Must have adequately consulted with the employee if there is a requirement to do so under an award or industrial instrument

Further, a redundancy will not be genuine if it would have been reasonable in all the circumstances for the person to be redeployed within the employer's business or the business of an associated entity.

Check If the "At Risk" Employee Is Award Covered

If an employee at risk of redundancy is award covered, additional requirements, including an obligation to consult, will arise. It is, therefore, crucial to understand if the employee is award covered.

Employers need to remember that, just because the industry in which they operates is typically award free, this does not necessarily mean all of its employees are award free. An occupational award may still cover some employees within the organisation. For example, the Clerks – Private Sector Award 2020 may cover employees performing clerical and administrative roles.

Failure to comply with the obligation to consult will mean that the redundancy is not "genuine", in turn, meaning that the employee can bring an unfair dismissal claim.

If You Are Required to Consult, Ensure it Is Meaningful

It is important to remember that the consultation process is more than a simple box-ticking exercise, and it is not simply an obligation to inform an employee about what is going to happen. Rather, the consultation process must be meaningful, and engaged in before an irreversible decision to terminate the employee's employment has been made. Notably, this does not require consultation to occur before a decision to restructure has been made. Instead, it requires meaningful consultation to occur prior to any decision regarding the termination of the employee's employment as a result of that restructure.

Consider Redeployment Opportunities for Each At-risk Employee

Prior to terminating an employee on the basis of redundancy, for it to be "genuine", employers have an obligation to consider reasonable redeployment opportunities. The "reasonableness" of a redeployment opportunity is assessed against a number of factors, including the remuneration, status, responsibilities, skills and qualifications required, hours of work and location of the redeployment opportunity as compared to the employee's current role. Something that is often not known or overlooked is that this obligation extends to considering redeployment opportunities not only within the employing entity, but also within any of its associated entities (potentially even if they are overseas).

When Reducing Headcount, Use Objective Selection Criteria

In circumstances where an employer experiences a downturn in work, it may be required to reduce the number of employees engaged to perform a particular task or duty to meet its altered operational requirements. While employers have the discretion to select which employees are at risk of redundancy, to minimise an allegation that unlawful criteria has been considered in the decision-making process, the selection should be based on a clear and objective assessment of each employee.

Calculate Each Employee's Redundancy Entitlements With Reference to Relevant Industrial Instruments, Contracts or Policies

Once a final decision has been made to terminate an employee on the basis of redundancy, an employer must ensure that they provide the employee with the correct entitlements, including notice (or payment in lieu of notice), any accrued but untaken annual or long service leave, and redundancy pay.

Under the Fair Work Act 2009 (Cth), employees are entitled to an amount of redundancy pay calculated with reference to their length of service. Small business employers, being those employers with less than 15 employees (including regular and systematic casuals), are exempt from the requirement to pay redundancy pay. More generous redundancy benefits may exist under the employee's contract of employment, an applicable workplace policy or a relevant modern award or enterprise agreement.

Upcoming Event: Webinar

Termination of employment: Your Rights and Responsibilities as an Employer in Australia

When: Thursday 12 August 2021
Time: 11 a.m. AWST / 1 p.m. AEST
Where: Online – dial-in details will be sent to you upon registration.

From long-term underperformance issues and misconduct to restructures and reducing the size of the workforce in a downtown, organisations of all sizes are often faced with the task of terminating employees. Despite the myriad of situations that may lead to a decision to terminate the employment of an employee, employers should ensure that each step taken is made with reference to its obligations in the employee's contract, the relevant legislation and any applicable modern award or enterprise agreement.

While a termination is never entirely risk free, it is crucial that employers of all sizes be equipped with an understanding of their rights and obligations to ensure the termination process is navigated in a manner that minimises exposure to a successful employee claim.

What Will You Take Away From the Session?

Our upcoming webinar will provide an overview of the legal framework underpinning termination of employment in Australia. Whether you are new to managing the termination of employees, or are just attending the webinar as a refresher, you will take away an understanding or renewed understanding of the following:

- The various grounds for termination of employment
- An overview of the unfair dismissal and adverse action regimes, including who is eligible to make a claim and the remedies available
- What constitutes a "genuine redundancy"
- What types of misconduct are considered "serious misconduct"?
- How to deal with a "heat of the moment" resignation
- Other claims that an employee may bring arising from their termination
- Learnings from recent case law
- Key tips and tricks for setting your organisation up to successfully defend a claim.

Who Should Attend?

This seminar is suitable for HR personnel, in-house legal counsel and any senior manager or business owner who is responsible for the management of Australian employees.

If you would like to join the webinar, please register here.

Q&A

COVID-19 Vaccinations and the Workplace

Erin Kidd, Director

COVID-19 vaccinations are a hot topic across Australia at the moment and this is no doubt why we are receiving questions from employers about the vaccination of their employees. Here are our responses to the three most common questions we are being asked.

The position in respect of Australia's vaccine rollout is constantly evolving; however, the following information is correct as at the date of publication of this Workplace View.

Can an Employer Require Its Employees to Be Vaccinated?

The Australian government's policy has, until recently, been that receiving a vaccination is voluntary. While it has always aimed to have as many Australians vaccinated as possible, it was only on 28 June 2021 that the Prime Minister announced that all residential aged care workers will need to be vaccinated, as will all quarantine workers and those involved in transporting those in quarantine.

Until the federal government's recent announcement about mandatory vaccines for some workers, it was up to state and territory governments to make public health orders requiring some workers to be vaccinated. For example, the Queensland government has required health workers working with diagnosed cases of COVID-19 to be vaccinated, and in Western Australia, there has been mandatory vaccination for various quarantine system workers. On 28 June 2021, the NSW government issued a public health order preventing workers in the NSW Airport and Quarantine Workers Vaccination Program from entering the workplace or providing services if they have not received the first dose of a COVID-19 vaccine.

The current position for most employers, however, is as set out in guidelines about COVID-19 vaccinations in the workplace issued the Fair Work Ombudsman (FWO) and SafeWork Australia. The FWO's guidelines encourage employers and employees to utilise a collaborative approach when it comes to discussing, planning for and facilitating COVID-19 vaccinations in the workplace. SafeWork Australia's guidelines note that, although under work health and safety laws employers have a duty to eliminate or if not possible, minimise, so far as is reasonably practicable, the risk of exposure of COVID-19 in the workplace, it is unlikely that a requirement for workers to be vaccinated will be reasonably practicable. This is because, at present, public health experts, such as the Australian Health Protections Principal Committee have only recommended mandatory vaccines in certain high-risk industries, there may not be vaccines available for all workers, or some workers may have medical reasons why they cannot be vaccinated.

Can an Employer Incentivise Its Staff to Receive a COVID-19 Vaccine?

We have received a number of questions from employers about whether they can encourage or incentivise their staff in Australia to get the COVID-19 vaccine. Australia's Therapeutic Goods Administration (TGA), which has responsibility for regulating therapeutic goods (including vaccines) and the advertising of therapeutic goods in Australia, has issued guidance explaining how employers and others can lawfully promote COVID-19 vaccines and offer rewards to people who have been fully vaccinated to support the government's vaccine rollout.

An employer can create its own content to promote COVID-19 vaccines provided that the content is consistent with the Commonwealth health messaging and national COVID-19 vaccination program. However, the content must not contain, among other things, any reference to the trade name of a particular vaccine or any statement regarding COVID-19 vaccines that is false or misleading.

An employer can also offer valuable consideration, such as cash or some other reward, to people who have been fully vaccinated subject to a number of conditions. These conditions include that the offer can only be made to people who have been fully vaccinated, the offer must contain a statement that the vaccination must be undertaken on the advice of a health practitioner, and the reward must not include alcohol or tobacco.

Based on the TGA's guidelines, an employer could encourage its eligible employees to receive the COVID-19 vaccine as recommended by the government, and on the advice of a health practitioner, and receive a monetary bonus. Alternatively, an employer might offer additional paid leave and transport for the employee to attend the vaccination appointments as an incentive for its staff to get vaccinated. However, despite the TGA's guidelines, employers would need to be mindful that they did not implement incentives that would directly or indirectly discriminate against those employees who, for medical or religious reasons, cannot receive the vaccine.

Can an Employer Record Whether an Employee Has Been Vaccinated Against COVID-19?

An employer can only require an employee to provide information about their vaccination status, which is "sensitive information" under Australia's Privacy Act 1988 (Cth), in very limited circumstances. Generally, the employer must seek the employee's consent to collect vaccination status information and the collection of the information must be reasonably necessary for one of more of the employer's functions or activities. The health and safety risks in the work sector, applicable workplace laws and contractual obligations will impact whether the collection of vaccination status information is reasonably necessary for the employer's activities or functions.

We note, however, that some employers are requesting information about vaccine status from employees on a voluntary and anonymous basis, with the information gathered being used to assist with work health and safety planning. If the collection of such information is genuinely voluntary and anonymous, then we do not consider this to be problematic.

Legislation Update

Elisa Blakers, Associate

How to Prepare Your Organisation for the Casual Employment Changes

Earlier this year, the federal government passed long awaited changes to Australia's casual employment regime. The Fair Work Act 2009 (Cth) (FW Act) was amended to introduce casual conversion obligations, along with a definition of "casual employee" and a requirement to provide all casual employees with the Casual Worker Information Statement (CEIS). We explained each of these changes in our article of 12 April 2021, a copy of which can be found here.

So, what is next for employers? We are now in the midst of a six-month transitional period, during which employers must take steps to prepare for the new provisions, which come into effect on 27 September 2021 (Transition Period).

During this Transition Period, employers should be looking to take the following steps:

Provisions	Timeframe	Action to Be Taken
Offers of casual conversion (*See Division 4A of the FW Act*)	By 27 September 2021	Employers must carefully assess **all** current casual employees (i.e. those employed prior to 27 March 2021) to determine which, if any, casuals are eligible for an offer of conversion. An existing casual employee will be eligible for conversion to permanent employment if they: • Have been employed for a period of 12 months; • Have worked a regular pattern of work on an ongoing basis for at least the last six months; and • Could continue working their regular hours as a permanent employee without significant adjustment. Employers may refuse to offer casual conversion on reasonable business grounds. In those circumstances, the employee must be informed in writing of the refusal and the reasons why.
Providing employees with a copy of the CEIS (See section 125B of the FW Act)	As soon as practicable after 27 September 2021	Employers will be required to provide current and new casual employees a copy of the CEIS.**
Record keeping	Prior to 27 September 2021	Implementing the above changes will likely require a considerable overhaul of an employer's human resource management systems. Employers will need to ensure that they have a system in place that accurately records: • When casual employees will become eligible for an offer of casual conversion; • Any offers or refusals of casual conversion; • Any requests for casual conversion; • Employee responses to offers of conversion; and • Provision of the CEIS to all casual employees.

**These changes impact small business employers, being those employers with a headcount of less than 15 employees, differently. For example, small business employers are required to have provided existing casual employees with a copy of the CEIS as soon as possible after 27 March 2021. Please get in touch with us if you would like to discuss your obligations as a small business employer.

Case Law Update

Deliver-who? An Employee or Contractor?

Diego Franco v Deliveroo Australia Pty Ltd [2021] FWC 2818

Andrew Burnett, Of Counsel

Digital platforms have appeared to facilitate the creation of new and more flexible relationships between platform operators and the people they engage to provide services, particularly because the worker does not have to attend a workplace or work a fixed number of hours per week, and can choose to accept or reject the opportunities offered.

However, in a blow to the many organisations operating through such platforms, on 18 May 2021, the Fair Work Commission ruled that a driver engaged to provide food delivery services on behalf of Deliveroo in Australia was an employee of Deliveroo and entitled to protection against unfair dismissal.

The decision is now on appeal to the Full Bench. We would normally await the appeal decision before updating clients. However, this case is newsworthy because the Commissioner attached significant importance to the way in which the algorithms within the Deliveroo app operated in practice to steer the behaviour of the working drivers. He did not simply accept the wording of the Deliveroo supply agreement signed by the worker, Diego Franco, as a characterisation of the relationship.

In this case, the work required limited skill and training other than the worker's ability to ride his own motorcycle and operate the Deliveroo app. The operator argued that the arrangement provided freedom and flexibility and that it did not control Mr Franco or the manner in which he provided the services, thereby making Mr Franco a contractor who could not bring an unfair dismissal claim.

Freedom or Control?

In applying the multifactorial test to establish whether Mr Franco was an employee or a contractor, the Commissioner considered how the engagement operated at worker level. Mr Franco was required to deliver food safely and efficiently. Deliveroo, through various apps, monitored his delivery times and the routes used, and because his times were generally slower than those of others, he was placed on performance management and eventually dismissed because the delays were unacceptable. While he used his own motorbike, he wore Deliveroo clothing and was the "face of Deliveroo to the many restaurants" he visited on his delivery rounds. He had no opportunity to build his own business and the all-pervasive monitoring by Deliveroo, in fact, meant they exercised control over the way Mr Franco did his work.

Capacity to Control

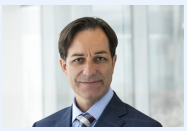
The Commissioner found that Mr Franco had no bargaining power and could not negotiate the fee paid. Although he was not obliged to perform work for Deliveroo, the company could exercise significant control over when, where and for how long he worked if it chose to. In applying the multifactorial test, the Commissioner asked "Does the relationship between Mr Franco and Deliveroo look more like employment or does it look more like independent contracting?" On balance, the fact that Mr Franco was working in Deliveroo's business and the extent of the platform operator's capacity to control meant that Mr Franco was an employee.

The Commissioner ordered that Deliveroo reinstate Mr Franco, with continuity of employment and restoration of lost pay.

What Does This Mean for Employers?

For those whose business model is built on using individuals with ABNs to provide services as contractors, this decision provides another warning of the risks that employers/principals take when creating contracts that do not reflect the underlying commercial realities of the relationship in an attempt to achieve flexibility to operate outside the Fair Work Act 2009 (Cth).

Contacts



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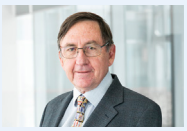

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