

A Review and Analysis of Unpaid
Wages Claims in the Federal
jurisdiction including the impact of
the *Fair Work Amendment (Protecting
Vulnerable Workers) Act 2017*

Ann Fitzpatrick

Basic Legal Scaffolding for Unpaid Wages Claims

- a) What is the basis of such a claim;
- b) Who can prosecute the claim;
- c) Where and when can claims be brought;
and
- d) What are the jurisdictional limits.

a) Whose responsibility is it to pay wages?

Fair Work Act 2009 (Cth) binds

Employers

Franchisors

Holding
Companies

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Where do you find the relevant wages?

Wages, remuneration and entitlements are set out in one or more of:

- Terms of the contract;
- Applicable awards;
- Industrial instruments;
- A relevant statute.

Other arrangements impacting whether wages are unpaid:

- Award offset clauses
- Trade-off of benefits
- Permitted deductions
- High Income guarantee

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Who can prosecute a claim for unpaid wages?

- Civil remedies – Chapter 4 FWA
- Generally, a claim may be made by an **employee**, an **employee's union** or a **Fair Work Ombudsman Inspector** – s 539 FWA

When and where can unpaid wages claims be brought?

- 6 years after the contravention day
- Small claims procedure – Federal Circuit Court and Magistrate’s Court
 - \$20,000 or less
- Federal Circuit Court, Federal Court or Queensland District Court or Magistrate’s Court
 - Over \$20,000

Magistrate's Court of Queensland

- Simplified procedure in Part 5A
- s 42B of the *Magistrate's Court Act 1921* (Qld) includes the power to impose a penalty under the FWA

Likely areas of claims

- Greed and dishonesty
- Long-term casual employment
- Rolled-up rates and annualised salaries
- Calculation of leave for shift workers
- Misclassification of employees as independent contractors

Greed and dishonesty

- *Fair Work Ombudsman v Xia Jing Qi Pty Ltd & Anor*
- The franchisee used a cash back scheme to circumvent a biometric payroll system introduced by head office

Casual Employment

“At least 1.6 million of the 2.6 million casuals in Australia work on a regular, ongoing basis”

Workpac Pty Ltd v Skene; Workpac Pty Ltd v Rossato

0.9

Fair Work Regulation 2009

- Reg 2.03A Claims to offset certain amounts if:
 - An employee is employed by their employer on a casual basis
 - The employee is paid a casual loading that is **clearly identifiable** as being an amount paid to compensate the person in lieu of entitlements
 - The employee was in fact an employee other than a casual for the purposes of NES
 - The employee has made a claim to be paid for one or more of the NES entitlements and they did not receive it

Rolled up rates and annualised salaries

“ *not adhering to record-keeping laws relating to time records for some annualised salary employees and incorrectly classifying employees* ”

George Columbaris



Calculation of leave for shift workers - *Mondelez*

*What is the meaning
of a day?*

Calculation of leave for shift workers - *Mondelez*

Mondelez says:

- All employees work 36 hours per week – 7.2 hours day x 5 days
- Employees accrue 72 hours or 10 calendar days or personal/carer's leave in a year
- Ordinary employees are paid for a 7.2 hour day whilst on leave
- For ordinary employees the leave is used up by deducting 7.2 hours each day from the 72 hours bank. The paid leave lasts for 10 days.

- The 12 hour shift employees have 72 hours leave.
- Employees are paid for a 12 hour day whilst on leave
- The leave is used up by deducting 12 hours each day from the 72 hour bank. The paid leave lasts for 6 days.

The Union says:

- 12 hour shift workers work 36 hours per week – 12 hours x 3 days
- Employees accrue 120 hours or 10 working days of personal/carer's leave in a year
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Calculation of leave for shift workers - *Mondelez*

- Bromberg and Rangiah JJ say
 - A “day” is a working day
- O’Callaghan J says
 - A “day” is not affected by the spread of ordinary hours

Employee/ Independent Contractor

- Regulator is cracking down on companies that misclassify employees as independent contractors
- *Fair Work Ombudsman v Eagle Tours Pty Ltd* – penalties of **\$89,000**

Role of the Fair Work Ombudsman

- Takes formal enforcement action in a limited number of cases in which it detects serious non-compliance with workplace laws:
 - Infringement notices
 - Compliance notices that require an employer to remedy a contravention
 - Enforceable undertakings
 - Litigation seeking civil penalties

Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

- Increased penalties for serious contraventions
- Prohibiting employer requests for “cashback”
- Increased penalties for breaches of recordkeeping and payslip obligations
- Reverse onus of proof for employers who do not meet recordkeeping or payslip obligations
- Strengthened powers to collect evidence
- New penalties for giving false or misleading information or hindering or obstructing investigations
- Franchisors and holding companies can be liable for franchisee or subsidiary contraventions

Franchisors and Holding Companies

- Franchisors and holding companies can be liable for contraventions such as underpayments made by their franchisees or subsidiaries, if:
 - They knew (or could have reasonably known) of the contravention
 - They did not take reasonable steps to prevent it

Serious Contravention

- A serious contravention happens when:
 - The person or business knows they were contravening an obligation under workplace law
 - The contravention was part of a systematic pattern of conduct affecting one or more people
- Increased penalties

Reverse Onus of Proof

- If the employee did not keep the right records, make those records available or give a worker a payslip, the employer has to the burden of disproving the allegation.

Collecting Evidence

- “FWO Notice” – requires a person or business to give information produce documents or attend an interview to answer questions
- The privilege against self-incrimination for individuals has been removed
- Nothing requires a person to produce a document that would disclose information that is the subject of legal professional privilege

Payslips, Cash and Records

- Right to inspect and copy
- *Fair Work Ombudsman v Pulis Plumbing Pty Ltd & Anor.*
 - “a Court would accept even the most slight and generalised evidence of an employee as to the hours of employment in circumstances where an employer does not produce appropriate records”
- Payslips are the most practical check on false recordkeeping and underpayments and allow for genuine mistakes or misunderstandings to quickly be identified

Penalties

- Paid to the Commonwealth, a particular organisation or a particular person
- *Fair Work Ombudsman v Pulis Plumbing Pty Ltd & Anor.*
 - The imposition of penalties is to put a price on contravention that is sufficiently high to deter repetition by the contravener and others who might be tempted to contravene the Act.
 - Credible expression of regret
 - A sanction must be imposed at a meaningful level
 - Penalty consistent with deterrence

Mason v Harrington

- Non-exhaustive range of considerations:
 - The nature and extent of the conduct
 - Circumstances
 - Any loss or damage
 - Similar previous conduct
 - Distinct breaches or a course of conduct
 - Size of the business
 - Deliberate conduct
 - Senior management involvement
 - Contrition
 - Taking of corrective action
 - Cooperation with enforcement authorities
 - Compliance processes in place
 - The need for specific and general deterrence

Eagle Tours

- A discount should be reserved for cases where it can be fairly said that an admission of liability has indicated an acceptance of wrongdoing and a suitable and credible expression of regret or has indicated a willingness to facilitate the course of justice.

EMPLOYMENT AND INDUSTRIAL RELATIONS CONFERENCE 2019
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Topic: A Review and Analysis of Unpaid Wages Claims in the Federal jurisdiction including the impact of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.

Introduction

1. Parties bringing or defending a claim for unpaid wages have access to helpful step by step guides on the websites of the Federal Circuit Court and the Federal Court of Australia in terms of the process of conducting a claim. I will not focus on process today but rather on some of the substantive issues met along the way.
2. My paper focuses on the obligations of national system employers rather than those falling into the State system.
3. I will start with the basic legal scaffolding for an unpaid wages claim:
 - (a) what is the basis of such a claim;
 - (b) who can prosecute the claim;
 - (c) where and when can claims be brought; and
 - (d) what are the jurisdictional limits?
4. We will look at particular areas of vulnerability for employers; the role and powers of the Fair Work Ombudsman; the impact of amendments made to the *Fair Work Act 2009 (Cth)* by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth)*; the importance of keeping time and wages records and finally the nature of the penalties regime.

The basis of an unpaid wages claim

Whose responsibility is it to pay wages?

5. An employee's entitlement to wages and other remuneration for work performed arises out of the underpinning contract of employment between employer and employee. At common law that is the primary relationship and that is the relationship which gives rise to remedies for failure to pay wages and other remuneration.
6. Employers are bound to comply with the *Fair Work Act* and to honour the contract of employment in respect of their own employees. That is, employees with whom they have a direct employment relationship. A host employer will not be bound in respect of the employees of labour hire providers.¹ Qantas was not bound to provide Australian award conditions to pilots flying Trans-Tasman routes when those pilots had been hired through a commercial arrangement with a wholly owned New Zealand subsidiary that employed the pilots. Likewise in *Fair Work Ombudsman -v- Valuair Ltd (No 2)*² Jetstar was not required to pay Australian award wages to cabin crew hired through arrangements with associated labour hire companies incorporated in Singapore and Thailand.
7. As we will see the *Fair Work Act* intrudes on that relationship to also expose accessories (who are not the employer) to liability for unpaid wages; and in the case of franchisors and holding companies to expose the franchisor or holding company (who is not the employer) to liability for unpaid wages.

¹ *Australian and International Airline Pilots Association -v- Qantas Airways Ltd and Jetconnect Ltd* [2011] FWAFB 3706.

² [2014] FCA 759

Where do you find the relevant wage?

8. Wages, remuneration and entitlements are set out in one or more of:
 - (a) the terms of the contract of employment;
 - (b) any applicable award;
 - (c) an industrial instrument such as an enterprise agreement;
 - (d) a relevant statute such as the *Fair Work Act* which sets out the mandatory National Employment Standards.

9. The Fair Work Ombudsman website provides various pay tools to assist in finding the applicable pay rates for employees or to calculate an employee's weekly pay.

10. These are the first places to look, however other arrangements may impact the question of what wages are unpaid:
 - (a) Obviously, the pay of many employees is higher than that set out in a modern award or enterprise agreement. Wages are often paid to meet market demand and are not calculated by reference to hourly rates and calculation of entitlements, penalties and loadings. It is common to see an Award offset clause in contracts of employment which purports to offset the agreed remuneration against any award entitlement. The clause is valid provided the clause states what the over award payment is being used to satisfy (for example overtime) and that the over-award payments are in fact sufficient to compensate the employee.
 - (b) Bear in mind that under the *Fair Work Act* all employees are entitled to be paid at least the National Minimum Wage (or Special National Minimum Wage) per hour for each hour worked.
 - (c) Any trade-off of an improvement in one benefit for surrender of another provided by a modern award can only be achieved by making and securing approval of an enterprise agreement made under the *Fair Work Act*.
 - (d) There is limited scope for making "individual flexibility arrangements" to vary the application of awards to particular employees. They can only be made to make the employee "better off overall". It is possible that employers who believe they have varied the terms of a modern award through individual flexibility arrangements discover at a later time that the terms agreed breached the award and expose the employer to unpaid wages claims and civil penalties.³
 - (e) Section 323 of the *Fair Work Act* provides that employers must pay their employees fully in money (cash, cheque or electronic funds transfer). Employers who pay by some other means, for example, in-store vouchers or goods will find that employees can still recover their full wage entitlements in money, without any set-off for the value of the goods.⁴
 - (f) Deductions from pay for breakages and till shortages are prohibited.
 - (g) Some deductions are permitted provided they are authorised in writing and are principally for the employee's benefit. For example, a salary sacrifice arrangement.⁵ Any deduction directly or indirectly for the benefit of the employer or a party related to the employer and is unreasonable, is prohibited.⁶
 - (h) If a high income guarantee is entered into, the employee is not subject to the application of a modern award.⁷The high income threshold is 148,700.00 as from 1 July 2019.

³ s 143(3).

⁴ s 327.

⁵ s 324.

⁶ s 326.

⁷ S328

Who can prosecute a claim for unpaid wages?

11. Chapter 4 of the *Fair Work Act* provides for civil remedies for contravention of civil remedy provisions of the Act. This is the Chapter which covers unpaid wages claims. Relevantly, failure to comply with the National Employment Standards (s44(1)), a modern award (s45), an enterprise agreement (s50), minimum wages (s293) and failure to pay the full amount payable in relation to the performance of work (s323) is a contravention of the Act which gives rise to an entitlement for a civil remedy.
12. The table at s539 of the *Fair Work Act* sets out the persons who may apply to the Courts, for an Order, the relevant courts and the maximum applicable penalty. Generally, a claim may be made by an employee, an employee's union or a Fair Work Ombudsman Inspector.
13. An employee or an Inspector may also apply to the Federal Circuit Court or Federal Court for an Order relating to contravention of a safety net contractual entitlement. Safety net contractual entitlements take effect as an entitlement under the *Fair Work Act* ⁸They include any entitlement agreed in a contract between an employer and employee that deals with one of the matters in the NES or a modern award. An Employment contract may include terms which agree to meet or exceed the minimum entitlement set out in the NES or an applicable award. The effect of this provision is to permit employees to bring breach of employment contract claims (as opposed to breach of civil remedy provision claims) in the Federal Circuit Court or Federal Court.

When can unpaid wages claims be brought?

14. A person may apply for an Order relating to underpayments only if the application is made within 6 years after the day on which the contravention occurred.⁹
15. A Court must not make an order in relation to underpayment that relates to a period that is more than 6 years before the proceedings commenced.¹⁰

Small Claims procedure Federal Circuit Court and Magistrates Court

16. If the amount claimed is \$20,000.00 or less, an applicant may choose the small claims procedure in the Federal Circuit Court or State Magistrate's court.¹¹
17. This involves a simpler process. The Court is not bound by rules of evidence and procedure and may act in an informal manner and without regard to legal forms and technicalities.
18. Leave is needed for legal representation and costs orders are usually not made.
19. Pecuniary penalties are not ordered under the small claims' procedure.¹²

Federal Circuit Court, Federal Court or the Queensland District or Magistrate's Court

20. If the claim is over \$20,000.00 or the applicant does not want to use the small claims' procedure then proceedings may be commenced in the Federal Circuit Court, the Federal Court or an eligible State Court, which is relevantly defined for Queensland as the District or Magistrate's Court.

⁸ s542

⁹ s544

¹⁰ s545(5)

¹¹ s548

¹² s548(1)(a)

21. The Federal Court and the Federal Circuit Court have jurisdiction in relation to any civil matter arising under the *Fair Work Act*.¹³
22. As a rule of thumb shorter, simpler matters are dealt with in the Federal Circuit Court. Filing fees are lower than the Federal Court. The downside is that there is currently a considerable backlog of matters and it can take some time for a claim to be determined.
23. Eligible State Courts have jurisdiction under s539(2) of the Act to make orders in relation to contravention of civil remedy provisions, including the payment of penalties. Eligible State Courts are given express power to order an employer to pay an amount to, or on behalf of, an employee if the court is satisfied that the employer was required to pay the amount under the Fair Work Act or a fair work instrument and the employer has contravened a civil remedy provision by failing to pay the amount.¹⁴

Magistrates Court of Queensland

24. As an alternative, in Queensland, an employment claim up to \$150,000 (the jurisdictional limit of the Magistrates Court) can be made in the Magistrates Court using a simplified procedure if the employee earns less than the high income threshold prescribed by legislation. That is currently \$98,200.00. S42B of the *Magistrates Court Act 1921 (Qld)* provides that the processes for employment claims apply to claims under the *Fair Work Act* including the imposition of a penalty under the Act.
25. An advantage of commencing an employment claim using the simplified procedure under Part 5A of the *Magistrates Court Act 1921 (Qld)* is that once the claim is filed, it is referred to the Queensland Industrial Relations Commission for a conference, to be held with an Industrial Commissioner. This is very helpful as the Commissioner can bring employment and industrial experience to the issue.
26. If the claim is not settled at the conference, it will be referred to the Magistrates Court and will proceed to a hearing. Legal representation is not usually permitted, and costs orders are not usually made. There is no appeal.
27. Alternatively, the standard Magistrates Court process can be used which is more detailed and allows the use of lawyers and the benefit of a costs order against the losing party.

Other Types of Claims

28. If an employee is owed money for contractual incentives such as commission or bonuses, recovery proceedings must be commenced in a State civil court.
29. If compulsory superannuation payments are outstanding, a complaint can be made to the Australian Taxation Office.
30. A claim for unpaid long service leave can be made in the Federal Circuit Court or in the State Industrial Relations Commission.
31. If an employer goes into administration or liquidation, minimum statutory or award entitlements may be recovered through the Federal Government's Fair Entitlements Guarantee Scheme.

Likely areas for claims

32. Some recent decisions highlight areas of exposure for employers, including

¹³ S562, s566

¹⁴ S545(3)

- (a) greed and dishonesty;
- (b) use of long-term “casuals”;
- (c) use of rolled up rates and annualised salaries;
- (d) calculation of personal/carer’s leave for shift workers;
- (e) misclassification of employees as independent contractors.

Greed and dishonesty

33. Two recent decisions of the Federal Circuit Court in *Fair Work Ombudsman v Xia Qi Jing Pty Ltd and Anor*¹⁵, are particularly egregious examples. A former 7-Eleven franchisee responded to Fair Work Ombudsman s712 notices for the production of documents, with false and misleading pay records, intended to disguise underpayments. The franchisee used a cash-back scheme to circumvent a biometric payroll system introduced by head office to stamp out underpayments.
34. After 2016 the franchisee used 7-Eleven’s biometric workforce management system, which required employees to sign in and out by scanning their fingerprints so that head office could transfer the applicable minimum award rates into their respective bank accounts. However, the franchisee simply continued his practise of having employees return amounts in excess of \$15 an hour via a safe drop box or to the store manager’s bank account. The manager then transferred the cash to her employer. The result was underpayment of Chinese student workers.
35. The franchisee and the manager (as an accessory) were ordered to pay significant penalties.

Casual employment

36. The recent decision of the Full Court of the Federal Court in *Workpac Pty Ltd v Skene*¹⁶ has reopened the Pandora’s box as to what a “casual” employee might be. *Skene’s* case involved an interpretation of the word “casual” as it appears in s86 of the *Fair Work Act*. The section sets up the entitlement of an employee to annual leave in accordance with the NES. Section 86 says: ‘This Division applies to employees, other than casual employees.’
37. The traditional industrial approach reflected in many industrial instruments is that an employee is a casual if he or she is employed as a casual and paid as a casual.
38. Mr Skene was employed by a labour hire business as a dump truck operator for 4 years until 17 April 2014 at coal mining operations in central Queensland. Workpac designated his employment as casual. Mr Skene was aware of that. He was paid a flat rate of \$50, later \$55 an hour. The contract did not allocate any part of the rate of pay to a casual loading or as monies in lieu of paid annual leave.
39. Mr Skene worked 7 shifts of 12.5 hours, followed by 7 days off in accordance with a roster set 12 months in advance. His employment was continuous.
40. On termination he was not paid for accrued untaken annual leave. Mr Skene was successful in establishing an entitlement to payment in lieu of annual leave and an entitlement to pecuniary penalties.
41. The Federal Court affirmed the decision of Justice Jarrett below that if an employee works regular and systematic hours with an expectation of ongoing employment the employee is not a casual and is entitled to annual leave in accordance with the NES.

¹⁵ [2019] FCCA 83 and [2019] FCCA 84

¹⁶ [2018] FCAFC 3035

42. The Court said:

- At [180]: The conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship will need to be assessed...the nature of the relationship may be legitimately examined by reference to the actual way in which the work was carried out...the characterisation of employment by (the employee) and the (employer) generally or in a document and the provisions of the Award are simply matters to be taken into account in determining the true character of the employment.
- At [181]: Whether the requisite firm advance commitment to continuing and indefinite work (subject to rights of termination) is absent or present must be objectively assessed including by reference to the surrounding circumstances created by both the contractual terms and the regulatory regime (including the FW Act, awards and enterprise agreements) applicable to the employment.¹⁷

43. The decision was not appealed. However, another case is following hot on its heels. In *Workpac Pty Ltd v Rossato*¹⁸ Chief Justice Allsop directed that the matter be determined by a Full Court. Workpac seeks to challenge the statement of principle as expressed in [180], which I have referred to earlier. The Chief Justice said at [4]:

It is important to understand that the statement of principle as expressed in [180] was obiter and not the subject of any substantive challenge in *Skene* by counsel...Workpac now seeks to challenge legal propositions contained within [180]...That point is whether the status of casualness for the purpose of s86 is a question of characterisation considering all the aspects of the work relationship or a question of construction of the employment contract. That way of putting the matter by senior counsel in this application may overlook, with respect, the possible complexities of proper factual analysis. What a contract states at the commencement of an employment relationship is one thing, it may be another if it is administered in a particular way. It may be that over time, and through conduct, the contract is varied. This “characterisation” may just be seen as the fluid variation of the contract, in practice. Thus, I am far from convinced that the binary analysis of counsel is, or will be in the long term, helpful or determinative.

44. Mr Rossato and Workpac agreed a statement of facts to form the basis of the resolution of the dispute. The Minister for Jobs and Industrial Relations supported Workpac’s application and was granted leave to intervene. The CFMMEU was also granted leave to intervene. The case has been heard but no decision handed down as at the date of this paper.

45. The case law will have to play out to its conclusion. In the meantime, employer groups have complained about the potential for double dipping. As Australian Industry Group Chief Executive Innes Willox put it:

It is obviously unfair for employees who have been paid a casual loading to be allowed to claim years of back-pay for annual leave entitlements from business that have, in good faith, employed them as casuals and paid them a casual loading. Everyone knows that casual loadings are paid in lieu of annual leave and various other entitlements of permanent employment.

... Small businesses will be particularly hard hit, as can be seen from the following statistics extracted from Ai Group analyses of ABS and HILDA statistics:

¹⁷ Extracts paraphrased by me. Citations omitted.

¹⁸ [2018] FCA 2100

At least 1.6 million of the 2.6 million casuals in Australia work on a regular, ongoing basis...¹⁹

46. The Federal Government has responded with amendments to the *Fair Work Regulations 2009*:
- (a) Reg 2.03A Claims to offset certain amounts. An Employer can make a claim to have the casual loading payments made to an employee taken into account when working out the entitlements owing to the employee for relevant NES entitlements. This applies where all the following criteria are met:
- An employee is employed by their employer on a casual basis.
 - The employee is paid a casual loading that is **clearly identifiable** as being an amount paid to compensate the person in lieu of entitlements that casual employees are not entitled to under the NES, such as personal or annual leave.
 - The employee was in fact an employee other than a casual for the purpose of the NES.
 - The employee has made a claim to be paid for one or more of the NES entitlements (that casual employees do not have) that they did not receive for all or some of the time that they were incorrectly classified as a casual.
- Note 1 to the Regulation provides that the regulation is intended to apply if the person has been mistakenly classified as a casual employee during all or some of the employment period.
- Note 2 provides examples of where a loading has been clearly identified as compensation for not having an NES entitlement, as including correspondence, pay slips, contracts and relevant industrial instruments.
- The Regulation goes on to provide that the regulation does not affect the matters to which a court may otherwise have regard, at law or in equity, in determining an employer's claim to have the loading amount taken into account.
- (b) Reg 7.03 Application of amendments – claims to offset certain amounts. Regulation 2.03A applies in relation to employment periods that occur (whether wholly or partly) before, on or after the commencement of that Schedule.
47. Finally, I note that the CFMMEU has launched a class action against Workpac seeking at least \$12 million in unpaid annual leave entitlements for allegedly misclassified individuals working on flat rates of pay under long-term rosters. Adero Law has also launched a class action seeking \$84 million for 7,000 on-hire casuals engaged by Workpac.

Rolled up rates and annualised salaries

48. It will have been impossible to miss the high-profile difficulties of George Columbaris and the Made Establishment group of restaurants.
49. This is not a matter which proceeded to Court. The half page public apology published in the Weekend Australian on 10 August 2019 sets out the history of the matter:

In early 2017 following a change in ownership and management, the Group conducted a review of its records and identified that it had failed to correctly pay many employees. The Group self-reported to the Fair Work Ombudsman which commenced an investigation.

Admissions were made that it:

- failed to pay minimum rates of pay, casual loadings, Saturday, Sunday, Public Holiday, early morning and evening penalty rates, overtime rates, split shift allowances, minimum

¹⁹ AiGroup Media Release 8 November 2018.

hourly engagements, penalties for working through meal breaks and annual leave loadings;

- failed to conduct annual reconciliations for those employees paid through an annual salary arrangement to ensure they had been properly remunerated for all accrued overtime and penalty rates;
- failed to make and keep part time work agreements; and
- failed to keep a record of start and finish times for employees on annualised salaries.

The Group said that things which contributed to the underpayments were not adhering to record-keeping laws relating to time records for some annualised salary employees and incorrectly classifying employees.

50. The Group has back paid \$7.8 million in wages and superannuation to more than 500 current and former employees. It will make a \$200,000 contribution payment to the Commonwealth and has entered into an Enforceable Undertaking committing to training, audits, implementation of systems and processes to monitor compliance and registering with the Fair Work Ombudsman 'My account' portal. Mr Columbaris has committed to promote compliance within the restaurant industry and to educate fellow industry leaders about the importance of complying with the *Fair Work Act*.
51. Much can be learned from the Made Establishment experience. First, the importance of good record keeping and constant monitoring of compliance. Next, despite all the public humiliation associated with these issues, the Group went on the front foot by self-reporting. It was not prosecuted through the Courts. The Enforceable Undertaking serves to prevent an application for imposition of penalties for contravention of the civil remedy provisions of the *Fair Work Act*, so its loss and costs were minimised to a degree.²⁰ Finally, it has done the right thing in the end. It does not appear to be receiving much credit for that in the public square, but it is objectively important.

Calculation of leave for shift workers

52. On 21 August 2019 the Full Federal Court handed down a decision in *Mondelez v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union known as the Australian Manufacturing Workers Union (AMWU)*²¹.
53. The decision will impact more than a million employees who work shift work and could see back pay bills for employers.²² Section 96 of the *Fair Work Act* provides that for each year of service an employee is entitled to 10 days of paid personal/carer's leave. The leave accrues progressively during a year of service according to the employee's ordinary hours of work and accumulates from year to year.
54. Justices Bromberg and Rangiah, in their majority decision set out the competing constructions of the word "day": at [6]:

Mondelez' employees each work 36 ordinary hours per week. Some work 7.2 hours per day, five days per week. Others work 12 hours per day, three days per week. On Mondelez' "notional day" construction, under s96(1) of the Act, each employee is entitled to accrue 72 hours of paid personal/carer's leave over a year; but a 7.2 hour employee's entitlement will be

²⁰ S715(4)

²¹ [2019] FCAFC 138

²² The Australian Financial Review, 22 August 2019, p 9.

used up over ten calendar days, whereas a 12 hour employee's entitlement will be used up over six calendar days. On Mondelez' construction, a 12 hour employee who is unable to work after the sixth day would lose income, whereas a 7.2 hour employee would not. In contrast, on the respondents' construction, the 12 hour employee is entitled to more hours of paid personal/carer's leave than the 7.2 hour employee, but neither would lose income over a period of ten calendar days.

55. Their Honours fleshed out the problem at [84]:

The fundamental differences produced by the parties' constructions may be illustrated by assuming there is a group of employees who work the same number of average ordinary weekly hours, have the same base rate of pay, have the same quantum of paid personal/carer's leave entitlements accrued and are unable to work because of illness on the same days. However, it may also be assumed that the employees' shift patterns vary such that they have different numbers of ordinary hours each day. Under Mondelez' construction, all the employees would be entitled to take up to the same number of hours of paid personal/carer's leave, but some could lose earnings depending upon their shift patterns, whereas others would not. Under the Union's construction, some employees could be entitled to take more hours of paid personal/carer's leave than others, but no employee would lose earnings for the ordinary hours that the employee was unable to work.

At [85]:

It is impossible to avoid unequal outcomes between employees on either construction. To say that outcomes are unequal is not, however, to say that such outcomes are necessarily inequitable or unintended.

56. Justices Bromberg and Rangiah held at [199]:

- (1) A "day" in s96(1) of the Fair Work Act refers to the portion of a 24 hour period that would otherwise be allotted to work (a "working day").
- (2) A "day" of "paid personal/carer's leave" under s96(1) is an authorised absence from work for a working day for a reason set out in s97.
- (3) Under s96(1), an employee accrues an entitlement to be absent from work for a reason set out in s97 for ten such working days for each year of service.
- (4) The entitlement to paid person/carer's leave under s96(1) is not an entitlement to take such leave, which only arises when one of the conditions in s97 is satisfied.
- (5) For every day of paid personal/carer's leave taken, a day is deducted from the employee's accrued leave balance.
- (6) Under s96(1), the accrual is of part-days of paid personal/carer's leave, not only full days.
- (7) An employee may take a part-day of paid personal/carer's leave, and an equivalent part-day is deducted from the employee's leave balance.
- (8) The expression "ordinary hours of work" in ss96(2) and 99 distinguishes ordinary hours from overtime hours.
- (9) The expression "ordinary hours of work" is used in s96(2) to indicate that part-days of paid personal/carer's leave entitlement are calculated on the basis of ordinary hours.

...

57. Justice O’Callaghan dissented. His Honour relied heavily on the Explanatory Memorandum to the *Fair Work Act* and concluded that the amount of personal/carer’s leave to be accrued is not affected by any different spread of an employee’s ordinary hours of work in a week. His Honour said that 10 days leave for each year of service must operate as a unit of time directly referable to, or expressed, as ordinary hours.²³
58. The *Mondelez* decision follows a recent Fair Work Commission decision with a similar outcome. In *AWU v AstraZeneca Pty Ltd*²⁴ the Fair Work Commission rejected the employer’s submission that the entitlement to 10 days of paid person/carer’s leave means an entitlement to payment equal to the time that would have been worked on 10 ordinary or standard days of averaged ordinary hours. That is of 7.2 or 7.6 hours duration.
59. The upshot is that employers who have been paying their employees for 7.2 hours when they ordinarily work longer shifts are exposed to backpay for underpayment for leave days taken, which should have been paid at the rate for a longer working day. Further for employees who have used up their leave days because their longer shift length has been deducted from the accrued leave, may have claims for non-payment of days of leave taken.
60. The Fair Work Ombudsman’s website is currently offering no advice on how to calculate or pay for person/carer’s leave, noting the decision in *Mondelez* and recommending employer’s take legal advice.

Employee/Independent Contractor

61. The Fair Work Ombudsman, Sandra Parker, has said that the Regulator is cracking down on companies that misclassify employees as independent contractors.
62. In the recent decision of *Fair Work Ombudsman -v- Eagle Tours Pty Ltd*,²⁵ Judge Cameron imposed penalties of \$89,000.00 on Eagle Tours Pty Ltd which had employed bus drivers as independent contractors and paid them a flat rate of \$22.00 per hour, rostering them on 10-12 hour shifts.

Role of the Fair Work Ombudsman

63. The Fair Work Ombudsman is the National labour inspectorate, established under the *Fair Work Act*.
64. The Fair Work Ombudsman uses a range of tools to promote cooperative workplace relations and ensure compliance with workplace laws. These include providing information and education, receiving complaints, investigating suspected contraventions and in a small number of cases, undertaking litigation and other enforcement actions against non-compliant employers. The Fair Work Ombudsman has wide powers to investigate breaches of Commonwealth workplace laws by visiting workplaces, interviewing people or requiring the production of documents.
65. These powers have been expanded by the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017*.
66. Despite the breadth of its mandate and activities, the Fair Work Ombudsman has only a limited number of inspectors responsible for ensuring compliance with the *Fair Work Act* nationally and

²³ Mondalez, op.cit at [209] and [217]

²⁴ [2018] FWC 4660

²⁵ [2019] FCCA 2009.

inspectors responsible for early intervention and alternative dispute resolution, serving more than 12 million workers in more than 2 million workplaces.²⁶

67. The agency's core functions are not directed to the large-scale provision of individual remedies. Rather, their resources are primarily oriented to strategic enforcement, systemic deterrence of non-compliance and the promotion of harmonious workplaces.
68. The Fair Work Ombudsman takes formal enforcement action in a limited number of cases in which it detects serious non-compliance with workplace laws. This takes four forms:
 - infringement notices.
 - compliance notices that require an employer to remedy a contravention.
 - enforceable undertakings with employers who have accepted responsibility and agreed to remedy contraventions and ensure future compliance.
 - litigation seeking civil penalties.
69. It appears that the Fair Work Ombudsman's approach is for persons to obtain information themselves and to try and resolve issues themselves in the workplace. The vast majority of people who contact the Fair Work Ombudsman's info line are provided with information, referred to other avenues and receive no further assistance.
70. The Pay and Conditions Tool on the FWO's website is intended to enable workers to determine their rate of pay, including penalty rates. The tool does not assist workers to determine the actual amount owing and may be difficult to use for those who are unable to identify their precise job classification.
71. Calculating unpaid wages and entitlements requires significant time, mathematical skill, knowledge of the appropriate award classification, base rate of pay and other rates applicable at different times. This is one of the greatest obstacles to recovery of unpaid entitlements. In my experience, for a claim that covers a number of years the only way to undertake the calculations is to engage an accountant to do so and to prepare a report setting out the calculations. That may well be beyond the reach of most employees.
72. The Fair Work Ombudsman utilises the accessorial liability provisions of the *Fair Work Act* (s 550) to extend responsibility to others "involved in" a contravention of the Act. It uses accessorial liability to reinforce the critical roles and responsibilities of key personnel involved in the breach including company directors or advisors, accountants or HR advisors and other entities benefiting from the labour.
73. Courts have made orders for accessories to pay penalties, freeze their assets and to restrain future contraventions. The 7-Eleven manager in the *Xia Jing Qi Pty Ltd* case is an example. Judge Hartnett noted that the manager was herself underpaid, on a student visa and had been placed in a terrible and illegal position. However, he rejected her explanation that she was following directions and that she thought she might be demoted if she questioned the cashback scheme. The Judge found this was not an excuse and did not ameliorate her responsibility.

Fair Work Amendment (Protecting Vulnerable Workers) Act 2017

74. The amending Act took effect on 15 September 2017. It made the following changes to the *Fair Work Act*:
 - increased penalties for serious contraventions of workplace laws.

²⁶ Productivity Commission 2015, 1, 4.

- prohibiting employer requests for “cashback” from employees or prospective employees.
- increased penalties for breaches of recordkeeping and payslip obligations.
- employers who do not meet recordkeeping or payslip obligations and cannot give a reasonable excuse will need to disprove wage claims made in a Court. This is a reverse onus of proof.
- strengthened powers to collect evidence in investigations.
- new penalties for giving false or misleading information or hindering or obstructing Fair Work Ombudsman investigations.
- Franchisors and holding companies can be liable for contraventions by their franchisee or subsidiary.

Franchisors and Holding Companies

75. In *Fair Work Ombudsman –v- Yogurberry World Square Pty Ltd*,²⁷ a master franchisor was found liable for contraventions of its franchisees. Fines were imposed on companies in the group including the master franchisor and the payroll company on the basis that they had knowledge of and participated in establishing rates of pay, making payment of wages, determining hours of work and dealing with employment-related matters for the employee and were therefore liable under the accessory liability provisions of the Act.
76. As a result of amendments to the *Fair Work Act* expressly directed to franchisors and holding companies, franchisors and holding companies can be held responsible if their franchisee or subsidiary does not follow workplace laws about minimum entitlements, the National Employment Standards, awards, sham contracting, recordkeeping and payslips.
77. This applies to franchisors who have a significant amount of influence or control over the business affairs of the franchisee.
78. Franchisors or holding companies could be liable for contraventions such as underpayments made by their franchisees or subsidiaries, if:
- they knew (or could have reasonably known) of the contravention
 - they did not take reasonable steps to prevent it.²⁸
79. In determining if reasonable steps were taken the following is relevant:
- (a) the size and resources of the franchise or body corporate;
 - (b) the extent to which the person had the ability to influence or control the contravening employer’s conduct;
 - (c) action taken to ensure the contravening employer had reasonable knowledge and understanding of relevant requirements;
 - (d) compliance arrangements;
 - (e) complaint processes;
 - (f) the extent to which the person’s arrangements with the contravening employer encourage or require the contravening employer to comply with the Act or any workplace law.²⁹

²⁷ [2016] FCCA 1290.

²⁸ S558B

²⁹ s558B(4)

80. If a franchisor or holding company is ordered to make a payment to an employee, they have a right of recovery from the contravening employer in proceedings in the Federal Court, Federal Circuit Court or an eligible State or Territory court.³⁰

Serious Contraventions

81. There are increased penalties for serious contraventions of workplace laws. A serious contravention happens when:
- the person or business knew they were contravening an obligation under workplace law.
 - the contravention was part of a systematic pattern of conduct affecting one or more people.³¹
82. This applies to breaches of the National Employment Standards, a modern award, an enterprise agreement, a workplace determination, a National minimum wage order, an equal remuneration wage order, method and frequency of paying wages, cashback schemes, guarantees of annual earnings, recordkeeping requirements and payslip requirements.

Reverse Onus of Proof

83. If an employee claims there is a breach of the National Employment Standards, a modern award, enterprise agreement, workplace determination, minimum wage order, equal remuneration wage order, method and frequency of paying wages, or a cashback scheme, and the employer did not keep the right records, make those records available or give a worker a payslip, the employer has the burden of disproving the allegation.³²
84. The reverse onus does not apply if the employer provides a reasonable excuse as to why there has not been compliance.

Collecting Evidence

85. The Fair Work Ombudsman can apply to the Administrative Appeals Tribunal for a “FWO Notice” if it is reasonably believed a person has information or documents that will help an investigation and is capable of giving evidence. The notice requires the person or business to give information, produce documents or attend an interview to answer questions.³³
86. In relation to the additional powers of the Fair Work Ombudsman to issue a notice requiring information and giving enforceable powers of questioning, the privilege against self-incrimination for individuals has been removed³⁴ on the basis that doing so is necessary to ensure the Fair Work Ombudsman has all the available relevant information to carry out its functions and to prevent investigations from being stalled.
87. The new powers are similar to those available to ASIC and the ACCC and are subject to a number of safeguards before they can be exercised by the Fair Work Ombudsman.
88. Importantly, nothing in the Act dealing with the powers of the Fair Work Ombudsman requires a person to produce a document that would disclose information that is the subject of legal professional privilege.³⁵

³⁰ s558C

³¹ s557A

³² s557C

³³ s712AA

³⁴ S713

³⁵ S713AA

Payslips, Cash and Records

89. Employers must issue payslips to each employee within one working day of pay day.
90. There is no legitimate excuse for an employer not to provide payslips. A failure to do so is in breach of s 53(6) of the *Fair Work Act*. The payslip must provide the following information:
- Name of the employee.
 - Name of employer and ABN.
 - The period to which the payslip relates.
 - An hourly rate of pay for ordinary hours worked (if there is one), the amount, the number of hours worked, the amount of the payment.
 - An annual rate (if there is one) at the latest date to which the payment relates.
 - The date on which the payment was made for the period on the payslip.
 - The net and gross amount of the payment.
 - Any amount that is a bonus, loading, allowance, penalty rate, incentive payment or other separate entitlement.
 - Any deductions made.
 - Superannuation contributions – the amount paid or the amount the employer is liable to make in relation to the period to which the payslip relates.
 - Name and number of the superannuation fund.
91. If a dispute arises between an employer and an employee and there are no payslips, it is difficult for the employer or employee to provide evidence of relevant events or evidence that an employment relationship existed. The employer must keep accurate employee records for seven years. The records that an employer must keep are:
- The employee’s personal details and certain information about their employment.
 - Gross pay and deductions.
 - Bonuses, loadings, penalty rate payments, other allowances.
 - Overtime records.
 - Records regarding an agreement about averaging work hours.
 - Leave records.
 - Records of superannuation contributions.
92. Section 535 of the *Fair Work Act* 2009 and Regulation 3.42 of the *Fair Work Regulations* 2009 give employees or ex-employees the right to inspect and copy their employee records.
93. An employer must provide the documents within 14 days from the request.
94. An employer who refuses to make the records available or does not provide them within the specific time without a reasonable explanation may be penalised by a Court.
95. The decision of *Fair Work Ombudsman -v- Pulis Plumbing Pty Ltd & Anor*³⁶ is instructive.
96. In that case, an employee commenced work as a second-year apprentice plumber. He was paid wages for standard hours but worked between 10-12 hours each day.
97. The employee kept a record of his own hours.

³⁶ [2017] FCCA 3013.

98. The employer made two cash payments for overtime. The employer did not complete the employee's registration as an apprentice. The employee was terminated at the end of a three month trial period.
99. The employer ultimately admitted his contraventions of the *Fair Work Act* and rectified underpayments of \$26,882.73 for the three month period.
100. Timesheets were never produced to the Court or the Fair Work Ombudsman. Reliance was placed upon the employee's records of the hours worked.
101. His Honour Judge Riethmuller said:
- “Given the statutory requirements upon employers with respect to recordkeeping, it appears to me that, ordinarily, a Court would accept even the most slight and generalised evidence of an employee as to the hours of employment in circumstances where an employer does not produce appropriate records. More recently, the Fair Work Act has been amended to ensure that an employer who does not keep records required by the Act in s 535 and 536, then the employer has the burden of disproving the allegations about those matters. See s 557C. In short, in future if the employer fails to keep time sheets and provide payslips the employer has the burden of disproving an employee's claim about hours worked and payments made.”
102. His Honour noted that the Fair Work Ombudsman had recently released an application for smart phones called “Record My Hours” to assist employees in a practical way to keep records from which they may verify their payslips are correct.
103. His Honour commented that payslips have real and practical importance in the scheme of industrial law. They provide the most practical check on false recordkeeping and underpayments and allow for genuine mistakes or misunderstandings to quickly be identified. Without proper payslips employees are significantly disempowered, creating a structure within which breaches of the industrial laws can easily be perpetrated.

Penalties

104. Section 546 of the *Fair Work Act* provides that the Federal Court, the Federal Circuit Court or an eligible State or Territory court may, on application, order a person to pay a pecuniary penalty that the court considers appropriate if the court is satisfied that the person has contravened a civil remedy provision.
105. Penalty unit has the meaning given in s 4AA of the *Crimes Act 1914*.
106. The Court may order the penalty be paid to the Commonwealth, a particular organisation or a particular person. It is usually paid to the successful applicant. In the case of a Fair Work Ombudsman Inspector bringing a claim, the payment is made to the Commonwealth.
107. Courts are able to consider an agreement between the parties on penalties or submissions by a regulator on the quantum or a range of penalties, however, it is up to the court to decide whether the agreed amount is appropriate.³⁷
108. The decision of *Fair Work Ombudsman -v- Pulis Plumbing Pty Ltd & Anor*³⁸ sets out useful discussion in relation to calculation of penalties.

³⁷ *Commonwealth v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482 at [48].

³⁸ [2017] FCCA 3013.

109. His Honour Judge Riethmuller said that the purpose of imposing penalties under the *Fair Work Act* provisions is not for the purpose of retribution and rehabilitation. The imposition of penalties is to put a price on contravention that is sufficiently high to deter repetition by the contravener and others who might be tempted to contravene the Act.³⁹
110. His Honour said it is important to ensure one has regard to all the relevant facts and circumstances of a particular case before striking a penalty figure. The factors set out in *Mason -v- Harrington Corporation Pty Ltd*⁴⁰ is a useful guide, but not an exclusive list.
111. Judge Riethmuller noted that the applicant had been paid and liability conceded, however, he did not accept that there was any credible expression of regret and he accepted that the discount should be less than would be given in a case where genuine remorse or regret is expressed.
112. He thought that in considering the size and financial circumstances of the business, small employers have an obligation to meet minimum employment standards and a sanction must be imposed at a meaningful level.⁴¹
113. It was found that ignorance of correct arrangements could not be said to form any basis for an excuse given specific advice given by the Fair Work info line to the employer.
114. Although there was no significant financial evidence before the Court, His Honour intended to set a penalty consistent with deterrence.
115. The company was the first respondent and its director the second respondent. His Honour Judge Riethmuller noted that the legislature has sought to impose penalties on companies and those personally involved in the breach by the company. His Honour concluded that as a matter of principle there should be two penalties even where the individual is both the sole director and shareholder.
116. The Judge must however consider the particular facts and circumstances of individual cases.⁴²
117. The *Mason -v- Harrington* non-exhaustive range of considerations to be considered are:
- the nature and extent of the conduct which led to the breaches.
 - the circumstances in which that conduct took place.
 - the nature and extent of any loss or damage sustained as a result of the breaches.
 - whether there had been similar previous conduct by the respondent.
 - whether the breaches were properly distinct or arose out of the one course of conduct.
 - the size of the business enterprise involved.
 - whether or not the breaches were deliberate.
 - whether senior management was involved in the breaches.
 - whether the party committing the breach had exhibited contrition.
 - whether the party committing the breach had taken corrective action.
 - whether the party committing the breach had cooperated with the enforcement authorities.
 - the need to ensure compliance with minimum standards by provision of an effective means for investigation and enforcement of employee entitlements.

³⁹ At para 24 citing *Commonwealth of Australia -v- Director, Fair Work Building Industry Inspectorate; Construction, Forestry, Mining and Energy Union -v- Director, Fair Work Building Industry Inspectorate* [2015] HCA 46 at [55].

⁴⁰ [2007] FMCA 7.

⁴¹ *Kelly -v- Fitzpatrick* [2007] FCA 1080 at [28].

⁴² *Fair Work Ombudsman -v- Openica Logistics Pty Ltd & Anor* [2016] FCCA 159; *Hamilton -v- Whitehead* [1988] HCA 65; *Fair Work Ombudsman -v- Kentwood Industries Pty Ltd (No 2)* [2010] FCA 1156.

- the need for specific and general deterrence.
118. The *Eagle Tours* case mentioned earlier in the context of misclassification of employees as independent contractor is also instructive in relation to the determination of penalties. His Honour Judge Cameron set out the manner in which the question of penalties to be determined as follows:
- (a) the Court is to identify the separate contraventions involved. Each contravention of a separate obligation in the modern award, the *Fair Work Act* and the *Fair Work Regulations* is a separate contravention.
 - (b) The Court should consider whether contraventions resulting from any particular courses of conduct should be treated as a single contravention under s 557(1) of the *Fair Work Act*.
 - (c) To the extent that two or more contraventions have common elements, this should be taken into account when considering an appropriate penalty for those contraventions. A contravener should not be penalised twice for what is in substance the same conduct. This is distinct from the totality principle.
 - (d) The Court should determine an appropriate penalty to impose in respect of each contravention having regard to all of the circumstances of the case.
 - (e) Having fixed an appropriate penalty for each contravention or group of contraventions, the Court should consider the aggregate penalty to determine whether it is an appropriate response to the contravening conduct.
119. It is relevant to note in this case that a finding was made that all relevant actions were intentional and not accidental. The owner of the company gave evidence that he was not aware of the modern award, however Judge Cameron thought that Eagle Tours appreciated that at least some of the contravening conduct ran the risk of breaching an award.
120. As to the size of the business, there was no evidence which suggested Eagle Tours was unable to inform itself of its obligations or to act in accordance with them.
121. There was evidence before the Judge that Eagle Tours' solicitors had written a long submission to the Ombudsman arguing why three of the employees were at various times contractors and not employees. The owner of the business deposed to having believed his solicitor's submissions to the Ombudsman were correct. The Judge said that he did not identify the basis of that belief or whether it was reasonable for him to have held it other than to say that the ATO had decided to take no action.
122. As to the question of whether a corporation can exhibit contrition, Judge Cameron referred to contrary positions including:
- for civil penalty cases involving corporations, it would be more coherent to ask only whether the corporation has changed its behaviour. Nothing more can be expected; a person who does not literally or physically exist may not wear sackcloth.⁴³
 - Or absence of expressions of contrition by corporate respondents mean that no occasion arises to consider, on the basis of such expressions, any discounting of a penalty that was otherwise appropriate.⁴⁴
123. Judge Cameron held that as to the back payments, no discount is appropriate for the late discharge of an existing obligation and simple compliance with the law does not justify a discount on penalty. However, Eagle Tours has settled the contravention allegations and that does express contrition in a very practical way.

⁴³ *ACE Insurance Ltd -v- Trifunovski (No 2)* [2012] FCA 793 at [113]-[114].

⁴⁴ *Fair Work Ombudsman -v- Jetstar Airways Ltd* [2014] FCA 33 at [36]-[37].

124. The ultimate acceptance of error and settlement of the contravention allegations merits some allowance in the penalties to be imposed although not a large one as it came so late. Discounts for cooperation are not allowed simply because enforcement proceedings have been made less complicated and less expensive by appropriate concessions. The benefit of such a discount should be reserved for cases where it can be fairly said that an admission of liability has indicated an acceptance of wrongdoing and a suitable and credible expression of regret or has indicated a willingness to facilitate the course of justice.
125. In that case, a discount of 15% was applied.

Conclusion

126. The exposure to orders for payment of unpaid wages and penalties is high, especially for employers who knowingly rob their employees. However, the difficulty of construing and applying the Act and relevant industrial instruments cannot be underestimated. Many good employers make mistakes. Understanding of the law can change, catching people out.
127. We are at an interesting point in the development of industrial law, given the widespread impact of the Skene and Mondelez cases. The Federal Government seems engaged by the scale of the impact and has been prepared to intervene. It remains to be seen if it will legislate further. We must also await the outcome of Rossato and any appeal in Mondalez to achieve some clarity.
128. Thank you for your attention today.

Ann Fitzpatrick
Barrister at Law



FairWork
Commission

Recent developments and impending changes in practice and procedure in the Fair Work Commission

Employment and Industrial Relations Conference 2019

Deputy President Asbury
25 August 2019
Brisbane

Outline of presentation

- About the Commission
- Innovations in service delivery
- Commission workload
- Termination of employment
- Recent developments: Modern awards
- Recent developments: Enterprise agreements
- Anti-bullying update
- New Approaches update



FairWork
Commission

About the Commission

The role of the Fair Work Commission



How we perform our role

The Commission must perform its functions and exercise its powers in a manner that:

Is fair and just

Is quick, informal and avoids unnecessary technicalities

Is open and transparent

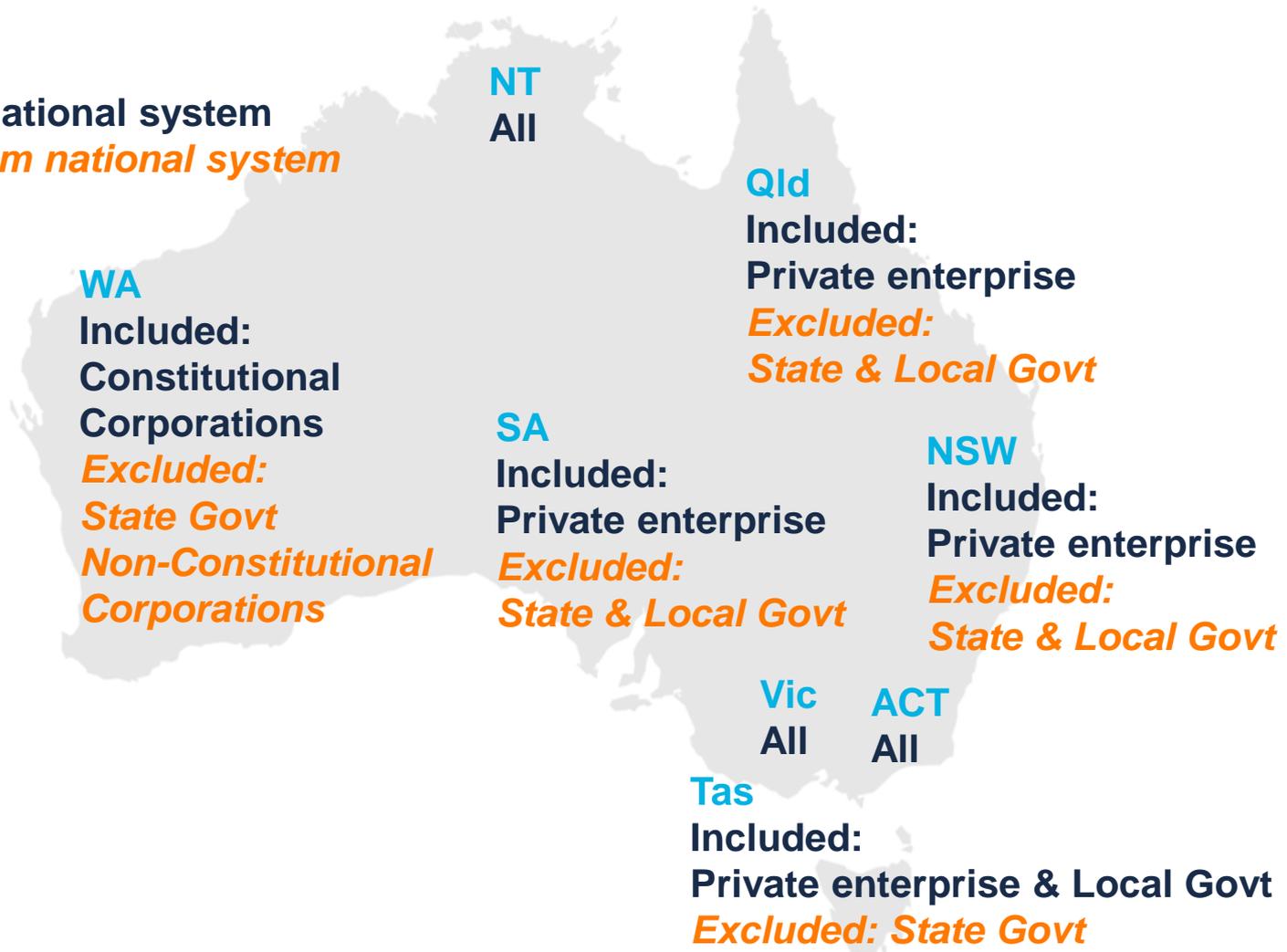
Promotes harmonious and cooperative workplace relations

Who is in the national system?

Key:

Included in national system

Excluded from national system





FairWork
Commission

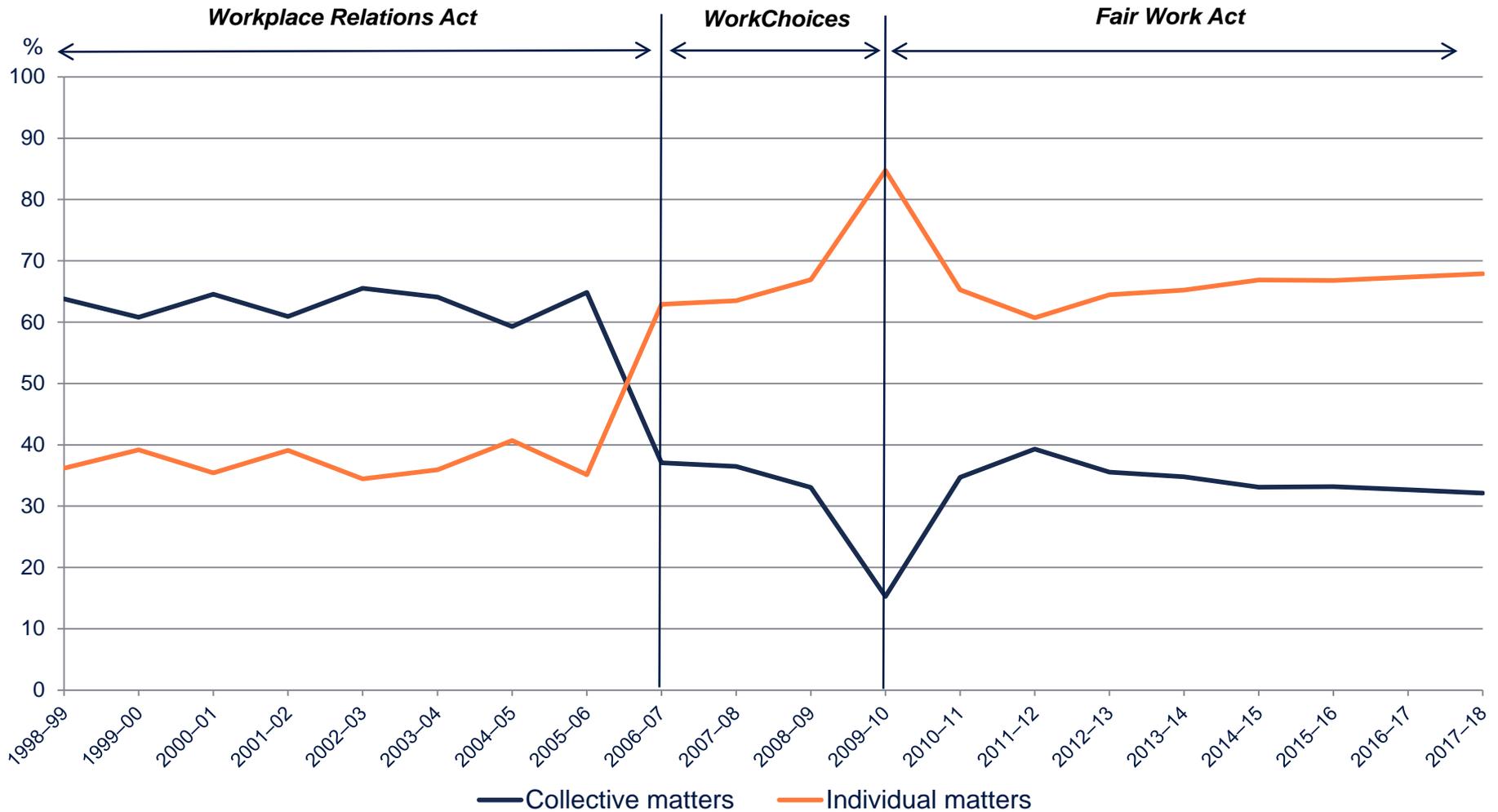
Innovations in service delivery

Our role

‘It should never be forgotten that tribunals exist for users and not the other way around. No matter how good tribunals may be, they do not fulfil their function unless they are accessible by the people who want to use them, and unless the users receive the help they need to prepare and present their cases.’

Sir Andrew Legatt (2011)
Tribunals for Users – One System, One Service
Report for the Review of Tribunals

Changing nature of Commission users



Source: Fair Work Commission *Annual Report 2014-15*, Figure 2, p.23, updated 2017-18

What's Next

The Fair Work Commission's plan to improve access and reduce complexity



What's Next – Planning for the future

In 2018–19 the Commission is determined to continue to improve its services to the Australian community. It will:

Focus on the changing needs of users

Provide more information that is simple and easy to understand

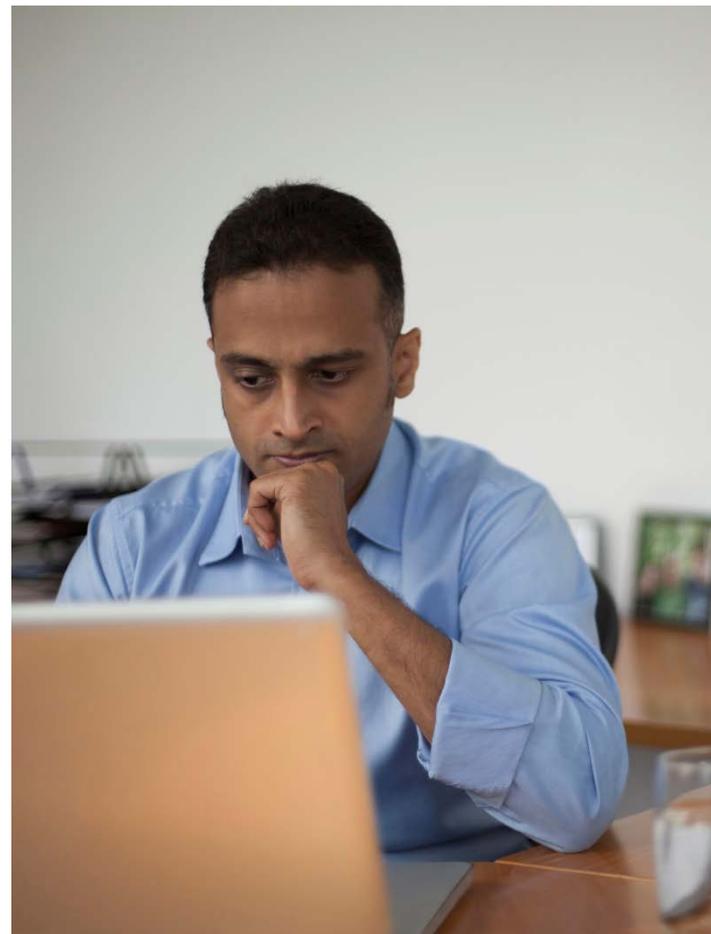
Guide users through its processes

Continue to innovate and draw on evidence based research

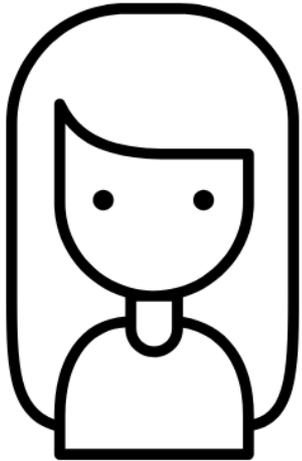
What's Next – Key elements



Self-represented users



Using behavioural insights

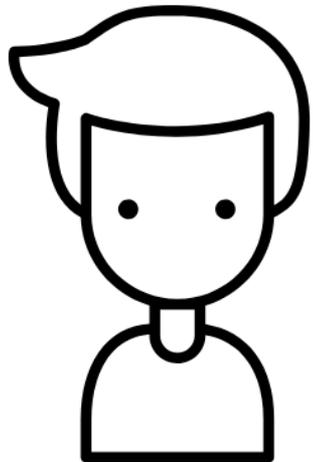


- Small things can make a big difference
- Three early priorities for the Commission are to:

Increase the number of compliant applications for agreements

Assist small business to understand and apply modern awards

Help parties understand unfair dismissal processes



Workplace Advice Service

Access to justice – Expansion:

- Workplace Advice Clinics
- Pro bono
- Out of Hours
- other new initiatives



Free Legal advice available throughout the application lifespan to applicants, named individuals and respondents at varying stages, depending on the application type.

Working with parties





FairWork
Commission

Commission workload

Workload 2017–18

Operational performance



31,554

Applications
lodged



11,196

Hearings and
conferences held



9,717

Decisions and orders
published

Source: Fair Work Commission Annual Report 2017–18 at p.18

Workload 2017–18

Engagement



4.36 million

Website visits



195,586

Phone calls made to
the information line



**3 minutes and
26 seconds**

Average call
wait time

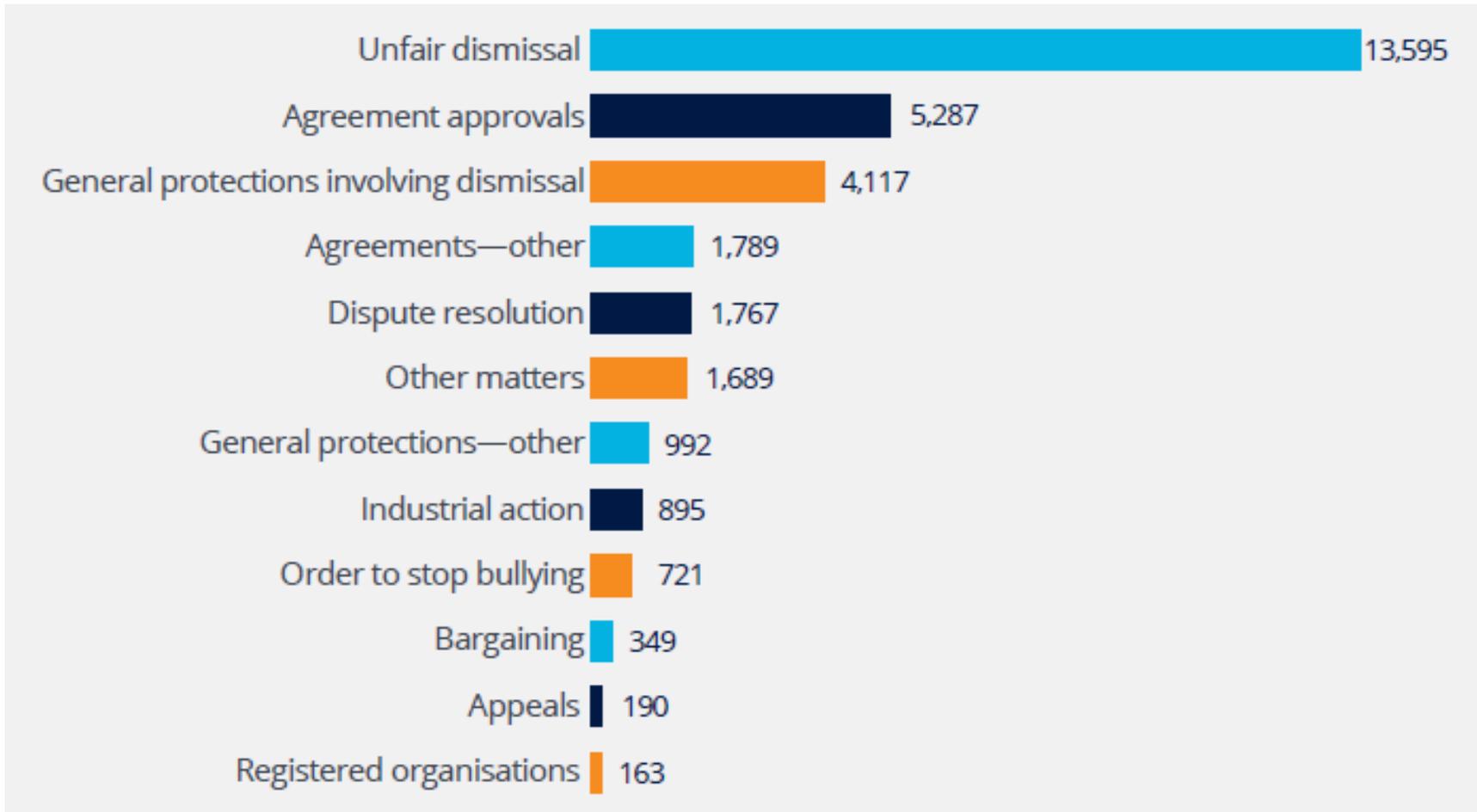
Source: Fair Work Commission Annual Report 2017–18 at p.19

Workload by matter type

| Matter type | 2017-18 | 2016-17 | 2015-16 | 2014-15 |
|--|---------------|---------------|---------------|---------------|
| Unfair dismissal | 13,595 | 14,135 | 14,694 | 14,624 |
| Agreement approvals | 5,287 | 5,698 | 5,529 | 5,922 |
| General protections involving dismissal ¹ | 4,117 | 3,729 | 3,270 | 3,382 |
| Agreements—other ² | 1,789 | 1,180 | 1,335 | 1,469 |
| Dispute resolution ³ | 1,767 | 2,106 | 2,194 | 2,331 |
| General protections—other ⁴ | 992 | 937 | 940 | 993 |
| Industrial action ⁵ | 895 | 797 | 1,272 | 957 |
| Order to stop bullying | 721 | 722 | 734 | 694 |
| Bargaining ⁶ | 349 | 399 | 408 | 479 |
| Appeals | 190 | 237 | 283 | 336 |
| Registered organisations | 163 | 1,243 | 1,472 | 1,120 |
| Other matters | 1,689 | 1,888 | 2,084 | 1,845 |
| Total | 31,554 | 33,071 | 34,215 | 34,152 |

Source: Fair Work Commission Annual Report 2017–18, Table 1

Types of applications lodged



Source: Fair Work Commission Annual Report 2017–18, Table 1



FairWork
Commission

Termination of employment

Number of matters 2017–18

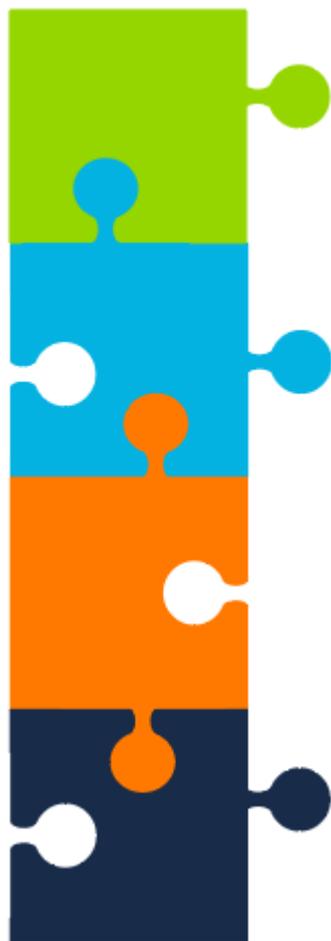
Unfair dismissal applications account for over 40% of matters lodged at the Commission



■ Unfair dismissal applications ■ Other applications

Source: Fair Work Commission Annual Report 2017–18, p. 19

Who is protected from unfair dismissal?



National system employee

Dismissed

Completed the minimum period
of employment

Earns less than the high income
threshold

Criteria for considering harshness?

Was there a valid reason?

Was employee notified of reason?

Was there an opportunity to respond?

Refusal of support person

Any warnings – unsatisfactory conduct?

Size of business

Human resources experience

Any other relevant matters

Objections to an application

**Application
lodged out of
time**

**Applicant not
an employee**

**Applicant not
dismissed**

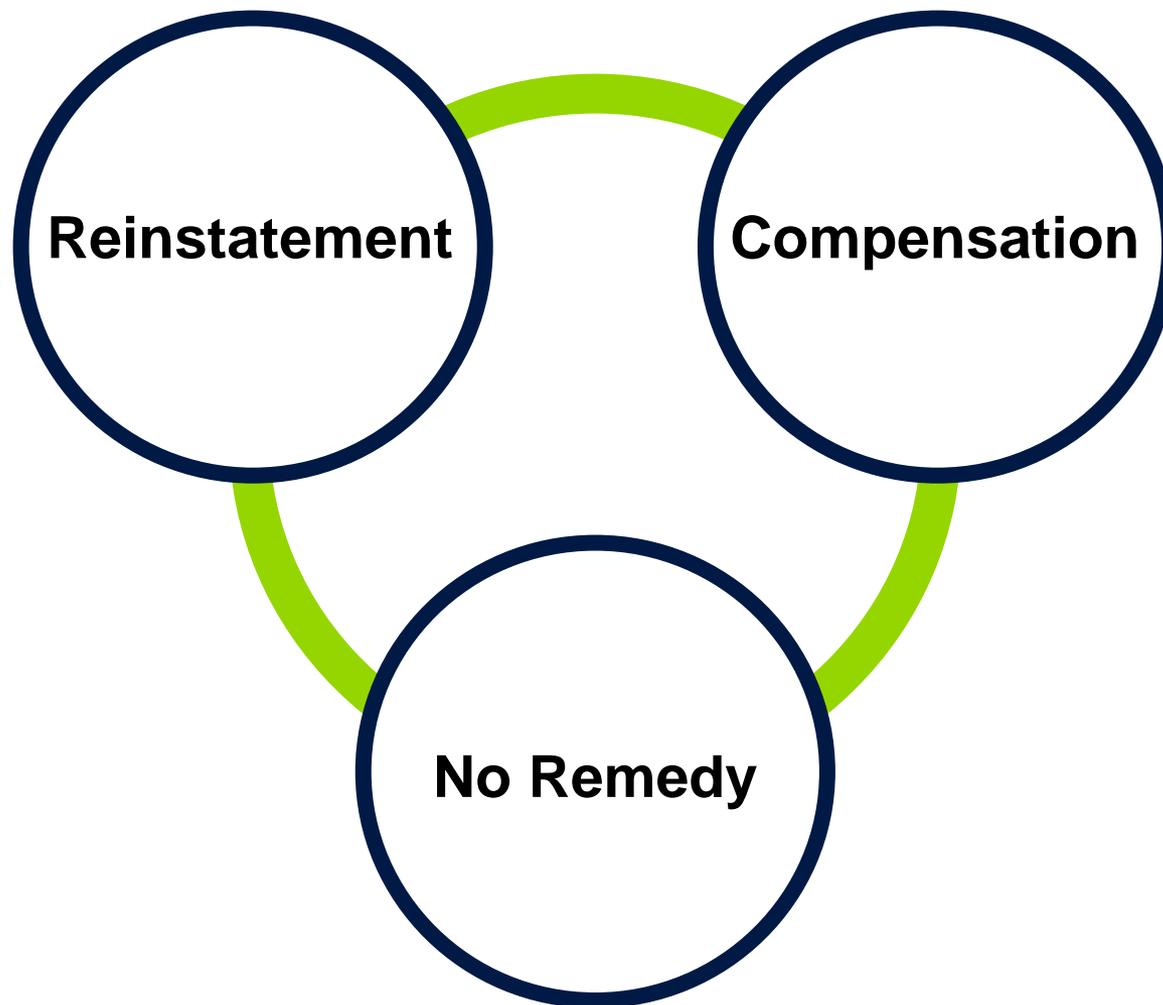
**Genuine
redundancy**

**Minimum
employment
period**

**High income
threshold**

**Small Business
Fair Dismissal
Code**

Remedies for unfair dismissal



Process overview – Step 1

Employee lodges application

Lodging an application

FAIR WORK COMMISSION
Form F2—Unfair dismissal application

Form F2—Unfair dismissal application

Fair Work Act 2009, s.394
This is an application to the Fair Work Commission for an unfair dismissal remedy in accordance with Part 3-2 of the *Fair Work Act 2009*.

The Applicant

 These are the details of the person who is making the application. Please make sure you provide a telephone number for the conciliation conference.

| | | | |
|--------------------|--|---|--|
| Title | | <input type="checkbox"/> Mr <input type="checkbox"/> Mrs <input type="checkbox"/> Ms <input type="checkbox"/> Other please specify: | |
| First name(s) | | | |
| Surname | | | |
| Postal address | | | |
| Suburb | | | |
| State or territory | | Postcode | |
| Phone number | | Fax number | |
| Mobile number | | | |
| Email address | | | |

Note: If you provide a mobile number the Commission may send reminders to you via SMS.

Does the Applicant need an interpreter?

 If the Applicant requires an interpreter (other than a friend or family member) in order to participate in conciliation, a conference or hearing, the Fair Work Commission will provide an interpreter at no cost.

Yes—Specify language

No

Does the Applicant require any special assistance at the hearing or conference (e.g. a hearing loop)?

Yes—Please specify the assistance required

No

Does the Applicant have a representative?

 A representative is a person or business who is representing the Applicant. This might be a lawyer, a union or a family member or friend who will speak on behalf of the Applicant. There is no requirement to have a representative.

Yes—Provide representative's details below

No

Fair Work Commission Approved Forms—approved 16 November 2016 1/6



\$73.20

or Waiver form

Process overview – Step 2

Employee lodges application



Application is checked to ensure it is complete and valid

Process overview – Step 3

Employee lodges application



Application is checked to ensure it is complete and valid



Employer is notified of the application

Responding to an application

FAIR WORK COMMISSION
Form F3—Employer Response to Unfair Dismissal Application

Form F3—Employer Response to Unfair Dismissal Application

Fair Work Commission Rules 2013, rules 19, 20, 23, 46 and Schedule 1

This is a response to an unfair dismissal remedy application lodged at the Fair Work Commission in accordance with Part 3-2 of the [Fair Work Act 2009](#).

The Applicant

 These are the details of the person who is making the application. You can find this information on the application Form F2.

| | |
|--------------------------|--|
| First name(s) | |
| Surname | |
| Commission matter number | |

The Respondent

 These are the details of the business or organisation responding to the application.

| | |
|-------------------------------------|------------|
| Legal name of business | |
| Trading name of business | |
| ABN/ACN | |
| Contact person | |
| Postal address | |
| Suburb | |
| State or territory | Postcode |
| Phone number | Fax number |
| Mobile number | |
| Email address | |
| What industry is the Respondent in? | |

Note: If you provide a mobile number the Commission may send reminders to you via SMS.

Does the Respondent need an interpreter?

 If the Respondent requires an interpreter (other than a friend or family member) in order to participate in conciliation, conference or hearing, the Commission will provide an interpreter at no cost.

Yes—Specify language

No

Fair Work Commission Approved Forms—approved 4 July 2017 1/6



Process overview – Step 4

Employee lodges application



Application is checked to ensure it is complete and valid



Employer is notified of the application



The Commission conciliates the application to try and help the parties resolve it themselves

Process overview – Step 5

Employee lodges application



Application is checked to ensure it is complete and valid



Employer is notified of the application

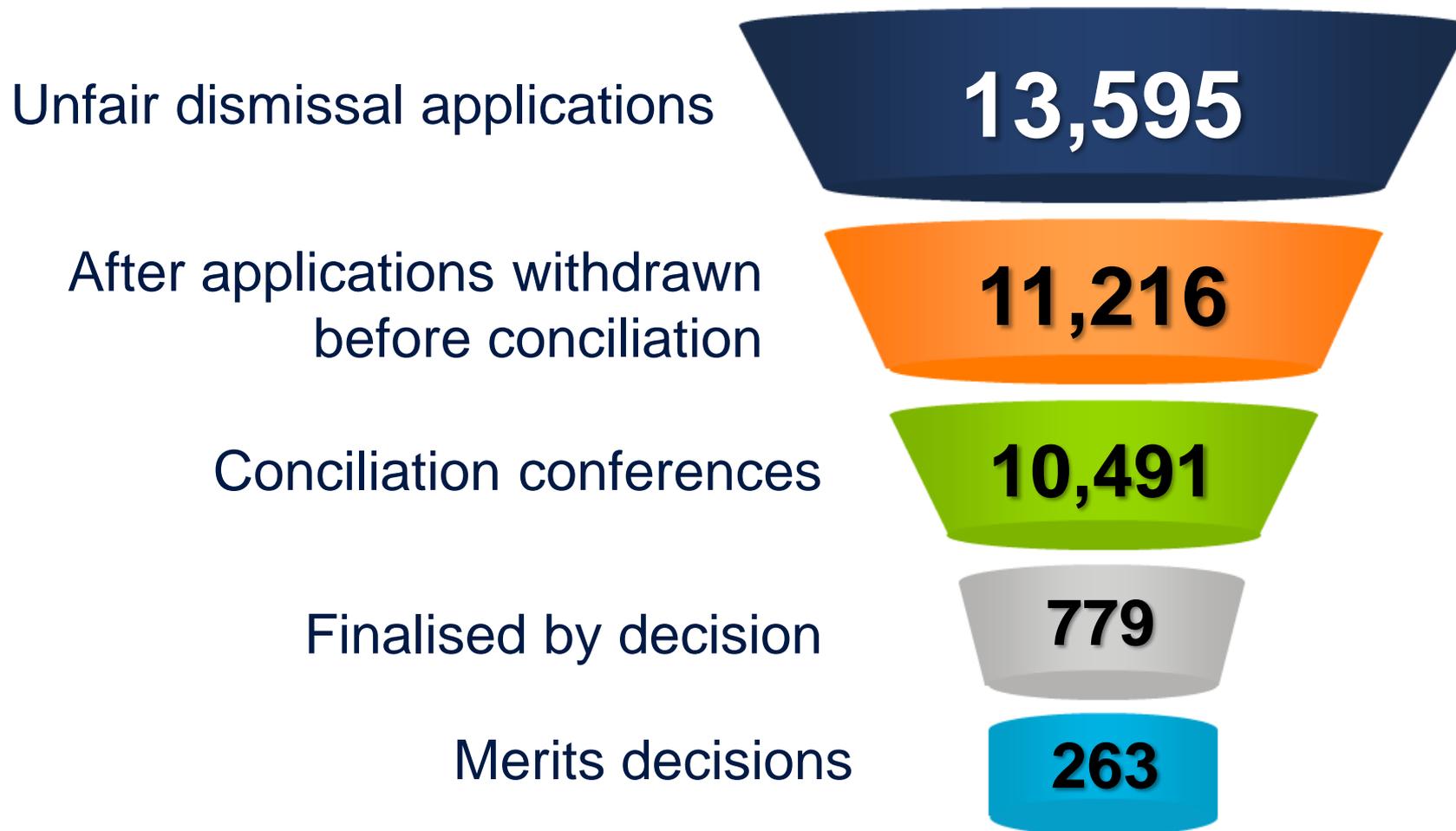


The Commission conciliates the application to try and help the parties resolve it themselves



Any unresolved application is determined by the Commission following a conference or hearing

Key unfair dismissal statistics 2017–18



Source: Fair Work Commission Annual Report 2017–18, p.31, Tables 2, 3 & D6

Finalisation of matters

| Outcome | 2017-18 | 2016-17 | 2015-16 | 2014-15 |
|---|---------------|---------------|---------------|---------------|
| Resolved before conciliation | 2,379 | 2,425 | 2,130 | 2,156 |
| Resolved at conciliation | 8,285 | 8,880 | 8,529 | 8,788 |
| Resolved after conciliation and before a formal hearing | 1,935 | 2,218 | 2,808 | 2,654 |
| Resolved after hearing and before decision | 37 | 36 | 104 | 52 |
| Finalised by decision | 779 | 1,028 | 1,457 | 1,527 |
| Finalised by administrative dismissal | 321 | 320 | 362 | 288 |
| Finalised: jurisdiction objection upheld | 195 | 401 | 769 | 890 |
| Finalised at arbitration: application dismissed | 104 | 125 | 130 | 161 |
| Finalised at arbitration: application granted | 159 | 182 | 196 | 188 |
| Total finalisations | 13,415 | 14,587 | 15,028 | 15,177 |
| Applications granted, as a proportion of total decisions | 20% | 18% | 14% | 12% |
| Applications granted, as a proportion of finalisations | 1% | 1% | 1% | 1% |

Source: Fair Work Commission Annual Report 2017-18, Table 3

Range of compensation at conciliation

| Range (\$) | No. of matters | | | | Percentage of settlements involving monetary payment | | | |
|------------------------------------|----------------|--------------|--------------|--------------|--|------------|------------|------------|
| | 2017-18 | 2016-17 | 2015-16 | 2014-15 | 2017-18 | 2016-17 | 2015-16 | 2014-15 |
| 0-999 | 510 | 553 | 539 | 526 | 8 | 8 | 8 | 8 |
| 1,000-1,999 | 935 | 1,002 | 922 | 1,038 | 14 | 14 | 13 | 15 |
| 2,000-3,999 | 1,683 | 1,893 | 1,866 | 1,806 | 26 | 26 | 27 | 26 |
| 4,000-5,999 | 1,206 | 1,344 | 1,288 | 1,338 | 18 | 19 | 19 | 19 |
| 6,000-7,999 | 760 | 790 | 717 | 739 | 12 | 11 | 10 | 11 |
| 8,000-9,999 | 418 | 474 | 447 | 438 | 6 | 7 | 7 | 6 |
| 10,000-14,999 | 606 | 643 | 608 | 565 | 9 | 9 | 9 | 8 |
| 15,000-19,999 | 219 | 251 | 236 | 227 | 3 | 3 | 3 | 3 |
| 20,000-29,999 | 168 | 163 | 153 | 163 | 3 | 2 | 2 | 2 |
| 30,000-39,999 | 48 | 49 | 57 | 48 | 1 | 1 | 1 | 1 |
| 40,000-maximum amount ¹ | 39 | 32 | 26 | 29 | 1 | <1 | <1 | <1 |
| Total | 6,592 | 7,194 | 6,859 | 6,917 | 100 | 100 | 100 | 100 |

Source: Fair Work Commission Annual Report 2017-18, Table D2



FairWork
Commission

Recent developments: Modern awards

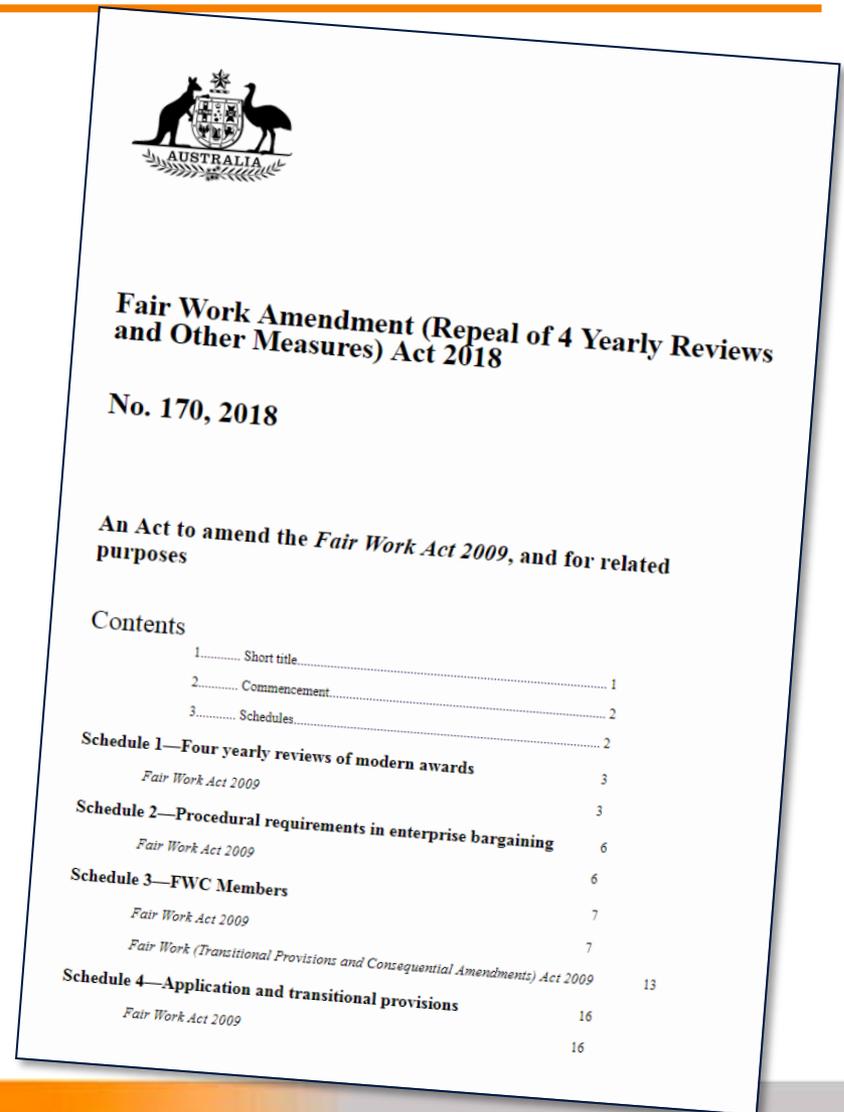
4 yearly review

- The Fair Work Act, prior to the introduction of the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)*, required the Commission to review all modern awards once every four years.
- The review began in February 2014 and is expected to be completed in 2019.
- The review's initial stage considered jurisdictional issues. Having dealt with those matters, the Commission is reviewing four groups of individual awards and 17 common issues that apply across multiple awards

Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)

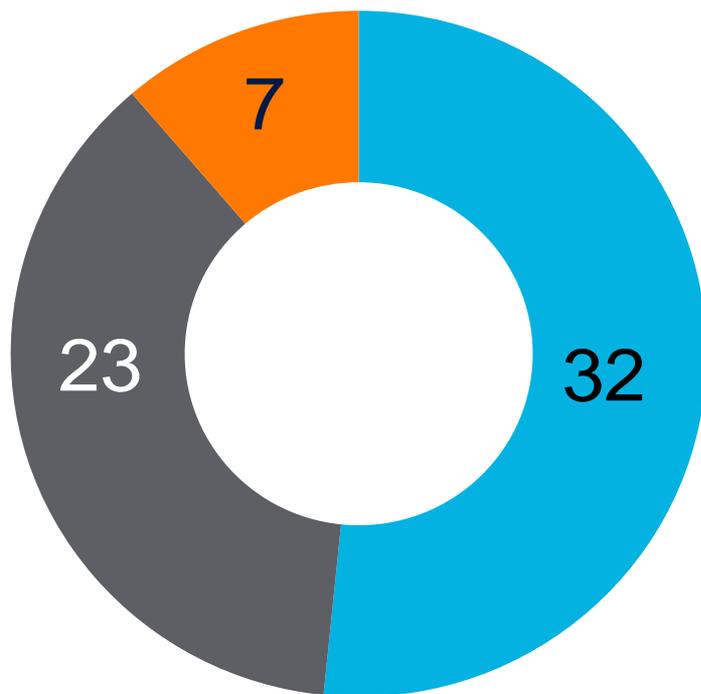
The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)* was passed in December 2018.

The Act repeals the provision for 4 yearly reviews in the Fair Work Act with effect from 1 January 2018.



| Contents | |
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| Schedule 2—Procedural requirements in enterprise bargaining | |
| <i>Fair Work Act 2009</i> | 6 |
| | 6 |
| Schedule 3—FWC Members | |
| <i>Fair Work Act 2009</i> | 7 |
| <i>Fair Work (Transitional Provisions and Consequential Amendments) Act 2009</i> | 7 |
| Schedule 4—Application and transitional provisions | |
| <i>Fair Work Act 2009</i> | 16 |
| | 16 |

Progress of Substantive Claims



- Heard and Determined
- Part heard or not yet commenced
- Reserved decision

Common issues

| Matter | Common issue | Status | Decision |
|------------|-----------------------------------|--------------------|---|
| AM2016/35 | Abandonment of employment | Determined in part | [2018] FWCFB 139 |
| AM2014/47 | Annual leave | Determined | [2015] FWCFB 3406 [2015] FWCFB 5771 |
| AM2016/13 | Annualised salaries | Determined in part | [2018] FWCFB 154 |
| AM2014/192 | Apprentice conditions | Determined | [2014] FWCFB 9156 |
| AM2014/300 | Award flexibility | Determined | [2015] FWCFB 4466 |
| AM2016/36 | Blood donor leave | Determined | [2017] FWCFB 4621 |
| AM2014/197 | Casual employment | Determined in part | [2017] FWCFB 3541 [2018] FWCFB 4695 [2018] FWCFB 5846 |
| AM2015/1 | Family & domestic violence clause | Determined | [2018] FWCFB 1691 [2018] FWCFB 3936 |
| AM2015/2 | Family friendly work arrangements | Determined | [2018] FWCFB 1692 [2018] FWCFB 5753 [2018] FWCFB 6863 |

Common issues

| Matter | Common issue | Status | Decision |
|------------|----------------------------|--|---|
| AM2014/306 | Micro business schedule | Claim withdrawn | |
| AM2016/17 | National Training Wage | Determined | [2017] FWCFB 4174 |
| AM2017/51 | Overtime for casuals | Statement issued | [2017] FWCFB 6417 |
| AM2014/196 | Part-time employment | Determined | [2017] FWCFB 3541 [2018] FWCFB 4695 [2018] FWCFB 5846 |
| AM2016/8 | Payment of wages | Determined in part | [2018] FWCFB 4735 |
| AM2016/15 | Plain language re-drafting | Determined in part | [2018] FWCFB 4704 |
| AM2014/301 | Public holidays | Determined in part | [2018] FWCFB 4 |
| AM2014/190 | Transitional provisions | Redundancy and district allowances transitional provisions deleted | [2015] FWCFB 644 |

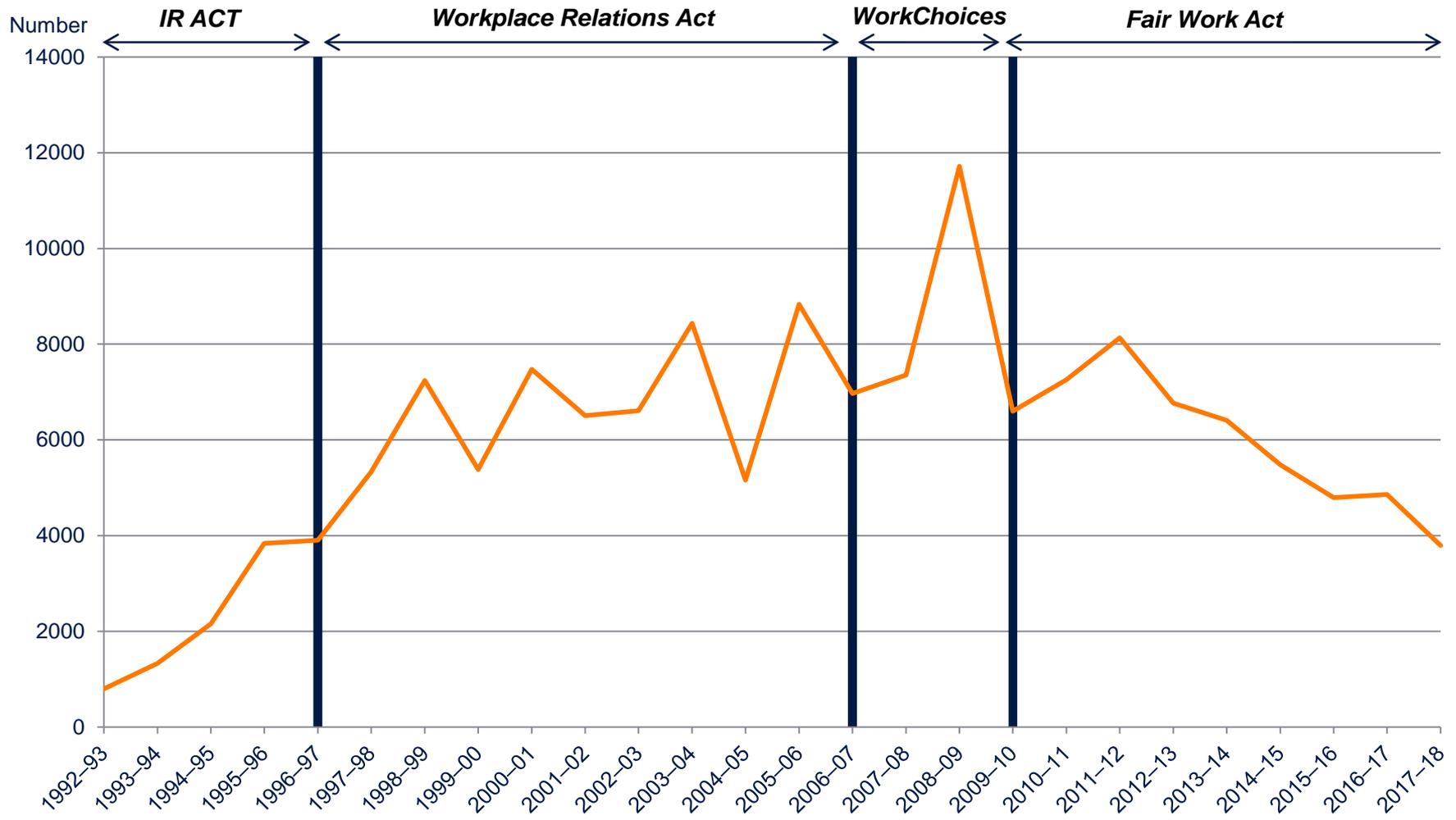


FairWork
Commission

Recent developments: Enterprise agreements

1992–93 to 2017–18

Enterprise agreements approved



Source: Department of Jobs and Small Business, *Workplace Agreements Database*, September quarter 2018.

Agreement Triage Process

Agreement application lodged

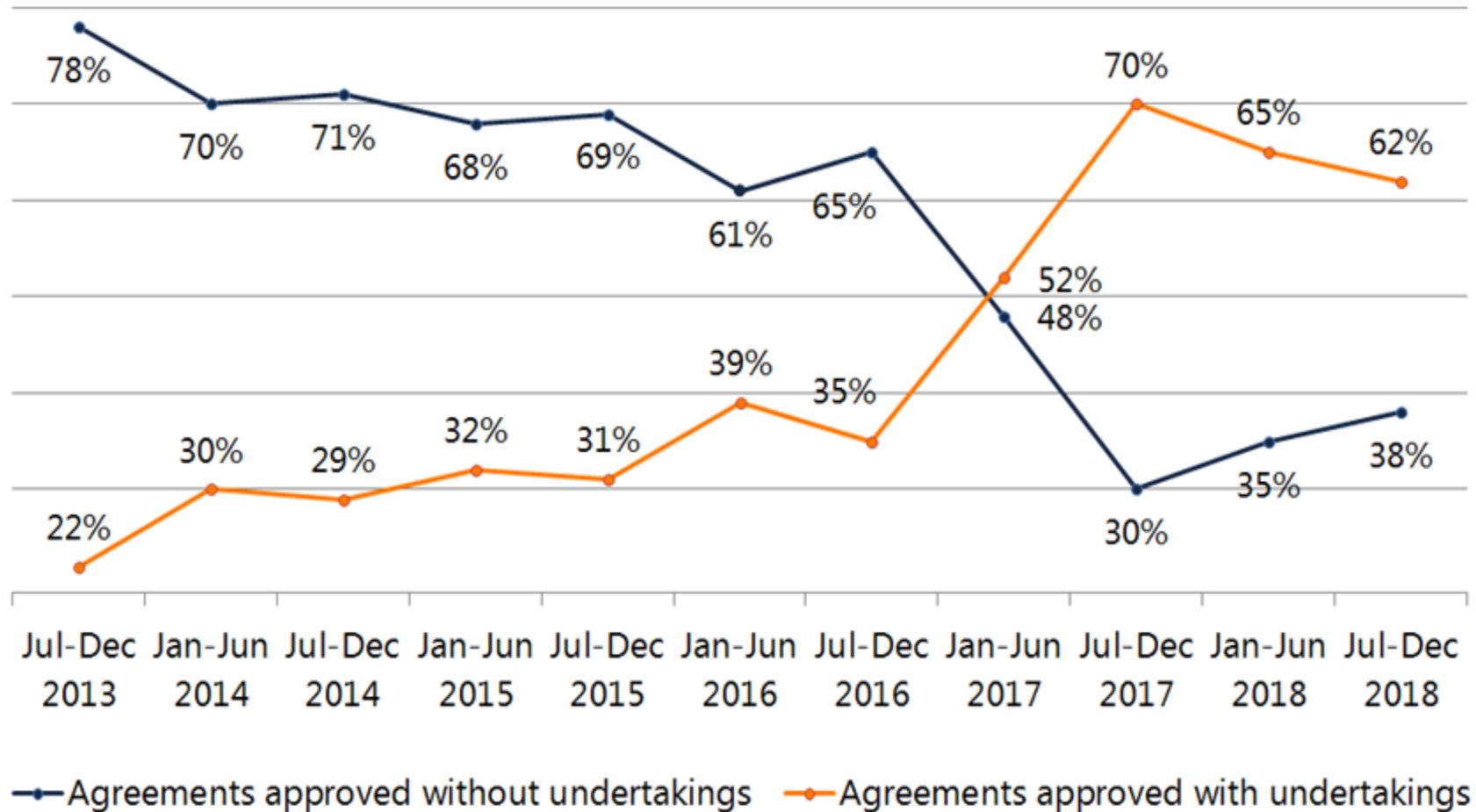
Staff conduct comprehensive analysis of approval application

Legislative checklist completed

Commission Member considers analysis and modelling – may request further information or undertakings

Commission Member determines whether agreement should be approved or if an undertaking should be sought or accepted

Approvals with undertakings



Source: Fair Work Commission Annual Report 2017–18, Figure 6 (updated)

Non-compliant applications

Where the Commission has a concern that an enterprise agreement may not meet the requirements of the Fair Work Act:

- the applicant may withdraw the agreement
- the Commission may approve the agreement with a written undertaking from the employer
- the Commission may dismiss the agreement

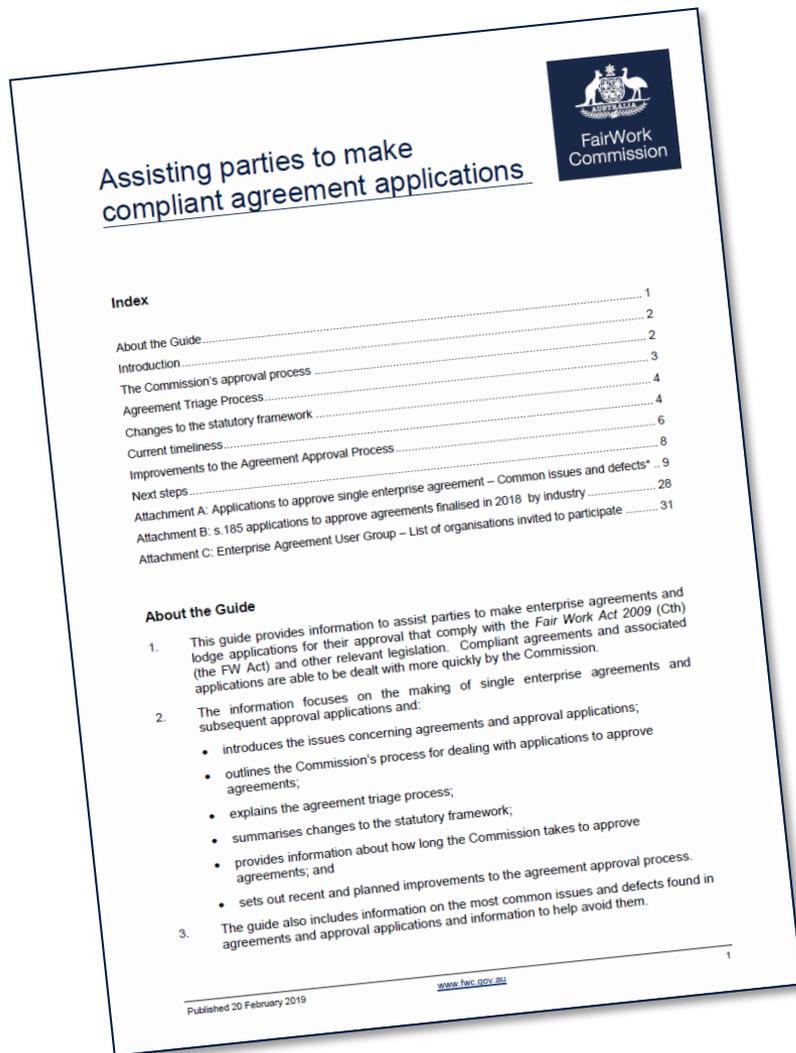


Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth)

The Amending Act amended s.188 of the Fair Work Act to enable the Commission to overlook **minor procedural or technical errors** when approving an enterprise agreement, as long as it is satisfied that those errors were not likely to have disadvantaged employees.



Making compliant agreement applications



Most agreements and approval applications either:

- do not fully comply with the statutory requirements at the time they are lodged with the Commission, or
- require additional information to be provided to assess compliance

Common issues and defects in agreements

National Employment Standards

Definition of shift workers

Parental Leave

Annual leave

Notice of termination and redundancy

Personal/carer's leave

Public holidays

Compassionate leave

Flexible working conditions

Better Off Overall Test

Reduced or omitted award entitlements

Loaded Rates

Common issues and defects in agreements

Mandatory terms

Dispute settlement term

Flexibility and consultation terms

Other terms of the agreement

Nominal expiry date

Unlawful terms

Incorporating the award into an agreement

Common issues and defects in agreements

Pre-approval requirements

Notice of employee representational rights

Access to copy of agreement and incorporated material

Notification of vote

Explanation of effect of agreement

Forms and lodgment

Signature and content requirements

Lodgment

Identifying more and less beneficial terms

Agreement making tips



10 tips for agreement making

This guide has been developed to help employers make and lodge an enterprise agreement with the Fair Work Commission

Agreement making process

- 1 Comply with the statutory **timeframes** for agreement making.
TIP: Our [Date Calculator](#) can help.
- 2 Provide your employees with a compliant **Notice of Employee Representational Rights (NERR)**.
TIP: Our [NERR generator](#) can help issue this in the correct form.
- 3 Provide as much **information** as possible when you complete the application form and statutory declaration including:
 - when and how the NERR was provided to employees
 - how the effect of the agreement was explained to employees
 - when and how you informed employees of the time and place of the vote, when the vote took place, as well as the method of voting
 - the details of any terms that are more or less beneficial than the relevant award(s) that would apply to the employees.TIP: Attach any relevant documents about these matters to your application, including copies of the NERR, emails to employees about the voting process and copies of any material provided to employees to explain the terms of the agreement and the effect of those terms.
- 4 Submit forms that have been **correctly signed and dated**.
TIP: The agreement, including the signature page, will be published on the Fair Work Commission website. People signing the forms may prefer to use their business address rather than their home address for privacy reasons.

© Commonwealth of Australia 2018

Agreement content

- 5 The nominal expiry date of the agreement must be no more than **4 years** from when the agreement is **approved** by the Fair Work Commission (not from the date it commences).
- 6 **Redundancy and notice of termination** entitlements must provide at least the same entitlements as the National Employment Standards (NES).
Apprentices must not be excluded from notice of termination provisions.
- 7 If the agreement covers shiftworkers, make sure that shiftworkers are explicitly defined as '**shiftworkers for the purposes of the NES**'.
- 8 Make sure the **dispute resolution provision** allows the Fair Work Commission (or another independent person) to settle disputes and allows for the representation of employees if there is a dispute.
- 9 If the agreement relies on provisions from an award, make it clear that the agreement **incorporates** either those provisions or the entire award (rather than 'is to be read in conjunction with the award').
- 10 Any definition of **public holidays** must include 'holidays declared or prescribed by or under a law of a State or Territory'.

Issued 30 May 2018

Further information – fwc.gov.au

Part 5—Agreement making process
Starting point for bargaining

There are several mandatory steps in the process of making a single enterprise agreement. Some of these steps (the Fair Work Act) which must be completed at the point at which the parties start bargaining or order of the Fair Work Act which is the starting point for everything.

There are no shortcuts
The process for making an enterprise agreement is a long process then the Commission will not accept a shortcut.

Stage in bargaining process

- Employer initiates or agrees to bargain for a proposed enterprise agreement
- Employer asks employees to approve proposed enterprise agreement (by voting)

Notification time
See Fair Work Act s.174
The notification time for:
• the employer agreement
• a majority support agreement

Published 31 July 2017

Making a Single Enterprise Agreement
Step by step guide to making a Single Enterprise Agreement that is not a greenfields agreement

Introduction
Why make an Agreement?
Who can make an Agreement?
STEP 1: Prior to Bargaining
What is a day?
STEP 2: Commence Bargaining
How do you begin the bargaining process?
How do you notify employees that Bargaining has commenced?
The bargaining process and appointing a bargaining representative
Good faith bargaining requirements
What do you do if parties are not meeting the good faith bargaining requirements?
STEP 3: Developing the terms of the Agreement
What do you need to consider when you are negotiating an Agreement?
What terms do you need to include in your Agreement?
Coverage term
Consultation term
Dispute settlement term
Flexibility term
Nominal expiry date for the Agreement
STEP 4: Vote on the Agreement
Who can vote?
Below is an explanation of what you must do at least 7 days before requesting employees to vote. 10
Methods of voting 11

Single enterprise agreement date calculator

The Fair Work Commission Single Enterprise Agreement Date Calculator is a tool that ensures that your process for agreement making and application meets the timeframes. More details can be found on Enterprise bargaining page.

The calculator is intended to be used alongside the making a Single Enterprise Agreement Guide: Notice of employee representational rights (PDF).

This calculator is not intended to be comprehensive. It is designed to assist you with the process of agreement making and approval. Using this calculator is not a substitute for legal advice. The Commission does not provide legal advice.

Begin by entering a date below.

Note: While filling in the calculator, select What if it's and What if it's not

Enter the date of Enterprise Agreement notified to employees
05/10/2017

Enter the date that the last Notice of Employee Representational Rights (Notice) will be given to employees
08/10/2017 This date must be on or before 19/11/2017

Enter the date when voting will commence
18/10/2017 This date must be on or before 19/11/2017

Enter the date that your Access to Enterprise Agreement will be made

Enter the date when voting will close

Enter the date you intend to lodge the Agreement with the Commission

Print these dates for your records

SECTION 2 – PRE-APPROVAL REQUIREMENTS

| | |
|--|--|
| Time between notification time and last notice of representational rights (s.173(3)) (Q2.8) The employer provided the Notice of employee rep rights no later than 14 days after notification time | |
| Time between making of agreement (date voting concluded) and lodging of application for approval of agreement (s.182(1), s.185(3)) (Q2.8 & 2.9) Agreement was lodged no later than 14 days after it was made | |
| Notice of representational rights provided to all employees (Q2.3) • The Notice of employee representational rights is in prescribed form; and • The employer took all reasonable steps taken to give the Notice to each employee covered by the agreement and employed at the time of notification | |
| Genuine agreement (s.181, s.186(2)) | |

Download notice of employee representational rights

Answer the following 2 questions to download the correct Notice of employee representational rights. Guidance on the notice can be found on [Guide to the Notice of employee representational rights](#). For more information please visit the Enterprise bargaining page.

- Does a low-paid authorisation apply to the agreement?
 Yes
 No
- Is the employee covered by an individual agreement-based transitional instrument?
 Yes
 No

Based on your answers, a low-paid authorisation does not apply to the agreement and the employee is not covered by an individual agreement. Please download your Notice of employee representational rights below.

Download

- YOUR Notice of employee representational rights (Word)
- YOUR Notice of employee representational rights (PDF)

After downloading the Notice, please insert relevant information in the 3 highlighted sections: name of employer, name of proposed agreement and proposed coverage.



FairWork
Commission

Anti-bullying

Examples of bullying

Belittling or humiliating comments

Teasing or practical jokes

Aggressive and intimidating conduct

Conducting unfair investigation

Vexatious allegations

Exclusion from work-related events

Displaying offensive material

Unreasonable expectations

Pressure to behave inappropriately

Spreading rumours

Observations about bullying conduct

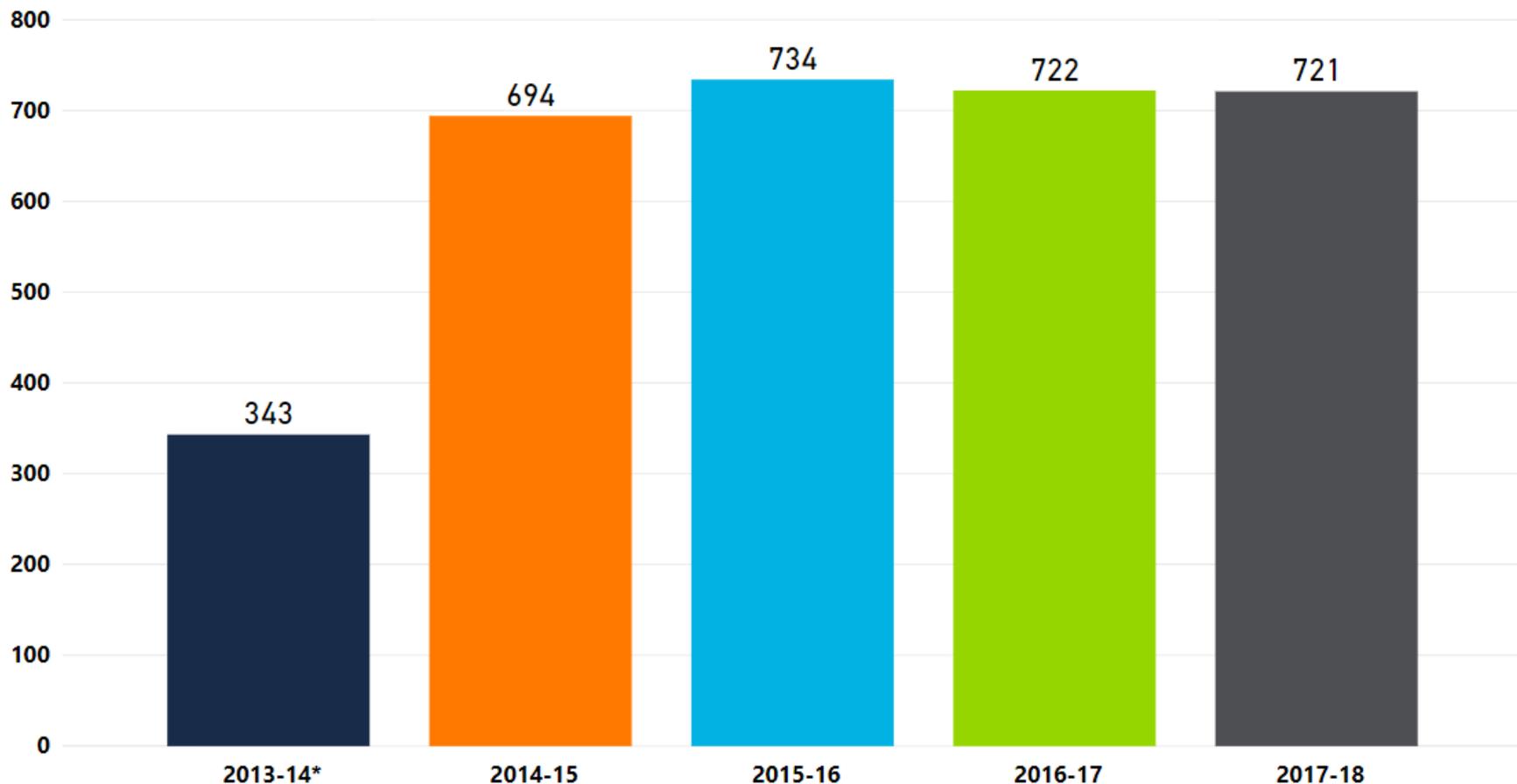
Types

- Conflict escalation (most common)
- Predatory bullying
- Victimisation of a whistle blower
- Normalised unreasonable conduct
- Sexual harassment, discrimination
- Mobbing
- Upwards bullying

Context

- Performance management
- Disciplinary action
- Workplace change – roles, workload, loss of 'control'
- New Management
- Individual rogue behaviour (less common)

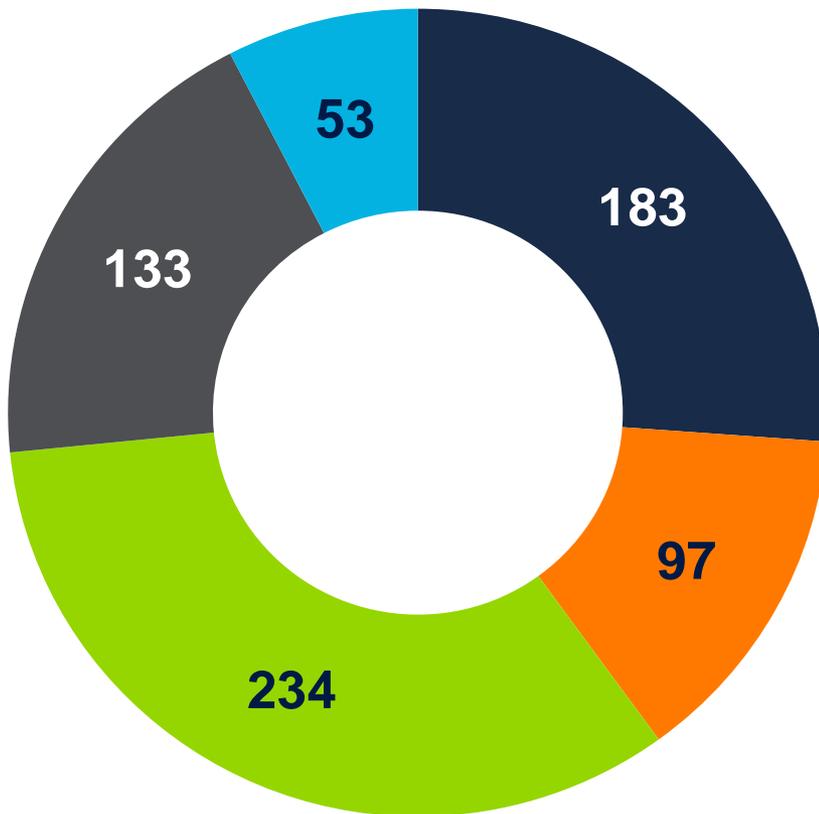
Anti-bullying applications 2017–18



Note: The anti-bullying jurisdiction under the Fair Work Act commenced on 1 January 2014. Figures for 2013–14 are for six months from 1 January to 30 June 2014.

Source: Fair Work Commission Annual Report 2017–18, Table 12

Finalisation of matters 2017–18



- Applications withdrawn early in case management process
- Applications withdrawn before proceedings
- Applications resolved during the course of proceedings
- Matters withdrawn after a conference or hearing and before decision
- Applications finalised by decision

Source: Fair Work Commission Annual Report 2017–18, Table 13

Orders and remedies

Requiring the individual or group to stop the behaviour

Regular monitoring of behaviours by an employer

The provision of information, additional support and training to workers

Review of the employer's bullying policy

Compliance with an employer's bullying policy



FairWork
Commission

New Approaches

New Approaches

- The Commission has developed a new jurisdiction to expand the focus of the Commission's role from one-off dispute resolution to longer term support for parties

Division 2—Establishment and functions of the Fair Work Commission Subdivision A—Establishment and functions of the Fair Work Commission

576 Functions of the FWC

(1) The FWC has the functions conferred by this Act in relation to the following subject matters:

- (a) the National Employment Standards (Part 2-2);
- (b) modern awards (Part 2-3);
- (c) enterprise agreements (Part 2-4);
- (d) workplace determinations (Part 2-5);
- (e) minimum wages (Part 2-6);

(2) The FWC also has the following functions:

- (aa) promoting cooperative and productive workplace relations and preventing disputes;

About the F79 notification form Application for the Commission's assistance to promote cooperative and productive workplaces and prevent disputes



Who can use this form

Use this form if you would like to seek the assistance of the Fair Work Commission (Commission) under s.576(2)(aa) of the Fair Work Act 2009 (Cth) (Fair Work Act), and one or more employer and employee parties agrees to the application.

Please note

- Parties seeking to notify a dispute under a dispute settlement procedure in an award or agreement (s.739 of the Fair Work Act) should use Form F10.
- Parties seeking to notify the Commission of a bargaining dispute (under s.240 of the Fair Work Act) should use Form F11.

About New Approaches

Under s.576(2)(aa) of the Fair Work Act, the Commission can assist employers, employees and their representatives to achieve cooperative and productive workplaces that facilitate change and foster innovation.

The Commission retains its existing functions relating to dispute resolution and bargaining under the Fair Work Act. New Approaches complements these functions by providing a formal process to assist parties to work together to prevent disputes.

Specifically, the Commission works with parties to:

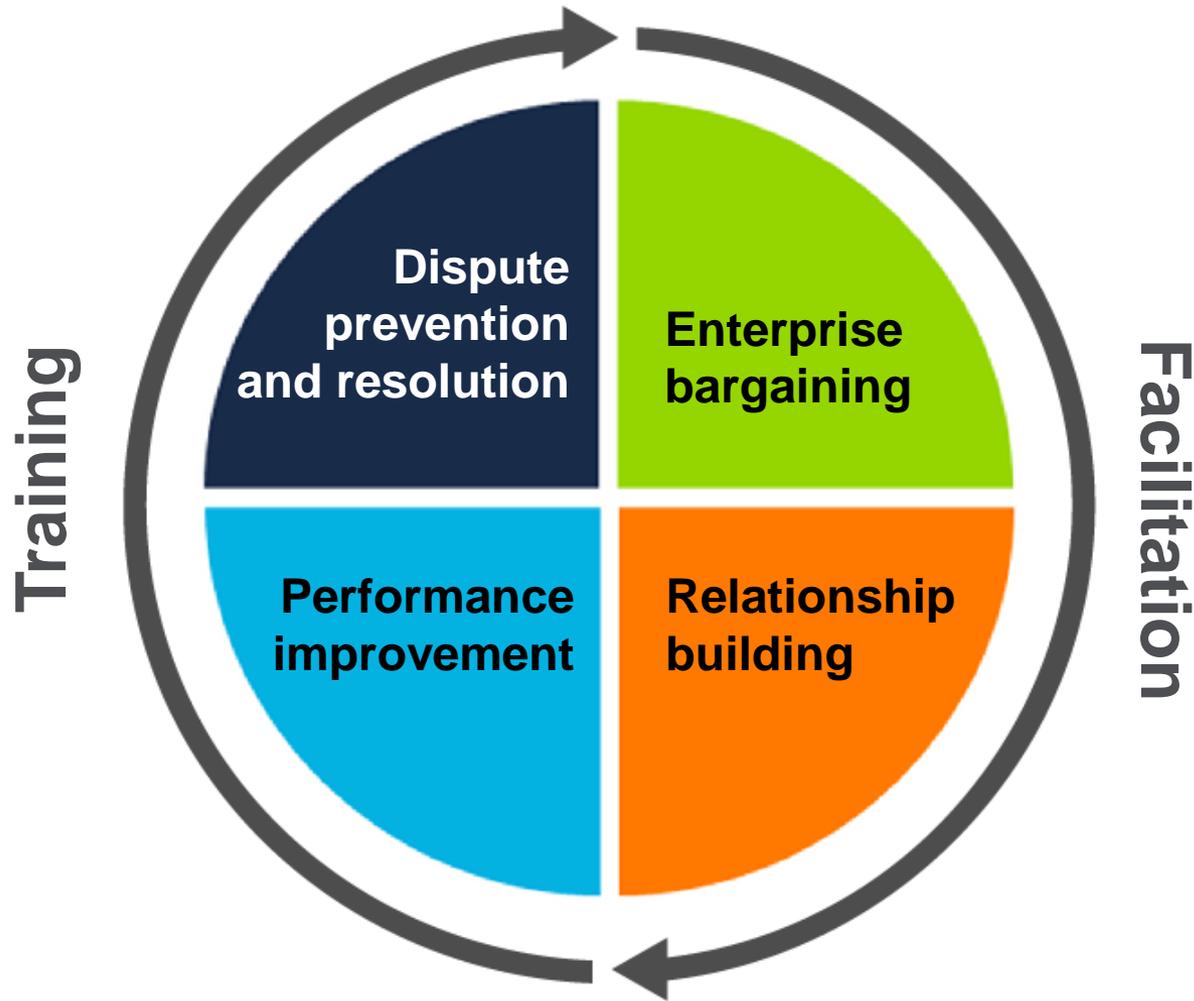
- promote cooperative and productive workplace relations through interest-based approaches to bargaining for enterprise agreements
- develop new ways of resolving conflict at the workplace using interest-based approaches to outside of the bargaining cycle, and before a dispute occurs.
- support the facilitation of change and fostering innovation through new ways of collaborating of the parties rather than with the outcomes they say they want. Once key interests are identified parties jointly develop the outcomes that best satisfy these interests.

Parties can apply to the Commission for assistance in:

- training in interest-based bargaining,
- facilitation of enterprise bargaining,
- facilitation of joint processes to implement enterprise agreements,
- training in interest based dispute resolution,
- training and facilitation in collaborative workplace change.

For more information about the New Approaches initiative and case studies, visit the [New Approaches](#) page on the Commission's website.

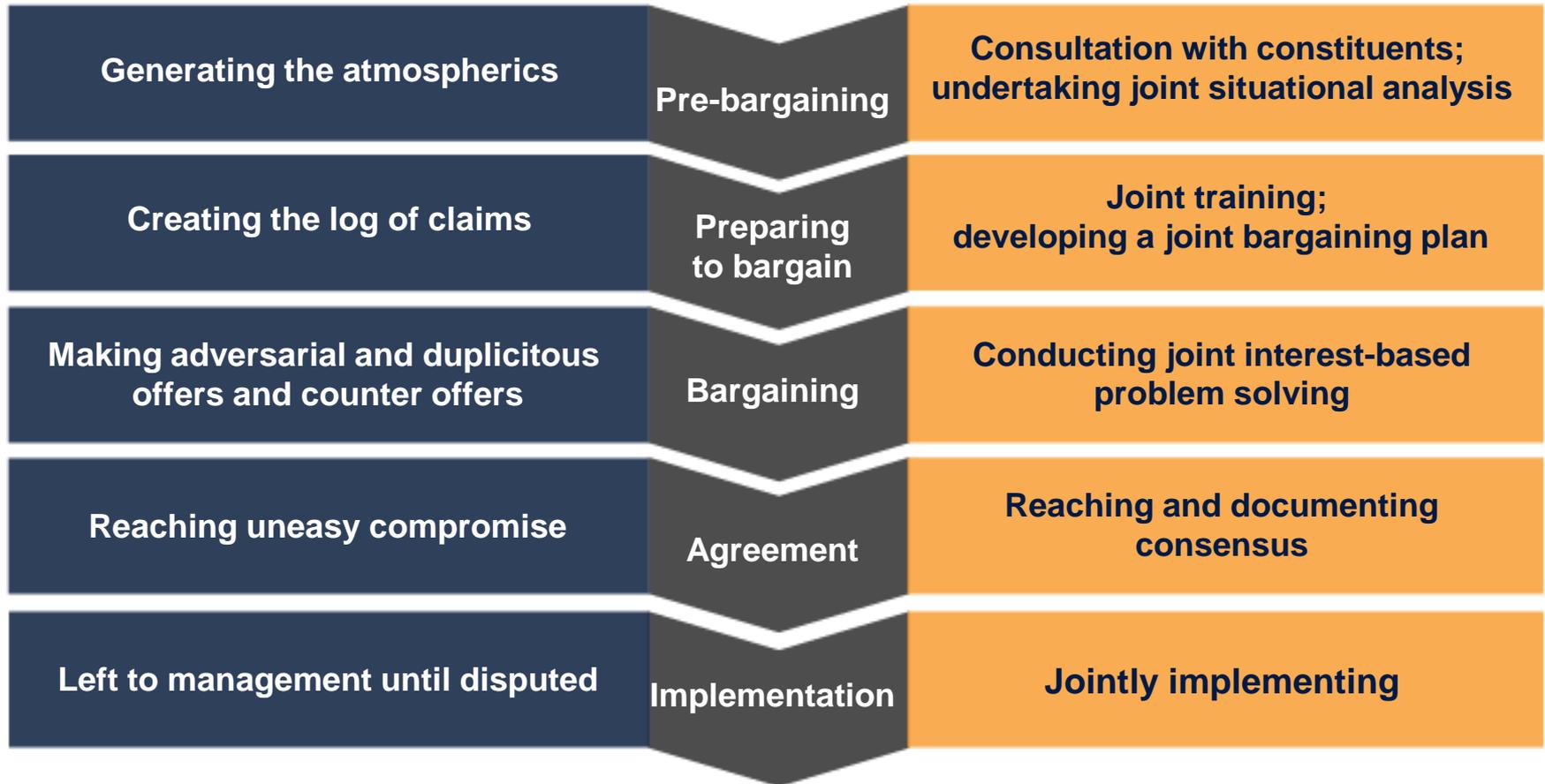
New Approaches



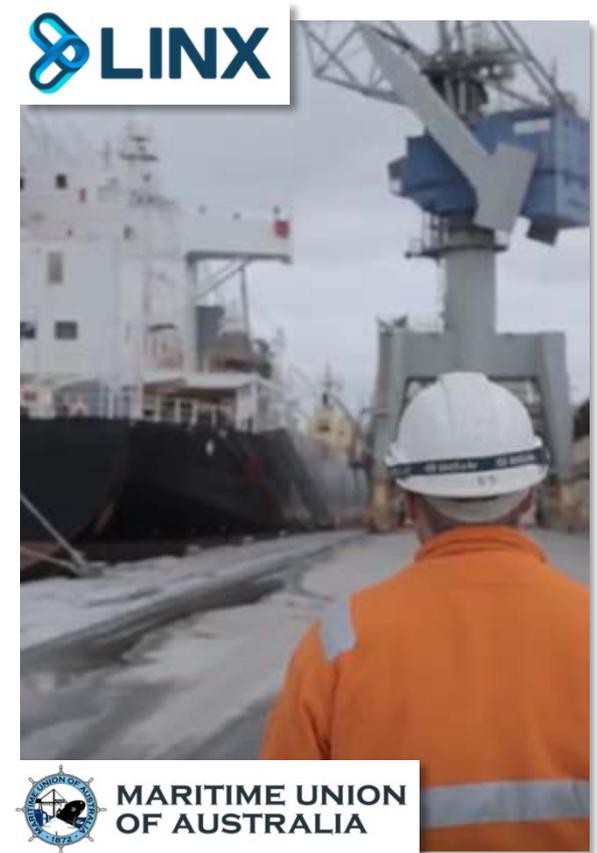
New Approaches

Traditional positional bargaining

Interest-based bargaining



Case studies



New case study – Tertiary education





FairWork
Commission

Questions?

Employment Contracts – Variations and Terminations

*BAQ Employment and Industrial Relations Conference
24 – 25 August 2019, Sheraton Mirage Gold Coast*

1. Introduction

- 1.1 Whether an employment contract has been validly varied or terminated is not always straightforward, particularly when parties purport to exercise their rights in an imperfect or unusual way.
- 1.2 This paper takes the form of a worked scenario involving questions of variation, repudiation, resignation, redundancy, and termination.

2. Scenario

- 2.1 On 1 January 2018, **Chuck** commenced employment with **Small Company Pty Ltd** as a Business Development Manager.
- 2.2 Chuck’s contract of employment was made orally with **Donald**, the owner and CEO of Small Company Pty Ltd. It was agreed that Chuck’s salary would be \$170,000 per annum, but no other details were discussed (**the Agreement**).
- 2.3 After about 6 months, on 9 July 2018, Donald sent the following e-mail to Chuck:

‘Chuck,

It’s been a tough year for the business. I will have to lower your salary to \$150,000 p.a. but if you can bring in \$2m in new business over the next 12 months, we can discuss a profit share up to 2%. If this new arrangement doesn’t suit, please let me know ASAP so I can recruit a replacement.’
- 2.4 Chuck replied, stating: *‘Donald, this is completely unfair. Can you please reinstate my base salary or I will need to consider my options.’*
- 2.5 A few weeks later, Chuck spoke with Donald and told him that he wanted his base salary reinstated. The discussion became heated, ending with Donald saying *‘Fine! But you can forget about any profit share!’*

- 2.6 On 15 August 2018, when Chuck received his next payslip, he noticed that his base salary remained at only \$150,000, but that he was now being paid an annual car allowance of \$20,000. Chuck raised this with Donald when they next spoke, but Donald just told him to ‘...take it or leave it’.
- 2.7 Chuck decided not to press the issue. He continued to present to work and things carried on relatively smoothly for around 5 months. He kept an eye out for other opportunities.
- 2.8 On 15 January 2019, Donald sent an e-mail to Chuck which said ‘*Chuck, sadly I don’t think we need your role anymore. I’ve become fond of you, so I won’t formally terminate you, but you should start looking for a new job. When you find one, we’ll agree to a date for you to finish up here (let’s just give each other, say, 1 month’s notice). If you can’t find a new job within a reasonable period, we will have to review this arrangement.*’
- 2.9 Chuck did not reply.
- 2.10 On Friday 8 February 2019, Chuck e-mailed Donald to advise that he had found a new role and gave 2 weeks’ notice of his resignation. The two men spoke that day and agreed that Chuck’s employment would terminate that afternoon and that he would be paid 2 weeks’ pay in lieu of the notice (first thing next week). They parted company on good terms. They did not discuss the topic of redundancy pay.
- 2.11 On Monday 11 February 2019, before processing the notice payment, Donald happened to look at Chuck’s Facebook page. He saw that Chuck had been, for some months, posting wildly scandalous insults and threats on his page about Donald.
- 2.12 Donald rang Chuck and yelled: ‘*I saw your Facebook page - don’t expect me to pay your 2 weeks’ notice!*’ Chuck replied: ‘*You’d better pay it, and I want my redundancy pay too!*’

3. 1 January 2018 – The formation of the Agreement

- 3.1 As set out above, the Agreement was made orally and no details beyond salary were discussed.
- 3.2 Relevantly, the men did not expressly discuss or agree upon the parties’ rights under the Agreement in respect of termination.
- 3.3 A common misconception is that the existence of the National Employment Standards, specifically s 117 of the *Fair Work Act 2009* (Cth) (**FW Act**), removes the need to expressly deal with notice of termination in the contract.
- 3.4 But the existence of this applicable minimum notice period in statute will not operate to prevent the implication of a ‘reasonable notice’ term.
- 3.5 The position was more ambiguous on earlier authorities, decided in the context of

s 661 of the *Workplace Relations Act 1996* (Cth) (which prescribed the payment of a ‘required period of notice’) or various award provisions (that did not so explicitly prescribe minimum as opposed to actual periods of notice).¹ But in the context of s 117 of the FW Act – which clearly prescribes the payment of a ‘minimum period of notice’ – the weight of authority is clear. There remains room for an implied ‘reasonable notice’ term.

3.6 Because the Agreement in the present case is silent on the issue, the court will imply into it, as a matter of law, the right for either party to terminate the contract on ‘reasonable notice’.² The court will fill the gap.

3.7 What is reasonable notice is calculated by reference to various factors, including:³

- a) The length of service;
- b) The employee’s age;
- c) The character or ‘importance’ of the employment (that is, its seniority, responsibility, whether it requires specialised qualifications, experience or skill and so on);
- d) The level of remuneration;
- e) The availability of similar employment; and
- f) What the employee ‘gave up’ to take the role and his expectation of long-term employment with the employer; and
- g) The circumstances of the dismissal (as relevant to obtaining alternative employment).

3.8 Which factors are relevant in any particular case will depend on the facts.

3.9 Though the above is trite, there are three worthwhile points to make about reasonable notice in the context of the scenario.

3.10 First, in Australia, awards of 12 months are at the upper end.⁴ In *Macauslane*, the court noted that the authorities to which it was referred supported a range of 6 to 12 months ‘...in the case of a senior executive with a large corporation in anticipated long term employment...’⁵

3.11 In assessing a claim for reasonable notice, all the circumstances should be

¹ See for example in *Brennan v Kangaroo Island Council* (2013) 120 SASR 11.

² *Commonwealth Bank of Australia v Barker* [2014] HCA 32 at [30], citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 423, 429.

³ See *Quinn v Jack Chia (Aust) Ltd* [1992] 1 VR 567 at 580; *Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117; *Rogan-Gardiner v Woolworths Ltd* (2012) 218 IR 417 etc.

⁴ For example, 12 months was awarded in *Quinn v Jack Chia (Aust) Ltd* [1992] 1 VR 567 at 580 and *Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117.

⁵ *Macauslane v Fisher & Paykel Finance Pty Ltd* [2003] 1 Qd R 503 at [28].

considered and practitioners should be cautious to not get carried away.

- 3.12 Second, the assessment as to what is reasonable notice is determined as at the date of termination, as opposed to the commencement of the contract.⁶ Normally, post-contractual conduct is not relevant to the interpretation of a contract. But in *County Securities Pty Limited v Challenger Group Holdings Pty Limited & Anor* [2008] NSWCA 193, Spiegelman CJ cited with approval the following *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] EWCA Civ 7:

‘In the present case, the question is not one of construction of the contract, but of what were the terms of an oral and only partially expressed contract. In my opinion, the court can in such a case take into account what was done later as a basis for inferring what was agreed when the contract was made, or as establishing later additions or variations.’

- 3.13 Third, reasonable notice of resignation by the employee and reasonable notice of termination by the employer will not necessarily be reciprocal:

‘Merely because employment contracts and industrial awards usually specify a reciprocal period, it does not follow that parties could not agree to nominate different periods and that what is reasonable may be different depending upon whether it is the employer or the employee who is to be given notice.’⁷

‘The point is that there is no necessary and neat equation between the needs of employee and employer for notice such as would lead to an inevitable conclusion that what is reasonable for one is reasonable for the other.’⁸

- 3.14 Returning to the facts of the scenario, it is suggested that:

- a) Donald’s proclamation on 15 January 2019 that the parties should ‘give each other, say, 1 month’s notice’, though it occurred a year into the employment, might be taken as of *some* relevance in determining reasonable notice if the point is to be argued (limited of course by the fact that Chuck signalled no agreement to the figure); and
- b) Chuck ultimately gave Small Company Pty Ltd 2 weeks’ notice of his resignation. Even if a court accepted that that was reasonable notice of his resignation, this would *not* preclude a finding that if the termination was in fact at Small Company Pty Ltd’s initiative, some period of notice *greater* than 2 weeks was the requisite reasonable notice.

4. 9 July 2018 and 15 August 2018 – The purported variations

- 4.1 As set out above:

- a) on 9 July 2018, Donald unilaterally reduced Chuck’s salary from \$170,000 per annum to \$150,000 per annum (**the first purported variation**). Chuck complained, initially by e-mail and then verbally; and

⁶ *Westpac Banking Corporation v Wittenberg* [2016] FCAFC 33 at [111].

⁷ *Gane v Total Freight Agency Pty Ltd* (1996) 68 IR 204 at 208.

⁸ *Macaulane v Fisher and Paykel Finance Pty Ltd* [2003] 1 Qd R 503 at [20].

- b) on 15 August 2018, Chuck noted on his payslip that his base salary remained at only \$150,000, but that he was now being paid an annual car allowance of \$20,000 (**the second purported variation**). Chuck initially complained, but then dropped the issue and continued to present to work for another 5 months.
- 4.2 An employer, of course, cannot unilaterally change the terms of a contract of employment.⁹
- 4.3 The first purported variation was not a valid variation. Indeed, it was a repudiation of the Agreement.
- 4.4 A repudiation occurs where a party engages in a sufficiently grave breach of the contract or evinces an intention to no longer be bound by the contract or its essential terms – the test is whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it.¹⁰ Repudiation may also be established by conduct that evinces an intention to perform the contract only in the manner in which it suits that party to perform.¹¹
- 4.5 Where an employer repudiates an employment contract, the employee may elect to affirm the contract or to accept the repudiation and treat the contract as at an end.
- 4.6 Here, Chuck did not accept the repudiation, and rather he protested, at least in respect of the first purported variation. At that point, Small Company Pty Ltd retracted that repudiatory breach,¹² at least to a point.
- 4.7 The second purported variation, though it returned Chuck’s remuneration to its previous level, transformed the character of part of it. It was arguably a repudiation too, though less obviously so. In any event, if it were a repudiation, and if Chuck had the option to either affirm the Agreement or terminate it, the evidence suggests that he elected to do the former. Though Chuck initially complained, he decided not to press the issue, and continued to present to work for another 5 months.
- 4.8 On the same basis, Chuck arguably consented to this (second) variation of the Agreement.
- 4.9 Continued work under changed conditions without protest can be construed as consent to the variation. But a Court will be slow to accept that an employee consented to a variation imposed upon them like this.
- 4.10 Materially, continued work under new conditions should not be taken to be

⁹ *Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 at [111].

¹⁰ See discussion of the meaning of ‘repudiation’ in *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115 at [44].

¹¹ *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311 at [33], citing *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 647-649 per Brennan J, *La Fontaine v La Fontaine* [2009] VSCA 305.

¹² *Whittaker v Unisys Australia Pty Ltd* (2010) 192 IR 311 at [39].

consent unless the employee's conduct can only be explained as an acceptance of the new terms:

*'The employee does not consent to a variation of a contract (leaving aside issues of consideration and whether consideration other than the continuation of work is necessary) simply by not objecting ... The employee must either take some positive step or decline to take an objection in circumstances where objection would be necessary or at least expected.'*¹³

- 4.11 Why does it matter whether the second purported variation was a valid variation or not? It will bear upon his quantum if there is to be an argument over whether redundancy pay is owed.
- 4.12 Under s 119 of the FW Act, any redundancy pay is payable at Chuck's '*base rate of pay*'. As s 16(1) of the FW Act clarifies:

'16 Meaning of *base rate of pay*

General meaning

- (1) The ***base rate of pay*** of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but **not including** any of the following:
- (a) incentive-based payments and bonuses;
 - (b) loadings;
 - (c) **monetary allowances**;
 - (d) overtime or penalty rates;
 - (e) any other separately identifiable amounts.'

[emphasis added]

5. 15 January 2019 – The first purported termination

- 5.1 As set out above, on 15 January 2019, Donald sent an e-mail to Chuck which said '*Chuck, sadly I don't think we need your role anymore. I've become fond of you, so I won't formally terminate you, but you should start looking for a new job. When you find one, we'll agree to a date for you to finish up here (let's just give each other, say, 1 month's notice). If you can't find a new job within a reasonable period, we will have to review this arrangement.*'
- 5.2 Chuck did not reply.
- 5.3 This event is identified as the 'first purported termination' because, presuming Chuck will bring a claim, he may well argue that the Agreement was terminated (one way or another) at this point.

¹³ *Downe v Sydney West Area Health Service (No 2)* (2008) 174 IR 385 at [341].

- 5.4 What is the legal effect of this e-mail? Was it a valid termination? Was it a repudiation? Did it entitle Chuck to redundancy pay?
- 5.5 First, it is necessary to note that there are essentially two ways to terminate a contract:
- a) Pursuant to the terms of the contract; or
 - b) By a separate and subsequent agreement between the parties.
- 5.6 The 15 January 2019 e-mail did not effectively do either.
- 5.7 It was not a valid notice of termination pursuant to the Agreement because in order to be valid, a notice of termination must be in clear and unambiguous terms:¹⁴

*‘Whatever the test to be applied, it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate. These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts. Both employer and employee need to know where they stand. **They both need to know the exact date upon which the employee ceases to be an employee.** In a lucrative contract such as this one, a good deal of money may depend upon it.’*

[my emphasis]

- 5.8 Some authorities suggest that a conditional notice of termination can be effective, but only where the condition is sufficiently certain.¹⁵
- 5.9 The terms of the 15 January 2019 e-mail were not sufficiently clear and unambiguous to be a valid notice of termination, or even a conditional notice of termination:
- a) It expressly disavowed that it was a formal notice of termination;
 - b) It did not define any end date for the employment, instead suggesting that the two men would ‘agree to a date’ on some other occasion;
 - c) It suggests the parties give each other ‘1 month’s notice’ at some future point, which presupposes that the employment was not terminated by the e-mail at all, and that it would in fact be terminated when (or if) that notice were given; and
 - d) It failed to set any end date, and left things up in the air, even in the event that Chuck could not find a new job in a within a ‘reasonable period’ (undefined).
- 5.10 The 15 January 2019 e-mail is too uncertain to be taken to be a valid notice of termination. Such an open-ended notice of termination is no valid notice of

¹⁴ *Geys v Societe General, London Branch* [2012] UKSC 63 at [57].

¹⁵ *Fardell v Coates Hire Operations Pty Ltd* [2010] NSWSC 346 at [85]-[92].

termination at all.

- 5.11 For the same reasons, neither was it an effective example of the second way in which a contract may be terminated (by a separate and subsequent agreement between the parties): it was simply too uncertain and insufficiently final. Further, the evidence does not support a finding that there was ‘*mutual consent*’ to the proposed arrangement ‘*established and freely reached between the parties*’.¹⁶
- 5.12 So the 15 January 2019 e-mail was probably not a valid termination of the Agreement. But was it a repudiation, and did it entitle Chuck to redundancy pay? Arguably yes, but its vagueness clouds the question.
- 5.13 The essence of the 15 January 2019 e-mail was to:
- a) Advise Chuck that Donald did not ‘*think*’ his role was required anymore; and
 - b) Invite to him look for new employment and let Donald know once he had found it, whereupon they would agree an end date.
- 5.14 Dealing with the question of redundancy pay first:
- a) The Agreement did not expressly provide any entitlement to it, and such a term will not be implied into the Agreement by law;¹⁷ but
 - b) s 119 of the FW Act provides that an employee is entitled to be paid redundancy pay if their employment is terminated ‘*...at the employer’s initiative because the employer no longer requires the job done by the employee to be done by anyone*’.
- 5.15 As to whether there was a termination at the employer’s initiative, the immediate difficulty for Chuck is that, for reasons set out above, the 15 January 2019 e-mail was not a termination at all. It was too vague by its terms.
- 5.16 That aside, even the question of whether the employer ‘*no longer requires the job done by the employee to be done by anyone*’ is clouded by Donald’s equivocal language. His e-mail certainly suggests the possibility. The balance of the evidence will decide the point, including what became of Chuck’s ‘job’ after his departure. (Of course, whether or not business development tasks were still performed by others after Chuck’s departure, the relevant question is whether anyone was employed to perform the ‘job’¹⁸ formerly held by Chuck.)
- 5.17 Moving to the question of repudiation, whether there has been a repudiation in a given case is a question of fact.
- 5.18 Here, it is difficult to conclude that the 15 January 2019 e-mail was a repudiation in either of the two ‘senses’ in which the term is said to be used in *Koompahtoo*

¹⁶ *Birch v University of Liverpool* [1985] EWCA Civ 8.

¹⁷ See e.g. *Sterling Commerce (Australia) Pty Ltd v Iliff* (2008) 173 IR 378 at [29]-[32].

¹⁸ See e.g. *Jones v Department of Energy and Minerals* (1995) 60 IR 304 at 308.

Local Aboriginal Land Council v Sanpine Pty Limited,¹⁹ namely:

- a) Conduct which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations: the test being whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it; and
- b) Any breach of the contract which justifies termination by the other party.

5.19 That said, the 15 January 2019 e-mail certainly seems on its face to be an invitation in the category of 'resign or be sacked'. Indeed, what occurred next – without any clarifying communication between the parties – was that Chuck resigned his employment on 8 February 2019.

5.20 Chuck may argue that he was constructively dismissed, and that his 'resignation' was involuntary and given in the face of an effective request for it.

5.21 The concept of constructive dismissal in the common law context is the subject of various authorities. For example, it was considered by the Supreme Court of New South Wales in *Hiser v Hardex Co-operative Ltd*, where the following was said:²⁰

'The question thus arises as to whether notice of termination was required in circumstances where the contract was formally brought to an end by the employee, but where the employer gave no real choice but to resign or be dismissed. Termination was allowed to take the form of a resignation as an act of clemency to allow the employee to 'save face', thereby minimising the prejudice to the employee's reputation and improving his chances of finding alternative employment.

It is clear that in actions for unfair dismissal brought under the various legislative provisions, a demand for a resignation in a "resign or be sacked" situation is treated as a dismissal. Where an employee resigns because he or she prefers to resign rather than be sacked (the alternative having been expressed by the employer in the term of the threat that if he or she does not resign then he or she will be dismissed), the mechanics of the resignation do not cause it to be other than a dismissal. The absence of an explicit threat by the employer in peremptory language is not fatal. Rather the circumstances of the resignation are examined to determine whether it was in substance equivalent to a dismissal by the employer, in that the employee did not freely consent to the termination...

*...
In a situation where the contract was formally terminated by the employee by resignation, reasonable notice would normally have to be accorded to the employer by the employee, rather than vice versa. However, by analogy with the dismissal cases, a demand for a resignation may amount to termination of the contract of employment by the employer, a termination which requires a reasonable period of notice: For example, see the Canadian case of *Smith v Campbellford Board of Educational* (1917) 37 DLR 506 at 509.*

I am thus satisfied that the Defendant was obliged to give the Plaintiff reasonable notice, or pay in lieu of notice period, despite the contract being formally terminated by the actions of the employee. Although there was no explicit threat of a sacking, it is clear that in the circumstances the request for a resignation was implicitly offered as an alternative to termination of employment by the Defendant.

¹⁹ (2007) 233 CLR 115 at [44].

²⁰ Unreported decision, NSWSC, Santow J, 14 December 1994.

...
Even if I were wrong in this and the resignation did not amount at law to a termination of the contract by the employer, I am satisfied that an equivalent equitable remedy would be available in the circumstances. Where a resignation by an employee cannot be considered truly voluntary due to the conduct of the employer, a unilateral attempt by the employer to attempt to bypass the requirement for reasonable notice to the employee, would amount in the circumstances to an unconscionable exercise of the employer's strict legal rights.'

- 5.22 All of that would appear to suggest a fairly low bar for a resignation to be regarded as a dismissal: one which might well be satisfied in the present case. Here, the act of 'clemency' was to foreshadow dismissal so that Chuck had time to look for a new job, and like in *Hiser*, there was no explicit threat of a sacking but it was clear that the request for a 'resignation' was offered as an alternative to termination by the Small Company Pty Ltd.
- 5.23 But though *Hiser* is an interesting illustration, the question (of what will be a constructive dismissal) is simplified when it is considered that the fundamental principle when determining if there was a constructive dismissal at common law is whether the conduct of the employer was such as to evince an intention to no longer be bound by the contract i.e. to repudiate the contract (giving rise to a right on the part of the employee to accept the repudiation).²¹
- 5.24 Though the question of constructive dismissal at common law can be complicated, the anterior question – whether there was conduct amounting to a repudiation of the contract by the employer – is more straightforward.
- 5.25 Ultimately, that is a question for the Court to judge objectively.
- 5.26 Given the vagueness of the 15 January 2019 e-mail, and the lack of communication from either side to clarify things, the argument is not without its challenges.

6. Friday 8 February 2019 – The resignation

- 6.1 As set out above, on 8 February 2019 Chuck e-mailed Donald to advise that he had found a new role, and gave 2 weeks' notice of his resignation.
- 6.2 The two men spoke that day and agreed that Chuck's employment would terminate that afternoon and that he would be paid 2 weeks' pay in lieu of the notice (first thing next week). They parted company on good terms. They did not discuss the topic of redundancy pay.
- 6.3 Presuming that the Court does not find that the 15 January 2019 e-mail rose to the level of repudiation, this resignation was the event that ended the employment.
- 6.4 Chuck gave 2 weeks' notice because he understood it to be the minimum based on his reading of s 117 of the FW Act. At this point, it is worth emphasising that section 117 of the *Fair Work Act 2009* (Cth) imposes a statutory minimum notice

²¹ *Spencer v Dowling* [1997] 2 VR 127 at [160].

period on employers giving notice of termination (in this case 2 weeks' notice), but not on employees giving notice of resignation.

- 6.5 Accepting that the 2 weeks Chuck gave was 'reasonable notice' of his resignation (and Donald ultimately took no issue with that), it was a valid notice of termination. A valid notice of termination will operate according to its terms.
- 6.6 In the ordinary course, the Agreement would have terminated when the notice expired, 2 weeks hence. But, as noted, the men here agreed that Chuck's employment would terminate that afternoon and that he would be paid 2 weeks' pay in lieu of the notice (first thing next week).
- 6.7 Thus, from 8 February 2019, the employment was at an end and the 2 weeks' pay was owed as a debt.

7. Monday 11 February 2019 – The purported summary dismissal

- 7.1 As set out above, the following Monday 11 February 2019, before processing the notice payment, Donald happened to look at Chuck's Facebook page.
- 7.2 He saw that Chuck had been, for some months, posting wildly scandalous insults and threats on his page about Donald.
- 7.3 Donald rang Chuck and yelled: '*I saw your Facebook page - don't expect me to pay your 2 weeks' notice!*' Chuck replied: '*You'd better pay it, and I want my redundancy pay too!*'
- 7.4 For the sake of the scenario, it can be presumed that the misconduct apparent on Chuck's Facebook page was such as to justify summary dismissal (that is, sufficiently grave, even if not necessarily rising to the level of repudiation).²²
- 7.5 Was Donald entitled to summarily dismiss Chuck at this point?
- 7.6 After all, the case of *Shepherd v Felt & Textiles of Australia Ltd*²³ is often cited (particularly in the unfair dismissal context) in support of the principle that facts justifying dismissal, which existed at the time of dismissal but which the employer did not know about and rely upon at the time of dismissal, may retrospectively justify the dismissal.
- 7.7 Here, the *Shepherd* principle does not assist Small Company Pty Ltd.
- 7.8 The issue was considered in *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20. Ultimately, the Full Court there accepted that the *Shepherd* principle cannot be used to justify summary termination of the contract if termination had already occurred at an earlier time.

²² *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20 (**Melbourne Stadiums Ltd**) at [13], citing *Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117 at 142-143.

²³ (1931) 45 CLR 359.

7.9 The distinction between the present case, and cases where the *Shepherd* principle may apply, is that here there was an actual contractual termination, not a mere purported termination upon inadequate grounds and later justified on grounds not known or not relied upon at the time of purported termination.

7.10 The Full Court cited an English Court of Appeal decision (*Cavenagh v William Evans Ltd* [2013] 1 WLR 238) which makes the point clearly:²⁴

‘...*Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 [one of the cases relied upon by Dixon J in *Shepherd*] **did not go as far as to say that after-discovered misconduct provided an employer with a defence to an action for payment of an accrued debt.** The principle for which that case stands is that an employer can defend a claim for damages for wrongful dismissal by using at trial, in its defence of justification, evidence of misconduct by the employee that was not known to the employer at the time of dismissal. **[H]is appointment was terminated... in a fashion that was lawful... The consequence of the lawful termination was that the company became contractually bound to Mr Cavenagh for pay in lieu... The lawful termination had already triggered the liability for pay in lieu,** which was, as a matter of legal analysis, quite a different situation than that facing the Court of Appeal in *Boston Deep Sea Fishing*.’

7.11 In the present case, the *Shepherd* principle cannot justify a summary dismissal on 11 February 2019, because the Agreement was already lawfully terminated on 8 February 2019. A lawfully terminated agreement cannot be resuscitated and then re-terminated upon some ground not known at the time of the termination.²⁵

7.12 As to concerns that the Full Court’s narrower interpretation of the *Shepherd* principle in *Melbourne Stadiums Ltd* may lead to circumstances where an employee might ‘get away with’ misconduct discovered after termination, the Full Court said as follows:²⁶

‘The risk that misconduct may and often will not be discovered until after the employment agreement has, by some means, been lawfully terminated and payment in lieu of notice made could be addressed by a contractual term entitling the employer to repayment of those monies. In an employment agreement it may be that, by reason of the combined natures of the after discovered pre-termination breaches and the particular contract, payments in lieu of notice made may be recoverable as damages. Such too may be the case where the employee is under a fiduciary duty to his employer to report facts that may provide a foundation for any breach of his fiduciary duties and has failed to do so. Additionally, such payments may be recovered where the termination was induced by fraud or caused by proscribed statutory conduct.’

7.13 In any event, the facts of *Melbourne Stadiums Ltd* were such that notwithstanding the above clarifications of principle, the employer there was able to summarily dismiss the employee. The Full Court reached this landing by finding that the agreement had not been lawfully terminated before the misconduct came to light.

²⁴ *Melbourne Stadiums Ltd* at [98], citing *Cavenagh v William Evans Ltd* [2013] 1 WLR 238 at [39].

²⁵ *Melbourne Stadiums Ltd* at [117].

²⁶ *Melbourne Stadiums Ltd* at [116].

7.14 Specifically, it was held that the first purported termination would have only occurred, on the particular terms of the contract there, on the payment of the notice (which had not yet occurred):

‘123. The termination under the employment contract required, in order to be effective, *payment* of the six months’ pay in lieu of notice. This never occurred and there was therefore no termination under cl 7.1.

...

132. MSL had not made payment under the second limb of cl 7.1 by the time it discovered Mr Sautner’s misconduct.

133. Accordingly, at the time that Mr Sautner’s misconduct was discovered his employment contract was still on foot.’

[Full Court’s emphasis]

7.15 Returning to our scenario, Donald and Small Company Pty Ltd can enjoy no such refuge in the words of a carefully written contract.

7.16 The Agreement terminated on 8 February 2019, and Small Company Pty Ltd could not resuscitate it, and re-terminate it, on 11 February 2019.

8. Conclusion

8.1 The point of traversing the complications of this scenario is to emphasise that it is important for practitioners to closely consider the various purported exercises of rights throughout the employment relationship and examine closely the legal effect of what has happened at each turn.

8.2 A detailed examination, particularly in edge cases, will inform the assessment of the claims that can be properly pursued (or defended).

24 August 2019

Edward Shorten
Chambers

Employment Contracts - Variations and Terminations

BAQ Employment and Industrial Relations Conference, 24 – 25 August 2019, Sheraton Mirage Gold Coast

Edward Shorten
Barrister-at-Law

Overview

- Whether an employment contract has been validly varied or terminated is not always straightforward, particularly when parties purport to exercise their rights in an imperfect or unusual way.
- This presentation takes the form of a worked scenario involving questions of variation, repudiation, resignation, redundancy, and termination.

Scenario (1 of 5 – the engagement)

- On 1 January 2018, **Chuck** commenced employment with **Small Company Pty Ltd** as a Business Development Manager.
- Chuck's contract of employment was made orally with **Donald**, the owner and CEO of Small Company Pty Ltd.
- It was agreed that Chuck's salary would be **\$170,000** per annum, but no other details were discussed.

Scenario (2 of 5 – the first purported variation)

- On 9 July 2018, Donald sent the following e-mail to Chuck:

‘Chuck, it’s been a tough year for the business. I will have to lower your salary to \$150,000 p.a. but if you can bring in \$2m in new business over the next 12 months, we can discuss a profit share up to 2%. If this new arrangement doesn’t suit, please let me know ASAP so I can recruit a replacement.’

- Chuck replied, stating: *‘Donald, this is completely unfair. Can you please reinstate my base salary or I will need to consider my options.’*
- A few weeks later, Chuck spoke with Donald and told him that he wanted his base salary reinstated. The discussion became heated, ending with Donald saying *‘Fine! But you can forget about any profit share!’*

Scenario (3 of 5 – the second purported variation)

- On 15 August 2018, when Chuck received his next payslip, he noticed that his base salary remained at only \$150,000, but that he was now being paid an annual car allowance of \$20,000. Chuck raised this with Donald when they next spoke, but Donald just told him to ‘...*take it or leave it*’.
- Chuck decided not to press the issue. He continued to present to work and things carried on relatively smoothly for around 5 months. He kept an eye out for other opportunities.

Scenario (4 of 5 – the first purported termination)

- On 15 January 2019, Donald sent an e-mail to Chuck which said:

‘Chuck, sadly I don’t think we need your role anymore. I’ve become fond of you, so I won’t formally terminate you, but you should start looking for a new job. When you find one, we’ll agree to a date for you to finish up here (let’s just give each other, say, 1 month’s notice). If you can’t find a new job within a reasonable period, we will have to review this arrangement.’

- Chuck did not reply.

Scenario (5 of 5 – resignation; summary dismissal)

- On Friday 8 February 2019, Chuck e-mailed Donald to advise that he had found a new role and gave 2 weeks' notice of his resignation. The two men spoke that day and agreed that Chuck's employment would terminate that afternoon and that he would be paid 2 weeks' pay in lieu of the notice (first thing next week). They parted company on good terms. They did not discuss the topic of redundancy pay.
- On Monday 11 February 2019, before processing the notice payment, Donald happened to look at Chuck's Facebook page. He saw that Chuck had been, for some months, posting wildly scandalous insults and threats on his page about Donald.
- Donald rang Chuck and yelled: '*I saw your Facebook page - don't expect me to pay your 2 weeks' notice!*'. Chuck replied: '*You'd better pay it, and I want my redundancy pay too!*'

The formation of the Agreement (1/5)

- Because the Agreement in the present case is silent on the issue of notice, the court will imply into it, as a matter of law, the right for either party to terminate the contract on ‘reasonable notice’. The court will fill the gap.

Commonwealth Bank of Australia v Barker [2014] HCA 32 at [30], citing *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 423, 429.

- s 117 of the *Fair Work Act 2009* (Cth) (**FW Act**) does not remove the need to expressly deal with notice of termination in the contract. The existence of an applicable minimum notice period in statute will not operate to prevent the implication of a ‘reasonable notice’ term.

The formation of the Agreement (2/5)

- ‘Reasonable notice’ is calculated by reference to various factors, including:
 - Length of service
 - The character or ‘importance’ of the employment (that is, its seniority, responsibility, whether it requires specialised qualifications, experience or skill and so on)
 - The availability of similar employment (and the circumstances of dismissal as relevant to obtaining alternative employment)
 - Employee’s age
 - The level of remuneration
 - What the employee ‘gave up’ to take the role and his expectation of long-term employment with the employer

See *Quinn v Jack Chia (Aust) Ltd* [1992] 1 VR 567 at 580; *Rankin v Marine Power International Pty Ltd* (2001) 107 IR 117; *RoganGardiner v Woolworths Ltd* (2012) 218 IR 417 etc.

- Which factors are relevant in any particular case will depend on the facts.

The formation of the Agreement (3/5)

- In Australia, awards of 12 months' reasonable notice are at the upper end. In *Macauslane v Fisher & Paykel Finance Pty Ltd* [2003] 1 Qd R 503 at [28], the Court noted that the authorities to which it was referred supported a range of 6 to 12 months '*...in the case of a senior executive with a large corporation in anticipated long term employment...*'
- The assessment as to what is reasonable notice is determined as at the date of termination, as opposed to the commencement of the contract. From *County Securities Pty Limited v Challenger Group Holdings Pty Limited & Anor* [2008] NSWCA 193:

“In the present case, the question is not one of construction of the contract, but of what were the terms of an oral and only partially expressed contract. In my opinion, the court can in such a case take into account what was done later as a basis for inferring what was agreed when the contract was made, or as establishing later additions or variations.”

The formation of the Agreement (4/5)

- Reasonable notice of resignation by the employee and reasonable notice of termination by the employer will not necessarily be reciprocal:

*‘Merely because employment contracts and industrial awards usually specify a reciprocal period, it does not follow that parties could not agree to nominate different periods and that **what is reasonable may be different depending upon whether it is the employer or the employee who is to be given notice.**’ (Gane v Total Freight Agency Pty Ltd (1996) 68 IR 204 at 208.)*

‘The point is that there is no necessary and neat equation between the needs of employee and employer for notice such as would lead to an inevitable conclusion that what is reasonable for one is reasonable for the other.’ (Macauslane v Fisher and Paykel Finance Pty Ltd [2003] 1 Qd R 503 at [20].)

The formation of the Agreement (5/5)

- Donald’s proclamation on 15 January 2019 that the parties should “*give each other, say, 1 month’s notice*”, though it occurred a year into the employment, might be taken as of *some* relevance in determining the question of reasonable notice (limited of course by the fact that Chuck signalled no agreement to the figure); and
- Chuck ultimately gave Small Company Pty Ltd 2 weeks’ notice of his resignation. Even if a court accepted that that was reasonable notice of his resignation, this would *not* preclude a finding that if the termination was in fact at Small Company Pty Ltd’s initiative, some period of notice *greater* than 2 weeks was the requisite reasonable notice.

The purported variations (1/5)

- As previously set out:
 - on 9 July 2018, Donald unilaterally reduced Chuck's salary from \$170,000 per annum to \$150,000 per annum (**the first purported variation**). Chuck complained, initially by e-mail and then verbally; and
 - on 15 August 2018, Chuck noted on his payslip that his base salary remained at only \$150,000, but that he was now being paid an annual car allowance of \$20,000 (**the second purported variation**). Chuck initially complained, but then dropped the issue and continued to present to work for another 5 months.

The purported variations (2/5)

- An employer cannot unilaterally change the terms of a contract of employment (*Riverwood International Australia Pty Ltd v McCormick* [2000] FCA 889 at [111]).
- The first purported variation was not a valid variation. Indeed, it was a repudiation of the Agreement.
- Where an employer repudiates an employment contract, the employee may elect to affirm the contract or to accept the repudiation and treat the contract as at an end.
- Here, Chuck did not accept the repudiation, and rather he protested, at least in respect of the first purported variation. At that point, Small Company Pty Ltd retracted that repudiatory breach, at least to a point.

The purported variations (3/5)

- The second purported variation, though it returned Chuck's remuneration to its previous level, transformed the character of part of it. It was arguably a repudiation too, though less obviously so.
- In any event, at least arguably, Chuck would seem to have elected to affirm the Agreement and consented to this variation of it.

The purported variations (4/5)

- Continued work under changed conditions without protest can be construed as consent to the variation. But a court will be slow to accept that an employee consented to a variation imposed upon them like this.
- Materially, continued work under new conditions should not be taken to be consent unless the employee's conduct can only be explained as an acceptance of the new terms:

“The employee does not consent to a variation of a contract (leaving aside issues of consideration and whether consideration other than the continuation of work is necessary) simply by not objecting ... The employee must either take some positive step or decline to take an objection in circumstances where objection would be necessary or at least expected.” (Downe v Sydney West Area Health Service (No 2) (2008) 174 IR 385 at [341].)

The purported variations (5/5)

- Why does it matter? Any redundancy pay (under the FW Act) will be at Chuck's 'base rate of pay'.

“16 Meaning of *base rate of pay*

General meaning

- (1) The *base rate of pay* of a national system employee is the rate of pay payable to the employee for his or her ordinary hours of work, but not including any of the following:
- (a) incentive-based payments and bonuses;
 - (b) loadings;
 - (c) **monetary allowances**;
 - (d) overtime or penalty rates;
 - (e) any other separately identifiable amounts.” [emphasis added]

15 January 2019 – the first purported termination (1/11)

- *“Chuck, sadly I don’t think we need your role anymore. I’ve become fond of you, so I won’t formally terminate you, but you should start looking for a new job. When you find one, we’ll agree to a date for you to finish up here (let’s just give each other, say, 1 month’s notice). If you can’t find a new job within a reasonable period, we will have to review this arrangement.”*
- Depending on how Chuck’s ultimate claim is framed, he may argue that the Agreement was terminated (one way or another) at this point.

15 January 2019 – the first purported termination (2/11)

- Two ways to terminate a contact:
 - Pursuant to the terms of the contract; or
 - By a separate and subsequent agreement between the parties.
- The 15 January 2019 e-mail did not effectively do either.

15 January 2019 – the first purported termination (3/11)

- In order to be valid, a notice of termination must be in clear and unambiguous terms:

“Whatever the test to be applied, it seems to me to be an obviously necessary incident of the employment relationship that the other party is notified in clear and unambiguous terms that the right to bring the contract to an end is being exercised, and how and when it is intended to operate. These are the general requirements applicable to notices of all kinds, and there is every reason why they should also be applicable to employment contracts. Both employer and employee need to know where they stand. They both need to know the exact date upon which the employee ceases to be an employee. In a lucrative contract such as this one, a good deal of money may depend upon it.”

(Geys v Societe General, London Branch [2012] UKSC 63 at [57].)

15 January 2019 – the first purported termination (4/11)

- 15 January 2019 e-mail:

*“Chuck, sadly I don’t **think** we need your role anymore. I’ve become fond of you, so **I won’t formally terminate you**, but you should start looking for a new job. When you find one, **we’ll agree to a date for you to finish up here** (let’s just give each other, say, 1 month’s notice). **If you can’t find a new job within a reasonable period, we will have to review this arrangement.**”*

- Such an open-ended notice of termination is no valid notice of termination at all.
- Neither was it an effective example of the second way in which a contract may be terminated (by a separate and subsequent agreement between the parties) because of the same vices: it was simply too uncertain and insufficiently final.

15 January 2019 – the first purported termination (5/11)

- So the 15 January 2019 e-mail was probably not a valid termination of the Agreement.
- But was it a repudiation, and did it entitle Chuck to redundancy pay? Arguably yes, but its vagueness clouds the question.

15 January 2019 – the first purported termination (6/11)

- Redundancy?
- No entitlement to redundancy pay in the Agreement itself and none will be implied by law (see e.g. *Sterling Commerce (Australia) Pty Ltd v Iliff* (2008) 173 IR 378 at [29]-[32]); but
- s 119 of the FW Act provides that an employee is entitled to be paid redundancy pay if their employment is terminated “...*at the employer's initiative because the employer no longer requires the job done by the employee to be done by anyone*”.

15 January 2019 – the first purported termination (7/11)

- Entitlement pursuant to s 119 FW Act:
 - Termination at employer's initiative?
 - Job no longer required to be done by anyone?

15 January 2019 – the first purported termination (8/11)

- Repudiation?
- *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* (2007) 233 CLR 115 at [44]) – two ‘senses’ of the word:
 - Conduct which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party's obligations: the test being whether the conduct of one party is such as to convey to a reasonable person, in the situation of the other party, renunciation either of the contract as a whole or of a fundamental obligation under it; and
 - Any breach of the contract which justifies termination by the other party.

15 January 2019 – the first purported termination (9/11)

- Constructive dismissal? See discussion in *Hiser v Hardex Co-operative Ltd* (NSWSC, unreported):

“Termination was allowed to take the form of a resignation as an act of clemency to allow the employee to 'save face', thereby minimising the prejudice to the employee's reputation and improving his chances of finding alternative employment.

It is clear that in actions for unfair dismissal brought under the various legislative provisions, a demand for a resignation in a "resign or be sacked" situation is treated as a dismissal. Where an employee resigns because he or she prefers to resign rather than be sacked (the alternative having been expressed by the employer in the term of the threat that if he or she does not resign then he or she will be dismissed), the mechanics of the resignation do not cause it to be other than a dismissal. The absence of an explicit threat by the employer in peremptory language is not fatal. Rather the circumstances of the resignation are examined to determine whether it was in substance equivalent to a dismissal by the employer, in that the employee did not freely consent to the termination...”

15 January 2019 – the first purported termination (10/11)

“In a situation where the contract was formally terminated by the employee by resignation, reasonable notice would normally have to be accorded to the employer by the employee, rather than vice versa. However, by analogy with the dismissal cases, a demand for a resignation may amount to termination of the contract of employment by the employer, a termination which requires a reasonable period of notice...

I am thus satisfied that the Defendant was obliged to give the Plaintiff reasonable notice, or pay in lieu of notice period, despite the contract being formally terminated by the actions of the employee. Although there was no explicit threat of a sacking, it is clear that in the circumstances the request for a resignation was implicitly offered as an alternative to termination of employment by the Defendant.”

15 January 2019 – the first purported termination (11/11)

- *Hiser* is an interesting decision that appears to suggest a fairly low bar.
- But the question is simplified when it is considered that the fundamental principle when determining if there was a constructive dismissal at common law is whether the conduct of the employer was such as to evince an intention to no longer be bound by the contract i.e. to repudiate the contract (giving rise to a right on the part of the employee to accept the repudiation).

Spencer v Dowling [1997] 2 VR 127 at [160].

8 February 2019 – the resignation

- Chuck e-mailed Donald to advise that he had found a new role and gave 2 weeks' notice of his resignation.
- The two men spoke that day and agreed that Chuck's employment would terminate that afternoon and that he would be paid 2 weeks' pay in lieu of the notice (first thing next week). They parted company that day on good terms. They did not discuss the topic of redundancy pay.
- From 8 February 2019, the employment was at an end and the 2 weeks' pay was owed as a debt.

11 February 2019 – the purported summary dismissal (1/6)

- The following Monday 11 February 2019, before processing the notice payment, Donald happened to look at Chuck's Facebook page.
- He saw that Chuck had been, for some months, posting wildly scandalous insults and threats on his page about Donald.
- Donald rang Chuck and yelled: "*I saw your Facebook page - don't expect me to pay your 2 weeks' notice!*"

11 February 2019 – the purported summary dismissal (2/6)

- Was Donald entitled to summarily dismiss Chuck at this point?
- *Shepherd v Felt & Textiles of Australia Ltd* (1931) 45 CLR 359 – Facts justifying dismissal, which existed at the time of dismissal but which the employer did not know about and rely upon at the time of dismissal, may retrospectively justify the dismissal.
- Here, the *Shepherd* principle does not assist Small Company Pty Ltd.

11 February 2019 – the purported summary dismissal (3/6)

- *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20:
 - The *Shepherd* principle cannot be used to justify summary termination of the contract if termination had already occurred at an earlier time.
 - The distinction between the present case, and cases where the *Shepherd* principle may apply, is that here there was an actual contractual termination, not a mere purported termination upon inadequate grounds and later justified on grounds not known or not relied upon at the time of purported termination.

11 February 2019 – the purported summary dismissal (4/6)

- *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20 at [98], citing *Cavenagh v William Evans Ltd* [2013] 1 WLR 238:

“...*Boston Deep Sea Fishing and Ice Co v Ansell* (1888) 39 Ch D 339 [one of the cases relied upon by Dixon J in *Shepherd*] **did not go as far as to say that after-discovered misconduct provided an employer with a defence to an action for payment of an accrued debt.** The principle for which that case stands is that an employer can defend a claim for damages for wrongful dismissal by using at trial, in its defence of justification, evidence of misconduct by the employee that was not known to the employer at the time of dismissal. **[H]is appointment was terminated... in a fashion that was lawful... The consequence of the lawful termination was that the company became contractually bound to Mr Cavenagh for pay in lieu... The lawful termination had already triggered the liability for pay in lieu,** which was, as a matter of legal analysis, quite a different situation than that facing the Court of Appeal in *Boston Deep Sea Fishing.*” ([39])

11 February 2019 – the purported summary dismissal (5/6)

- In the present case, the *Shepherd* principle cannot justify a summary dismissal on 11 February 2019, because the Agreement was already lawfully terminated on 8 February 2019.
- A lawfully terminated agreement cannot be resuscitated and then re-terminated upon some ground not known at the time of the termination (*Melbourne Stadiums Ltd* at [117]).

11 February 2019 – the purported summary dismissal (6/6)

- Risk of employees ‘getting away with’ misconduct discovered after termination?
- *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20 at [116]:

“The risk that misconduct may and often will not be discovered until after the employment agreement has, by some means, been lawfully terminated and payment in lieu of notice made could be addressed by a contractual term entitling the employer to repayment of those monies. In an employment agreement it may be that, by reason of the combined natures of the after discovered pre-termination breaches and the particular contract, payments in lieu of notice made may be recoverable as damages. Such too may be the case where the employee is under a fiduciary duty to his employer to report facts that may provide a foundation for any breach of his fiduciary duties and has failed to do so. Additionally, such payments may be recovered where the termination was induced by fraud or caused by proscribed statutory conduct.” ([116])

Conclusion

- It is important for practitioners to closely consider the various purported exercises of rights throughout the employment relationship and examine closely the legal effect of what has happened at each turn.
- A detailed examination, particularly in edge cases, will inform the assessment of the claims that can be properly pursued (or defended).

Questions?

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MANAGING PROFESSIONAL EMPLOYEES: CASE STUDY

Chair: Geraldine Dann

Panel members: Mark Healy, Gavin Rebetzke, Holly Blattman

24 August 2019

Bar Association of Queensland Employment and Industrial
Relations Conference, Gold Coast

Setting the scene:

Dorothy, a junior solicitor at Hashtag Legal Pty Ltd



Mr George Christian, the managing partner of Hashtag Legal Pty Ltd



Mr Meshuga, the new Magistrate in town



Mr Jock Spot, one of George's partners



Q1: If you were George should you have:

- a) Been worried about Dorothy's wellbeing ?
- b) Got her side of the story ?
- c) Sought to speak to some other people about what happened in Mr Meshuga's Court ?
- d) Thought about what support she might need ?
- e) Given her potential consequences if she did it again ?

And the answer is:

None of the above

Key Points for discussion:

Standard of care

Significance of warning signs

Duties as officers of the court

Key case

XY (A pseudonym) v The Age Company Limited
[2019] VCC 148

And the story goes as follows:



Q2: Should George:

- a) Agree to a transfer?
 - b) Be regarded as having given Dorothy a direction about how she is to act ?
 - c) Call in the HR Department for assistance ?
 - d) All of the above ?
- 

And the answer is:

(c) – if there is one; (a) if there is not

Key Points for discussion:

Appropriateness of George's actions

Discharge of duty of care

What work can an employee be required to perform

Key case

Tropoulos v Journey Lawyers Pty Ltd [2019] FCA 436

And then:



Q3: What does George do now. Should he:

- a) Dismiss Dorothy
- b) Put Dorothy on a performance improvement plan
- c) Conduct an investigation
- d) Transfer Dorothy out of commercial
- e) Go and check the trust account

And the answer is:

(e) and (c) in that order

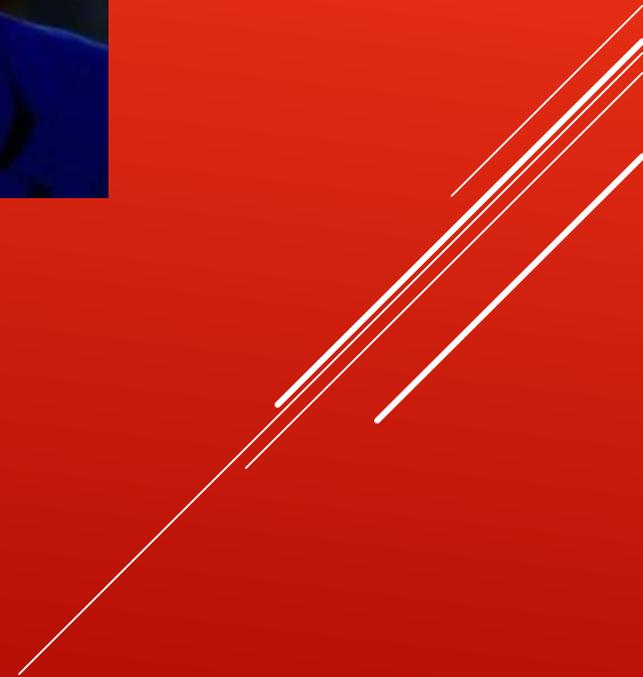
Key Points for discussion:

Sexual harassment and bullying
Adverse action
Whistleblower issues

Key case and sources

Part 9.4AAA *Corporations Act 2001*
Section 341(1)(c) *Fair Work Act 2009*
The Environmental Group v Bowd [2019] FCA 951

So what happens to Dorothy ?



**Questions, comments or observations from
the audience**



ABOUT YOUR PANEL

CHAIR

GERALDINE DANN



Geraldine commenced at the bar in 2008 after almost 20 years as a solicitor in private practice in Brisbane, the United Kingdom and Melbourne. Her key areas of practice include employment, industrial, discrimination, safety and related laws under the Federal and State regimes; regulatory law (both prosecution and defence, across State and Commonwealth regimes, including acting in closed hearings for regulators); inquests and Tribunal work; and mediation of disputes (including as a mediator). For the last three years Geraldine has been junior counsel for the State of Queensland in the Stolen Wages Class action.

PRESENTERS

MARK HEALY



Mark has been a lawyer for 29 years, having been admitted as a solicitor in 1991 and as a barrister in 2004. As a solicitor, he practiced in crime, family, wills and estates, WHS (in which he lectured at QUT), personal injuries (including asbestos litigation and psychiatric injury cases), defamation, conveyancing, commercial, industrial and employment law. He won the James Archibald Douglas Prize for the best advocate on the Bar Practice Course and completed the ABA's Advanced Trial Advocacy Course in 2012. Mark has appeared in all tribunals and courts in Queensland, exercising both State and Commonwealth jurisdiction except the High Court. He cannot claim musical accomplishments of Gavin Rebetzke but he owns six guitars.

GAVIN REBETZKE



Gavin Rebetzke is a barrister from Wilberforce Chambers at Level 19, 239 George Street, Brisbane. Prior to going to the bar in 2007 he was a partner of Roberts & Kane solicitors where his career included acting for the then Queensland Nurses' Union in several significant matters including the Bundaberg Hospital Commissions of Inquiry. His practice areas at the bar include industrial and employment related law, professional discipline, superannuation and income protection claims, defamation and administrative law. He is also principal clarinet of the Brisbane Symphony Orchestra.

HOLLY BLATTMAN



Holly was admitted to the Bar in 2007 and has a broad and busy practice. Her primary focus is commercial, industrial and insurance litigation, but her practice spans other areas including inquests and inquiries, estates and defamation law. She has appeared in trials and appeals, led and unled, in the District and Supreme Courts of Queensland, the Queensland Court of Appeal, the Federal Court, Full Federal Court, Federal Circuit Court, Family Court and Full Family Court of Australia. Holly is a member of the Queensland Bar Association Ethics, Professional Indemnity Insurance and Professional Standards, Industrial and Employment Law, and Hearsay Committees. Before joining the Bar, Holly was associate to her Honour Chief Judge Wolfe of the Queensland District Court, and then practiced as a solicitor at (then-called) DLA Phillips Fox.



Queensland
Human Rights
Commission

Human Rights Act 2019

Employment and Industrial Relations Conference
Bar Association of Queensland

25 August 2019

Overview

- Objectives
- How the Act works
- Remedies



Human Rights Act 2019

Preamble

Objectives:

- Protect and promote human rights
- Promote a culture in the Queensland public sector
- Promote dialogue



The human rights

Recognition & equality before the law

Right to life

Protections from torture & cruel, inhuman or degrading treatment

Freedom from forced work

Freedom of movement

Freedom of thought, conscience, religion & belief

Freedom of expression

Peaceful assembly and freedom of association

Taking part in public life

Property rights

Privacy & reputation

Protection of families & children

Cultural rights – generally

Cultural rights – Aboriginal peoples & Torres Strait Islander peoples

Right to liberty & security of person

Human treatment when deprived on liberty

Fair hearing

Rights in criminal proceedings

Children in the criminal process

Right not to be tried or punished more than once

Retrospective criminal laws

Right to education

Right to health services



Key concepts

- Compatible with human rights
- Human rights may be limited



Meaning of *compatible with human rights* (s.8)

An act, decision or statutory provision is ***compatible with human rights*** if the act, decision or provision:

- (a) does not limit a human right; or
- (b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.

Human rights may be limited (s.13)

A human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Proportionality test – s.13(2)



How does the Act work?

- Making legislation
- Interpreting legislation
- Administering legislation

Public entities (s.9)

- Core public entities
- Functional public entities
- Opt-in public entities



Responsibilities of public entities (s.58)

Public entities must act and make decisions in a way that is compatible with human rights.

Two responsibilities on public entities:



Properly consider
human rights
when making a
decision



Act or make
decision
compatibly with
human rights

Interpreting statutory provisions (s.48)

- (1) All statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights.
- (2) If a statutory provision can not be interpreted in a way that is compatible with human rights, the provision must, to the extent possible that is consistent with its purpose, be interpreted in a way that is most compatible with human rights.

...



Courts and tribunals

- Act applies to courts and tribunals when:
 - interpreting legislation
 - performing functions relevant to the human rights (direct application)
 - acting in an administrative capacity (public entity)
- Referral to Supreme Court
 - question of law about the application of the Act
 - question about the interpretation of a statutory provision
- A-G and QHRC may intervene
 - question arises (Supreme or District Court) or question referred to Supreme Court
 - notice to be given
- Declaration of incompatibility

Remedies

- No stand alone cause of action
- Where relief or remedy available on the ground that act or decision was unlawful – add ground of unlawfulness under HR Act
- Primary ground doesn't need to succeed
- No damages
- Complaint to QHRC

Some things to think about

- Acts and decisions of courts and tribunals when acting in administrative capacity - complaints
- Direction for independent medical assessment (*Nursing & Midwifery Board v HSK*)
- Unfair dismissal proceedings against public entity under *Fair Work Act*
- Giving notice when questions arise in proceedings



Resources

- Explanatory Notes, Human Rights Bill 2018
- Judicial College of Victoria, *Charter of Human Rights Bench Book* (<https://www.judicialcollege.vic.edu.au/node/1207>)
- Judicial College of Victoria, *Victorian Human Rights Charter Case Collection* (<https://www.judicialcollege.vic.edu.au/publications/charter-case-collection>)
- Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co., 2nd ed, 2019)
- Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials, and Commentary* (Oxford University Press, 3rd ed, 2013)



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Use of Comparative Sentences in Prosecutions under the Work Health and Safety Act 2011 (Qld)

The important factor in the sentencing process the subject of this paper is ensuring consistency in sentencing between like cases. This paper aims to comment on the case law applicable to the use of comparative sentences in the sentencing process under the *Work Health and Safety Act 2011* (Qld). The paper will identify the case law relating to use of comparative sentences generally, the divergent authority in what may properly be considered comparative sentences for WHS Act prosecutions, and the availability of Queensland comparative sentences under the WHS Act. It will finish with commentary on the possible rectification of the issues identified.

The sentencing process is a complex function of the Court. It involves a difficult balancing exercise, where the Court must take into account all of the circumstances of the offence, and the offender, to reach a single sentence for an offence. In *R v MacNeil-Brown*,¹ this process was described as follows –

It is the judge who must make the necessary findings of fact. It is the judge who has the obligation to determine what weight should be given to the facts so found. The sentencing judge has to form a view as to the gravity of the offence and the part played by the offender. The judge has to determine not only what happened but how and why it happened. The judge has to determine the culpability of the offender. The judge has to find and articulate whether or not there are factors of aggravation. The judge must make a finding as to the harm suffered by the victim. The judge must consider the personal factors relevant to the offender and make findings as to factors of mitigation. The judge must consider the weight of each of those factors. Often the judge must form a view as to how burdensome the sentence might be for the particular offender in the light of factors, such as the prisoner's health, family issues and employment. The judge must give consideration to all of the above matters, and sometimes more, in the context of what is required to achieve the sentencing goals of general deterrence, denunciation, specific deterrence, rehabilitation and just punishment. Appropriate consideration of all of the above factors is required before the determination by the judge of a just sentence. The ultimate sentence to be imposed involves the exercise of a judicial discretion, which is the result of an "intuitive synthesis" of all the relevant facts, circumstances and sentencing principles. The exercise of that discretion is the function of the judge and the judge alone.

¹ *R v MacNeil-Brown* (2008) 20 VR 677 at [140] per Kellam JA

Not only that, the Court must seek consistency in its sentencing. To do so, it necessarily has to understand what sentences have been given previously in relation to like offences, and the reasons why such sentences were given. The High Court in *Barbaro v R* (2014) 305 ALR 323 at [41]² held that –

*“...in seeking consistency sentencing judges must have regard to what has been done in other cases. Those other cases may well establish a range of sentences which have been imposed. But that history does not establish that the sentences which have been imposed mark the outer bounds of the permissible discretion. The history stands as a yardstick against which to examine a proposed sentence. What is important is the unifying principles which those sentences both reveal and reflect. And as each of Buchanan JA and Kellam JA rightly observed in *MacNeil-Brown*, the synthesis of the “raw material” which must be considered on sentencing, including material like sentencing statistics and information about the sentences imposed in comparable cases, is the task of the sentencing judge, not counsel.”*

(footnotes removed, underlining added)

Consideration of the appropriate principles to be applied as part of the sentencing process must necessarily commence with a consideration of the relevant legislation governing the sentencing process.³ It is important to recognise at this point that each jurisdiction in Australia has its own sentencing legislation, and they are not all the same.

In Queensland, and in particular with regard to considering the sentencing process relevant to the *Work Health and Safety Act 2011* (Qld) (**the WHS Act**), the applicable legislation is the *Penalties and Sentences Act 1992* (Qld) (**the P&S Act**). The P&S Act requires the same considerations as, or is at least congruent with, the statement made in *R v MacNeil-Brown* above through application of the sentencing guidelines contained in s9. In addition, pursuant to s15, both the prosecution and the defendant are entitled to make a submission stating the sentence, or range of sentences, the party considers appropriate for the Court to impose in a particular case.

Accordingly, it can be clearly seen that, in Queensland at least, both the prosecution and the defendant are able to place before the Court their idea as to what would be an appropriate penalty, or range within which an appropriate penalty might lie, for a breach of any particular provision of the WHS Act. Properly, any such submission should be supported by relevant information properly placed before the Court.

The WHS Act is part of a nationally harmonized (although not completely uniform) legislative scheme. A model form of legislation was released in 2009 by SafeWork

² Per French CJ, Hayne, Kiefel and Bell JJ

³ *Markarian v The Queen* (2005) 228 CLR 357 at 371 per Gleeson CJ, Gummow, Hayne and Callinan JJ at [27]

Australia, and each of the Commonwealth, New South Wales, Queensland, Australian Capital Territory and Northern Territory jurisdictions commenced substantively similar versions thereof on 1 January 2012. South Australia and Tasmania commenced versions on 1 January 2013, while Western Australia has indicated an intention to introduce a Bill into Parliament in late 2019. Victoria has indicated it does not intend at this time to adopt any form of the model legislation.

It was on the basis of the WHS Act forming part of a nationally harmonized regime that submissions were made in *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56 that sentences ordered in jurisdictions outside Queensland could and should be considered as comparatives for consideration in sentences under the WHS Act in Queensland. The matter involved a prosecution for breach of s32 of the WHS Act for failing to comply with a health and safety duty under s19 of the Act. The defendant company manufactured and assembled camper trailers. During development of a prototype product in 2012, a portion of a strut explosively detached, resulting in the death of a worker.

At first instance, the magistrate considered the circumstances of the case, identified the maximum penalty and the impact of the loss of the worker's life on his family, and the need for the penalty to reflect the seriousness of the offence. The magistrate did not consider that, on the facts, the company had been cavalier in its attitude to employee safety, noting it has undertaken a safety audit shortly prior to the incident which had not identified any issues. Ultimately, the magistrate ordered a fine of \$90,000 be imposed.⁴

The prosecution appealed on the basis the sentence was manifestly inadequate. The matter came before Dearden DCJ in November 2016. His Honour noted that, at the time of the Magistrate's decision, the prosecution was unable to provide the Court with guidance on an appropriate penalty range as a result of the decision in *Barbaro v R*.⁵ His Honour noted that the prosecution did tender "a range of comparatives which provided a useful overview of penalties imposed in similar cases" and had made submissions on those cases.⁶ His Honour made a finding that the magistrate had erred by failing to take into account the gravity and seriousness of the breach, such that the role of the appellate court was invoked, within the well understood terms of *House v The King* [1936] 55 CLR 499.

It was at this point His Honour went on to consider the impact of the fact the WHS Act was part of the harmonised national work health and safety legislative scheme for Australia. At [70], His Honour stated –

⁴ plus professional costs of \$2,500 plus filing fees of \$83.70.

⁵ (*supra*), overruled by amendment of s15 of the P&S Act, effective 5 May 2016

⁶ His Honour did not make any comment on the appropriateness or otherwise of the form of the comparatives tendered, but I infer from the fact it was an "overview" that a schedule was tendered.

"It is submitted on behalf of the appellant that sentencing in respect of the harmonised work safety laws in Queensland is analogous to the sentencing of federal offences by state courts. The High Court has recently indicated in R v Pham [2015] HCA 39 that a sentencing judge "must have regard to current sentencing practices throughout the Commonwealth." It is further submitted by the appellant that "consistency in sentences imposed under the harmonised scheme", which currently applies in New South Wales, Queensland, South Australia, Tasmania, the Northern Territory and the Australian Capital Territory, should permit sentencing courts to "have regard to decisions in harmonised jurisdictions" which will result in "like cases [being] treated in a like manner."
(footnotes removed)

His Honour went on to state at [72], having been guided by s3(1)(a), (e) and (h) of the WHS Act, that he had "no hesitation in accepting" the prosecution's submission. At [73], His Honour stated the court should look to relevant decisions in harmonised interstate jurisdictions for guidance on appropriate penalties, noting there is no single correct sentence but the "fundamental" requirement to "a fair system of justice" is sentencing be undertaken with as much consistency as possible.⁷ His Honour went on to consider a range of New South Wales decisions, and identified that in His Honour's opinion the fine would be in the order of \$250,000, although an appropriate range could be \$200,000 to \$400,000. Ultimately, though, his Honour considered that as a result of the particular circumstances, the lengthy delays in the appeal process, the issues involved as a result of the impact of *Barbaro v R*, and that this was the first appeal under the harmonized laws, the penalty should be substantially ameliorated to \$125,000.

Accordingly, the practice then adopted by Work Health and Safety Queensland (**WHSQ**) in prosecuting such matters from that time on was to include comparative sentencing decisions from other jurisdictions. The impact of this conduct was the general increase in fines, certainly in relation to s32 and s33 breaches of the WHS Act.⁸ The appropriateness of reference to sentencing decisions from other jurisdictions has, however, been put into question by the more recent decision in *Reynolds v Orora Packaging Australia Pty Ltd* [2019] QDC 31.

Orora Packaging involved an appeal of a decision of the Magistrates Court in Holland Park on 21 June 2018. The company pleaded guilty to a breach of s47 of the WHS Act, being a failure to consult with workers. The company operated a plant manufacturing corrugated cardboard products. A worker was injured while trying to remove tape and paper stuck inside a machine as a result of a roller turning while the worker reached inside. The worker was acting in an appropriate manner, and an audit of the machine had not identified the issue with the roller moving. However, it was known to the maintenance workers that the roller could move, and they were therefore aware of the

⁷ citing *Wong v The Queen* (2001) 207 CLR 584 and *Hili v The Queen* (2010) 242 CLR 520

⁸ evidenced by the summaries published by WHSQ

need to avoid the situation the worker was placed in. The prosecution's case was that the company owed a duty to consult relevant workers about the risks, which had not occurred. The magistrate imposed a fine of \$9,000.⁹ The prosecution appealed on the basis the fine was inadequate.

Relevant to this paper, the prosecution again submitted that, on the basis the WHS Act was part of the nationally harmonised work health and safety laws, the decisions of other jurisdictions were relevant, relying on the *VH & MG Imports* decision. At [13], McGill SC DCJ respectfully disagreed with the approach of Dearden DCJ, identifying that the High Court in *Pham* (on which Dearden DCJ relied) had recognised that in sentencing for federal offences, state sentencing legislation may have differing impacts, but to the extent that the federal sentencing legislation applied, decisions of all jurisdictions were relevant as comparatives.

His Honour went on at [14] to identify the two distinguishing features of *Pham* to cases under the WHS Act – first, there was not the unifying sentencing legislation (in *Pham*, being the *Crimes Act 1914* (Cth)); and second there was not the appropriateness of offenders under the singular laws of the Commonwealth being dealt with throughout the Commonwealth. McGill SC DCJ then stated at [15] that while High Court cases should be considered by courts when dealing with general sentencing principles, those principles should be treated as applying subject to the Queensland legislation. Ultimately, His Honour dismissed the appeal.

In the circumstances, we are left with alternate precedents on the proper use of sentencing decisions from jurisdictions other than Queensland when considering comparatives in any particular matter. In my respectful opinion, the approach adopted by McGill SC DCJ in *Orora Packaging* is to be preferred to the approach endorsed by Dearden DCJ in *VH & MG Imports*. In the absence of recognition of the difference in sentencing principles between each jurisdictions' sentencing regime, the results can not be truly comparative.

One final matter then is the comparatives that are able to be placed before Magistrates Courts in Queensland. In *Orora Packaging*, McGill SC DCJ also highlighted the final issue relevant to this paper – the Queensland comparatives that could be used. At [26], it was noted that a summary of a decision of Brisbane magistrate, from the WHSQ website, was placed before the magistrate. It is not clear whether this was by the prosecution (either in support of or attached to some schedule) or by the defendant. His Honour was clear, having noted that it was not a transcript that was provided –

The magistrate should have disregarded the Queensland decision, as it was not properly before her; it is not appropriate to use something like a press release as

⁹ This provision has a maximum penalty of \$20,000.

a means of putting before a magistrate information about an earlier decision of a court on which a party relies.

This point identifies one particular issue with comparative sentences in Queensland. But for s31 offences, all prosecutions proceed summarily in the Magistrates Court. As a result, decisions are very rarely published publicly.¹⁰ Typically, a schedule of comparative offences is provided by the prosecution, with a defendant forced to identify any other matters by use of the WHSQ website summaries.

In *R v Hammond* [1997] 2 QdR 195, the Court (Thomas, Dowsett and White JJ) stated –

... schedules can be of assistance in giving an overview of the range of sentences imposed, against certain basic factors such as age of the offender, previous relevant convictions, whether a weapon was used and so on. But to appreciate if any particular case is of assistance it is necessary to have regard to the full judgment. Sometimes factors which the compiler of the schedule may not have considered particularly relevant may have been omitted from the schedule but which, when appreciated, cause the sentence to be understood differently.

(underlining added, footnotes removed)

Accordingly, in Queensland, a defendant is at a distinct disadvantage in being able to truly consider and make submissions on comparative sentences. It is assumed that WHSQ, in developing the summaries it publishes, does so from the Court transcript. But they still remain a public official's interpretation of what was important for the purposes of what McGill SC DCJ termed a "press release". If the summary is not prepared from a transcript, then with respect this may in fact be worse.

The issue has also been noted by some Magistrates in written reasons for decision delivered in matters in which the author has been briefed. With respect, it leaves the magistrate in an invidious position.

It is noted that, in the Final Report of the *Review of the model Work Health and Safety laws* issued December 2018 to Safework Australia, the author (Marie Boland) considered sentencing practices. In Ms Boland's view, consistency of sentencing across the jurisdictions was crucial in meeting the objects of the model legislation. Accordingly, Recommendation 25 was for SafeWork Australia to work with relevant experts to develop sentencing guidelines for use in all jurisdictions.

In response, in June 2019 SafeWork Australia issued a Consultation Regulation Impact Statement, seeking comments on various recommendations by 5 August 2019.

¹⁰ It is noted in New South Wales a large number of similar matters are electively run in the District Court, while in South Australia such matters are run in the Industrial Court which publishes its decision.

However, this did not include seeking comment on sentencing guidelines but indicated it was being treated by Safework as something for it to review. It does not appear that any guidelines will be available and in force any time soon.

The Work Health and Safety Prosecutor was appointed in March 2019. The WHSQ website provides that the information relevant to the guidelines for prosecutions under the WHS Act will need to be updated or replaced.¹¹ No comment is made as to practical approaches for comparatives, although the summaries of cases are available in a de-identified form.¹² It is advised that prosecutions will be based upon application of the Director of Public Prosecution Guidelines, a document which also is stated as being under review at the same time. The DPP Guidelines merely identify that the most recent authorities are to be provided.

Accordingly, the time would appear suitable for the newly appointed Prosecutor to change the approach, and to provide copies of the sentencing remarks for the comparative cases on which it intends to rely, along with copies of any other relevant comparative sentence, as part of a prosecution brief. A similar process was undertaken in mines safety and health prosecutions in the period around 2010, in recognition that defendants simply had no access to such decisions otherwise, although this appears to have ceased. It is also incumbent upon Defendants, and their representatives, to seek the prosecution to provide such transcripts at the earliest time. The level of information available as part of the summaries in no way appears sufficient for copies of transcripts to be ordered. Should they be refused, consideration may be needed as to whether the issue should be brought to the attention of the Court, as it would certainly appear that WHSQ is best placed to maintain the library of such transcripts.

Ultimately, the Work Health and Safety Prosecutor, as well as all other regulatory prosecutions branches within the various Queensland government departments, has an obligation to provide the Court with the necessary information for just sentences to be imposed.

Simon R Grant
24/08/2019

¹¹ as at 21 August 2019

¹² See *DHG v State of Queensland* [2015] 2 QdR 201

Work place health and safety update

Simon R Grant
LLB LLM (QUT)

24 August 2019

Topics to be covered

- R v Lavin – Category 1 prosecution
- Betterlay Brick and Block Laying Pty Ltd v Williamson
- Reynolds v Orora Packaging Australia Pty Ltd
- Review of the model Work Health and Safety laws

R v Lavin [2019] QCA 109

- Death of a worker as a result of falling from a roof on 29 July 2014
- Refurbishment of old brickworks into soft drink factory
- Long contractual chain of responsible entities/persons
- 4 parties charged - all with Category 1 (s31) breaches

Lavin – at first instance

In District Court Maroochydhore (before Cash DCJ) -

- Roofing company and director found guilty
- Building company and director – no verdict reached

In sentencing, Cash DCJ highlighted 4 culpability factors

- How great was the risk created by the conduct?
- How long was the risk tolerated?
- How easily could the risk have been eliminated/min?
- What motivated the Defendant to take the risk?

Lavin - penalties

- Roofing Company fined \$1,000,000, with 6 months to pay
- Director sentenced to 12 months imprisonment, to be suspended after serving 4 months

Mr Lavin appealed on the basis His Honour did not properly identify the elements of the offence, such that there was a misdirection to the jury.

The sentence was not appealed.

Lavin – Appeal (McMurdo JA, Mullins & Davis JJ)

- Discusses the elements of sections 31, 32 and 33
- Identifies that ss32 and 33 both import consideration of “reasonableness” through the duty provision (s19) requiring to ensure so far as “reasonably practicable”
- s31 imports consideration of “reasonableness” in a very different way – by asking was there a reasonable excuse for the act or omission: see [45]

Lavin (cont.)

Davis J at [47] –

In determining whether there was “reasonable excuse” the jury was obliged to consider the alternative measures which the appellant directed to be put in place (the harnesses and the use of the scissor lifts), not just whether it was reasonably practicable to install the railing. ... “Reasonable excuse” also raises consideration not only of what measures were put in place but also what measures the appellant believed had been put in place. His belief is relevant to the reasonableness of any excuse.

Betterlay Brick and Block Laying Pty Ltd

- Company was engaged to build block walls at Trinity College as part of a refurbishment project
- On 28 November 2014, the sole director and worker attended site for the purpose of finishing the walls by inserting steel, and then core-filling the walls
- They were assisted in the task by workers from the head contractor, who were instructed to place steel in the wall cavities. The wall was then filled with concrete.
- On 2 December 2014 the wall collapsed – no steel.

Betterlay Brick and Block Laying Pty Ltd (cont.)

- Conviction under s33 of the WHS Act for breach of s19(2) - \$35,000 fine
- Charge was that on 2 December 2014 the company failed under s33 to comply with its duty to ensure
- Company appealed to District Court
- Appeal allowed – [2018] QDC 172

Betterlay Brick and Block Laying Pty Ltd (cont.)

- Richards DCJ found the company did not comply with its duty under the WHS Act – see [28].
- However, Her Honour found the breach occurred on 28 November, not 2 December as charged. Therefore, the prosecution had not proven its case.
- The Regulator appealed to Court of Appeal. The Appeal has been heard and the decision reserved.

Reynolds v Orora Packaging Australia Pty Ltd

- Worker was injured by a machine. The company had previously had the machine assessed by an independent expert, who failed to identify the particular issue.
- The issue was known to maintenance workers though.
- Company pleaded guilty in Holland Park Magistrates Court to breaching s47, being a failure to consult with workers - \$9,000 fine, no conviction recorded

Reynolds v Orora Packaging [2019] QDC 31

- The Regulator appealed the sentence as inadequate
- The Regulator relied on *Williamson v VH & MG Imports Pty Ltd* [2017] QDC 56 to refer to sentencing decisions from NSW as comparatives
- McGill DCJ rejected this approach

Reynolds v Orora Packaging Aust (cont.)

- His Honour noted each jurisdiction's sentencing laws affect exercise of sentencing discretion differently
- His Honour noted *R v Pham* (2015) 256 CLR 550 was distinguishable as it related to operation of the Commonwealth sentencing provisions
- Finally, His Honour rejected the use of the departmental summaries as a comparative – see my paper

Review of the model WHS laws

- SafeWork Australia commissioned a review of model WHS laws – this ran through 2018
- Final Report was delivered in December 2018, making 34 recommendations, including:
 - adoption of industrial manslaughter laws, using Qld's provisions as a base;
 - development of uniform sentencing guidelines;
 - increasing penalties by 50%.

Review of the model WHS laws (cont.)

- Safe Work Australia released a Consultation Regulation Impact Statement (RIS) on 24 June 2019
- The RIS sought comments and recommendations in relation to the Review's recommendations
- The consultation period ended on 5 August 2019

Are there any questions? I am happy to take them.

Please note I will break them down into three categories:

- A. Those I wish you had called me about last week so I could prepare a response.
- B. Those deserving of a long answer, but to which I will give a short answer and suggest you see me at either morning tea or drinks this evening.
- C. Those I wish you hadn't asked me.

SIMON R. GRANT

Thankyou

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RECENT DEVELOPMENTS

IN

WORKERS' COMPENSATION

A presentation by Mr Stephen Gray Barrister

Bar Association of Queensland Employment and Industrial Relations Conference

24 — 25 August 2019, Sheraton Grand Mirage Resort, Gold Coast, Queensland

THE SECOND FIVE-YEARLY REVIEW OF THE WORKERS' COMPENSATION SCHEME

- 1 Professor David Peetz completed his report of the second five-yearly review of the Workers' Compensation Scheme on 27 May 2018.
- 2 One of the areas considered in the report relates to the way that psychological and psychiatric injury claims are determined under the *Workers' Compensation and Rehabilitation Act 2003* ("the WCRA").
- 3 Professor Peetz commenced his analysis by writing:

Chapter 5: Psychological and psychiatric injuries

25. Psychological or psychiatric injuries include a range of cognitive, emotional and behavioural symptoms that have an impact on a worker's life and can significantly affect how they feel within themselves and interact with others. **These claims** are a small proportion of the number of claims but they **are quite different to physical injury claims: they take much longer to decide; a much higher proportion are rejected;** they involve a much greater amount of time off work; they have a much lower return to work rate; and **they have a higher rate of disputation over decisions.** The incidence of such claims increased several years ago but has declined slightly over the past four years.

26. As with other Australian jurisdictions, **where a psychiatric or psychological injury is said to arise from 'reasonable management action', it is excluded. There is some uncertainty as to what that means.** In all jurisdictions the workplace must be a 'substantial' or 'significant' (as was previously the case in Queensland) contributing factor. In 2013, the Newman Government required the workplace be 'the major significant factor' in relation to psychiatric and psychological injuries. **The label 'the**

major’ probably has more symbolic value for the parties than its practical impact, which appears small though probably real. On the other hand, there seems no good reason for Queensland to be out of step with the other jurisdictions in Australia, none of which appear to require work to be ‘the major’ contributory factor. (My emphasis added)

- 4 Recommendation 5.1 made by Professor Peetz was that the current WCRA definition of injury for psychiatric or psychological disorders should be revised to remove “the major” as a qualifier for work’s “significant contribution” to the injury.
- 5 On 22 August 2019 the Honourable Grace Grace, Minister for Education and Minister for Industrial Relations, tabled the *Workers’ Compensation and Rehabilitation and Other Legislation Amendment Bill 2019*. The Minister said that, amongst other things, the Bill embraces Professor Peetz’s recommendations to restore the previous definition of “psychological injury” when requiring that employment be a significant contributing factor. It is said that the amendment will ensure consistency in the way that physical and psychological injuries are treated within the workers compensation scheme and brings Queensland into line with the approach taken by all other jurisdictions.

Practical consequences of reverting to the statutory test requiring employment to be a significant contributing factor

- 6 There is an obvious benefit in a consistent approach to the determination of an injury under the WCRA.
- 7 In *SSX Services Pty Ltd v Workers’ Compensation Regulator*,¹ Neate considered that the “major significant contributing factor” test was more stringent; writing:

[200] In my view, the current requirement is more demanding or stringent than its predecessor because the Act now requires the employment be “the major” rather than “a” significant contributing factor to the injury, apparently removing the possibility that an application for compensation could be accepted where employment was simply one of a number of significant contributing factors to the injury.¹¹ “Major” is one of three adjectives describing the nature of the necessary factor. It is used in its ordinary English sense of “greater, as in ... importance,” “very important or significant,”¹² and “unusually important or serious or significant.”¹³

¹ [2016] QIRC 062

8 Reverting to the test requiring that employment be a significant contributing factor still requires the requisite connection the development of the claimed injury and the worker's employment.

9 In *Newberry v. Suncorp Metway Insurance Ltd*,² Keane JA, with whom de Jersey CJ and Muir J agreed, wrote:

[27] It cannot be disputed that, when s 32 of the WCRA speaks of "employment" contributing to the worker's injury, it is referring to employment as a set of circumstances, that is to the exigencies of the employment of the worker by the employer. The legislation is referring to "what the worker in fact does during the course of employment".⁴ ...

10 His Honour then observed:³

[41] ...the fact that an injury has been suffered arising out of employment, or in the course of employment, is not sufficient to establish that the employment has been "a significant contributing factor to the injury". To read s 32 of the WCRA in that way would be to read the latter words out of the section, and in my respectful opinion to accord scant respect to the evident intention of the legislature to require a more substantial connection between employment and injury than is required by the phrases "arising out of employment" or "in the course of employment".⁶

[42] Further, there is no warrant in the language of s 32 of the WCRA for reading the words "if the employment is a significant contributing factor to the injury" as lessening the stringency of the requirement that the injury "arise out of the employment", as was suggested in the course of argument on the appeal. It is clear, as a matter of language, that the words "if the employment is a significant contributing factor to the injury" are intended to be a requirement of connection between employment and injury additional to each of the requirements that the injury occur in the course of employment or arising out of the employment. It cannot, in my respectful opinion, sensibly be read as lessening the stringency of the latter or increasing the stringency of the former.

11 In *Oaks Hotels and Resorts (Qld) Pty Ltd v Blackwood and Anor*,⁴ referring to the judgment of Keane JA in *Newberry v Suncorp Metway Insurance Ltd*, wrote:

[10] The words "significant contributing factor" were introduced to a predecessor to the WCRA in 1994. Over time, that was changed to "the major significant factor" and then back again to its current expression. It is reasonably clear from the Explanatory Notes which accompanied some of the relevant Bills that the purpose of adding these terms was to "exclude those injuries which have only a minimal

² [2006] 1 Qd.R. 519 at page 529

³ At page 532

⁴ [2014] ICQ 023

work related component”⁷.

12 That principle was restated in *Campbell v Australian Leisure & Hospitality Group Pty Ltd & Anor.*⁵

13 In *Simon Blackwood (Workers’ Compensation Regulator) v Civeo Pty Ltd and Anor.*⁶ President Martin, referring again to *Newberry* as being of considerable importance⁷ continued by describing the test:

[24] The test applied in determining whether employment was a significant contributing factor must be applied in a practical way. It is the “exigencies” of employment which must be considered and, while that will ordinarily include the contractual terms of engagement, it will generally require an analysis of the circumstances surrounding the employment. ...

14 In *RACQ Insurance Limited v Foster*,⁸ Philippides JA, with whom Gotterson and Morrison JJA agreed, referred to *Newberry* as remaining one of the definitive authorities as to the meaning of section 32 of the WCRA.

15 It is neither desirable nor possible to set out a precise set of circumstances that would satisfy whether employment is “a significant contributing factor”. Whether employment is determined to be a significant contributing factor will always be a question of fact based on the evidence placed before the Commission.

16 You should heed the observations of President Martin about the quality of the medical evidence that might be relied on to support any claim.

17 In *Blackwood v Mana*,⁹ President Martin reiterated that “it is an un-contestable requirement that, for an expert opinion to be of any value, the facts upon which it is based must be proved by admissible evidence.” After analysing the relevant evidence upon which the experts had based their opinions, His Honour concluded that the case which was put before the experts was substantially different to that which was put before the Industrial Magistrate. That failure led to the conclusion that the experts’ evidence must be rejected.

18 In *Simon Blackwood (Workers’ Compensation Regulator) v Mahaffey*,¹⁰ His Honour wrote:

[10] Before turning to a consideration of the grounds of appeal, it will

⁵ [2015] ICQ 016

⁶ [2016] ICQ 001

⁷ At paragraph [21]

⁸ [2018] QCA 252

⁹ [2014] ICQ 027 at paragraph [13]

¹⁰ [2016] ICQ 010

assist if the expert evidence is set out. Dr Chau provided a psychiatric report which was not as clear as it might have been. Such a report should, at a minimum, discuss, and offer an opinion on:

- (a) the subject's psychiatric condition,
- (b) what the subject told the psychiatrist about the employment, and
- (c) the causal relationship (if any) between the employment and the condition.

[11] In the process of doing that, the psychiatrist **should specifically consider the stressors nominated by the subject and express a view, on the assumption that they will be established, as to any causal relationship.**

[12] In this case, **the psychiatric report is not expressed in a helpful way. It did not give any clear opinion on the part the stressors played.** But that was remedied, to an extent, by the oral evidence given. It was more relevant to the issues to be decided by the Commission. (My emphasis added)

- 19 A recent example of a case being dismissed where an appellant failed to prove the allegations on which his claim was based is *Dorsett v Workers' Compensation Regulator*.¹¹
- 20 When preparing any case for trial, considerable focus should always be given to the adequacy of the factual evidence laying the foundation for your expert's evidence.

WHAT IS "MANAGEMENT ACTION"?

21 Central to the determination of a psychiatric or psychological injury is also the exclusionary provisions contained in the WCRA, which are:

- (5) ... **Injury** does not include a psychiatric or psychological disorder arising out of, or in the course of, any of the following circumstances—
- (a) reasonable management action taken in a reasonable way by the employer in connection with the worker's employment;
 - (b) the worker's expectation or perception of reasonable management action being taken against the worker;
 - (c) action by the Regulator or an insurer in connection with the worker's application for compensation.

Examples of actions that may be reasonable management actions taken in a reasonable way—

- action taken to transfer, demote, discipline, redeploy, retrench or

¹¹ [2019] QIRC 097

dismiss the worker

- a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment

22 In more recent times there has been focus on what conduct might constitute management action as required by section 32(5) of the WCRA.

23 In *Read v Workers' Compensation Regulator*,¹² the worker was employed by a Council in the town planning area. Over a period of time there were a number of errors with respect to information contained in emails sent by her. Ms Read was eventually invited to attend a meeting about this conduct. Following the meeting, she developed a psychiatric condition and made a claim for compensation.

24 Analysing might what might be determined to be management action, O'Connor DP wrote:

[8] Management action is not defined in the *Workers' Compensation Act* 2003. Indeed, very little has been written in this jurisdiction to assist in the interpretation of the expression "management action".

[9] In *O'Brien v Q-Comp*, Linnane VP referred to the Canadian authority of *Canadian General Electric Company Limited v The Ontario Labour Relations Board* to assist in determining the scope of what is and is not management. In that case, it was stated that:

"... managerial means something pertaining to or characteristic of a manager and it is equally obvious that the word 'manager' means one who manages ... The word 'manage' is said to be equivalent to conducting or carrying on a business or under-taking or an operation, to conduct affairs. It is also said to be equivalent to controlling or directing the affairs of a household, institution or state, or as the taking of or attending to a matter. It apparently includes the action or manner of conducting affairs or administering and directing or controlling any matter. It is obvious ... that the essential meaning of the word is to control and direct and that must obviously include not only administration but direction of planning for any particular enterprise ..."³

[10] Management action does not embrace every instruction of and action by an employer. Rather, the expression contemplates a particular type of action by an employer, and something other than a mere instruction or requirement that the worker perform his or her duties.⁴ Management action must be something different to the normal duties and incidents of her employment as a Town Planner. In other words, it must be something more than what was part and parcel of her employment.⁵

¹² [2017] QIRC 72 at paragraph [10]

- 25 His Honour determined that the meeting involved management action because the disciplinary process commenced by Council was in accordance with the *Local Government Act* and one of the meetings was convened for the purpose of outlining the allegations of unsatisfactory work.
- 26 His Honour continued his analysis in *Allwood v Workers' Compensation Regulator*,¹³ when he wrote:

[60] The concept of management action in the context of a worker's employment, and for the purposes of the Act, is not so broad that it encompasses anything and everything that a manager does or says in the particular workplace, rather the expression "management action" relates to those actions undertaken when managing the worker's employment. This statement is informed by the reasoning of Doyle CJ, with whom Prior and Williams JJ agreed in *WorkCover Corp (SA) v Summers*.⁷²

[61] In *Summers*, their Honours were called upon to construe the words "reasonable administrative action taken in a reasonable manner by the employer in connection with the worker's employment" in s 30(2a) of the *Workers Rehabilitation and Compensation Act 1986* (SA). I note the similarities of that provision to the one under consideration in this matter. In *Summers*, Doyle CJ wrote:

"The appellant argued that "administrative action" referred to "every instruction given by the employer or action taken by the employer which relates to the performance of the worker's duties, whether directly or indirectly". That is how it was put in the appellant's outline. In his submissions counsel for the appellant said that administrative action embraced every instruction or action by the employer, indirectly or directly

I am unable to accept this submission.

If it is correct, it means that it becomes necessary to identify all instructions and directions given by the employer which did contribute or might have contributed to the stress, and then to examine the reasonableness of each one of them. That would be a daunting task, and I would hesitate to conclude that Parliament intended that it be performed. ...if the stress resulted from instructions or actions of the employer (and presumably an implied instruction would be as good as an express instruction), then the claim would fail unless the instruction or action was unreasonable. Commonsense suggests that many, and probably most aspects of a worker's work could be related back to instructions given by an employer or action taken by an employer. It is clear that Parliament intended to restrict stress claims, but it is another matter whether it intended to go as far as this....

Moreover, the words chosen by Parliament — "administrative

¹³ [2017] QIRC 088

action” do not seem apt to embrace every instruction of and action by an employer. The expression chosen suggests that Parliament had in mind a particular type of action by an employer, and something other than a mere instruction or requirement that the worker perform her duties. In my opinion the appellant’s submission fails to give any effect to the adjective “administrative”.⁷³

[62] *Summers* was considered by the Full Court of the Federal Court in *Commonwealth Bank of Australia v Reeve*.⁷⁴ In that matter their Honours examined, amongst other things, s5A(1) of the *Safety, Rehabilitation and Compensation Act 1988* (Cth). Gray J, in dismissing the appeal, wrote the following:

“The use of the word “administrative” in the exclusion is significant. In accordance with normal principles, it is not to be assumed that a word in a legislative provision has no function to perform. The word “administrative” must have been inserted to distinguish the kind of action to which the exclusion is directed from other kinds of action that might also be taken with respect to the employment of a particular employee. Such action that is not “administrative” could be operational, in the sense that it relates to the activities or business of the institution or enterprise in which the employee is employed. Thus, an instruction to perform work at a particular location, to drive on a particular route, or to perform particular duties would not be regarded as “administrative” action, but as operational action with respect to the employee’s employment.”⁷⁵

[63] Rares and Tracey JJ, also dismissing the appeal, stated that:

“It is one thing to contemplate disciplining an employee or taking steps under his or her contract of employment, and quite another to define or delimit or supervise the employment, job or task entrusted to the employee for him or her to perform or to give directions to him or her as to how and when he or she is to perform it. The former is comprehended by the expression “administrative action” in s 5A(1); the latter deals with the way in which the employee carries out the employment for which he or she was engaged. The latter is not “administrative action”.⁷⁶

[64] In discussing the definition of “administrative” their honours wrote:

“The ordinary and natural meaning of “administrative” concerns the management of a body or enterprise as opposed to the task or job entrusted to a person who is subject to that management. “Administrative” has the following relevant dictionary meanings:

- relating to administration (“administration” being defined as “the management or direction of any office or employment”) (The Macquarie Dictionary online);
- pertaining to, or dealing with, the conduct or management of affairs (The Oxford English Dictionary online);⁷⁷

[65] The *Workers' Compensation and Rehabilitation Act 2003* (Qld) sets out examples of actions that may be reasonable management actions taken in a reasonable way. That includes action taken to transfer, demote, discipline, redeploy, retrench or dismiss the worker or a decision not to award or provide promotion, reclassification or transfer of, or leave of absence or benefit in connection with, the worker's employment.

[66] Section 14D of the *Acts Interpretation Act 1954* (Qld) provides that:

“14D Examples

If an Act includes an example of the operation of a provision-

- (a) the example is not exhaustive; and
- (b) the example does not limit, but may extend, the meaning of the provision; and
- (c) the example and the provision are to be read in the context of each other and the other provisions of the Act, if the example and the provision so read are inconsistent, the provision prevails.”

[67] Accordingly, the examples set out in s32(5) are not exhaustive. They act as an aid to interpretation as they elucidate which “actions” are appropriately deemed “management action”.

[68] I respectfully adopt the approach of Rares and Tracey JJ in *Reeves*. The exclusory action in s32(5) of the Act was, in my view, intended by Parliament to relate to specific management action directed to the appellant's employment itself, as opposed to action forming part of the everyday duties or tasks that the worker performed in their employment. Therefore the management action said to enliven s 32(5) of the Act must be something different to the everyday duties and incidental tasks of the appellant's employment. The examples set out in s32(5) are not exhaustive. They act as an aid to interpretation as they elucidate which “actions” are appropriately deemed “management action”.

27 Mr Allwood was an IT repair person who claimed a psychiatric injury arising out of four events:

- (a) The first was the discovery of a child pornography file on a computer owned by an educational institution;
- (b) The second was the way in which repair jobs were put through as warranty claims, even when no warranty remained in place (“fake jobs”).
- (c) The third was the use of a photograph of the worker which he considered made him look fat; and
- (d) The fourth was a conversation with his manager about leave following his grandmother passing away.

28 In respect to those nominated stressors, O'Connor DP determined:

- (a) The way in which the employer investigated and responded to the worker's discovery and reporting of the child pornography was management action;
 - (b) The system for the repair of computers was part of the worker's everyday tasks and did not constitute management action;
 - (c) The display of photographs in the foyer was not management action; and
 - (d) The conversation regarding bereavement leave was not management action because it was informal and spontaneous. It was also not directed at the question of approval of leave, which might well have been management action.
- 29 O'Connor DP has reiterated his approach to the determination of what falls within the definition of management action in subsequent decisions such as *Haack v Workers' Compensation Regulator*¹⁴ and *Allen v Workers' Compensation Regulator*.¹⁵
- 30 Some examples of "administrative action" in claims determined pursuant to the *Safety, Rehabilitation and Compensation Act 1988* (Commonwealth) are:
- (a) *Ting v Comcare*¹⁶-a manager sending a worker emails regarding errors in his work was part of a performance management process;
 - (b) *Pettiford v Comcare*¹⁷-which involved an injury sustained after a worker was directed to work particular hours which were different from those which she previously enjoyed. The direction was considered to be administrative action because it directly concerned that particular worker's working arrangements. The management action was unreasonable because the direction was made without following the procedure for work hour changes as required by the employment agreement;
 - (c) *Wiggins v Comcare*¹⁸-a counselling session relating to the worker's performance was administrative, rather than operational; and
 - (d) *Kennedy v Comcare*¹⁹- the administrative action involved a series of meetings with the worker specifically directing her how she should do her work differently in order to perform improve her performance. This was

¹⁴ [2017] QIRC 115

¹⁵ [2017] QIRC 041

¹⁶ [2014] AATA 85

¹⁷ [2014] AATA 95

¹⁸ [2017] AATA 785

¹⁹ [2017] AATA 1271

distinguished from meetings which would have been operational if they were simply about how to do the job.

- 31 Finally, when assessing whether the management action was reasonable and taken in a reasonable way, it is the management action which was in fact undertaken which is the primary focus of determination. In *Davis v Blackwood*,²⁰ Martin P wrote:

[47] ... The task of the Commission when applying s 32(5) does not involve setting out what it regards as the type of actions that would have been reasonable in the circumstances. There may be any number of actions or combinations of actions which would satisfy s 32(5). The proper task is to assess the management action which was taken and determine whether it was reasonable and whether it was taken in a reasonable way. Sometimes, that may involve consideration of what else might have been done but that will only be relevant to whether what was done was, in fact, reasonable.

- 32 Simply proving that there was a better course available does not mean that the management action itself was not reasonable or taken in a reasonable way.

²⁰ [2014] ICQ 009

24 August 2019

Come with me and change the world – misleading and deceptive conduct in the employment context

*Bar Association of Queensland Employment and Industrial Relations Conference 2019
24-25 August 2019, Sheraton Mirage, Gold Coast, Queensland*

Introduction

1. The misleading and deceptive conduct provisions in the *Australian Consumer Law (ACL)*¹ have been a staple of commercial litigation for many years, stemming back to their initial forms in the now-repealed *Trade Practices Act 1974 (Cth) (TPA)* and its state equivalents. Yet in the employment sphere, claims of misleading and deceptive conduct under the ACL are comparatively rare.
2. For example, in the month of July 2019, the Federal Court and Federal Circuit Court issued nine separate decisions in matters involving an alleged contravention of s.340 of the *Fair Work Act 2009 (Cth) (FW Act)* arising from an employment relationship. But the two Courts, in total, only issued one decision for a matter that involved allegations of misleading and deceptive conduct in an employment context.
3. As a result many practitioners who specialise in employment law are unfamiliar with claims of misleading and deceptive conduct under the ACL. However, in the right circumstances the ACL can be a powerful tool, with the potential for wider application than at present.
4. This paper aims to assist practitioners by reviewing the ways in which ss.18 and 31 may operate in the employment sphere. This includes:
 - (a) an overview of both ss.18 and 31, including:
 - (i) the advantages/disadvantages of a misleading and deceptive conduct claim to a potential Applicant;

¹ Operating as a schedule to the *Competition and Consumer Act 2010 (Cth)*.

- (ii) the practical distinctions between ss.18 and 31;
 - (iii) how the “trade and commerce” limitation in s.18 applies to an employment relationship;
- (b) an overview of the provisions that relate to representations about “future matters”, including:
- (i) what is and is not a representation regarding a “future matter”;
 - (ii) how the s.4(2) evidentiary burden may be discharged; and
- (c) a consideration of some issues that may arise in an employment-based claim under the ACL.

Overview of ss.18 and 31 in the employment sphere

Why misleading and deceptive conduct? Advantages or disadvantages to a potential applicant

5. Claims under the ACL have, from an Applicant’s perspective, a number of advantages:
- (a) it can apply to a wide variety of situations and conduct, ranging from deliberate misstatements, to negligent misstatement to silence;
 - (b) if the misstatement relates to a future matter, then the Respondent bears the evidentiary burden to establish that its representation was reasonable; and
 - (c) it typically involves an objective analysis of the meaning of words or actions, rather than pure reliance upon the Respondent’s state of mind. This makes it harder to rely upon subtle distinctions in the mind of the decision-maker.²
6. This said, there are some common pitfalls and threshold requirements that must be considered:
- (a) while not entirely settled, the current weight of authority is that most conduct that occurs within an existing employment relationship will not be in “trade or commerce”;³

² See, for example, *CFMEU v Endeavour Coal Pty Ltd* [2015] FCAFC 76; 231 FCR 150;

³ See *Robinson v Western Union Business Solutions (Australia) Pty Ltd* (2018) 284 IR 414; [2018] FCA 1913; and *Westpac Banking Corporation v Wittenberg* [2016] FCAFC 33; (2016) 242 FCR 505

- (b) the FWC (or similar body) will not be available to assist with the early conciliation of the claim, meaning that initial legal costs in the form of filing fees and preparation of pleadings will be incurred;
- (c) costs orders are more likely, as the ACL contains no equivalent of s.570 of the FW Act;⁴ and
- (d) no compensation will be awarded without proof of reliance upon the misleading or deceptive conduct causing some form of compensable harm. This issue is frequently overlooked, even in the commercial sphere.⁵

Content of and distinctions between ss.18 and 31 of the ACL

7. For present purposes, the two relevant provisions in the ACL are ss.18 and 31.⁶ Section 18 is a general prohibition against misleading and deceptive conduct, while s.31 is a specific prohibition that applies to offers of employment.

8. Section 18 states:

“A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.”

9. Section 31 of the ACL states:

“A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:

- (a) *the availability, nature, terms or conditions of the employment; or*
- (b) *any other matter relating to the employment.”*

10. The main distinction between the two is that s.31 is not confined to conduct in “trade or commerce”, although (as will be discussed below) there are authorities to suggest that pre-employment representations are in “trade or commerce” in any event. Other differences include:

⁴ See *CFMEU v D,FWBII (No 2)* [2013] FCAFC 25; (2013) 209 FCR 464.

⁵ See, for example, *Griffiths v LMM Holdings Pty Ltd* [2017] FCA 1212.

⁶ Other potentially relevant provisions, particularly in relation to a contract for services, include ss.20 and 21 (which deal with unconscionable conduct), s.29 (false or misleading statements regarding the supply of goods or services) and s.151 (false or misleading statements regarding goods or services).

- (a) s.18 is not a civil penalty provision, meaning that the Applicant must show a causal link to loss or damage in order to receive any helpful remedy.⁷ Contravention of s.31 however can carry, in addition to any orders for compensation, a maximum penalty of (at least) \$10 million for bodies corporate, or \$500,000 for individuals;⁸ and
- (b) a successful claim under s.18 cannot result in either an adverse publicity order, or an order disqualifying a person from managing a corporation. Both of these remedies are available under s.31 of the ACL, although only on the application of the regulator.⁹

When is conduct “misleading or deceptive”?

- 11. There are numerous authorities and summaries to assist in the determination of whether conduct is misleading or deceptive. As the purpose of this paper is to focus on the employment-specific aspects of ss.18 and 31 of the ACL, they are not discussed here. A useful summary extracted from [10] of *ACCC v Dukemaster Pty Ltd* (ACN 050 275 226) [2009] FCA 682 is attached at **Annexure A**.¹⁰

When does conduct occur “in trade or commerce”?

- 12. A restrictive approach to the definition of “trade or commerce” is most likely the reason that s.18 arises infrequently in an employment context. There are authorities suggesting that conduct occurring within an existing employment relationship cannot be in “trade or commerce”, and so s.18 cannot apply. However the issue is not definitively settled.
- 13. The phrase “trade or commerce” does not have a precise definition.¹¹ The words have been described as having a “chameleon-like hue”¹²; dependent upon their immediate context.
- 14. The following helpful summary was given by Dowsett J in *Hearn v O'Rourke* [2003] FCAFC 78; (2003) 129 FCR 64:

⁷ See, for example, *Woodcroft-Brown v TimberCorp Securities (in liq)* [2011] VSC 526; (2011) 253 FLR 240.

⁸ See s.224(3) and (3A) of the ACL. Section 224(3A) provides that in some circumstances the maximum penalty for a corporation can exceed \$10,000,000.

⁹ See ss.247 and 248 of the ACL.

¹⁰ Another useful summary is available at *Comite Interprofessionnel du Vin de Champagne v Powell* [2015] FCA 1110; 330 ALR 67 commencing at [169].

¹¹ The phrase is defined in s.4 of the ACL as “trade or commerce within Australia or between Australia and places outside Australia.”

¹² *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 at 603 per Mason CJ, Deane, Dawson and Gaudron JJ

“...the focus must be upon the conduct in question and not upon the range of activities in which a relevant corporation may be engaged. In other words, one does not simply identify the conduct in question, note that the relevant corporation is engaged in commercial activity of some kind and then look to a connection between the two. Because corporations are usually formed to engage in commercial activities, it will rarely be difficult to find such a connection. The correct approach is to determine whether or not the relevant conduct can, according to ordinary usage, be described as having occurred in the course of dealings "which, of their nature, bear a trading or commercial character". The commercial undertakings of the corporation in question may be relevant to the exercise. However, the more important question will be whether the conduct is of a kind which is usually of a commercial nature.” (emphasis added)

15. There are a number of authorities that have applied the term to exclude conduct arising from an employment relationship. See, for example:
 - (a) in *Concrete Constructions (NSW) Pty Ltd v Nelson* (1990) 169 CLR 594 the High Court dealt with a scenario where a construction worker was told by his foreman that certain grates were secured by certain bolts. This was alleged to be untrue, and the worker suffered injury when one of the grates gave way. The communication was found to not be in “trade or commerce” because it was made by one employee to another in the ordinary course of their duties. The majority noted, however “*the position might well be different if the misleading statement was made in the course of, or for the purposes of, some trading or commercial dealing between the corporation and the particular employee*” (at 604);
 - (b) in *Robinson v Western Union Business Solutions (Australia) Pty Ltd* [2018] FCA 1913 the Federal Court dealt with a “general protections” claim where an employer claimed that they dismissed an employee due to their failure to attend for an independent medical examination, and uncertainty over their capacity to return to work. The employee also alleged that the dismissal contravened ss.20 or 21 of the ACL, but the Court found that the dismissal was not conduct in “trade or commerce”; and
 - (c) in *Australian Education Union v Royal Melbourne Institute of Technology* [2018] FCA 1985 the Federal Court found (noting that it had not had the benefit of full argument due to the urgent circumstances) that explanations as the terms of a

proposed enterprise agreement were similarly not made in the course of “trade or commerce”.

16. The authorities are not unanimous. Specifically:

- (a) in *Westpac Banking Corporation v Wittenberg* [2016] FCAFC 33; (2016) 242 FCR 505 White J expressly reserved the question of whether a statement made by an employer to an existing employee with a view to retaining their services is in “trade or commerce”. Although Buchanan J commented that matters arising within an existing employment relationship were “*unlikely to meet the requirements for the engagement of s.52*”;
- (b) in *Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd* (2016) 259 IR 47; [2016] FCA 430 Bromberg J expressly agreed with White J’s position in *Wittenberg*;
- (c) in *Barto v GPR Management Services Pty Ltd* (1991) 33 FCR 389 the Federal Court (per Wilcox J) refused to strike out a claim under s.52 of the TPA based on allegedly misleading and deceptive conduct made during the renegotiation of an employment contract. The Court made the following observation at 393:

“It is clear enough, on the one extreme, that conduct which is not inherently a commercial activity, such as driving a truck: or giving information about the safety of a building site, is not conduct “in trade or commerce” simply because, in the particular case, it is performed in the course of a larger activity for commercial gain. It seems equally clear, on the other extreme, that conduct which would plainly be conduct “in trade or commerce” if carried out vis-a-vis a stranger does not lose that characteristic simply because the party with whom the corporation is dealing happens to be an employee....if a company which carried on business as a car dealer sold a motor car to an employee, that would be conduct “in trade or commerce”

17. The weight of authority therefore currently favours the proposition that conduct occurring within the confines of an existing employment relationship will likely not be in “*trade or commerce*”. However there is no definitive Full Court authority on the issue, so the issue is still open to argument.

18. The argument that s.18 does apply to pre-employment negotiations is slightly stronger.¹³ Also, it must be remembered that s.18 will apply in full to individuals engaged under a contract for services. It is therefore far from irrelevant to the sphere of employment law, particularly should an appropriate vehicle arise for resolution of the “trade or commerce” issue.

Representations about “future matters”

19. Section 31 of the ACL is available to any employee who considers that they have been subject to misleading or deceptive conduct which they relied upon in the course of pre-employment negotiations.
20. These kinds of claims will usually arise in respect of “future matters”, such as assurances of duties, locations or promotion opportunities. Claims of misleading and deceptive conduct in relation to future matters need to be handled with some care, as it must be remembered that the action is not based upon the promise not being fulfilled, but on the words said, at the time they were said. The focus is on words, not deeds.
21. Applicants alleging a misleading or deceptive statement in respect of a “future matter” gain some benefit from s.4 of the ACL, which is set out in full in Annexure B. In summary it provides that if a person makes a representation about a future matter, that representation will be taken to be misleading unless:
- (a) evidence is adduced to demonstrate that there was “reasonable grounds” to make the representation (s.4(2)); and
 - (b) the Court accepts that the person did in fact have reasonable grounds to make that statement. (s.4(1)(b))
22. Some important things to not about the operation of s.4 include:
- (a) identification of the precise representation is crucial, including whether it is truly as to a “future matter”;
 - (b) the evidence required to discharge s.4(2); and

¹³ See, for example, *Rakic v Johns Lyng Insurance Building Solutions (Victoria) Pty Ltd* (2016) 259 IR 47 at 62; [2016] FCA 430

- (c) if a representation is made by a corporation, then it is the corporate knowledge that is significant, and not merely the knowledge of the individual speaker.

Representations with respect to future matters

- 23. In any claim based on a misleading and deceptive representation, care must be taken to accurately identify the alleged representation with precision. For example, there is a significant difference between a representation that an employer will want a certain position to be filled for a long time, and a representation that the employer wants the position filled by the prospective employee for a long time.¹⁴
- 24. For s.4 of the ACL to apply, the representation must be “with respect to” a “future matter”. The phrase “with respect to” is inherently broad,¹⁵ while the phrase “future matter” is not defined. It requires (at least by implication) a reference to something that may occur in the future.
- 25. However there is a distinction between a representation of the future, and a statement of a person’s current knowledge or opinion. For example:
 - (a) a statement that the company was not presently aware of any reasons why it should not reach its sales targets was not in respect of a “future matter” in *Rakic v Johns Lyng*; but
 - (b) in *Cummings v Lewis (1993) 41 FCR 559* an accountant’s financial projection, based upon his then known information, was found to be in respect of a “future matter”.

Providing evidence as required by s.4(2)

- 26. Section 4(2) states that if the Court is to find that a representation was made with “reasonable grounds”, then someone (usually the Respondent) must adduce evidence that the person making the representation had “reasonable grounds” for making it.
- 27. In *Rakic v Johns Lyng*, Bromberg J adopted the approach in *Sykes v Reserve Bank of Australia* (1998) 88 FCR 511 to s.51A of the TPA by summarising the approach as follows:

¹⁴ See *O’Neill v Medical Benefits Fund of Australia Ltd* (2002) 122 FCR 344.

¹⁵ See *Smith v Federal Commissioner of Taxation* (1987) 164 CLR 513

“If there was a representation as to a future matter, s 51A requires the representor to show:

- some facts or circumstances*
- existing at the time of the representation*
- on which the representor in fact relied*
- which are objectively reasonable and*
- which support the representation made.”*

28. The issue is assessed as at the date of the representation, by reference to the information that was available at the time the statement was made and relied upon.

29. Note also that the question is not simply whether the Representation was based on “some” facts or circumstances, but whether the facts or circumstances as a whole supported the representation. A Respondent cannot escape the application of s.4 by selective reliance upon existing facts.

30. Parties must also be alert to the correct identification of the party making the representation. Where a representation has been made by a corporation, it is the knowledge of the corporation, not the individual, that is relevant. For example, in *RT & YE Falls Investments Pty Ltd v New South Wales* [2001] NSWSC 1027 at [116]-[117] Palmer J stated:

“Clearly enough, Dr Salmon himself had reasonable grounds for making the representations as at 28 August. The evidence is uncontradicted that he made those representations honestly and on the basis of what he had been told by his superior, Mr Roe. Mr Roe was the person properly authorised to convey to Dr Salmon the Department’s attitude to the Plaintiff’s proposal.

But Dr Salmon was not NSWAg. He made the representations on behalf of NSWAg, as NSWAg concedes. He was its mouthpiece as far as the Plaintiff was concerned. NSWAg was, in law, making the representations and it must show that it, not Dr Salmon, had reasonable grounds for the representations which Dr Salmon made.”

31. Discharge of the s.4 onus therefore requires a careful consideration of:

- (a) the precise conduct alleged to form the representation;
 - (b) whether that conduct did in fact establish the alleged representation;
 - (c) who made the representation;
 - (d) whether the representation is of a “future matter”; and
 - (e) what evidence can be produced to show that, at the time of the representation, it was objectively reasonable for the entity making the representation to do so.
32. If the s.4 onus is discharged, the Court will often still need to consider the broader question of whether the conduct was “misleading or deceptive” (see s.4(4)).

Employment specific issues – matters that may arise

33. In closing, let us consider a few circumstances that are common to an employment relationship that may affect a misleading and deceptive conduct claim:

- (a) Inconsistent contractual terms

If an employment contract contains terms that are inconsistent with the alleged representation, then it will be more difficult for an employee to establish that the representation was relied upon. For example, in *Haros v Linfox Australis Pty Ltd* [2012] FCAFC 42; (2012) 64 AILR 101-562; a qualified lawyer with employment law experience negotiated a contract containing a three-month probationary period and a three-month termination period. The Court found that, in the circumstances, the Applicant had not relied upon any representations as to the security of his employment.

- (b) Transfer of business

Even if ss.18 and 31 are strictly held to apply only to “new employees”, note that this may not be an issue for a “new” employee in a transfer of business scenario. For example, an employee may be promised that they will be “no worse off” if they accept a new position with a new employing entity as part of a restructure, only to find that in practice the new position results in a significant loss of bonuses or pay.

An employee may argue that as it is technically a new employment relationship with a new employer, then any representations are caught by ss.18 or 31.

(c) Calculating compensation based on loss of alternate employment

Often a claim for misleading and deceptive conduct in employment will base compensation upon the loss of some other employment opportunity, such as alternate employment. This can make calculation of compensation difficult, because it raises a large number of hypothetical questions, including how long the Applicant would have stayed in the alternate employment. *Rakic* provides a useful example for calculating compensation in these scenarios, based upon the Court's determination of the most likely alternate scenario and an adjustment based on the possibility of that scenario occurring.

(d) Application of s.31 to a union

In *Aldi Foods Pty Ltd as general partner of Aldi Stores (A Ltd Partnership) v Transport Workers Union of Australia* [2017] FCA 1004 an Applicant argued that s.31 applied to make a union liable for alleged misrepresentations it made regarding the working conditions that it offered to new staff. The Court declined to strike out the relevant provisions of the statement of claim, although noted that it was an "adventurous" construction of s.31, which appeared to be limited to representations made by an employer to a prospective employee. Still, the argument is open.

Conclusion

34. While the ACL is rarely used in the employment context, practitioners should always consider its potential applicability, particularly in relation to new employees.
35. Further, if (consistent with the reservations of Bromberg and White JJ) the meaning of "trade or commerce" is expanded to include comments made within an existing employment relationship, then s.18 could yet have a significant impact upon the current legal landscape.

Stephen Mackie

Chambers

Annexure A – summary of principles for assessing “misleading or deceptive” conduct

ACCC v Dukemaster Pty Ltd (ACN 050 275 226) [2009] FCA 682; (2009) ATPR 42-290 per Gordon J at [10]:

“The following principles are worth restating.

1. A contravention of s 52(1) of the TPA is established by “conduct” which is misleading or deceptive or likely to mislead or deceive: *Global Sportsman Pty Ltd* 2 FCR 82, 87. The “conduct”, in the circumstances, must lead, or be capable of leading, a person into error (*Hannaford (trading as Torrens Valley Orchards) v Australian Farmlink Pty Ltd* [2008] FCA 1591 at [252] citing *Taco Company of Australia Inc v Taco Bell Pty Ltd* (1982) 42 ALR 177 at 200; *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 198) and the error or misconception must result from “conduct” of the corporation and not from other circumstances for which the corporation is not responsible: *Global Sportsman Pty Ltd* 2 FCR 82, 91. “Conduct” is likely to mislead or deceive if there is a “real or not remote chance or possibility regardless of whether it is less or more than fifty per cent”: *Global Sportsman Pty Ltd* 2 FCR 82, 87.
2. Section 52(1) is concerned with the effect or likely effect of “conduct” upon the minds of that person or those persons in relation to whom the question of whether the “conduct” is or is likely to be misleading or deceptive falls to be tested. The test is objective and the Court must determine the question for itself: *Global Sportsman Pty Ltd* 2 FCR 82, 87. Section 52 is not designed for the benefit of persons who fail, in the circumstances of the case, to take reasonable care of their own interests: *Elders Trustee and Executor Co Ltd v E G Reeves Pty Ltd* (1987) 78 ALR 193 at 241. Moreover, it would be wrong to select particular words or acts which although misleading in isolation do not have that character when viewed in context: *Elders Trustee* 78 ALR 193 at 241 citing *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* (1982) 149 CLR 191 at 199.
3. “Conduct” can, of course, include making a statement which is misleading or deceptive or likely to mislead or deceive: *Global Sportsman Pty Ltd* 2 FCR 82, 88.
4. By making a statement of past or present *fact*, a corporation’s state of mind is irrelevant unless the statement involved the state of the corporation’s mind: *Global Sportsman Pty Ltd* 2 FCR 82, 88. Contravention of s 52(1) does not depend upon the corporation’s intention or its belief concerning the accuracy of the statement of fact but upon whether

the statement conveys a meaning which is false. A false meaning will be conveyed if what is stated concerning the past or present fact is inaccurate but also if, although literally true, the statement conveys a meaning which is false.

5. Precisely the same principles control the operation of s 52(1) to statements involving the state of mind of the maker when the statement was made (e.g. promises, predictions and opinions). A statement which involves the state of mind of the maker ordinarily conveys the meaning (expressly or impliedly) that the maker of the statement had a particular state of mind when the statement was made and, commonly, that there was a basis for that state of mind: *Global Sportsman Pty Ltd* 2 FCR 82, 88.
6. A statement of opinion will not be misleading or deceptive or likely to mislead or deceive merely because it turns out to be incorrect, misinforms or is likely to do so: *Elders Trustee* 78 ALR 193, 242 and *Bateman v Slatyer* (1987) 71 ALR 553, 559. An incorrect opinion does not of itself establish that the opinion was not held by the person who expressed it or that it lacked any or any adequate foundation: *Global Sportsman Pty Ltd* 2 FCR 82, 88. An expression of an opinion which is identifiable as an expression of opinion conveys no more than that the opinion is held and perhaps that there is a basis for the opinion. If that is so, an expression of opinion however erroneous misrepresents nothing: *Global Sportsman Pty Ltd* 2 FCR 82, 88.
7. However, an opinion may convey that there is a basis for it, that it is honestly held and when it is expressed as the opinion of an expert, that it is honestly held upon rational grounds involving an application of the relevant expertise. If the evidence shows that the opinion was not held or that it lacked any or any adequate foundation, particularly if the opinion was expressed as an expert, a statement of opinion may contravene s 52 of the TPA: *Elders Trustee* 78 ALR 193, 242, proposition (4): see also *Hannaford* [2008] FCA 1591 at [253] and *RAIA Insurance Brokers Ltd v FAI General Insurance Co Ltd* (1993) 41 FCR 164; *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388; NC Seddon and MP Ellinghaus, *Cheshire and Fifoot's Law of Contract* (9th Australian Edition, 2008), [11.116].”

Annexure B – s.4 of the Australian Consumer Law

4. Misleading representations with respect to future matters

- (1) If:
 - (a) a person makes a representation with respect to any future matter (including the doing of, or the refusing to do, any act); and
 - (b) the person does not have reasonable grounds for making the representation;the representation is taken, for the purposes of this Schedule, to be misleading.
- (2) For the purposes of applying subsection (1) in relation to a proceeding concerning a representation made with respect to a future matter by:
 - (a) a party to the proceeding; or
 - (b) any other person;the party or other person is taken not to have had reasonable grounds for making the representation, unless evidence is adduced to the contrary.
- (3) To avoid doubt, subsection (2) does not:
 - (a) have the effect that, merely because such evidence to the contrary is adduced, the person who made the representation is taken to have had reasonable grounds for making the representation; or
 - (b) have the effect of placing on any person an onus of proving that the person who made the representation had reasonable grounds for making the representation.
- (4) Subsection (1) does not limit by implication the meaning of a reference in this Schedule to:
 - (a) a misleading representation; or
 - (b) a representation that is misleading in a material particular; or
 - (c) conduct that is misleading or is likely or liable to mislead;and, in particular, does not imply that a representation that a person makes with respect to any future matter is not misleading merely because the person has reasonable grounds for making the representation.



FEDERAL COURT OF AUSTRALIA



Recent developments and impending changes in practice and procedures in the Federal Court

The Honourable Justice Berna Collier

Good morning everyone. This morning my colleagues and I have been asked to talk about recent developments and impending changes in practice and procedures in our respective jurisdictions. It is my pleasure and privilege to talk to you for approximately 20 minutes on that topic in relation to the Federal Court of Australia.

I gave a presentation on this topic a few years ago, shortly after the Federal Court introduced National Practice Areas (and in particular an Employment and Industrial Relations National Practice Area). Today I would like to divide my time by referring

- first to statistics relevant to the employment area filings in the Federal Court, which may be of interest;
- second, I would like to briefly talk about an update on our Employment and Industrial Relations Practice Note, which is about to be re-issued following consultation with our Judges, our user groups and the profession; and
- finally, I would like to make a few concluding comments about general practice in this area.

Statistics

The filings in the employment NPA in the Federal Court have risen steadily over the past few years, with a more than 20% increase in filings since the 2014/2015 financial year. There was a dip in the most recent year compared to last financial year, however overall there has been more litigation in this area since mid-decade.

Victoria continues to lead the way, comprising almost half of the filings in the Federal Court in respect of employment and industrial relations. This is double the filings in New South Wales and four times the filings in Queensland.

There is considerably more activity in the Federal Circuit Court than our Court (with which my colleague from that Court will no doubt address shortly) and a more even spread across filings in that Court.

A happy statistic from our end is that the number of matters finalised in the Federal Court looks healthy in the last financial year – 205 matters finalised in 2018/2019 compared with 180 finalised in 2017/2018. It is very interesting to look at the way in which matters were finalised – for example of those finalised in 2018/2019 :

- a. 62 were finalised by mediation (double the rate from the previous financial year)
- b. 44 were finalised by final judgment (a drop on the previous year)
- c. A surprising 99 were finalised by “other” means, which includes discontinuation of the proceeding, consent orders or transfer to another Court.

Of the filings in the 2017/2018 financial year the bulk were claims in respect of general protection under the *Fair Work Act 2009* (Cth) and terms and conditions of employment. Of the filings only 9 were right of entry claims, and there were no claims in “discrimination”. I note that claims which might be considered employment matters may be classified as human rights matters if for example they involve allegations of harassment or discrimination.

Based on a sample of trials heard between 1 July 2014 and 30 June 2019, the length of most trials in the Federal Court in employment during that period was 1-2 days. So far as concerns time from hearing to trial, trials in this area have on average been heard 10.5 months after commencement, which is longer than taxation and general commercial matters but considerably less than intellectual property.

A good final statistic – the great majority of judgments in this area are delivered within 3 months of hearing.

Practice notes

Turning now to practice in the area – you may already know that each of the National Practice Areas in the Federal Court of Australia (including the Employment NPA) has its own Practice Note, read in conjunction with the overarching Central Practice Note applicable to all, and available on the Federal Court website.

For your information we are about to release an amended Employment Practice Note after consultation with the Federal Court Judges, our user groups and the profession. Unfortunately, because the new practice note is currently with the Chief Justice for approval, I am not in a position to give you a copy, however I can tell you some points about it by way of a sneak peak. So for example, the proposed new practice note anticipates :

- (1) Originating applications being accompanied by a statement of claim or affidavit or, in appropriate cases, a concise statement (under the arrangements in Part 6 of the Central Practice Note. This formalises approaches which some litigants are currently utilising in any event. Cases commenced by affidavit are not often those concerning the general protection provisions of the Fair Work Act, however they do include those under the *Fair Work (Registered Organisations) Act 2009* (Cth) such as election inquiries. A suitable case for commencement by concise statement could be where there are a large number of workers affected by, for example, alleged underpayment – in such a case the concise statement could plead underpayment by reference to a schedule which would then set out the details of the affected workers. However concise statements have been used in other circumstances – a recent case looking at amendment to a concise statement in the Fair Work area is *Tomvald v Toll Transport Pty Ltd (No. 2)* [2019] FCA 510, where the applicant sought declarations and compensation for alleged breaches of ss 50 and 340 of the Fair Work Act in respect of limitations on working hours)
- (2) When the proceeding has been commenced using a concise statement, the respondent should file a concise response in advance of the first case management hearing. Whether a matter will continue under the concise statement method will however be at the discretion of the Court. The respondent, for example, may assert that pleadings need to be filed, and the Court may agree.
- (3) Similarly, in cases in which a proceeding is commenced on affidavit, the docket Judge will consider at the first case management hearing whether the proceeding should *continue* on affidavit. In normal circumstances the Court requires the filing of an affidavit by the respondent within 28 days after the date of service of the originating application. The exchange of any evidence beyond that contained in those affidavits will be addressed at the first case management hearing
- (4) The Court has a naming convention for cases which commonly appear with the same title, usually involving regular litigants such as a regulator and a registered organisation.

In such cases, prior to the delivery of judgment, the Court may assign an identifying title to the proceeding (for example, *Australian Building and Construction Commissioner v Construction, Forestry, Maritime, Mining and Energy Union (Cardigan St Case)* [2018] FCA 957)

- (5) The Court will list the proceeding for the conduct of a case management hearing, generally, after the close of pleadings or the expiration of the time within which the respondent's affidavit is to be filed, as the case may be
- (6) At the first case management hearing the parties are expected to give consideration to such issues as :
 - (a) whether the proceeding is more appropriately heard in the Federal Circuit Court (including because it fails to raise a point of principle);
 - (b) the nature of the case and the facts or legal issues that are not in controversy and whether they may be agreed at an early stage of the proceeding;
 - (c) any need for discovery, including limited discovery for the purpose of assisting the resolution of the matter at mediation;
 - (d) the means by which evidence is to be adduced at the trial of the proceeding and, in particular, if not to be led orally, whether by witness statement or affidavit. Ordinarily, evidence-in-chief in relation to controversial facts is led orally. When evidence-in-chief is to be led orally, outlines of evidence will ordinarily be exchanged;
 - (e) in a proceeding in which the imposition of a penalty on an individual is claimed, such modifications of normal procedures as will accommodate the making of an election by the individual to file a defence and/or to lead evidence, including any need to split the hearing in order that sufficient notice be given to the applicant of the respondent's case should such an election be made.

The purpose of an outline is to provide notice of the evidence to be given by the witness, and such outlines should identify the topics the witness will address, and also outline, in summary form, the evidence that will be given on each topic. Outlines would ordinarily be no more than 4 pages in length.

As a general rule the docket Judge always has the power to dispense with particular aspects of the Practice Notes, although we aim to require compliance with them because otherwise what

is the point of having them? Further, the Practice Notes have been put together after much thought and consultation, with a view to improving procedure in the Court. If they have that effect, we should comply with them; if practitioners have problems with the Practice Notes the Court wants to know.

Under our national registry cases are allocated to Judges in the relevant Practice Area by the National Operations Registrar. Generally, practising in Brisbane, you will get a Brisbane Judge, but not necessarily. The Brisbane Judges hearing cases in this area of practice are Justice Logan, Justice Reeves, Justice Rangiah and myself. Once allocated, the docket Judge has responsibility for case management and trial, as usual in this Court.

You may also know that we have a formal national Duty Judge system. I know for the remainder of this year when I am the Duty Judge for hearing urgent applications in this area of practice in Queensland. The current duty Judge listings for each State are available on the Court's website at <http://www.fedcourt.gov.au/contact/urgent-duty-contact>.

As I mentioned earlier the proposed amendments to the Employment and Industrial Relations Practice Note are currently with the Chief Justice. The formal review period has closed in respect of feedback. However, we continue to welcome feedback from you on all practice notes. Please provide any feedback via email, addressed to the Deputy Principal Judicial Registrar & Deputy National Operations Registrar, David Pringle, at practice.notes@fedcourt.gov.au, including a short summary of important issues that you wish to bring to the Court's attention and your relevant contact details. The Court will consider all feedback and acknowledge receipt of all feedback provided.

There are also helpful websites dedicated to each of the Practice Areas, and in particular that for Employment and Industrial Relations at <http://www.fedcourt.gov.au/law-and-practice/national-practice-areas/employment>. In this section of the Court's website you will find further information about what types of matters are covered by the Practice Area, as well as links to the relevant Practice Notes, court forms, rules and legislation. You can view the list of the National Coordinating Judges and review the procedures for commencing urgent applications. Additionally, you can browse the latest Federal Court judgments in this area, and subscribe to the Court's email subscription service to receive daily notifications of judgments published within your own areas of interest.

General observations

Finally, a few observations more generally in respect of practice.

Our Electronic Court File is going strong. As you would be aware, all Court documents in the Federal Court of Australia are lodged electronically through eLodgment, and relevant documents and orders can be downloaded from the Commonwealth Courts Portal. This allows Judges to access filed materials from their computers at any time and in any place.

Don't be surprised if we still use paper in Court, however. It can be difficult to abandon one's habits of a lifetime and completely forego paper, plus reliance on IT can sometimes be problematic. Overall, however, it works well. If you want to be electronically creative, do make your suggestions known to the Judge as the Court welcomes the efficient use of technology during proceedings.

With sections 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) in mind, we are trying to encourage greater efficiency in both the pre-trial period and during trials. So, for example:

- (1) It is scarcely novel for me to say that, until closer to the hearing date, the lawyers will know the case much better than the Judge does. To that extent, it is very useful if, in the course of case management, the lawyers are proactive in talking to each other about possible case management orders, and providing them in draft form in advance to the Judge for his or her consideration (see the Court's 'Case Management Imperatives' in the Central Practice Note at paragraph 8.5 on this point). If both sides consent to case management orders, the Judge may be prepared to make orders from Chambers without the need for appearances (thus minimising associated costs to clients and time spent by practitioners appearing in Court).
- (2) We continue to encourage mediation between the parties, and – at the very least – engagement between the lawyers throughout the pre-trial process (see the Central Practice Note at paragraphs 8.4 and 8.7). I know you are all very busy; however, I can tell you that it is extremely frustrating from the Judge's perspective to find out that the first time the lawyers have actually engaged with each other is on the morning of the trial. When this occurs in my cases, the first question that always springs to my mind is: what opportunities to either narrow or resolve this litigation have been lost?

Mediation, especially by Registrars of the Court, is a relatively inexpensive but very effective way of narrowing the issues in a proceeding. However – I promise you that if the parties are dead against going to mediation I won't order it, provided the lawyers talk to each other with a view to progressing the litigation. I recognise that sometimes the positions of the parties are so far apart that sending them to mediation will be a waste of time and money. But let me say that in this area of practice, I find that such situations are the exception rather than the rule.

- (3) I also find it very useful to order the parties to file a joint statement of facts and issues for decision. It is usually one of the last things I require the parties to do before filing closing submissions, and after the hearing when the air has cleared somewhat on what is actually in dispute. I admit to quietly despairing when the lawyers say solemnly that they can't agree on anything in the case. How can that be? Either someone is way off the beam in their understanding of the law and facts in dispute, or someone is being contrary. Either way is counterproductive for your own case, can unnecessarily prolong the trial and, frankly, can make the Judge annoyed with you (which is never good).
- (4) A final point from me in relation to efficiency – those of you who have appeared before me will know that it is my practice to, if possible, adjourn the trial for a brief period after the evidence is completed, to allow the lawyers to have regard to the transcript for the purposes of preparing closing submissions. By “a brief period” I mean a few days to a week or so, depending on my availability and the commitments of the lawyers involved. This is a luxury for all parties, I admit, and is not always possible (particularly in cases where a decision is urgent). However I find it effective, and consider that it allows the lawyers the opportunity to put their best cases forward at the end of the trial. This practice is not specifically referred to in the Practice Note, and I would be interested in any feedback from the practitioner's perspective (for example, if you think it unduly prolongs the trial and that this outweighs any benefits, please let me know).

Thank you for your time. I look forward to any questions you may have later in this session or during the break.



**FEDERAL COURT
OF AUSTRALIA**



Employment & Industrial Relations NPA

**Recent developments and impending changes in
practice and procedures in the Federal Court**

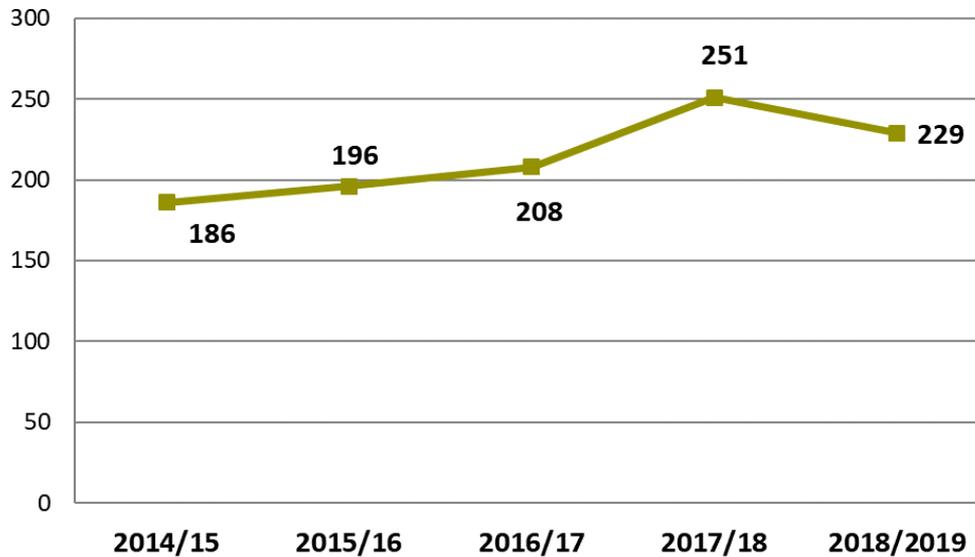
Justice Collier

Topics for today

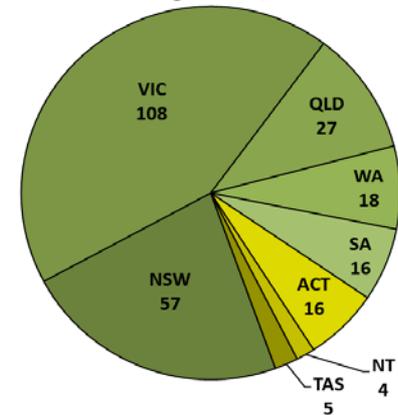
1. Statistics
2. New Practice Note,
Employment and
Industrial Relations
National Practice
Area (NPA)

E&IR NPA: FCA Filings

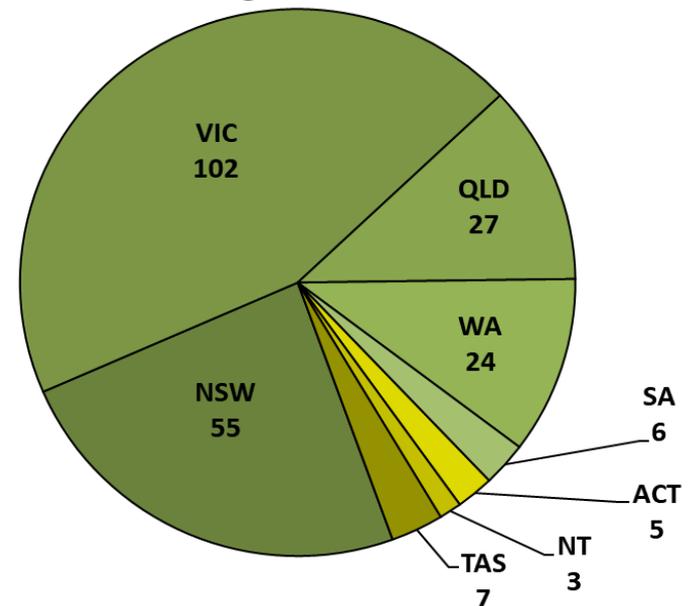
Total Filings (2014/15 - 2018/19)



Filings: 2017/18

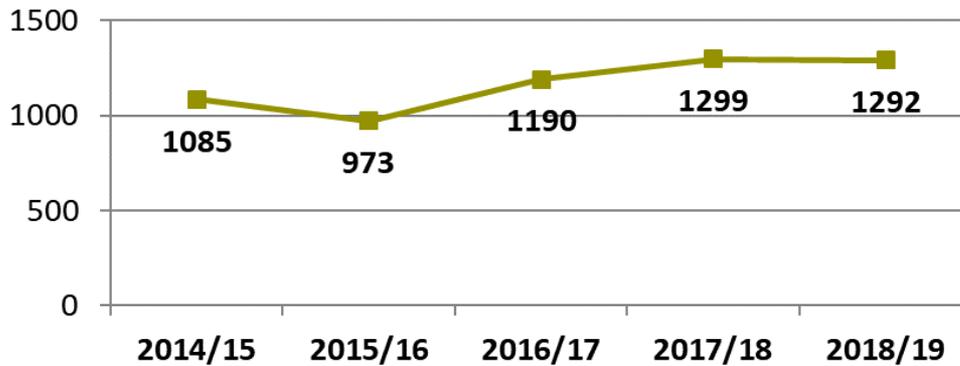


Filings: 2018/19

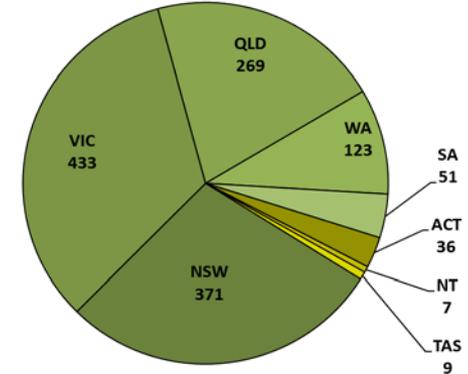


E&IR: FCC Filings

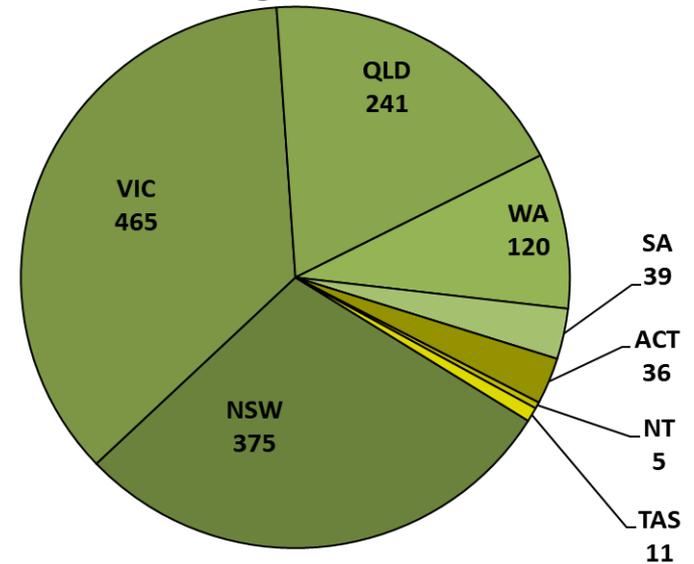
Total Filings (2014/15 - 2018/19)



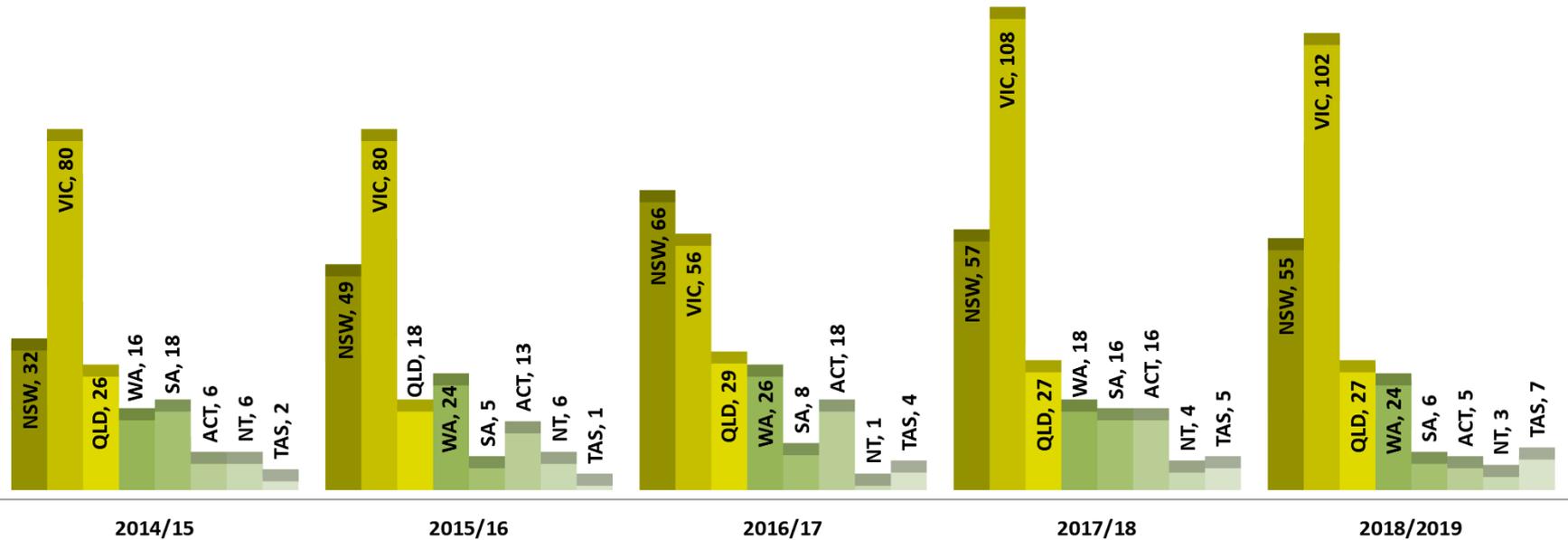
Filings: 2017/18



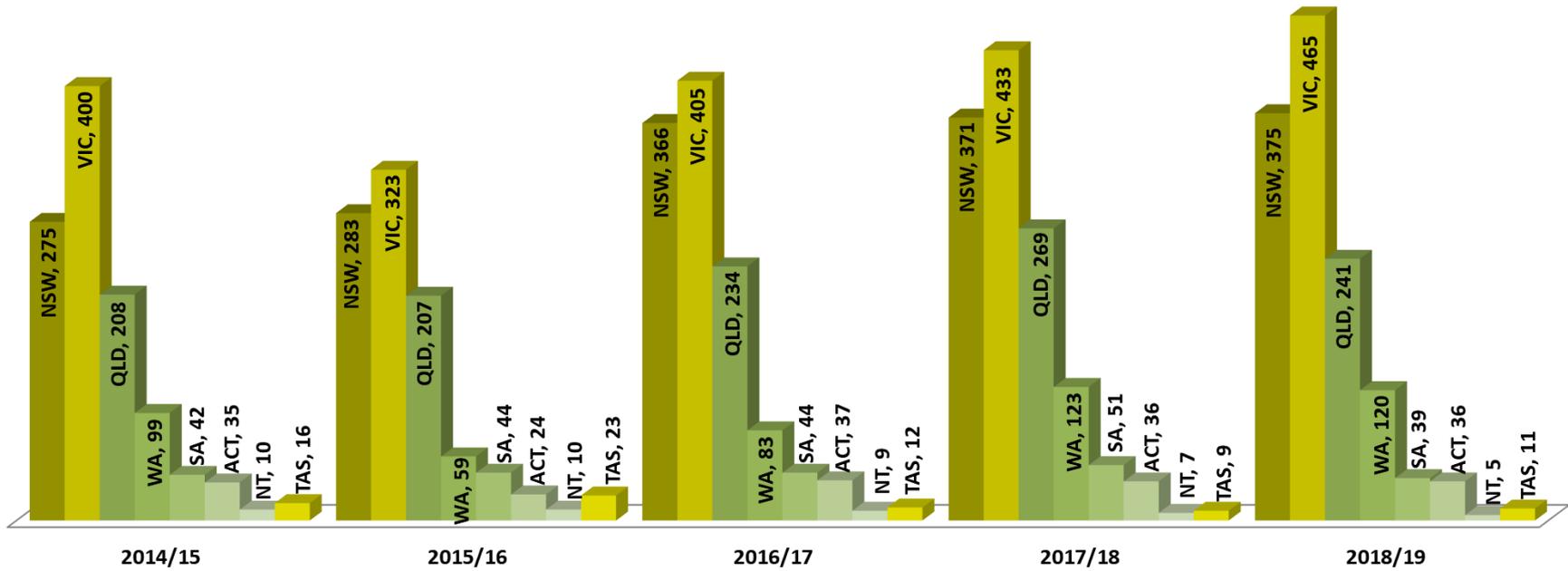
Filings: 2018/19



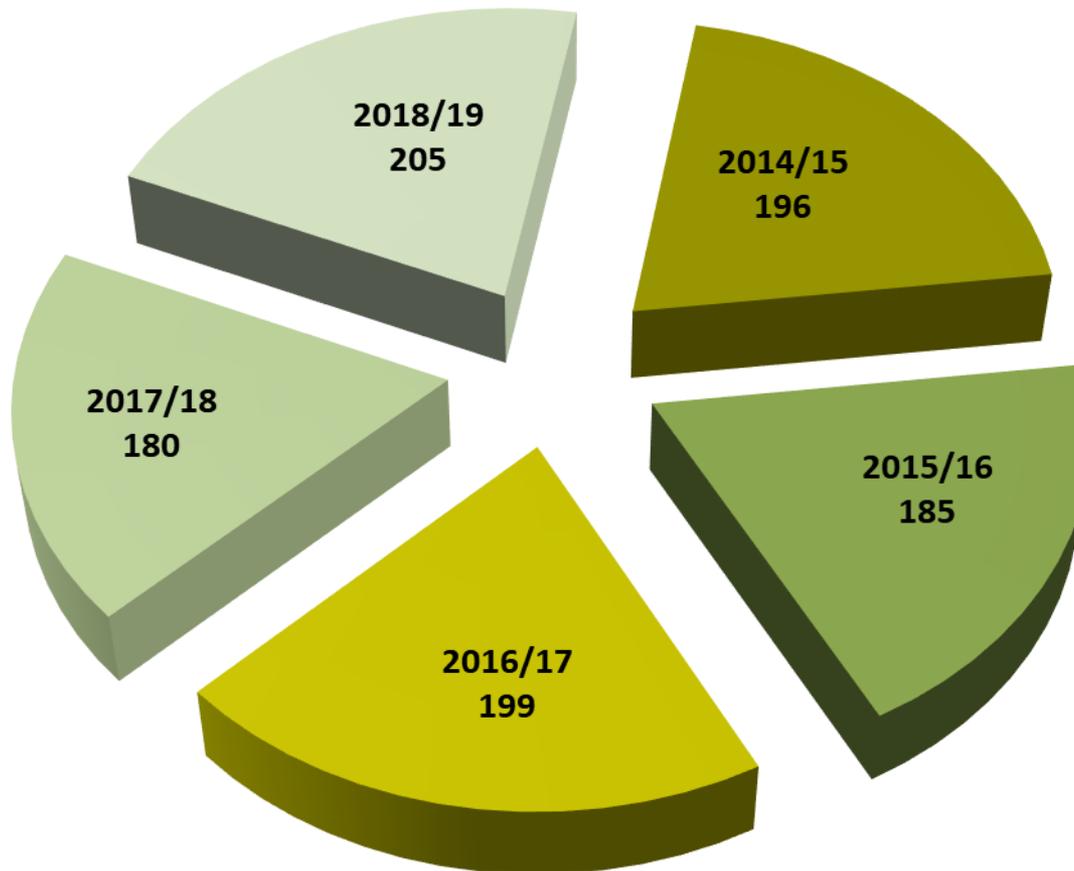
E&IR NPA: FCA Filings by State (2014/15 – 2018/19)



E&IR: FCC Filings (2013/14 – 2017/18)



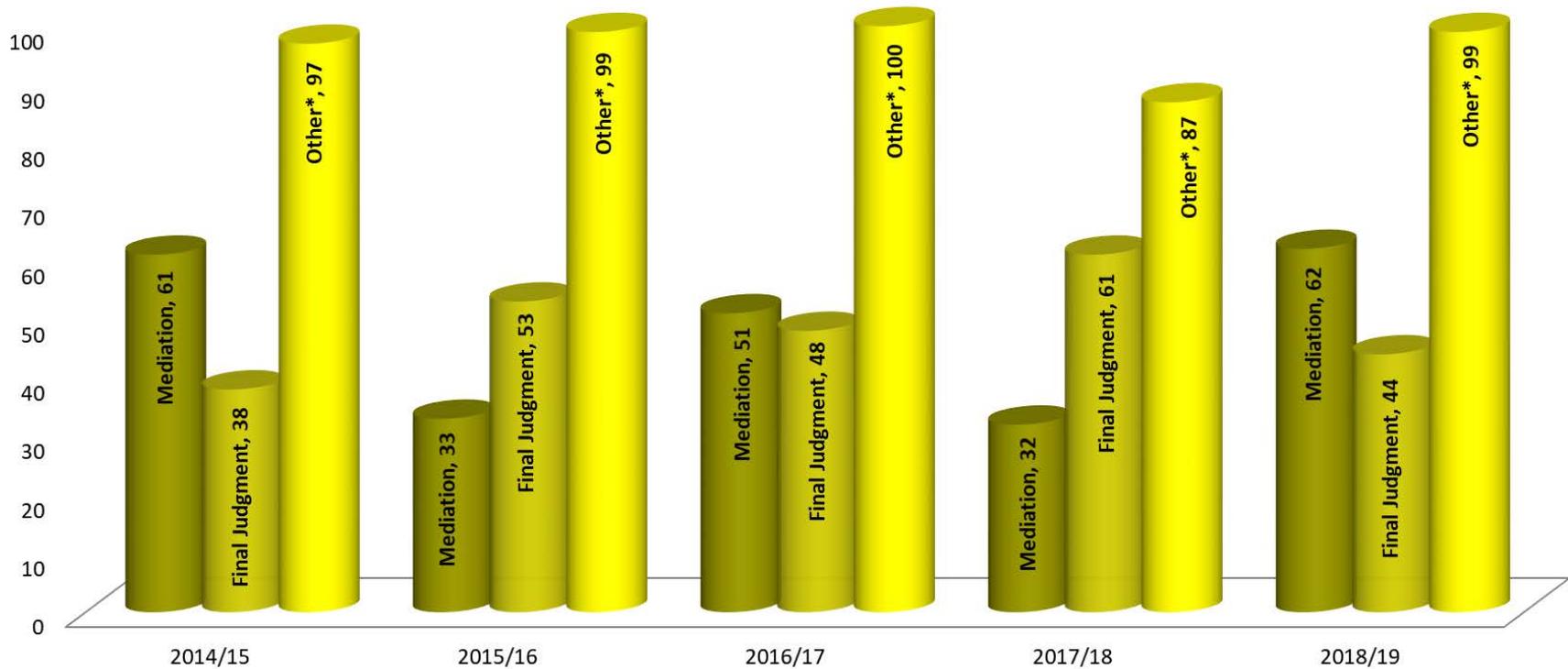
E&IR NPA: Finalisation Totals (2014/15 – 2018/19) (FCA)



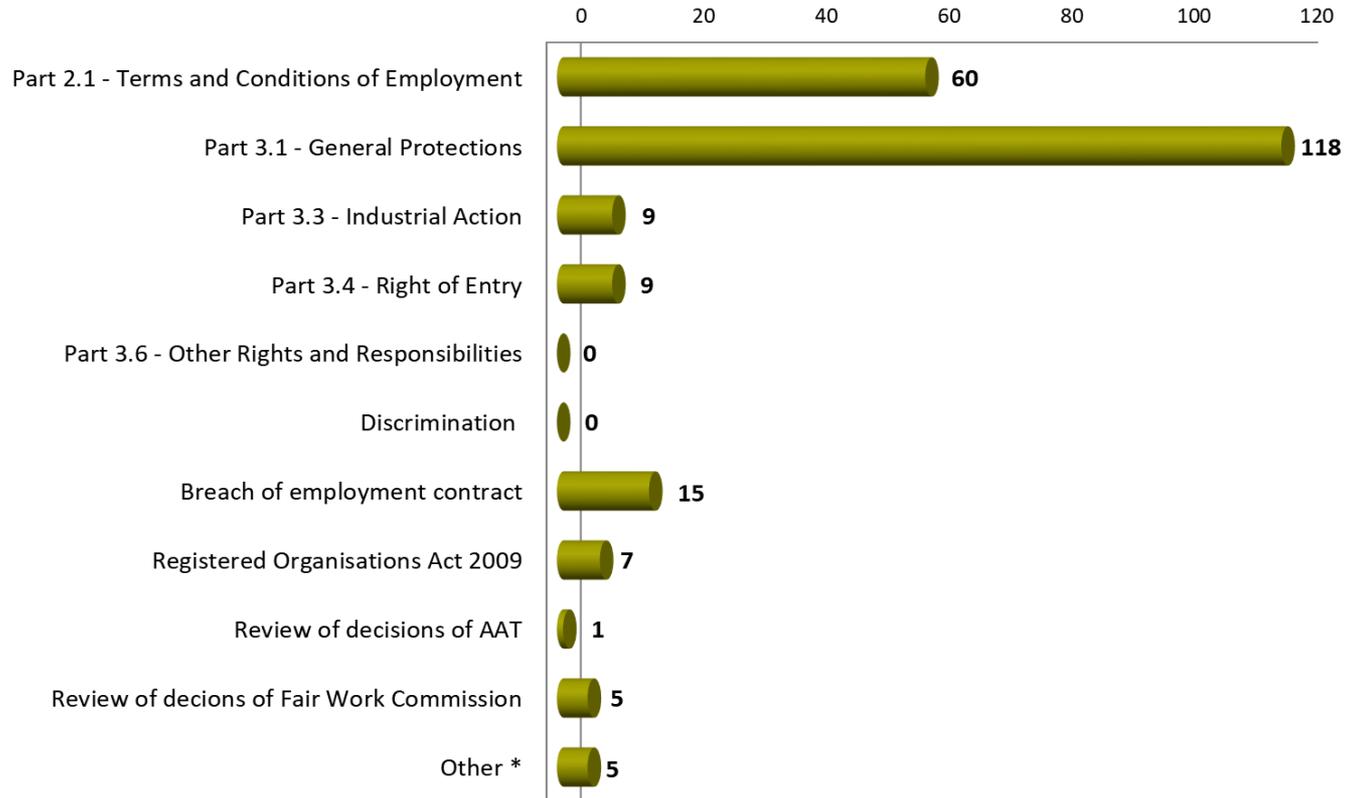
E&IR NPA: Finalisations by Outcome (2014/15 – 2018/19) (FCA)

NOTE: Other* includes matters:

- Discontinued/withdrawn
- Finalised by consent
- Transferred to another Court



E&IR NPA: Filings by Type (2017/18) (FCA)

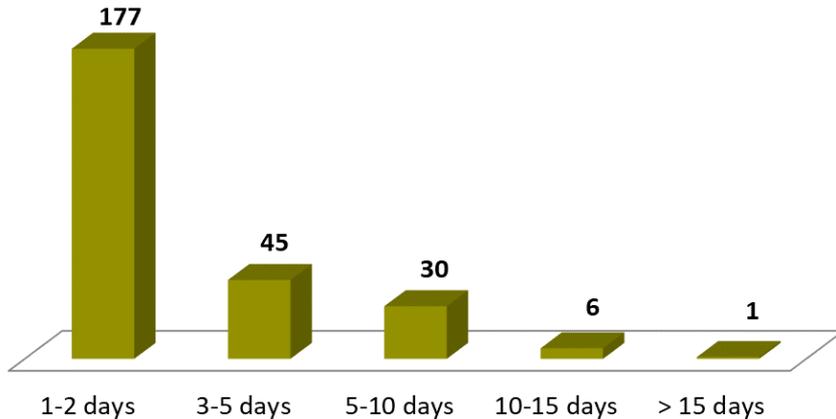


NOTE: Other* includes applications relating to:

- Interlocutory/prospective applications
- *Building and Construction Industry (Improving Productivity) Act 2016*

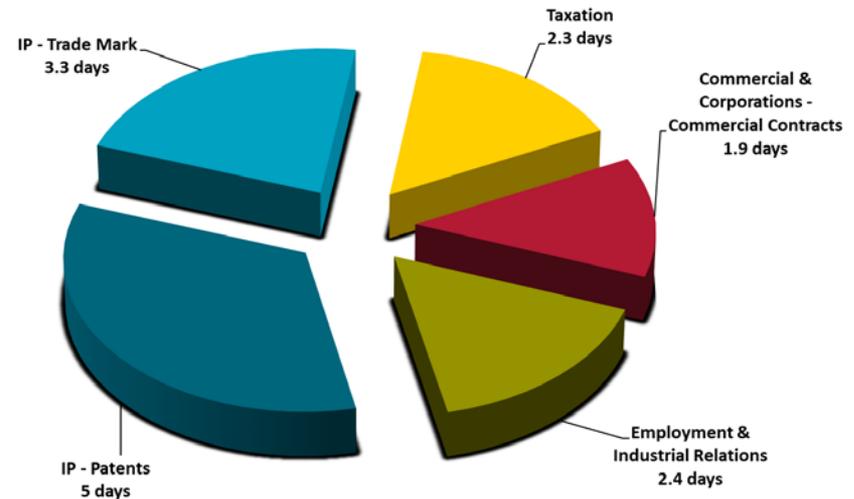
E&IR NPA: Length of Trial (FCA)

E&IR NPA: Average length of trial (2014/15 - 2018/19)



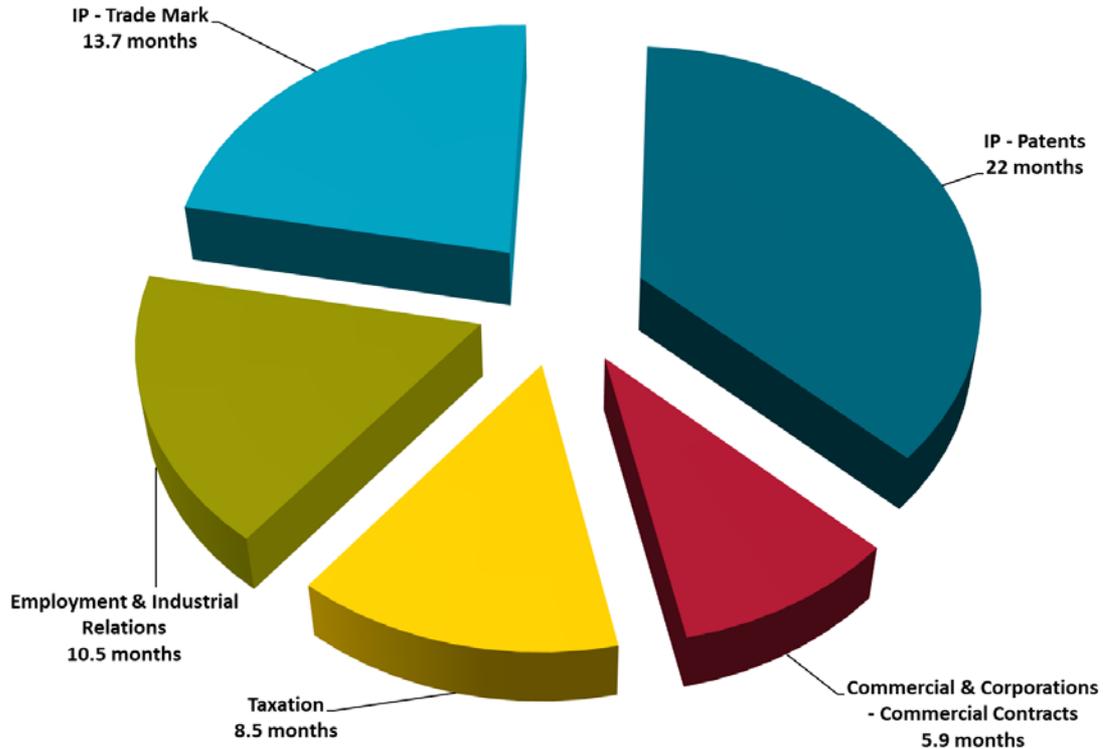
NOTE: The average has been determined using a sample of trials heard between 1 July 2014 and 30 June 2019

Average Length of Trial (comparing NPAs) - FCA



E&IR NPA: Average Time taken to Trial (FCA)

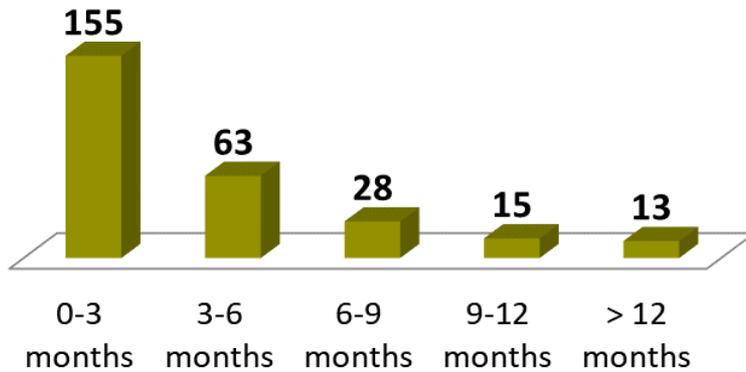
Average time taken to Trial (comparing NPAs) - FCA



NOTE: The average has been determined using a sample of trials heard between 1 July 2014 and 30 June 2019

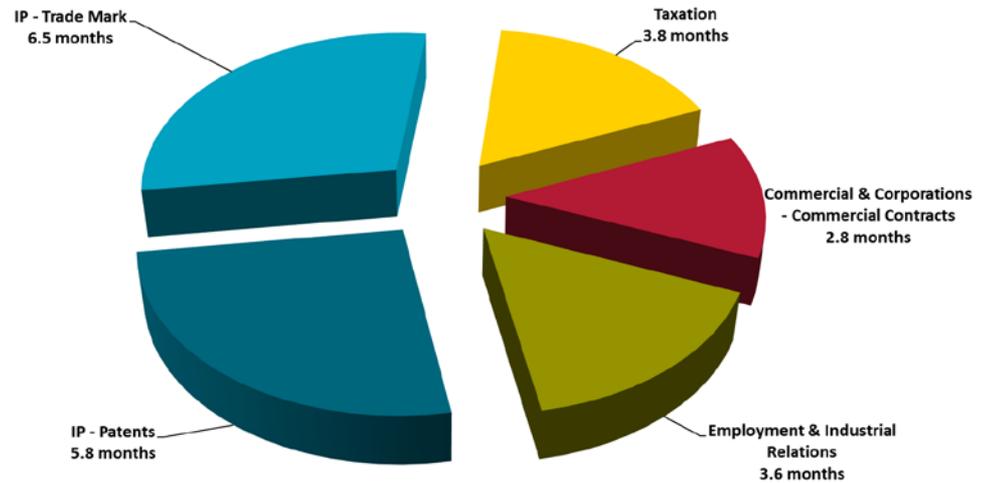
E&IR NPA: Average Time taken to Judgment (FCA)

E&IR NPA: Average time taken to deliver Judgment (2014/15 to 2018/19)



NOTE: The average has been determined using a sample of 274 final judgments delivered between 1 July 2014 and 30 June 2019

Average time taken from date of trial to judgment (comparing NPAs)



Forthcoming proposed amendments to Practice Note

- Concise statement : note *Tomvald v Toll Transport Pty Ltd (No 2)* [2019] FCA 510
- Where commenced on affidavit
- Naming convention
- After pleadings closed
- First case management hearing :
 - Transfer to FCCA?
 - Agreement of facts and issues?
 - Discovery?
 - Evidence?
 - Split hearing necessary?

NPA Judges

- In Brisbane : Justice Collier, Justice Logan, Justice Reeves, Justice Rangiah
- Duty Judges : <http://www.fedcourt.gov.au/contact/urgent-duty-contact>

Electronic Court file and website

- Filing on the ECF
- Commonwealth Courts Portal
- Feedback : practice.notes@fedcourt.gov.au

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- Feedback : practice.notes@fedcourt.gov.au
- <http://www.fedcourt.gov.au/law-and-practice/national-practice-areas/employment>

Conclusion

Any questions?



Developments in casual employment post Skene

Chair - Commissioner John Dwyer

Presenter - Troy Spence



Introduction

**Commissioner John Dwyer,
Queensland Industrial
Relations Commission**

- Changes in employment trends and casualisation of the workforce across industries
- Consideration of meaning of 'other than casual' under the Fair Work Act 2009 (Cth)
- Discussion of:
 - Important case law
 - Changes to Modern Awards
 - Prospective legislative response

Introduction

- *WorkPac* operates a labour hire business that supplies labour to operators of coal mines in central Queensland.
- *Paul Skene* worked for the *WorkPac* as a 'FIFO' dump truck operator from 17 April, 2010 to 17 July, 2010 and then again from 20 July, 2010 to 17 April, 2012 at coal mining operations carried on in central Queensland owned by *Rio Tinto*.
- From April 2010 – April 2012:
 - his hours of work would be 12.5 hours per shift on "a 7 days on, 7 days off continuous roster arrangement" set by *Rio-Tinto* for 'C Crew'. (@ [24])
 - was paid weekly by the respondent. (@ [25])
 - He lived in camp accommodation provided by *Rio Tinto* at no cost to him (@[22])
 - Flights were paid for by *Rio Tinto* (@[22])
- After working from July 2010 to April 2012, the *Skene* was stood down, and subsequently dismissed

The Facts – *Skene v Workpac Pty Ltd* [2016] FCCA 3035

- Skene claimed that he was a permanent full-time employee and therefore:
 - entitled to annual leave and consequential entitlements; or
 - payment in lieu of annual leave upon his employment coming to an end.
- The two principal issues for determination:
 - The first is whether Mr Skene was entitled to annual leave pursuant to his EA.
 - The second is whether Mr Skene was other than a casual employee for the purposes of s.86 of the Fair Work Act.

The Claim –
*Skene v
 Workpac Pty
 Ltd [2016]
 FCCA 3035*

- “ [35] On 20 May 2014, Mr Skene initiated these proceedings. A trial was set down for 14 July, 2015. However on 13 July, 2015 the respondent sought leave to file an amended response and a defence that introduced a restitutionary cross-claim against Mr Skene. The respondent sought that its cross-claim be heard and determined after the initiating application had been heard and determined. I gave the respondent leave to file its amended defence but I refused leave to add the cross-claims for reasons that I delivered at the time.”

The Restitutionary
 Cross Claim –
*Skene v Workpac
 Pty Ltd [2016]
 FCCA 3035*

FW Act - SECT 86

- Division applies to employees **other than casual employees**

SECT 87

Entitlement to annual leave

- Amount of leave
 - (1) For each year of service with his or her employer, an employee is entitled to:
 - (a) 4 weeks of paid annual leave; or
 - (b) 5 weeks of paid annual leave, if:
...

Was Skene entitled to annual leave in accordance with the NES *FW Act* provision?

- The Fair Work Act contains no definition of casual employee – therefore you must go to the common law
- A determination of whether an employee is a casual employee depends upon an application of the principles developed in a number of cases for the identification of such employees.
- Whether a person is a casual employee or some other type of employee is a question of fact to be determined having regard to the circumstances pertaining to the particular employee the subject of the Court's consideration.

“other than casual”

Skene v WorkPac Considered the following

- *Williams v MacMahon Mining Services Pty Ltd* [2010] FCA 1321:

“The question of whether an employee is a casual employee is a question of fact. (Supported by Doyle v Sydney Steel Co Ltd (1936) 56 CLR 545 Starke, Dixon and McTiernan JJ)

- *Reed v Blue Line Cruises Ltd* (1996) 73 IR 420:

“It is the informality, uncertainty and irregularity of the engagement that gives it the characteristic of being casual.”

Characteristics of casual employment:

- *informality or flexibility in the employment following the engagement.*
- *there is no certainty about the period over which employment of this type will be offered.*
- *the employer can elect to offer employment on a particular day or days when offered, the employee can elect to work.*

The FCC followed decades of authority - *Skene v WorkPac* – [71] – [73]

Skene’s employment at Clermont Mine was:

- **regular and predictable – set 12 months in advance in accordance with a stable and organised roster**
- **The hours of work were regular and certain**
- **The employment was continuous**
- **There was an expectation that Mr Skene would be available, on an ongoing basis**

Skene was entitled to annual leave in accordance with the *Fair Work Act 2009* (Cth) (‘FW Act’)

***WorkPac Pty Ltd v Skene* [2018] FCAFC 131 at [180] – [181]**

- The conduct of the parties to the employment relationship and the real substance, practical reality and true nature of that relationship will need to be assessed. This is now the settled approach to the question of whether a person is an employee...
- The same approach is appropriate to adopt in determining the nature of the employment relationship.
- Whether the requisite firm advance commitment to continuing and indefinite work (subject to rights of termination) is absent or present must be objectively assessed including by reference to the surrounding circumstances:
 - Contractual terms
 - FW Act
 - Awards
 - Enterprise agreements

The Full Federal Court Confirm FCC Decision regarding FW Act Annual Leave

It is the approach adopted in:

MacMahon Mining Services Pty Ltd v Williams [2010] FCA 1321 at [38]

Reed v Blue Line Cruisers Limited (1996) 73 IR 420 at 424

Hamzy v Tricon International Restaurants trading as KFC [2001] FCA 1589; (2001) 115 FCR 78 at [38]

Melrose Farm Pty Ltd (t/as Milesaway Tours) v Milward [2008] WASCA 175; (2008) 175 IR 455 at [101]-[105]

Bernardino v Abbott [2004] NSWSC 430 at [18]-[23].

Ledger v Stay Upright Pty Ltd [2016] FCA 659 at [62] and [65]

South Jin at [138]-[152]) discussed above and also

CPSU, Community & Public Sector Union v State of Victoria [2000] FCA 14; (2000) 95 IR 54 at [10]

Cases supporting the Full Federal Court

- In the wake of *Skene*, another WorkPac employee, Robert Rossato makes a claim for annual leave upon his retirement
- Mr Rossato's employment with WorkPac commenced on 17 July 2014 and ended when he retired on or around 9 April 2018
- During his employment Rossato worked on a '7 days on, 7 days off' roster determined by WorkPac's client, Glencore
- His camp accommodation was provided at no cost for the majority of his employment
- WorkPac make an application for a declaration from the Federal Court that challenging

The Facts: *WorkPac v Rossato*

- Is WorkPac entitled to restitution for casual loading?
 - Distinguishing mistake from misprediction or a voluntary payment
 - Was there a clearly identifiable sum or an invisible sum?
- Is WorkPac entitled to 'set off' amounts paid to Mr Rossato as casual loading?
- Full Federal Court – to be determined...

WorkPac's claims in *Rossato*

**Full Federal Court
– to be
determined...**

Watch this
Space...

As previously stated, Skene confirmed decades of jurisprudence regarding the common law characterization of casual employment

- **“Insecure work the 'new norm' as full-time job rate hits record low: report” (7 Jun 2018, ABC News)**
- **For the first time in recorded history, less than half of all working Australians have a permanent full-time job with leave entitlements, new research reveals.**
- **Key points:**
 - **Report find 'insecure work' the new normal**
 - **Part-time work on rise, full-time work in decline**
 - **Younger workers facing most difficulties**
 - **Call for labour law changes**
 - **The Australia Institute's Centre for Future Work has crunched ABS data to find a dramatic rise in "insecure" work in the past five years, with employees missing out on benefits like paid holidays, superannuation and sick leave.**
- <https://www.abc.net.au/news/2018-06-07/full-time-job-rate-hits-new-low-as-casual-work-takes-over-report/9840064>

Casual
Conversion

Building and Construction General On-site Award 2010 - extract

14.8 Casual conversion to full-time or part-time employment

- A casual employee, other than an **irregular casual employee**, who has been engaged by a particular employer for a sequence of periods of employment during a period of six months:
 - has the right to elect to have their contract of employment converted to full-time or part-time employment; only if
 - the employment is to continue beyond the conversion process.
 - (an **irregular casual employee** is one who has been engaged to perform work on an occasional or non-systematic or irregular basis.
 - Every employer of such an employee must give the employee notice in writing of the provisions of clause:
 - within four weeks of the employee having attained such period of six months.
 - The employee retains their right of election if the employer fails to comply with the clause.
- ...

Modern Award Clauses

**FAIR WORK AMENDMENT (RIGHT TO
REQUEST CASUAL CONVERSION) BILL 2019**

Outline

“There is currently nothing preventing an employee from requesting that their employer convert their employment to a different type, and nothing preventing an employer from agreeing to such a request. However, many employees do not currently have access to a protected right providing a formal pathway to request conversion. The amendments in the Bill would provide eligible employees with a clear conversion pathway.”

FAIR WORK AMENDMENT (RIGHT TO REQUEST CASUAL CONVERSION) BILL 2019 E.M.

- **66B Employee may make a request**
- **66C Employer must give a response**
- **66D Refusals of requests**
- **66E Grants of requests**
- **66G Disputes about the operation of this Division**

Fair Work
Amendment
(Right to
Request Casual
Conversion) Bill
2019

QUESTIONS