HFW

HFW WORKPLACE RELATIONS UPDATE

2021 - THE YEAR AHEAD

2020 in numbers

129

129 applications for the Fair Work Commission to deal with a bargaining dispute were made

60%

unfair dismissal applications settled at conciliation

7%

of unfair dismissal applications were finalised by a decision

13

reinstatement orders were made under section 391 of the Fair Work Act 2009 (Cth)

5,507

general protections applications were made

10%

of bullying applications were dismissed at final hearing

20 out of 3304

applications to approve an enterprise agreement were rejected

2021 – The Year Ahead

Jobkeeper winds-down

The JobKeeper Payment scheme was introduced on 30 March 2020 to offer a wage subsidy to businesses significantly affected by the COVID-19 pandemic. The scheme was originally scheduled to finish on 28 September 2020 but was extended to 28 March 2021. Currently, the Federal Government has not announced any plans to extend the scheme beyond March 2021.

3 January 2021

End of JobKeeper 2.0 Extension 1.

4 January 2021

Start of JobKeeper 2.0 Extension 2

Rates fall to $1,000 / fortnight for Tier 1 and $650 / fortnight for Tier 2

28 January 2021

December business monthly declaration due - the usual deadline of the 14th day of each month was extended

31 January 2021

New entities to enrol and submit 'Check decline in turnover' form to ATO

Wage condition for JobKeeper fortnights 21 and 22 to be met - the deadline for these fortnights was extended

'Schedule I- Award Flexibility During the COVID-19' in the Vehicle Repair, Services and Retail Award 2020 ends.

14 February 2021

January business monthly declaration due

14 March 2021

February business monthly declaration due

28 March 2021

End of JobKeeper Payment scheme

29 March 2021

The relevant provisions of Part 6-4C of the Fair Work Act 2009 (Cth) repealed and any jobkeeper enabling directions cease to have effect

'Schedule X - Additional Measures During the COVID-19 Pandemic' of certain modern awards ends

30 June 2021

'Schedule I - Award Flexibility During the COVID-19 Pandemic' of the Clerks - Private Sector Award 2020 ends

'Schedule X - Additional Measures During the COVID-19 Pandemic' of certain modern awards ends

Wage theft developments

We expect wage theft to remain a hot topic in 2021 following its criminalisation in both Queensland and Victoria, and proposed criminalisation at the Federal level following the introduction of the Coalition Government's IR omnibus Bill in December 2020.

Federal law update

At the Federal level, the Government's *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, introduced to Parliament in December 2020, seeks to amend the Fair Work Act 2009 (Cth) by adding criminal offences for 'the dishonest and systematic underpayment of employees' and includes proposed four year prison sentences for certain serious contraventions. The Bill has been referred to the Senate Education and Employment Legislation Committee.

In late 2019, the Senate also referred an inquiry on the underpayment of wages to the Economics References Committee to investigate 'the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers and measures that can be taken to address the issue'. The report was delayed a number of times during 2020. At this stage, the report is expected to be released by 24 June 2021.

If the Bill is passed, wage theft will be criminalised with the objective of creating a national scheme to replace State and Territory wage theft laws.

Victorian law update

In June 2020, Victoria became the first jurisdiction in Australia to criminalise wage theft with the passing of the *Wage Theft Act 2020* (Vic). The new Act will commence operation on 1 July 2021. The legislation creates three "employee entitlement offences":

1. dishonestly withholding employee entitlements, or expressly or impliedly authorising or permitting the withholding of employee entitlements;
2. falsification of an employee entitlement record with a view to dishonestly obtaining a financial advantage, or preventing the exposure of a financial advantage obtained; and
3. failing to keep an employee entitlement record with a view to dishonestly obtaining a financial advantage, or preventing the exposure of a financial advantage obtained.

Each employee entitlement offence attracts a maximum penalty of up to $991,320 for a company, or up to 10 years' imprisonment for an individual.

Each employee entitlement offence requires there to have been dishonesty, defined in the legislation to mean 'dishonest according to the standards of a reasonable person'. This is intended to capture both intentionally dishonest conduct, as well as reckless conduct.

Officers of a company may be individually liable for an employee entitlement offence, unless they can show that they exercised due diligence to prevent the commission of the offence by the company.

Regarding the failure to keep or the falsification of employee entitlement records, a company will have committed these offences where a corporate culture existed within the company that directed, encouraged, tolerated or led to the relevant conduct being carried out.

Companies and officers will generally be able to defend proceedings where they can show they have exercised due diligence to prevent the offence.

The legislation also established the Wage Inspectorate Victoria as a statutory authority with investigative powers to enter, search and seize

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items regarding possible employee entitlement offences. The Wage Inspectorate Victoria may refer matters to the Victorian Office of Public Prosecutions, and may accept enforceable undertakings from those who are alleged to have committed employee entitlement offences.

Queensland law update

On 14 September 2020, the Queensland Criminal Code Act 1899 (Qld) was amended to expand the definition of "stealing" to include, *'a failure to pay an employee, or another person on behalf of the employee, an amount payable to the employee or other person in relation to the performance of work by the employee'.* For the failure to pay an employee to be criminal conduct, it must be intentional. A finding of guilt may result in a sentence of 10 years' imprisonment. The new laws only apply to conduct from 14 September 2020.

Importantly, the new laws expressly capture persons who help, enable, or turn a blind eye to a criminal offence being committed, providing that a person, '*...who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence*', '*...who aids another person in committing the offence,'* or '*...who counsels or procures any other person to commit the offence*', is also guilty of the offence. This squarely exposes officers and employees to potential liability, and imprisonment if found guilty of wage theft.

Where to from here?

Between the recent criminalisation of wage theft in Queensland and Victoria, and ongoing Fair Work Ombudsman, media and union interest on the matter, it is essential that companies take pro-active steps to ensure they are complying with all of their obligations regarding employee entitlements.

Companies should consider reviewing their systems and processes to ensure that they are up to date and are fit for purpose to ensure compliance with employee entitlement obligations and to prevent any employee entitlement offences from occurring.

If the Federal Bill is passed, wage theft will be criminalised at the Commonwealth level with the objective of creating a national scheme to replace State and Territory wage theft laws, including the Victorian and Queensland laws noted above.

Can employers require employees to have the COVID-19 vaccine?

The Australian government has not legislated to mandate COVID-19 vaccination in Australia; rather, vaccination is strongly encouraged. Once available in Australia, the vaccine will be released in phases to priority groups, starting with frontline healthcare, quarantine and border workers, and aged and disability care residents and staff.

In the absence of a legislative obligation on employers generally to ensure employee vaccination, it would be difficult for the majority of Australian employers to defend the adoption of a blanket position requiring employees to be vaccinated without objective evidence that the nature of the particular work in the particular location presents a heightened and unacceptable risk of COVID-19 infection, relative to the risks associated with day to day life. In the absence of a legislative obligation on the employer to ensure employee vaccination, an employer's right to direct an employee to receive the COVID-19 vaccine (as opposed to highly recommending, facilitating and encouraging vaccination) will turn on whether the direction is lawful and reasonable. A lawful and reasonable direction must be (1) lawful, (2) reasonable, and (3) within the scope of the employment.

On this basis, whether any vaccination direction is lawful and reasonable will require consideration on a case-by-case basis with reference to the inherent requirements of the particular job. This will require an assessment of the nature of the employer's business, the nature of the employee's duties, the employee's risk of exposure to COVID-19 at work (relative to their life generally) and whether other reasonable measures could provide adequate protection in the circumstances (eg masks and other PPE, hand washing, social distancing, remote work arrangements where the role permits, workplace sanitation). Work health and safety obligations would require an employer proposing to implement a mandatory COVID-19 vaccination policy to consult with workers before any policy is implemented, and this process would help to identify the issues relevant to the workplace.

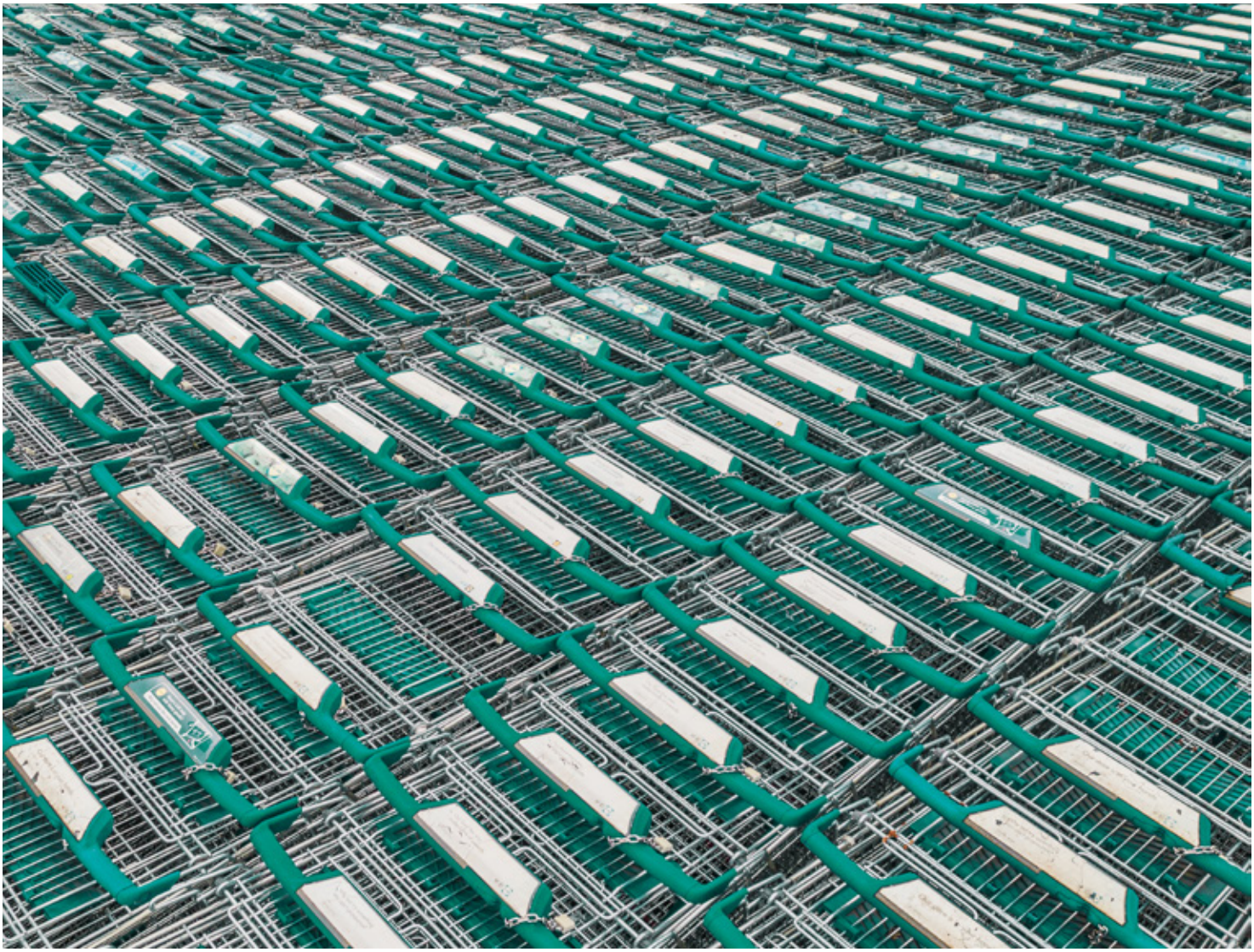
Some employees will have valid reasons to refuse vaccination (eg on health or religious grounds). These would need to be assessed on a case by case basis to mitigate the risk of discrimination, adverse action and/or unfair dismissal claims where the failure to be vaccinated would prevent the employee from performing work. In the case of employees with valid health reasons for refusing the vaccine, the employer would need to assess whether reasonable adjustments that do not impose an unjustifiable hardship on the employer are available to enable the employee to perform the inherent requirements of the job.

Questions remain about the ultimate efficacy of the COVID-19 vaccine that will be available in Australia relative to the workplace. There is currently no evidence that vaccination prevents a person from spreading COVID-19, and the vaccine is not 100% effective. It will be relevant to ask, does the employer already enforce strict social distancing, masks, barriers and other reasonable protective measures? If not, what will vaccination achieve? What obligations will the employer impose on clients and customers regarding proof of vaccination?

At this time, most Australian employers would likely struggle to establish the reasonableness of a direction to an employee to have the COVID-19 vaccine unless the employer can objectively demonstrate a heightened an unacceptable risk to the health and safety of the employee based on the employee's position.

At this time, it would be premature for most employers to make a final decision on the implementation of any mandatory vaccination policy, as the Australian government has announced that initial vaccine numbers will be limited and available only to high risk groups. The vaccine is not expected to be generally available to the majority of the Australian public for some time. The Australian government is currently consulting with unions and employer groups about the particular difficulties associated with COVID-19 vaccinations and the workplace, and we can likely expect further specific government guidance in the months ahead.

"It will be relevant to ask, does the employer already enforce strict social distancing, masks, barriers and other reasonable protective measures?"



Possible loaded rates in the retail, hospitality and registered clubs awards

On 9 December 2020, the Minister for Industrial Relations wrote to the President of the Fair Work Commission (FWC), requesting that the FWC consider changes to key awards in distressed industries as follows:

1. potentially simplified pay arrangements in the form of loaded rates and/or exemption rate; and
2. further streamlining the present classifications structures so that they are clearer, easier to understand and simpler to apply.

The awards that the Minister identified as the key awards in distressed industry sectors are the:

- General Retail Industry Award 2020;
- Hospitality Industry (General) Award 2020;
- Restaurant Industry Award 2020; and
- Registered and Licenced Clubs Award 2010.

As a result of the Minister's request, the FWC has commenced a process to consider the inclusion of loaded rates and exemption rates clauses in the awards identified above. The process will also consider whether any changes can be made to simplify the classification structures in these awards and any other changes proposed by any interested party. The matters are listed for further conference in February 2020.

For more information on the process including the submissions lodged by parties, see https://www.fwc.gov.au/cases-decisions-orders/major-cases/award-flexibility-hospitality-and-retail-sectors.[1]

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All in a ‘days’ work: *Mondelez* confirms the calculation of leave entitlements

Late last year the High Court reversed a controversial decision of the Full Federal Court in which it was determined that an employee’s entitlement to personal leave was based on “working days”, irrespective of the employee’s weekly ordinary hours of work. The Full Federal Court’s finding lead to a number of anomalies and inequities:

1. employees who worked the same number of ordinary hours per week had different leave entitlements depending on how their hours were structured;
2. part-time employees’ leave entitlements bore no relation to the proportion of full-time hours that they worked, and in some circumstances, were greater than the leave entitlements of full-time employees; and
3. an employee’s accrued leave balance could increase or decrease depending on how their hours of work were structured.

On appeal, the majority of the High Court rejected the “working day” construction and held that a “day” of personal leave was a “notional day” consisting of one-tenth of the equivalent of an employee’s ordinary hours of work in a two-week period (or where the employee didn’t work a standard two-week cycle, 1/26th of the employee’s ordinary hours of work in a year).

The High Court’s decision means that employers may continue the longstanding practice of dealing with personal leave entitlements on an hourly basis (meaning that employers can deduct one hour from an employee’s personal leave balance for each ordinary hour that they are absent from work on account of illness or injury). While the High Court’s decision related to personal leave, the principles equally apply to annual leave, and have already been applied by the Fair Work Commission for that purpose (see *Australian Workers’ Union, The - Queensland Branch v Cleanaway Operations Pty Ltd T/A Cleanaway* [2020] FWC 6907).

A year of change in workplace health and safety

During 2020, we saw developments in safety law that will significantly affect Western Australia, another two States introduce the industrial manslaughter offence, and two States legislate to prevent insuring or indemnifying against safety penalties.

New safety legislation in WA

The Work Health and Safety Act 2020 (WA) (WHS Act) was given assent on 10 November 2020. Once it commences operation, this will leave Victoria as the only jurisdiction that hasn't implemented a version of the Commonwealth Model Act.

The WHS Act is a substantial change to the laws currently in place. It will:

1. replace the central concepts of 'employer' and 'employee' with the broader categories 'Person Conducting a Business or Undertaking (PCBU)' and 'Worker';
2. impose a personal positive duty on officers to exercise 'due diligence' to ensure that the PCBU they work for is complying with its obligations under the Act;
3. require PCBUs to consult, co-operate and co-ordinate with other PCBUs who also have a duty in relation to the same activities;
4. introduce an industrial manslaughter offence (see further below); and
5. prohibit insuring or indemnifying against fines for offences under the Act (see further below).

The WHS Act is not expected to commence operation before July 2021, when the accompanying regulations (with separate regulations for general workplaces, the mining and oil and gas industries) are complete.

Industrial Manslaughter laws

WA and Victoria also joined Queensland, the ACT and the NT in introducing an industrial manslaughter offence.

Under the WA Act, the maximum penalty for an individual is 20 years' imprisonment and a fine of $5 million, while the maximum penalty for a body corporate is a fine of $10 million.

Importantly, officers can be charged for industrial manslaughter if the PCBU they work for has engaged in conduct that has caused a death, and the PCBU's conduct was attributable to the officer's neglect, or engaged in with the officer's consent or connivance.

In Victoria, the offence commenced on 1 July 2020, and the maximum penalties are 25 years' imprisonment for individuals, and a fine of $16.5 million for body corporates.

> “WA and Victoria also joined Queensland, the ACT and the NT in introducing an industrial manslaughter offence.”

2020 saw Australia’s first ever industrial manslaughter conviction. On 11 June 2020, a Brisbane auto wrecking company was convicted of industrial manslaughter in relation to an accident where a worker was struck by a forklift reversed by an unlicensed and inexperienced worker. The District Court of Queensland imposed the highest workplace health and safety fine to date of $3 million.

The two directors of the defendant company were also found liable, with each convicted of reckless conduct and receiving sentences of 10 months imprisonment, suspended for 20 months.

No indemnity or insurance against WHS fines in NSW and WA

NSW and WA have also introduced provisions preventing duty holders from insuring or indemnifying against monetary penalties imposed for offences under the two Acts.

In NSW, from 10 June 2020, it is an offence to provide, take the benefit of or enter into a contract of insurance or other indemnity arrangement (without reasonable excuse) covering liability for fines imposed under the Act. The maximum penalties are

- $250,000 for a body corporate and $50,000 for an individual for providing or taking the benefit of a contract of insurance or indemnity arrangement; and
- $125,000 for a body corporate and $25,000 for an individual for entering into a contract of insurance or indemnity arrangement.

In WA, the maximum penalties for insuring or indemnifying against fines imposed under the WHS Act will be up to $51,000 for an individual, and up to $255,000 for a body corporate.

While these provisions are likely to cause some consternation among employers in relation to existing insurance policies, in both cases, the NSW and WA provisions do not expressly prohibit being insured or indemnified in relation to legal costs incurred in defending a WHS prosecution or during an investigation.

Conclusion

Although the introduction of the WA WHS Act brings the States and Territories slightly closer to full harmonisation, as can be seen with the new industrial manslaughter laws and prohibition on insuring and indemnifying against WHS fines, the law in each State and Territory will still have its own unique features. Accordingly, employers should be cognisant of the subtle differences in each jurisdiction and keep an eye out for more changes that may be forthcoming in the future.

Casual employment remains in the spotlight

On 26 November 2020, the High Court granted special leave to WorkPac Pty Ltd to appeal the decision of the Full Court of the Federal Court in *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

The Full Court held that Mr Rossato was not a casual employee as a firm advance commitment of work existed and therefore Mr Rossato was entitled to the associated benefits of non-casual employment, including paid leave entitlements. The Full Court also held that WorkPac could not offset its failure to provide non-casual employee entitlements against the casual loading that had been paid to Mr Rossato.

In December 2020, the Federal Government's *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* was introduced, in part, to clarify the definition of casual employment, on the back of the *WorkPac* decision. The current Bill defines a casual employee as an employee that has been engaged as such and will remain a casual employee until they 'convert' to full-time or part-time employment.

We will be following the Bill's progress through Federal Parliament and the decision of the High Court, as both will have a significant impact on how casual employment is to be defined in Australia.

> “Wage theft will be criminalised with the objective of creating a national scheme to replace State and Territory wage theft laws. ”

Proposed changes to the Fair Work Act 2009 (Cth)

In December 2020, the Coalition Government introduced the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*, which, if passed, will introduce important changes to Australian workplace law, including:

1. Old enterprise agreements made before 31 December 2009 will automatically terminate on 1 July 2022. For businesses with an old enterprise agreement still in place, modern awards will start to apply to employees covered by the old enterprise agreement from 1 July 2022 unless a new enterprise agreement is made.
2. Casual employment difficulties will be addressed by the introduction of a statutory definition of casual employment aligned with genuine casual work (ie where there is no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person). The issue of potential liability for permanent entitlements will be addressed by the introduction of a statutory casual loading offset mechanism.
3. JobKeeper flexible work provisions concerning duties and location of work will continue to apply for a further two years for some of the industries hardest hit by COVID-19, as covered by 12 identified modern awards (the Business Equipment, Commercial Sales, Fast Food, General Retail, Hospitality, Meat, Nursery, Pharmacy, Restaurant, Clubs, Seafood Processing and Vehicle Repair industry awards). New flexi-part time provisions will allow part-timers covered by these awards who have been guaranteed at least 16 hours' work a week to work up to 38 hours per week, by agreement, without overtime.
4. Wage theft will be criminalised with the objective of creating a national scheme to replace State and Territory wage theft laws. An employer that dishonestly engages in a systematic pattern of underpaying employees will commit a criminal offence. Penalties of imprisonment for 4 years, or $1,110,000, or both, are proposed for individuals, and $5,550,000 for a corporation.
5. Enterprise bargaining processes will be subject to less formality around the current complex agreement-making rules, including the introduction of a more employer-friendly BOOT and a general streamlining of the process. Greenfields agreements for major projects may have a nominal expiry date of eight years. Franchisees may ask employees to agree to vary an existing enterprise agreement to cover them.
6. Numerous additional compliance and enforcement changes will apply, including more money for the FWO to investigate and rectify non-compliance with workplace laws, the creation of a new employer advisory service, an increased small claims cap of $50,000 and powers for the Fair Work Commission to conciliate small claims matters and arbitrate by consent, increased penalties for sham contracting (up to $99,900 from $66,600 for a corporation), and a new civil remedy provision for advertising employment below the rate of the national minimum wage.

Labour and the unions have expressed wholesale opposition to the Bill, which remains before the House of Representatives. The Bill has been referred to the Senate Education and Employment Legislation Committee, and their report is expected to be released by 12 March 2021.

Our services

Workplace Advisory

- Performance, discipline and dismissal
- Sexual harassment, bullying and discrimination
- Foreign workers
- Contracts, awards, enterprise agreements and policies
- Managing ill and injured workers
- Redundancy
- Workplace privacy and surveillance

Workplace Strategy

- Labour engagement models
- Workplace change and restructuring
- Enterprise bargaining
- Union management
- Outsourcing/insourcing

Workplace Disputes

- Restraints and confidential information
- Defending employee claims
- Enterprise bargaining and other collective and industrial disputes
- Executive claims

Workplace Investigations

- Conducting workplace investigations and legal risk reviews
- Investigations training and coaching
- Investigations management and advice

Workplace Risk and Compliance

- Board advisory and reputation management
- Whistleblowers and protected disclosures
- Audits and due diligence
- Supply chain management
- Workplace training programmes

Executive Remuneration and Benefits

- Executive employment contracts
- Incentive and bonus schemes
- Corporations Act and ASX Listing Rules

Crisis Management

- Risk assessment and mitigation
- Preparing documented crisis plans and processes
- Responding to a crisis
- Managing communications and public relations
- Post-crisis assessment and recovery strategies

Workplace Health and Safety

- Understanding statutory duties and obligations
- Developing and implementing appropriate safety policies, procedures and best practice
- Liaising with and responding to requests from safety regulators
- Responding to workplace safety incidents
- Conducting investigations and maintaining legal professional privilege over documents
- Defending workplace safety prosecutions

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