HFW WORKPLACE RELATIONS UPDATE 2025 - THE YEAR AHEAD
MARCH 2025

2024 in numbers

Category	Number of applications lodged in 2022 – 2023	Number of applications lodged in 2023-2024
Unfair dismissal	11,012	14,772 (7,744 of which settled at conciliation and 183 applications were successful, with 17 orders for reinstatement made)
General protections (involving dismissal)	4,964	5,477
Stop bullying orders	681	883
Stop sexual harassment orders/ sexual harassment disputes	22	104
Enterprise agreements	160 bargaining disputes 30 applications for multi-enterprise agreements 1 intractable bargaining declaration application	203 bargaining disputes 34 applications for multi-enterprise agreements 11 intractable bargaining declaration application
Other		10 fixed term contract disputes 24 regulated labour hire arrangement orders

- The Fair Work Commission reported a **27%** increase in total lodgements received from the previous year, which is reflective of the expanded jurisdiction of the tribunal.
- **2,708** complaints made to the Australian Human Rights Commission alleging unlawful discrimination, the most common being alleged discrimination in contravention of the Disability Discrimination Act 1992 (Cth)
- The Fair Work Ombudsman recovered nearly **$473 million** in unpaid wages for **160,000** workers
- The Workplace Gender Equality Agency reported that **45%** of Australian private sector employers set targets to address gender equality in the workplace
- At state tribunals in New South Wales, Victoria and Queensland, employment was the area of public life most complaints were received about including:
  - **40.2%** of all the complaints received by the NSW Anti-Discrimination Tribunal related to the workplace;
  - **53%** of discrimination complaints received by the Victorian Equal Opportunity and Human Rights Commission related to the workplace and 9 out of 10 sexual harassment complaints related to the workplace; and
  - **51%** of discrimination complaints accepted by the Queensland Human Rights Commission arose in the workplace and over 80% of the sexual harassment complaints dealt with related to the workplace.

2025 – The Year Ahead

Foreword from our co-editors

This year's update from the national Workplace Relations Team of HFW Australia provides a collection of insightful, forward-looking thought pieces on topics at the cutting edge of employment, industrial relations, discrimination and safety law.

2024 brought with it a raft of changes introduced by the *Fair Work Legislation Amendment (Closing Loopholes) Act 2023* (Cth) and *Fair Work Legislation Amendment (Closing Loopholes No 2) Act 2024* (Cth) – the most significant changes to Australia's industrial relations system since WorkChoices. We have seen the introduction of a statutory right to disconnect, a new definition of employment, criminalisation of underpayments and many more employee protections inserted into the *Fair Work Act 2009* (Cth). The work of the Fair Work Commission has increased dramatically and the number of claims is on the rise across the board.

Now that those changes have commenced, 2025 promises to be the year in which the reforms are put to the test. This collection of articles deals with key issues raised by the amendments, together with changes to discrimination and safety laws and significant judicial decisions in this space. We hope you find this year's publication thought-provoking.

Of course, with 2025 being a federal election year, a change of Government may see some of these changes scaled back. We will issue a supplementary update in the event of a change in Government.

Please contact any member of the HFW team if you would like to discuss any of the issues discussed in the publication or require any support with workplace relations matters.

All the best

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Have you under-estimated the risk of multi-employer enterprise bargaining?

One of the key changes made to the *Fair Work Act 2009* (**FW Act**) by the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* was the introduction of the multi-employer enterprise bargaining streams. These changes were designed (along with other changes made at the time) to increase the prevalence of enterprise bargaining and get wages moving after an extended period of stagnate wage growth.

There are now two avenues available for unions to access multi-employer enterprise bargaining (i.e. bargaining for an enterprise agreement which will cover two or more employers) – (1) the supported bargaining stream and (2) the single interest employer bargaining stream. Both these streams require the Fair Work Commission (**FWC**) to make an order authorising the start of multi-employer enterprise bargaining.

Supported bargaining stream

A union can apply to the FWC for a supported bargaining authorisation for a multi-employer enterprise agreement and the FWC must grant the authorisation if it is satisfied that it is appropriate for the relevant employers and employees to bargain together having regard to:

- the prevailing pay and conditions within the relevant industry or sector including whether low rates of pay prevail in the industry or sector;
- whether the employers have clearly identifiable common interests including having regard to their geographic location, the nature of their enterprises and the terms and conditions of employment in those enterprises, and being substantially government funded;
- whether the likely number of bargaining representatives would be manageable; and
- any other matters the FWC considers appropriate.

Importantly, under the supported bargaining stream it is not necessary for a union to establish that a majority of employees of each of the relevant employers support bargaining for the multi-employer enterprise agreement. Historically, employers could not be compelled to bargain for an enterprise agreement unless there was such majority support of employees for bargaining.

At the time the changes were introduced to Parliament there were serious concerns raised by employer groups about the potential breadth of the supported bargaining stream and the circumstances in which a union could seek to engage the supported bargaining stream. Employers at the time were comforted by various statements made by the Government including:

- the supporting bargaining stream is intended to assist those employees and employers who may have difficulty bargaining at the single enterprise level e.g. those in low paid industries such as aged care, disability care and early childhood education and care who lack the necessary skills, resources and power to bargain effectively. The supported bargaining stream will also assist employees and employers who may face barriers to bargaining, such as employees with a disability and first nations employees (taken from the Explanatory Memorandum (**EM**) to the F*air Work Legislation Amendment (Secure Jobs, Better Pay) Bill).*
- the Bill intends to assist workers who require support to bargain. This might include those in low paid occupations, government funded industries, and female dominated sectors, as well as employees with a disability, employees who are culturally and linguistically diverse and first nations employees who may be employed in such sectors and face additional hurdles (taken from the EM).
- the Bill will remove barriers to access to the existing low paid bargaining stream with the intention of closing the gender pay gap and improving wages and conditions in sectors such as community services, cleaning and early childhood education and care, which have not been able to successfully bargain at the enterprise level (taken from the Second Reading Speech for the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill).*

Until the application in relation to McDonald's (see below), the union movement has only invoked the supported bargaining stream in cases where the relevant employers were reliant on government funding – early childhood education and care, community and social welfare services, and disability service providers. And, in all these cases the relevant employers consented to the granting of the authorisation by the FWC.

In the McDonald's case[1], the SDA seeks to invoke the supported bargaining stream in the case of several McDonald's franchise stores in South Australia. The union claims that the predominantly young, casualised workforce, who are reliant on award wages (and, in particular, junior rates) fit the criteria for the supported bargaining stream. Not surprisingly, the employers have opposed the application. The case was heard in February before a Full Bench of the FWC and represents a test case on the breadth of the supported bargaining stream.

The union has picked its target (McDonald's franchisees) carefully given it has ample evidence to support the claim that the relevant employers (McDonald's franchisees) have clearly identifiable common interests given the standardisation of their operations under a

franchise arrangement. Although, the employers are running a case that there are no such common interests given the differences in their operations. In addition, the employers are claiming that the supported bargaining stream should not be available to the union because there are no barriers to enterprise bargaining as evidenced by the relevant employers being previously covered by enterprise agreements.

Implications for employers - supported bargaining stream

Employers conducting businesses in sectors outside the anticipated target area of the supported bargaining stream - aged care, disability care and early childhood education and care – should look out for the outcome of the McDonald's case and consider the implications for their IR strategy carefully.

These employers may need to reassess the risk of being caught up in a supported bargaining authorisation where it is not necessary for a union to establish that a majority of their employees support bargaining for the multi-employer enterprise agreement.

If an employer is not actively bargaining for an enterprise agreement, is affording its employees award terms and conditions, is in a sector where the union is active and where their business is objectively similar to that of other employers in the sector, they may be vulnerable to being caught up in a supported bargaining authorisation.

Single interest employer bargaining stream

A union can apply to the FWC for a single interest employer authorisation for a multi-employer enterprise agreement and the FWC must grant the authorisation if it is satisfied (amongst other things) that:

- a majority of employees of each of the relevant employers support bargaining for the multi-employer enterprise agreement;
- the relevant employers and their employees are not covered by an existing enterprise agreement that is within its nominal term or the relevant employers and the union have not agreed in writing to bargain for a single enterprise agreement;
- the relevant employers have clearly identifiable common interests with relevant considerations including geographical location, the applicable regulatory regime and the nature of the enterprises and the terms and conditions of employment in those enterprises;
- the operations and business activities of each of the relevant employers are reasonably comparable;
- the relevant employers have at least 20 employees; and
- it would not be contrary to the public interest to grant the authorisation.

Unions have invoked the single interest bargaining stream in a range of sectors with the consent of the relevant employers. These employers have included Catholic Schools, TAFE, various government agencies and employees in the HVAC (heating, ventilation and air conditioning) sector.

To date, there has been one contested application made by a union[2] in relation to four mining companies in New South Wales for a multi-employer enterprise agreement that would cover underground coal mine supervisors, shift engineers and control room operators.

The FWC granted the authorisation as against three out of the four employers and carefully considered the tests to be applied in determining whether the relevant employers have clearly identifiable common interests and the operations and business activities of

each of the employers are reasonably comparable after considering a lot of evidence put on by the relevant employers about the nature of their operations, activities, commercial interests and employment and industrial arrangements.

The employer which escaped inclusion in the authorisation was able to satisfy the FWC that their operations and business activities were not comparable to the other employers and that there were not identifiable common interests. The matters of significance included that unlike the other relevant employers, the employer operated as a sole supplier to a single power station customer and was not competing in export markets to sell their coal and did not generate a profit or commercial gain from their operations.

Again, the union movement picked its target to explore the breadth of the single interest employer bargaining stream carefully – a unionised workforce, operating in the same geographic location (New South Wales), largely operating same business (a coal mine). The decision is on appeal to the Federal Court.

Implications for employers – single interest employer bargaining stream

Employers should consider the implications of this case for their IR strategy and look out for the results of the appeal. Employers may need to reassess the risk of being caught up in a single interest employer authorisation.

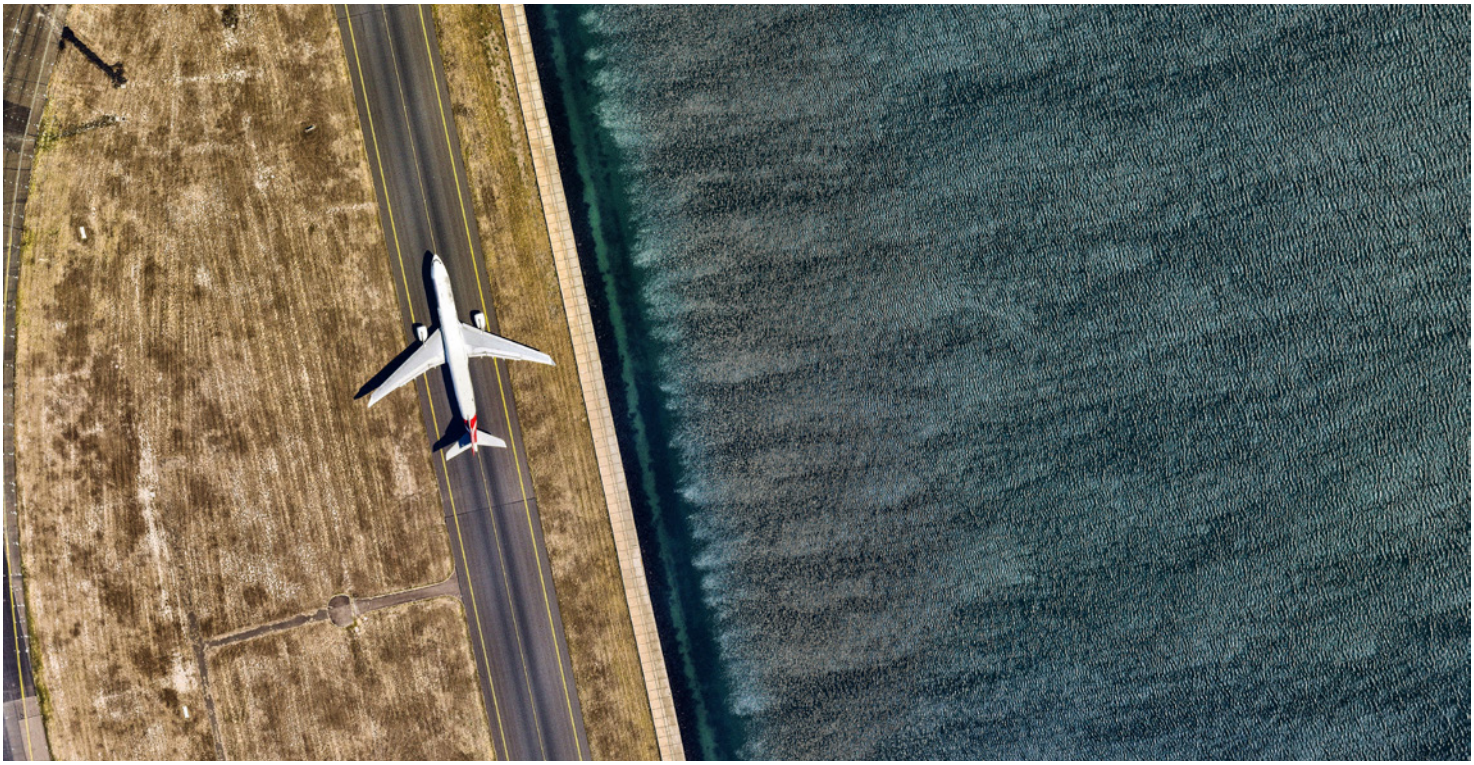
If an employer does not have in place an existing enterprise agreement within nominal term, is not actively bargaining for an enterprise agreement, is in a sector where the union is active and where their business is similar to that of other employers in the sector, they may be vulnerable to being caught up in a single interest employer authorisation.

These employers have at least the added protection of the union needing to establish that a majority of their employees support bargaining for the multi-employer enterprise agreement which is not the case under the supported bargaining stream. Employers will have an opportunity to work with their employees directly to put a case as to why a multi-employer enterprise agreement may not be in their best interests and why they should not support the obtaining of a single interest employer authorisation.

Furthermore, if the Government is returned after the upcoming Federal election (due before May 2025), further amendments to the FW Act may be on the cards to broaden the reach of single interest employer bargaining stream. A number of unions have proposed that the requirement for a majority of employees of each of the relevant employers to support bargaining for a multi-employer enterprise agreement be removed, giving unions easier access to this stream of enterprise bargaining. Keep an eye out for that!

Footnotes

1 B2024/992 - Application by the SDA for a supported bargaining authorisation.
2 Association of Professional Engineers, Scientists and Managers, Australia v. Great Southern Energy Pty Ltd and Ors [2024] FWCFB 253.



Redundancy risks – two cautionary tales for employers

Employers seeking to restructure their businesses, particularly in an increasingly complex financial and operational landscape, should take care not to overlook their employment obligations. In this article, we discuss two recent court decisions that demonstrate some of the consequences of getting it wrong.

Qantas Airways Limited v Transport Workers Union of Australia[1] – is your restructure for a prohibited reason?

In this case, the High Court of Australia held that Qantas took unlawful adverse action against its former ground handling employees when it outsourced their jobs to contracted third-party suppliers.

At the time the outsourcing decision was made, many of the affected employees were members of the Transport Workers' Union of Australia and covered by an enterprise agreement which was soon due to be renegotiated. Because the enterprise agreement had not yet reached its nominal expiry date, the employees were not yet entitled to engage in protected industrial action.

The general protections provisions in the *Fair Work Act 2009* (Cth) (**FW Act**) provide, amongst other things, that employers must not take adverse action against employees to prevent the exercise of their workplace rights. A key issue to be determined before the High Court was whether the general protections provisions only operated where a workplace right was presently in existence at the time adverse action was taken, i.e. whether the Qantas employees were protected from adverse action in circumstances where they did not yet have the right to engage in protected industrial action.

The High Court unanimously held that it would be unlawful for an employer to take adverse action to prevent employees from exercising a workplace right they would have in the future – even if that workplace right did not presently exist.

This a significant decision for employers seeking to take advantage of a "window of opportunity" to potentially terminate – for example, employees in probation who are just shy of reaching the minimum employment period and becoming eligible to make unfair dismissal claims, or employees who are about to reach a long service leave milestone – because they will need to demonstrate that the termination was not taken for the substantive and operative reason of depriving employees of the opportunity to exercise future workplace rights.

Helensburgh Coal Pty Ltd v Bartley[2] – reconceptualising reasonable redeployment?

Employers have a jurisdictional objection to an unfair dismissal claim in cases where they can establish that the dismissal was a case of a 'genuine redundancy'. A dismissal will be a genuine redundancy where:

- the employer no longer requires the job to be performed by anyone because of changes in the operational requirements of the employer's enterprise; and
- the employer has complied with any applicable consultation obligations in a relevant modern award or enterprise agreement.

"...the High Court of Australia held that Qantas took unlawful adverse action against its former ground handling employees when it outsourced their jobs to contracted third-party suppliers."

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

In *Helensburgh Coal,* the Full Federal Court confirmed that the dismissals of 22 employees working at the Helensburgh Mine were not cases of genuine redundancy because it would have been reasonable to redeploy the employees into positions which were at the time filled by employees of contractors engaged to perform other particular tasks at the mine.

This decision is significant as it confirms that when considering redeployment, employers should be undertaking a far-reaching analysis of measures that they could take to redeploy an otherwise redundant employee – and that the immediate unavailability of a position to which a redundant employee could have been redeployed will not necessarily render them immune from unfair dismissal claims.

Whilst the Full Court's decision in *Helensburgh Coal* serves as a caution to employers to undertake careful analysis of alternatives that would allow the employment to remain on foot, it is also currently subject to a High Court challenge by the employer. In the appeal, the High Court has been asked to determine whether the Full Court wrongly interpreted the redeployment obligation under the FW Act as authorising the tribunal to determine whether an employer should have made alternative changes to its enterprise (including by terminating other operational or staffing arrangements) so as to make positions available to otherwise redundant employees.

Key takeaways

These two cases highlight the necessity of:

- **having a strong business case for restructuring:** noting that even where there is a commercial reason for restructuring, discharging the 'reverse onus' in general protections claims presents significant evidentiary challenges. Employers looking to restructure should ensure there is a justifiable business case and that any decision-makers are prepared to give evidence to that effect;
- **taking redeployment obligations seriously:** the obligation to consider redeployment is wide – it extends beyond providing a list of vacant opportunities or inviting employees to apply for a role. Employers should actively consider things it could do apart from dismissing employees, including:
  - roles which are not currently available but are about to become available, e.g. where other employees are soon to retire or where a contract with a third party for the performance of work is about to expire;
  - providing training to enable employees to fill an available role that they may be unqualified for without such training; and
  - whether any barriers that would make redeployment difficult would render redeployment to not be reasonable in all the circumstances.

Employers should stay alert for developments in this area of law over the coming months – particularly in relation to the High Court appeal of *Helensburgh Coal*.

Footnotes

1 [2023] HCA 27.
2 [2024] FCAFC 45.

Wage theft has been criminalised: Is your business at risk?

As of 1 January 2025, it is a federal criminal offence for employers to intentionally underpay their employees.

What are the changes?

In short, employers who *intentionally* fail to pay an employee a 'required amount' under the *Fair Work Act 2009* (Cth) (**FW Act**), a modern award or enterprise agreement could be subject to up to 10 years' imprisonment, and/or a fine of up to the greater of:

- three times the amount of the underpayment; or
- $1.565 million for individuals or $7.825 million for corporations.

Underpayments that are accidental, inadvertent or based on a genuine mistake are not intended to be caught by the new offence.

How will intention be proved?

To be found guilty of the new criminal offence, an employer must have *intentionally* engaged in conduct, with that intentional conduct resulting in a failure to pay a 'required amount' to an employee in full on or before the day the 'required amount' is due for payment.

To establish the intention of a company, it will need to be proved that the company expressly, tacitly or impliedly authorised or permitted the commission of the offence. Pursuant to section 12.13 of the *Criminal Code* (Cth), this can be done by proving that:

1. the body corporate's board of directors intentionally carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
2. a high managerial agent of the body corporate intentionally engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
3. a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non–compliance with employer pay obligations in the FW Act and industrial instruments; or
4. the body corporate failed to create and maintain a corporate culture that required compliance with employer pay obligations in the FW Act and industrial instruments.

Very few companies are likely to fall within 1) or 2) above (ie, in very few companies would the board of directors or senior management knowingly or recklessly permit or engage in the underpayment of employees).

However, under 3) and 4) above, the concept of *intention* goes beyond conduct that is authorised or permitted. In addition, *a* company can be found to have *intentionally* underpaid its employees where there was a 'corporate culture' that tolerated non-compliance, or where the company failed to create and maintain a 'corporate culture' that required compliance.

What can employers do to create and maintain a corporate culture of compliance?

Employers should be carefully considering:

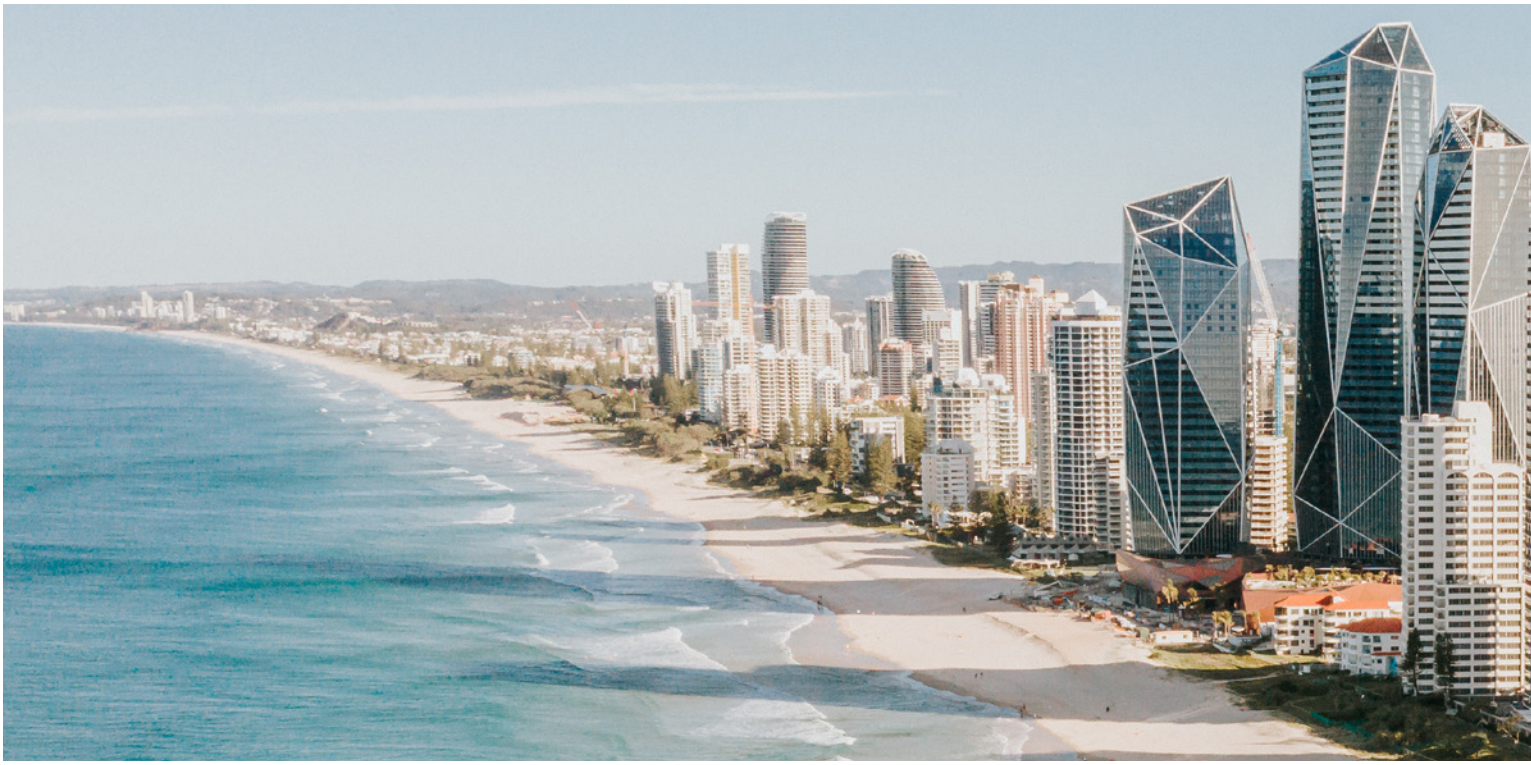
- what steps they can take to ensure that their 'corporate culture' does not tolerate non-compliance with employer pay obligations; and
- how they can create and maintain a 'corporate culture' that requires compliance with employer pay obligations.

Current systems and process may not be enough to establish the employer has a corporate culture of compliance with employer pay obligations. In our view, to create and maintain a corporate culture of compliance, employers should consider undertaking the following steps:

1. introduce a wage integrity policy, which sets out the employer's zero tolerance attitude to underpayments, as well as how an employee can raise a concern that they have not been paid properly;
2. implement a wage compliance framework, which outlines the employer's plan to, as far as possible, ensure compliance with employer pay obligations including key steps such as undertaking risk assessments, regular auditing, and future proofing the system; and
3. ensure relevant staff and managers are appropriately trained in relation to compliance with employer pay obligations.

Key takeaways

Given the broad circumstances in which an employer can be said to have intentionally underpaid their employees, it is essential that employers take appropriate steps to ensure that their 'corporate culture' is one which does not tolerate non-compliance with employer pay obligations. Employers who do not take proactive measures risk prosecution under the new federal criminal wage theft offence.



Around the grounds – discrimination reforms in focus

The laws relating to discrimination in connection with work have been the subject of a range of developments in recent years, particularly with respect to sexual harassment and sex discrimination. At a Federal level, those developments have included reforms in response to recommendations made in 2020 arising from the *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (**Respect@Work Report**), such as the introduction of the positive duty. Not surprisingly, the winds of change in this space continue to blow and are bringing with them further reforms. We address some of these reforms below.

Costs protections at a Federal level

The Respect@Work Report included a recommendation to insert a cost provision into the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**), aimed at limiting the awarding of costs against a party to circumstances where they instituted proceedings vexatiously or without reasonable cause, or otherwise caused the other party to incur costs through their unreasonable acts or omissions.

As a consequence of the *Australian Human Rights Commission Amendment (Costs Protection) Act 2024* (Cth), the AHRC Act has now been amended to include a costs provision, however, it differs markedly from the Respect@Work Report recommendation. Importantly, the new provision requires the Court to order a respondent to pay an applicant's costs in Federal discrimination proceedings (where they were commenced after 2 October 2024) if the applicant succeeds on one or more grounds against the respondent (the only exception being where the applicant's unreasonable act or omission caused the applicant to incur costs in which case the costs incurred due to that act or omission will be excluded from the order). In contrast, if the respondent is successful in defending all of the grounds of the applicant's claim, it won't be able to recover its costs except if the Court determines that:

- the applicant instituted the proceedings "vexatiously or without reasonable cause";
- the applicant engaged in an unreasonable act or omission which caused the respondent to incur costs; or
- the respondent did not have a significant power advantage over, and significant financial or other resources relative to, the applicant.

The stated purpose of this reform is to make Federal discrimination proceedings more accessible to applicants by minimising their risks of facing an adverse costs order. However, it may also have the effect of encouraging respondents, like employers, to settle, rather than defend claims, simply to avoid potential exposure to a costs order. It may also affect the approach taken by respondents in the defence of any proceedings, particularly if respondents resolve to avoid steps that might increase the applicant's costs (such as making interlocutory applications) or which might expose them to further unrecoverable costs (including making any admissions).

Amendments to anti-discrimination laws in Queensland

Not to be outdone, Queensland also recently introduced some discrimination reforms, including for greater consistency with those made at a Federal level in response to the Respect@Work Report. The *Respect at Work and Other Matters Amendment Act 2024* (Qld) was passed in September 2024 and, among other things, amends the *Anti-Discrimination Act 1991* (Qld) by introducing prohibitions on, for example, harassment on the basis of sex and subjecting persons to a workplace environment that is hostile on the ground of sex, as well as introducing a positive duty on employers to eliminate discrimination, sexual harassment, harassment on the basis of sex, and other objectionable conduct. The positive duty is of particular note, because it is broader than the Federal positive duty, and extends to all forms of discrimination. While these reforms were due to commence on 1 July 2025, the new Queensland LNP government has announced that they will introduce an amendment to delay the commencement of these reforms. The purpose of the delay is to allow for further consultation on the legislation and to address potential unintended consequences of the reforms.

Associated WHS changes

Not surprisingly, and in recognition of the fact that sexual harassment can be a work health and safety risk as well as a discrimination risk, New South Wales, Tasmania, South Australia and the Northern Territory introduced in 2024 a Code of Practice relating to sexual and gender-based harassment (modelled on that which SafeWork Australia published in December 2023). Those codes set out a risk management approach towards ensuring health and safety by eliminating or minimising the risk of sexual and gender-based harassment so far as reasonably practicable. They also contain useful insights on the role of leaders in achieving a safe and respectful workplace that proactively manages these risks.

In addition, since September 2024, the Work Health and Safety regulations in Queensland have expressly recognised sexual and sex or gender-based harassment at work as a risk which businesses must proactively address and so, from 1 March 2025, there is a requirement that businesses in Queensland have in place a prevention plan to manage any identified risks arising from sexual harassment and sex or gender-based harassment at work. The plan must outline and assess the identified risks (to workers and others) and must include control measures to mitigate those risks. The plan must be reviewed if a report of sexual or sex or gender-based harassment is made, if requested by a health and safety representative, or otherwise every three years.

Potential for NDAs in Victoria

Moves are also afoot in Victoria to potentially restrict by legislation the use of non-disclosure agreements or NDAs in workplace sexual harassment cases. The proposal is in response to a Victorian Ministerial Taskforce on Workplace Sexual Harassment which found that NDAs are often misused to silence victims, protect employer reputations and hide serial offenders.

Public consultation on the proposal resulted in a number of submissions being received. The Victorian Government is now considering those submissions before determining next steps. Employers in Victoria should watch these developments with interest.

Privacy in the spotlight

It has been an interesting 12 months in the world of privacy law, with some interesting decisions and a tranche of legislative reforms. There is no doubt that workplace privacy in particular is a growing concern in this digital age, and so it stands to reason that we can expect to see a continued focus in this space. Given this, it is important that all employers to whom the *Privacy Act 1988* (Cth) (**Privacy Act**) applies keep abreast of developments, and review and update their systems, practices and policies for privacy compliance.

Interesting decisions

Over the last 12 months, determinations of the Australian Information Commissioner (**Commissioner**) have shed some useful light on considerations for privacy compliance.

For example, in 'ATE' and 'ATF' (Privacy)[1], the Commissioner gave us some insights about the circumstances in which an employer may not be held vicariously liable for privacy interferences by its employees. In that case, an executive at a telecommunications company disclosed to a journalist personal information about an incarcerated customer (including the customer's full name and details relating to correspondence from the customer seeking reinstatement of a mobile number). The journalist subsequently published an article using that information.

The employer argued that it was not vicariously liable for the executive's conduct because the executive's actions in disclosing information to the journalist were not done in the performance of his employment duties – essentially, the employer suggested he had gone rogue.

The Commissioner found in favour of the employer. In reaching this position, the Commissioner:

- considered the ordinary duties of the executive and was satisfied that they did not involve him engaging with the media;
- formed the view that the executive had no authority to contact the media, and his conduct in doing so contravened policy of which the executive was aware, or ought to have been aware;
- concluded that the executive's actions in contacting the media had no discernible commercial purpose;
- was conscious that the executive concealed his conduct from his employer for months, so appreciated his actions were wrong; and
- was mindful that the employer would have terminated the executive for gross misconduct, had he not resigned, which suggested that the executive's actions were not in the performance of his duties.

Another Commissioner determination, *'ALI' and 'ALJ'* (Privacy)[2], has provided a timely reminder about the limits of the employee record exemption. In that case, an employer was found to have contravened the Privacy Act when it sent an email to all staff working in head office providing an update on the health of an employee. The employee in question had had a medical episode in the car park at the office earlier that day, which was witnessed by about 7 employees, some of whom administered CPR to the employee. After the incident, the employee's husband sent a text to her manager with an update. The manager conveyed the content of the husband's message to the Managing Director who in turn sent the email to about 110 staff. Among other things, the email referenced the employee by name, mentioned that she had experienced a medical episode in the car park, and conveyed the substance of the husband's update.

The employer argued that the email fell within the employee record exemption contained in the Privacy Act, such that it could not have

constituted an interference with the employee's privacy. The employee record exemption applies to an act done, or practice engaged in by a current or former employer, if the act or practice is directly related to a current or former employment relationship between the employer and the individual, and an employee record held by the employer and relating to the individual.

The Commissioner found, however, that the employee record exemption did not apply because the employer's act of sending the email did not relate *directly* to its employment relationship with the employee. Rather, the Commissioner considered that the email related directly to the employment relationship between the employer and the recipients of that email, because the employer sent the email to allay concerns of the recipients who were aware of the medical episode and to address its work health and safety duties to them.

Having found that the employee record exemption did not apply, the Commissioner resolved that the sending of the email constituted a contravention of the Australian Privacy Principles (**APPs**), including because:

- the personal information that the employer gathered from the husband's text was collected for inclusion in a record, including because a staff member requested that the husband provide the update and the purpose of requesting the information was to ensure the employee's welfare and for work health and safety purposes (including incident reporting) (**Primary Purpose**);
- when the employer disseminated that personal information in the email to staff, it did so for a secondary purpose (and not for the Primary Purpose), namely to address its duties to the recipient employees, and it did so without the employee's consent; and
- the employee did not reasonably expect, and a reasonable person would not reasonably expect, that the employer would use the employee's personal information in the manner in which it did, including identifying her by name.

It is apparent from the determination that the Commissioner was conscious that the employer appeared to have sent the email in good faith, was genuinely concerned about the employee's welfare and was seeking to navigate its competing duties to the employee and the remainder of its staff. While there was an appreciation that it may have been unreasonable for the employer not to have provided some kind of update, the Commissioner noted that the employer could have conveyed only relevant information to a limited number of staff, either with the employee's consent or otherwise in a de-identified manner.

Legislative reform

In an effort to keep pace with the evolving digital landscape, the *Privacy Act and Other Legislation Amendment Bill 2024* (Cth) (**Bill**) was passed on 29 November 2024. It implements the first tranche of reforms to (among other laws) the Privacy Act as outlined by the Commonwealth Government in response to the Privacy Act Review Report published by the Attorney General's Department in 2023.

Notably, among other things:

- It introduces, from 10 June 2025 (or such earlier date as is proclaimed), a statutory tort for serious invasions of privacy, and in so doing gives individuals a way to seek redress in Court against individuals or organisations (including entities to whom the Privacy Act does not apply) for certain privacy breaches. A range of remedies can be ordered, including damages. While there are some exceptions and defences, the following elements need to be proven to establish this tort:
  - there has been an invasion of the individual's privacy (either a misuse of information or intrusion in the individual's seclusion);
  - the individual had a reasonable expectation of privacy in the circumstances;
  - there was fault on the part of the defendant (being either an intentional or reckless invasion of privacy, and not just negligence);
  - the invasion of privacy was serious (and loss and damage, while not an element that must be proven, may be relevant to showing the seriousness); and
  - the public interest in protecting the individual's privacy outweighs any countervailing public interest (such as freedom of expression (including artistic expression) or freedom of the media);
- It requires that privacy policies be updated from 10 December 2026 to include specific information where an organisation uses a computer program to make a decision that could reasonably be expected to significantly affect the rights or interests of an individual where personal information of that individual is used by the computer program when making the decision;
- It creates a criminal offence of doxxing – which involves releasing personal data using a carriage service in a manner that would be regarded as menacing or harassing;
- It clarifies that, when taking reasonable steps to secure information, organisations must also take technical and organisational measures to protect that information from misuse, interference, loss and unauthorised access, modification or disclosure;
- It requires the Commissioner to develop a Children's Online Privacy Code (in respect of on-line services to be accessed by individuals who are under 18, including social media platforms) by 10 December 2026, a draft of which will be made available for public consultation before being finalised;
- It seeks to better facilitate cross-border data transfers, by allowing for the making of regulations prescribing countries with laws

or binding schemes that protect personal information in a similar way to the APPs, such that organisations bound by the Act will be able to disclose personal information to recipients in those countries without needing to firstly ensure that they will manage that information in a manner consistent with the APPs;

- It introduces broader investigation and enforcement powers for the Commissioner, including the ability to issue compliance notices compelling organisations to address privacy breaches before any enforcement action is taken; and
- It introduces a multi-tier civil penalty system for privacy breaches, including a civil penalty for a "serious interference with privacy", for an "interference with privacy" and for more administrative-type breaches (such as having no or a deficient privacy policy). There is potential for hefty penalties in the millions for the first two of these.

Next steps?

Employers should act now to ensure that its privacy policies and practices align with these legislative reforms, and to make changes where they don't. They should also consider whether there are measures they can take to improve or change practices to avoid the pitfalls outlined the Commissioner's determinations referred to above, such as clarifying employee duties and responsibilities relating to the use of personal information, and providing training in the same, plus introducing checks and balances into practices and systems to minimise any inadvertent privacy breaches.

Finally, we note that a second tranche of reforms to the Privacy Act is expected, and these are likely to have more implications for employers, including because they are anticipated to enhance protections for employee information and include further protections relating to data protection. So, it is vital that employers keep privacy reforms on their radar, so as to be able to remain compliant.

Footnotes:

1 [2025] AICmr 10.
2 [2024] AICmr 131.

Disconnecting in a connected world: The effectiveness of the Australian Right to Disconnect

In August 2024, the introduction of the right to disconnect saw Australia join a growing number of countries providing employees with a statutory right to disconnect from work. This means that employees are now legally entitled to refuse to monitor, read or respond to contact and / or attempted contact by their employer or by a third party (e.g. a client) outside their contracted working hours, provided their refusal is reasonable. But how effective is such a workplace right in addressing the negative effects of employees being hyperconnected to work?

In this article we look at Australia's Right to Disconnect within the broader global context and suggest that, although the Australian Right to Disconnect is in its early days, the global context indicates that the Right to Disconnect alone may not effectively provide employees with a mechanism to switch-off from work. Rather, employers should also have practical measures in place which enable employees to meaningfully disconnect from work. And, as the experience of other countries teaches us, employers will more effectively address the negative effects of hyperconnectivity, including minimising the risk of disputes over the Right to Disconnect and work hours, if they do have such practical measures in place.

The reasons behind a right to disconnect

When Australia introduced its Right to Disconnect, it joined over 20 countries across the world such as France, Belgium, Spain, Ireland, Argentina, Chile and Mexico which had already introduced measures to support a right to disconnect for employees. The increasing global momentum for an employee right to disconnect indicates a broader issue of tension in modern-day workplaces around the world: how to balance workplace flexibility against work-life balance.

In a post-pandemic world, employers and employees alike have embraced the advantages of being able to work more flexibly, whether that be by working remotely or at non-typical hours of the day. However, the move to flexible working and the technological changes it has involved have also left some employees feeling as if they are connected to work 24/7, with negative effects on their wellbeing. Studies show such negative effects include employees reporting higher levels of health issues, poorer wellbeing and lesser productivity. A recent study found that less than 2 in 5 women feel able to disconnect from work and this directly impacts upon their mental and physical wellbeing, with women who regularly work overtime *'reporting significantly lower levels of loyalty to their employer, motivation at work and productivity'*[1]

An ensuing reaction has therefore been a global trend of countries around the world providing employees with a workplace right to disconnect. However, the global experience draws into doubt the effectiveness of having such a right and suggests that practical measures on behalf of the employer are also needed.

"In a post-pandemic world, employers and employees alike have embraced the advantages of being able to work more flexibly, whether that be by working remotely or at non-typical hours of the day."

Is a right to disconnect effective?

The experience of other countries which have a right to disconnect indicates that the right alone may not be effective in achieving its purpose. For example, a study of employees from 9 EU countries which had all introduced legislative measures to support a right to disconnect for employees, indicated that the right was more effective at allowing employees to disconnect from work (and addressing the negative effects associated with hyperconnectivity) where an employer also had practical measures in place to set a culture of disconnection. Some of the measures reported included:

- introducing a workplace policy on the right to disconnect;
- actively raising awareness about the right and expectations around employees' work hours through employee training; and
- tailoring e-mail signatures to clarify when employees are not required to respond.

Other practical measures employers can implement include:

- updating contracts of employment;
- streamlining means of communicating with employees, including reducing the number of means used; and
- encouraging employees to utilise out-of-office notifications when they are on leave.

What does this mean for Australia's Right to Disconnect?

Australia's Right to Disconnect is in its early days. It has only been in force for around 6 months and the Fair Work Commission has also so far refrained from issuing guidelines on how the legislation creating the Right should be interpreted and applied by employers. We therefore anticipate that 2025 will be an illuminating year for the effectiveness of Australia's Right to Disconnect; whether it practically affords employees with the ability to disconnect from work and addresses the negative effects of hyperconnectivity or, whether it becomes the subject of disputes between employers and employees (and unions). We suspect the latter, and the global experience tells us something similar.

It is, however, clear that there are a range of compelling reasons as to why setting a culture which encourages employees to disconnect from the workplace is beneficial and that practical measures implemented by employers are crucial in setting this culture.

Footnotes:

1 Deloitte's 2024 Women at Work: Global Outlook Report p. 13.

Will WFH become a right for all employees or is it just hype?

Before the COVID-19 pandemic, working from home (**WFH**) arrangements were considered a perk, primarily available to a select few in managerial or professional roles.

However, the COVID-19 pandemic forced a rapid transition to remote work for millions of Australians in many industries, highlighting its feasibility, benefits and disadvantages.

In 2025, three years on from the relaxation of COVID-19 restrictions, WFH arrangements are still prolific, with 36% of employees (mainly in the managerial, professional and administrative fields) usually working from home[1]. A majority of these arrangements are implemented by agreement between the employer and an employee.

However, of recent times, some large organisations including Amazon, Coles and the NSW Public Sector have directed their employees to return to work in the office. The National Australia Bank, Qantas and Westpac have publicly announced that they are keen to get "workers back to work and behind their desks".

There have also been calls by academics, unions, peak union bodies and political parties to introduce a general right for employees to WFH, either through legislation or by way of modern award changes.

While legislative change is yet to occur, the Fair Work Commission (**FWC**), is taking steps to remove restrictions in awards on WFH arrangements, starting with the *Clerks Private Sector Award 2020* (**Clerks Award Proceedings**).

What are an employee's current rights to WFH?

FW Act provisions prior to June 2023

Traditionally, the *Fair Work Act 2009* (Cth) (**FW Act**) only extended that right to request a flexible WFH arrangements to a small cohort of employees, that is, employees who had at least 12 months' continuous service and who fell into one of the following categories:

- parents or carers of school-aged children or younger;
- carers (as defined by the *Carer Recognition Act 2010* (Cth));
- individuals with a disability; and
- employees aged 55 or older.

Prior to June 2023, the employer was entitled to refuse the request on 'reasonable business grounds' and was required to set out in writing to the employee the reason for the refusal within 21 days of the request being made. There was no right for an employee to challenge an employer's decision to refuse a flexible work request. The provisions were therefore largely facilitative and tokenistic.

FW Act provisions after June 2023

In June 2023, the FW Act legislative provisions were amended to give the provisions some "teeth" including:

- giving employees additional grounds to make a flexible work arrangement request to WFH (that is, if they were pregnant or they, or a member of their family who they cared for, were experiencing family and domestic violence);
- placing greater procedural requirements on employers when responding to such a request, including requiring the employer to genuinely tried to reach an agreement with the employee about making changes to the employee's working arrangements; and
- giving greater powers to the FWC to deal with a dispute (including arbitration) in the event of a refusal to grant the request on reasonable business grounds, by the employer.

In the recent case of *Ridings v Fedex Express Australia Pty Ltd t/a Fedex*,[2] the FWC observed that in considering whether a refusal to grant a flexible working arrangement was reasonable, the FWC will require the employer to demonstrate a likely detriment to the business if they wish to refuse a flexible working arrangement that an employee has requested. The FWC observed that "*generic and blanket HR answers are not sufficient alone to establish a reasonable business ground for refusing a request*".

Will the FWC entrench a WFH right for award employees in the Clerks Award Proceedings?

The Clerks Award Proceedings are concerned with the development of a WFH term in the *Clerks Private Sector Award 2020* (**Clerks Award**). The FWC has identified that under the Clerks Award, WFH is prevalent with 41.4% of clerical and administrative workers regularly working from home. The term will form a model for incorporation in other modern awards, with or without adaptation.

The FWC is currently seeking the views of the parties on several questions. One of the important questions that the FWC is seeking the views of the parties on is whether a WFH term:

- should include a *right for all (or some) employees* under the Clerks Award to request WFH arrangements; or
- whether the clause under the Clerks Award should be *facilitative in nature* only.

While the FWC has not proposed a clause for the parties' consideration, it is widely anticipated that the clause will use either the pre-June 2023 FW Act provisions or the post June 2023 FW Act provisions as a base.

There are good reasons for employers to be concerned about the prospect of the inclusion of a right to request WFH arrangements in the Clerks Award.

If the right to request WFH arrangements is based on the post-June 2023 FW Act flexible working request provisions and apply to all employees, then the new rights will have the potential to disturb the mandates that have been implemented by many Australian employers for employees to return to work in the office. To successfully defend an employer's decision to refuse a WFH arrangement, employers will need to have in place robust HR procedures for assessing an employee's request for a WFH arrangement and be in a position to clearly articulate reasonable business grounds for refusal of such a request.

At this stage it is too early to predict what the FWC will do in the Clerks Award Proceedings. Whether it all hype is yet to be determined. We will update clients on developments in this area as they occur.

Footnotes:

1 Australian Bureau of Statistics, August 2024.
2 [2024] FWC 1845.

Questions left unanswered: When will an employer be liable for an employee's psychiatric injury?

In December 2024, the High Court concluded an almost decade long legal saga over an employee's dismissal by reinstating an award of damages for over $1.44 million for psychiatric injury. In so doing, the Court overturned precedent that had arguably precluded recovery of contractual damages for the manner of dismissal, and set a high-water mark for this type of claim.

This article provides insights into *Elisha v Vision Australia*[1] (***Elisha***) and what this case means for employers.

Background

Elisha concerned what was described as a "sham" investigatory process and a "botched disciplinary procedure". The relevant employee commenced employment in 2006 pursuant to a written employment contract, which relevantly provided that:

- the employee's "*Employment Conditions [were] in accordance with regulatory requirements and [the Company's] Policies and Procedures. Breach of the Policies and Procedures may result in disciplinary action.*"
- the *employee "agree[d] to comply with these terms and conditions of employment and all other Company Policies and Procedures.*"

The employer's policies included a disciplinary procedure that was varied during the employment. At the time of the dismissal, the disciplinary procedure relevantly provided that where a concern raised in relation to an employee is of a serious nature, "a formal disciplinary meeting will occur" and the "employee will be provided with a letter containing a written outline of the allegations", and following that, a meeting will occur and the employee will be given an opportunity to respond to the allegations.

In March 2015, the employee stayed at a hotel while on a work trip, during which he had a number of terse interactions with the hotel proprietor. One of those interactions involved a late-night complaint about a noise outside his room. Those interactions became the subject of an internal investigation by the employer.

The employee was alleged to have engaged in serious misconduct by behaving in a verbally aggressive and intimidating manner towards the hotel proprietor. On the proprietor's account, he was alleged to have, among other things, walked towards her, raised his voice, waved his arms, and blocked her exit when she attended his room in the middle of the night to investigate the noise complaint.

The employee was found by his employer to have engaged in the alleged serious misconduct and was dismissed from his employment in May 2015. Instrumental in the reason for his dismissal, but never put to him, was what his immediate manager called a history of aggression and making excuses.

The employee brought an unfair dismissal application that settled for six months' salary. Inexplicably, the settlement deed was not sufficient to prevent him commencing further proceedings in the Supreme Court of Victoria for a claim for damages in contract and tort as a result of serious psychiatric illness he suffered following his dismissal.

The first instance judge gave judgment in favour of the employee and awarded him a substantial sum in damages ($1.44 million). The judge held that the employer had breached the contract of employment. On appeal, the Court of Appeal disagreed and held that damages for severe psychiatric illness were too remote and, in any event, an early 20th century House of Lords decision, *Addis v Gramophone*[2] (***Addis***), would have precluded recovery. The employee then appealed to the High Court.

What the High Court said...

The majority of the High Court gave judgment for the employee and reinstated the trial judge's award of damages. The majority held that parts of the disciplinary procedure were incorporated into the employee's contract of employment and so imposed binding obligations on both parties. Further, because the employer had set out onerous and specific assurances and promises in the disciplinary procedure, rather than aspirational ones, those obligations had contractually binding effect. As the employer had failed to follow the disciplinary procedure, it had opened itself up to a contractual claim by the employee.

The heart of the issue before the Court was whether the damage suffered by the employee was within the scope of the employer's contractual duties and whether that harm was too remote. The majority held that the *Addis* decision did not stand in the way of recovery for a number of reasons, including that "a great deal of water has passed under the bridge" since the case was decided, and so it is no longer good law.

This means that a barrier previously thought to be imposed on employees bringing contractual claims against their employer for the manner of their dismissal has been lifted. In other words, there is another arrow in the quiver of dismissed employees against their former employer, separate to statutory unfair dismissal laws and other claims under the *Fair Work Act 2009* (Cth).

What was left unanswered...

The High Court declined to answer the question of whether there exists a general duty of safe system of investigation and decision-making with respect to discipline and termination of employment. If that duty does exist, it would not necessarily require a contractual breach for an employer to be liable. This underscores the need for employers to engage in fair investigatory and disciplinary processes.

Key takeaways

Elisha is a salutary reminder to employers about the potential costs of defective investigatory and disciplinary processes. In particular, employers should be mindful that:

- their contracts of employment do not inadvertently incorporate workplace policies or otherwise create additional enforceable rights and obligations concerning disciplinary processes;
- their workplace policies are not expressed in contractually binding language. Often, less is more and flexibility is key so that matters can be dealt with on a case-by-case basis;
- they abide by procedurally fair investigatory and disciplinary processes; and
- settlement agreements are carefully drafted to avoid multiple successive claims.

Footnotes:

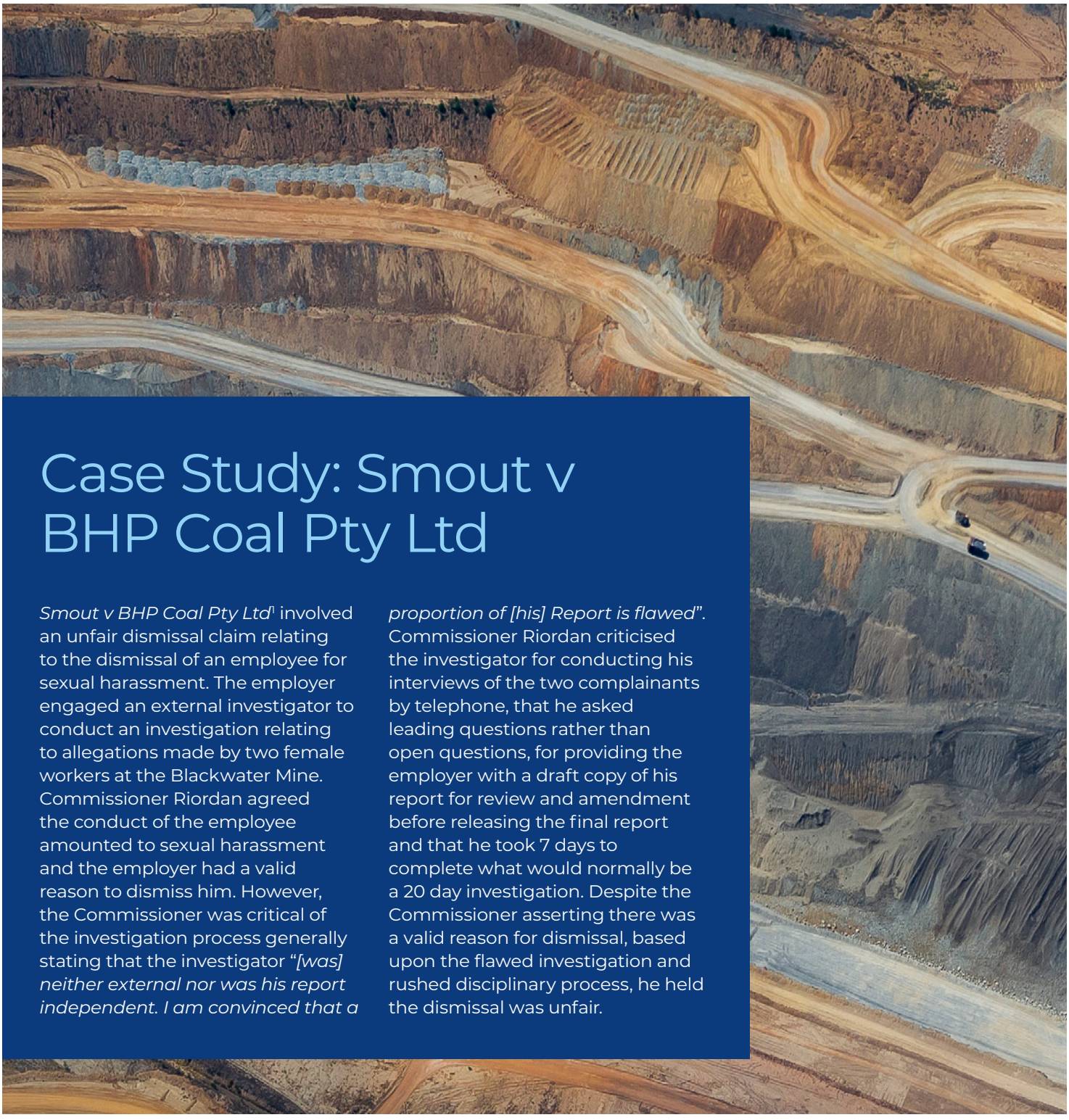
1 Elisha v Vision Australia Limited [2024] HCA 50.
2 [1909] AC 488.

Internal or external workplace investigation? – that is the question

Employers faced with employee misconduct will often ask: *should my business conduct a workplace investigation internally or engage an independent investigator*? The answer will usually depend on the circumstances of the allegations.

The Fair Work Commission is increasingly scrutinising investigations, whether conducted internally or by external investigators, more on this below in the case of *Roy Smout v BHP Coal Pty Ltd*. This case underscores the importance of ensuring that all investigations are carried out with impartiality and the principles of procedural fairness in mind.

We have set out below some factors that should be front of mind for businesses when considering which path to take.



Case Study: Smout v BHP Coal Pty Ltd

Smout v BHP Coal Pty Ltd[1] involved an unfair dismissal claim relating to the dismissal of an employee for sexual harassment. The employer engaged an external investigator to conduct an investigation relating to allegations made by two female workers at the Blackwater Mine. Commissioner Riordan agreed the conduct of the employee amounted to sexual harassment and the employer had a valid reason to dismiss him. However, the Commissioner was critical of the investigation process generally stating that the investigator "*[was] neither external nor was his report independent. I am convinced that a proportion of [his] Report is flawed*". Commissioner Riordan criticised the investigator for conducting his interviews of the two complainants by telephone, that he asked leading questions rather than open questions, for providing the employer with a draft copy of his report for review and amendment before releasing the final report and that he took 7 days to complete what would normally be a 20 day investigation. Despite the Commissioner asserting there was a valid reason for dismissal, based upon the flawed investigation and rushed disciplinary process, he held the dismissal was unfair.

Is an investigation necessary?

A formal workplace investigation is not always necessary. For example, admitted conduct does not need to be investigated. An employer may choose to address low-level misconduct through informal corrective action, such as counselling, training or a facilitated discussion.

What is the appropriate framework for conducting an investigation under any applicable industrial instrument and/or company policy?

An applicable enterprise agreement and/or company policy may set out a framework that the employer is required to follow when conducting an investigation and the form that the investigation must take. Typically, these documents will be drafted to provide a degree of latitude to the employer to decide the most appropriate means of investigating the allegations at hand. However, non-compliance can cause significant issues. A breach of a process prescribed by an enterprise agreement can result in civil penalties or a dispute. A breach of a company policy that has been 'contractualised' can result in damages (see our article *Questions left unanswered: When will an employer be liable for an employee's psychiatric injury?* on page 22 of this publication) and raise procedural fairness issues.

Should a regime of legal professional privilege be established?

If there is a real risk of litigation arising from the allegations, an employer should consider whether a law firm should be engaged to provide legal advice on the matters the subject of the investigation. If so, the employer may be able to rely on legal professional privilege over documents created during the investigation.

How serious or sensitive are the allegations?

Highly sensitive matters such as allegations involving discrimination, harassment, workplace violence, ethical breaches, fraudulent conduct or criminal conduct can draw increased scrutiny internally and externally to an employer. This is particularly important if the allegations are likely to attract media attention. An external investigator brings a neutral perspective, reducing the risk of accusations that an internal investigation may have been biased.

Allegations that are on the lower end of the scale of seriousness are more likely to favour an internal workplace investigation.

What are the potential sources of conflicts of interest in an internal investigation?

Internal investigators face several potential conflicts of interest that can compromise their impartiality. These include personal relationships with employees involved in the investigation, which may bias their judgment; financial interests, such as direct investments or bonuses linked to the investigation's outcomes; and career implications, where their advancement or job security might depend on favourable findings for certain individuals or departments. Additionally, company pressure, including loyalty to the employer and potential influence from senior management, can further challenge their ability to remain unbiased.

Does the employer have reporting obligations?

Depending on the nature of the allegations, the company may have reporting obligations to investors, shareholders, the board, industry regulators or similar. If external company reporting obligations do exist in relation to the allegation or the investigation findings, this position should favour the appointment of an external investigator to dispel potential assertions of investigation bias or perceived bias.

Is the investigation urgent and are there available resources?

In some cases, an investigation process may take up to or around one year or more to complete. The investigation duration will depend on matters such as the seriousness of the allegation, the fact pattern, the number of allegations, the number of parties involved, the amount of evidence that must be considered and the time spent in drafting the investigation report.

An internal investigation might be completed in a shorter time frame than an external investigation. However, this is not always the case. An assessment should be made of issues raised above combined with the availability of an internal investigator or an external investigator to complete the investigation

In relation to an internal investigator, consideration must also be given to whether an organisation can adequately continue to operate with the resources of one or more staff members being assigned to focus their time to a substantive investigation of one matter for what may be an extended period of time. In small to medium organisations with less available resources, an internal investigation may not be an efficient option.

Key takeaways

The decision between appointing an internal or external investigator necessitates a careful assessment of factors such as potential conflicts of interest, reporting obligations, urgency, and resource availability. Engaging an external investigator can often mitigate perceived biases and enhance credibility, particularly when reputational damage or regulatory scrutiny is at stake. However, conducting an internal investigation may be cost-effective, build employee trust, and can allow for faster resolution due to familiarity with company operations.

Footnotes:

1 [2024] FWC 2062.

Developments in workplace safety: Psychosocial risk reforms in Australia

There is a growing body of research that indicates that workplace stress, bullying, harassment (including sexual harassment), and lack of support can significantly affect performance and lead to psychological distress, high turnover rates, absenteeism, and burnout[1]. This is one of the reasons a (mentally and physically) healthy workforce is integral to a business' success.

It is also a matter that has received increased legislative and regulatory attention. In October 2023, Court Services Victoria was prosecuted, pleaded guilty and fined $379,157 for breaching the *Occupational Health and Safety Act 2004* (Vic) between 2015 and 2018 by failing to properly identify and assess risks in relation to the psychological wellbeing of its employees, particularly due to what was described a toxic culture within the Coroners Court[2].

Changes have now been made to the model *Work Health and Safety Regulations* (**WHS Regs**) that require employers to take a proactive approach in managing psychosocial risk in the workplace. Employers must actively identify psychosocial hazards, and implement, maintain and review control measures to address the risks these hazards pose. This article will set out the key obligations for managing psychosocial risks and suggest steps duty holders can take to help ensure compliance.

Background

The general duty imposed on persons conducting a business or undertaking (**PCBU**) to ensure, so far as is reasonably practicable, the psychological (as well as physical) health and safety of workers is not new. However, until the introduction of psychosocial risk reforms, work health and safety laws did not provide detailed guidance for duty holders on how to ensure a psychologically healthy workplace.

In 2019, the Boland independent review of model work health and safety laws highlighted, among other things, the need for stronger regulation to address psychological hazards in the workplace. This led to amendments to the model WHS Regs. SafeWork Australia also introduced a Model Code of Practice on Psychosocial Hazards at Work (**Model Code**). These reforms included the identification and management of 'psychosocial' hazards in the workplace, as is set out further below. Almost every Australian State and Territory has adopted in some fashion the changes to the model WHS Regs and adopted the Model Code (with some variations).

What are psychosocial hazards and psychosocial risks?

A psychosocial hazard is a hazard which arises from or relates to the design or management of work or the work environment, plant at the workplace or workplace interactions or behaviours and which may cause psychological harm (whether or not it may also cause physical harm). Psychosocial hazards can take many forms, including[3]:

- *Workload and Job Demands* – unrealistic deadlines, excessive workloads, or constant pressure to perform.

- *Lack of control* – limited autonomy in decision-making, inflexible work arrangements, or micromanagement.
- *Poor workplace relationships* – bullying, harassment (including sexual harassment), conflicts, or poor communication between colleagues or management.
- *Job insecurity* – uncertainty about job stability, contract work without security (gig economy workers), or frequent restructuring.
- *Poor organisational support* – lack of recognition, inadequate leadership, or insufficient resources to perform tasks effectively.
- *Exposure to traumatic events* – first responders, healthcare workers, or employees dealing with distressing situations.

A psychosocial risk refers to any risk to a worker's health or safety that stems from a psychosocial hazard. Unlike physical hazards, which are often tangible and more easily identifiable, psychological hazards arise from the design, management, or the environment of work, as well as workplace interactions and behaviours.

Unchecked psychosocial hazards can lead to stress, anxiety, depression, burnout, and decreased job satisfaction, and in some cases could contribute to physical health issues. From a business perspective, unmanaged psychosocial risks result in higher absenteeism, reduced productivity, increased regulatory scrutiny (e.g. investigations and prosecutions) and higher numbers of workers' compensation claims.

Steps to comply with psychosocial risk laws

The Code sets out a four-step overview to manage psychosocial risks including[4]:

1. *Identify hazards*
   Take a proactive approach in identifying any reasonably foreseeable psychosocial hazards which could arise within the workplace.

   For example, use employee surveys, and incident reviews to identify factors such as high workloads, poor job control, workplace bullying, and exposure to traumatic events.
2. *Assess risks*
   Conduct a risk assessment and identify whether the hazards alone, or combined, could pose a psychosocial risk to individuals, groups or the workplace.

   Evaluate the likelihood and severity of harm these hazards pose to employees. Assess work practices including working hours, surveys, review grievance data and consider the potential psychological and physical impact on workers and whether existing measures adequately address the risks.
3. *Control risks*
   Implement the most effective control measures that are reasonably practicable in the circumstances and ensure they remain effective over time. The control measures which are implemented must remain fit for purpose, suitable for the work and be installed, set up and used correctly.
4. *Review control measures*
   Implement a review process for the control measures which have been implemented in line with the requirements set out in the WHS Regs. Revise the control measures as necessary and record these processes as they occur.

   Compliance isn't a one-time task. PCBUs should regularly assess the effectiveness of implemented control measures, seek worker feedback (e.g. through exit interviews, surveys, or health and safety committees), and refine policies based on emerging risks or legislative updates.

   Separately, the model WHS laws impose a duty to consult workers. A PCBU must consult, so far as reasonably practicable, with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health or safety. Consultation should take place throughout each stage of the risk management process.

Key takeaways

As workplace lawyers we see businesses often not prioritising psychosocial risk and we see this commonly play out in the form of extended absences, performance management, conduct concerns or workers' compensation claims. With psychosocial risks now recognised as a serious workplace safety issue, businesses should integrate psychological health and safety into their WHS frameworks, ensuring a safe, productive, and legally compliant workplace. Ultimately, businesses that fail to adapt, risk not only legal repercussions but also long-term damage to employee satisfaction, productivity and reputation.

Footnotes:

1 SafeWork NSW – Psychological Health and Safety Strategy 2024–2026; Malola, P., Desrumaux, P., Dose, E., & Jeoffrion, C. (2024). The Impact of Workplace Bullying on Turnover Intention and Psychological Distress: The Indirect Role of Support from Supervisors. International Journal of Environmental Research and Public Health, 21(6), 751. **https://doi.org/10.3390/ijerph21060751**.

2 Marcel.ianno (2023) Response to the worksafe sentence, Court Services Victoria. Available at: **https://courts.vic.gov.au/news/response-worksafe-sentence**.

3 See Safe Work Australia - Managing psychosocial hazards at work: Code of Practice 2022, 1.1.

4 See Safe Work Australia - Managing psychosocial hazards at work: Code of Practice 2022, 2.

Gig-nificent Gains: New era of protections for gig workers

Recent legislative changes to the *Fair Work Act 2009* (Cth) (**FW Act**) have come into effect that provide protections for "gig economy workers", which refers to workers who perform work for a digital labour platform operator, and certain workers in the road transport industry (otherwise known as "regulated workers").

A new class of workers

Effective from 26 August 2024, the FW Act includes a new class of worker, called "employee-like workers", who would otherwise likely have been classified as independent contractors. These workers generally perform work through a digital labour platform (e.g. an app) which engages independent contractors and processes payments in relation to the work performed by the independent contractors (e.g. food delivery drivers and rideshare drivers) and must meet certain requirements of the FW Act in order to be considered as an employee-like worker.

Minimum standards

The Fair Work Commission (**Commission**) has been provided with powers to regulate the gig economy by setting award-like minimum standards for employee-like workers through issuing binding minimum standards orders (**MSO**) and non-binding minimum standards guidelines on matters such as payment terms, deductions, record-keeping, consultation, insurance, representation, delegates' rights and cost recovery. The Commission may also make a "contractual chain order" to set minimum standards/guidelines for regulated road transport chains on payment times, rate reviews, fuel levies and termination.

Digital platform operators and road transport businesses may also be able to enter into collective agreements with unions to agree on the terms and conditions of regulated work by its workers. Similar to how an enterprise agreement operates, the terms and conditions in the collective agreements cannot be lower than a MSO.

Protections against unfair deactivation/termination and unfair contract terms

The Commission has released the "Digital Labour Platform Deactivation Code" (**Code**) and the "Road Transport Industry Termination Code" which provide protections for workers from unfair deactivation from a digital labour platform and protections for road transport contractors from unfair termination. These changes came into effect from 26 February 2025.

Eligible regulated workers are now able to file an unfair deactivation/termination claim in the Commission and the Commission may make orders that the worker has their access to the platform reactivated or be paid any lost income as a result of the deactivation.

Digital platform operators must also follow a process before modifying, suspending or deactivating a worker from its platform. For example, the Code requires digital platform operators to provide a worker with a "deactivation warning" before deactivating a worker (subject to certain exceptions) to place the worker on notice that they are at risk of losing access to the platform.

If a digital platform operator is considering the deactivation of a worker's access to the platform, it is required to provide written notice to the worker before the deactivation occurs. The notice must state that the worker is at risk of being deactivated from the platform for a reason that relates to the worker's capacity or conduct and the digital platform operator is considering terminating the worker's access to the platform, that the worker has the right to respond to the notice and request a discussion with a representative of the digital platform operator within a reasonable period of time, and that the worker may appoint a person to be a support person or a representative.

If a worker requests a discussion with a representative, the digital labour platform operator must provide a human representative to consider the worker's response (if any) and make any enquiries (if any) that are reasonably warranted. This means that a digital platform operator has some flexibility in determining whether it is required to further investigate the matter on a case-by-case basis.

The Code also provides some examples of conduct that may constitute a valid reason for deactivation, including a failure to meet platform obligations, inappropriate physical or verbal conduct, misuse of information, fraud, dishonesty or deliberate damage to a person's property, or a failure to comply with licensing or accreditation requirements.

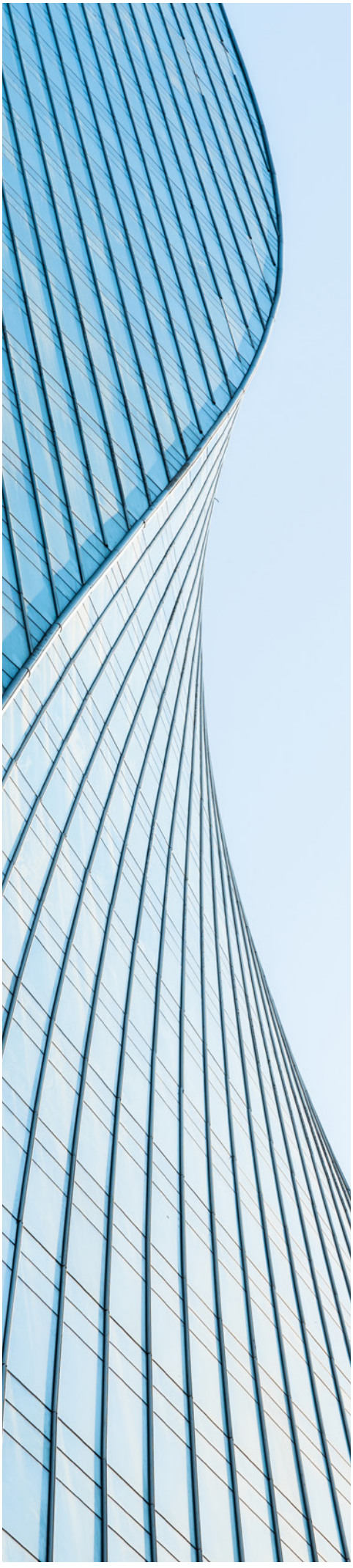
Lastly, the Commission has powers to amend or set aside a services contract if it is found that the terms and conditions of the contract are unfair.

Key takeaways

Businesses should be mindful that there is more scrutiny over the gig economy and the road transport industry. The new ability for regulated workers to make an unfair deactivation/termination claim mirrors the unfair dismissal jurisdiction that is currently available for employees. Businesses should therefore treat the modification, suspension and deactivation of any workers from its platform in a careful manner, ensuring that procedural fairness is given to the worker during the deactivation process and that it meets its obligations in accordance with the FW Act and the applicable code.

More generally, the societal shift from viewing vulnerable gig workers as “independent contractors” in business on their own account to “employee-like” means that businesses engaging such workers need to adapt.

It is also noteworthy that several applications have been made in the Commission for MSOs, particularly for workers involved in transporting goods, food and beverage deliveries and road transport. Businesses in these industries should remain updated on developments from the Commission throughout 2025.



Our Workplace services

Advisory

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

Strategy

- Labour engagement models
- Workplace change and restructuring
- Enterprise bargaining
- Industrial relations strategy

Disputes

- Restraints and confidential information
- Defending employee claims
- Executive claims

Investigations

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

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

Executive remuneration and benefits

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

Industrial relations

- Responding to industrial action
- Enterprise bargaining and other collective and disputes
- Contingency planning
- Management of transfer of business provisions arising from outsourcing/insourcing
- Union management

Risk and compliance

- Board advisory and reputation management
- Whistle-blowers and protected disclosures
- Wage theft and underpayments
- Due diligence
- Supply chain management
- Workplace training programmes

Crisis management

- Risk assessment and mitigation
- Preparing documented crisis plans and processes Crisis response
- Managing communications and public relations
- Post-crisis assessment and recovery strategies

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