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Wide Reach Of General Protections Provisions – Accessorial Liability

Australian Building and Construction Commission v Moses & Ors [2017] FCCA 738

In an interesting decision regarding the reach of the general protections provisions of the FW Act, FCCA has found that an employee (and, relevantly, union delegate) was liable as an accessory to a breach when he failed to correct the coercive and misleading statements put forth by a CFMEU union organiser regarding union membership.

On 11 September 2013, Jody Moses and Gregg Churchman, representatives of the CFMEU, organised to meet with Smithbridge Group Pty Ltd employees who had been contracted to work at a construction site referred to as the Gladstone Boardwalk Construction Project (Boardwalk Project). When addressing the Smithbridge employees, the Australian Building and Construction Commission (ABCC) alleged that the CFMEU organiser, Mr Moses, said words to the effect that union membership on the Boardwalk Project was 'compulsory' and that if the employees did not become union members then they would not be returning to work on that day, and would be removed from the project. It was further alleged that Mr Moses said that the Boardwalk Project was a union site and therefore if they wanted to continue working on site they had to join the CFMEU and that they only had five minutes to deliberate and decide.

The ABBC alleged that by way of conduct Mr Moses contravened the below sections of the FWA:

- section 346 which prohibits taking adverse action against a person because the person is or is not a member of an industrial association;
- section 348 which prohibits coercing a person to engage in industrial activity (which includes becoming a member of an industrial association); and
- section 349 which prohibits making false representations about another person's obligation to engage in industrial activity.

It was further alleged that Mr Churchman was liable pursuant to section 550(1) of the FW Act in that he 'aided, abetted, counselled or procured the contravention' or was otherwise 'knowingly concerned' in the contraventions committed by Mr Moses.

The ABCC called evidence from four witnesses all who attended and were present at the alleged CFMEU meeting with employees on the project.

The union organiser, Mr Moses, gave evidence and denied that he coerced or engaged in threatening behaviour towards the construction sites workers and their 'requirement' to join the union. Mr Moses contended that the purpose of the discussion with the Smithbridge employees was an introductory meeting, rather he had engaged in a "casual conversation" with the workers about their employment at the Boardwork Project and any concerns they had in relation to the terms and condition of their employment or any safety concerns. Mr Moses insisted that the discussion proceeded in a casual and amicable way, and that he did not recall any strong disagreement with the invitation to join the CFMEU.

The FCCA rejected Mr Moses characterisation of the incident and did not accept his 'unconvincing evidence' in large parts.

Accordingly, and not controversially, the FCCA found that Mr Moses had breached each section of the FWA listed above.

The FCCA then considered Mr Churchman's culpability in the contraventions and whether he was liable pursuant to section 550 of the FW Act.

Whilst there was no active or verbal encouragement or endorsement of the union organiser's statements, the finding of accessorial liability was based upon a combination of the union delegate's knowledge of the falsehood of the statements made and his failure to make any correction. The ABCC submission relied upon the interpretation of "encouragement" in the sense that an accomplice had been convicted in the murder case of R v Beck [1990] 1 Qd R 30. In Beck "encouragement" was described as instilling courage in another to engage in conduct that constitutes the commission of the offence, it was held that mere presence may be evidence of aiding or an act for the purpose of aiding.

Judge Jarret observed that Mr Churchman had "encouraged" Mr Moses in the same manner as in Beck. Mr Churchman's initial presence and silence was consistent with the union organiser not having a plan to threaten the workers, however, upon return from leaving the meeting for five minutes to let the assembled workers decide if they wanted to join the CFMEU, Mr Churchman's subsequent failure to correct the false statements amounted to encouragement in the commission of the contravention. Judge Jarret observed that Mr Churchman had "stood by silently and permitted Mr Moses to again deliver an ultimatum to the assembled workers that he knew [to be] false."

The FCCA further held that the CFMEU was liable for the actions of both Mr Moses and Mr Churchman.

There is yet to be a decision on the quantum of penalty, however the maximum penalty for a contravention of a civil remedy provision in the general protections is $63,000 per contravention for a corporation and $12,600 per contravention for an individual.

What does this mean for employers?

- This decision should be a reminder to employers about the breadth of the general protections provisions of the FWA, and in particular, the ability for the provisions to apply to an individual as an accessory
- The decision also highlights that the general protections provisions can be used to restrict unlawful union activity
- More broadly, employers and managers in particular, should be mindful that accessorial liability can apply where a person fails to correct a misleading statement (i.e. a failure to act, as opposed to a positive act can result in accessorial liability)

Roster flixibility: aged and health care employers permitted to make rostering changes without employee consent

Bupa Care Services Pty Ltd v NSW and Midwives Association [2017] FWCFB 1093

A recent Full Bench decision of the Fair Work Commission should provide employers across the aged care and nursing sector more certainty regarding their ability to develop rosters for part-time employees. As long as the existing workplace agreement is not in breach, the Full Bench has confirmed that employers within the respective health industry are entitled to make amendments to employees' rosters without obtaining consent to better align rostering with operational requirements of the business.

The case concerned the interpretation of the enterprise agreement (the Agreement) for the aged care provider Bupa Care Services Pty Ltd (Bupa).

In dispute was the correct interpretation of clause 9.3 (the Clause) which required that before commencing employment, a part-time employee and Bupa will agree in writing on 'the guaranteed minimum number of hours to be worked and the rostering arrangement' and that any variation be by agreement recorded in writing. This type of clause is common in enterprise agreements and also part of the nurses modern award.

BACKGROUND

In 2016, Bupa introduced a new model of care and the implementation resulted in changes to its staffing and rostering arrangements, predominantly in terms of shift patterns. The NSWNMA initially brought the claim on behalf of two part-time nurses who were affected by such rostering changes. The NSWNMA submitted that on the plain wording of the Agreement, the Agreement did not permit Bupa to alter an agreement by simply giving 'notice'. The NSWNMA contended that in accordance with the Clause, Bupa was required to reach a written agreement with a part-time employee not only in regards to the total of hours of work but also the 'rostering arrangement' which applied to those hours of work.

The NSWNMA were successful in the initial ruling where Commissioner John adopted the construction proposed by the NSWNMA and held that Bupa was not entitled to unilaterally direct an employee to change the rostering arrangement, and any change to the roster required the employee's written consent.

As part of this initial ruling, Commissioner Johns concluded that the "obvious objective" of the provision was to ensure "predictability and certainty in the working pattern of the employee", if it was permissible for an agreement to do no more than record the guaranteed minimum hours of work than this objective would not be achieved.

FULL BENCH

Upon appeal, Bupa again argued that properly construed, the Clause did not provide for mutually agreed decision. Bupa agreed with Commissioner Johns that there was an unambiguous interpretation to the Clause, however, argued that he had interpreted the Clause incorrectly.

Bupa argued that the initial pre-employment agreement on hours that was contemplated by the Clause was only about the guaranteed minimum number of hours of work. There was an obligation to reach 'agreement' if Bupa wished to vary the number of guaranteed hours – however, there was no obligation to reach an agreement with an employee to change the days of work. In support of this argument, Bupa noted that other industrial instruments expressly referred to a part-time employee and locked in the specific days that they would work those hours, however the Agreement did not do this.

Bupa further contended that the Commissioner had erroneously applied decisions of the Commission when interpreting the Clause. Bupa argued that in considering the phrases cited above from the Aged Care Award, for example, Commissioner Johns had inaccurately applied those phrases as they were not contained within the Agreement. In construing the meaning of "rostering arrangement", as contained within the clause, the Commissioner ought to have considered them in their plain and ordinary meaning of the words. Bupa contented that the words "rostering arrangement" included matters such as where the roster will be displayed to be accessed by employees, whether the roster is a weekly or fortnightly roster, whether an employee may be required to work additional hours and that an employee's roster may change over time.

The Full Bench agreed that the cases referred to by the Commissioner were distinguishable from the Agreement. This was because, as argued by Bupa, the case law construed different words in different instruments. The Full Bench upheld the appeal overruling the initial ruling.

The Full Bench held that the Agreement did not require an employee's agreement to implement changes to when the employee worked their rostered hours.

In dispute was also whether a particular employee was entitled to be notified personally in writing of a change to their roster. The Commission further held that Bupa is not required to personally inform the affected employee and that it was sufficient to inform an employee by way of ensuring that any change to the roster, stipulating start and finishing times, is readily displayed and accessible by employees.

What does this mean for employers?

- Employers need to understand their obligations under industrial instruments and be aware of the flexibilities that are available under these terms
- While the terms of an individual enterprise agreement must be interpreted, agreements that reflect the modern nurses award will not 'bind' an employer to rigid part-time hours of work
- Hours of work and rostering are operational matters and employers should ensure that they maintain a degree of flexibility under enterprise agreements

Employee reinstated because dismissal outweighed drunken, outside-hours misconduct

Clarkin v Bechtel Construction (Australia) Pty Ltd [2017] FWC 1871

The FWC has found that an employer's incorrect categorisation of an employee's dispute with his partner and damage to a hotel room as 'serious misconduct', instead of the lesser offence of 'misconduct', resulted in the worker being harshly and unjustly dismissed. The FWC has ordered the employer to reinstate the rigger and compensate him for lost wages, but deducted 8 weeks' wage as a consequence of his misconduct.

Mr Clarkin and his partner Ms Horsey were both employees of Bechtel Construction (Australia) Pty Ltd (Bechtel). They were engaged by Bechtel to work on a multi-billion dollar construction project with Chevron Australia (Chevron) in Wheatstone (Project).

The Project involved in excess of 10,500 employees. On rostered days off, employees would often visit the nearby coastal town of Onslow, which was a community of only 500 permanent residents. Bechtel was sensitive to the population disparity between the two locations and acknowledged the needs of the Onslow community by providing its employees with a detailed Employee Code of Conduct and a Community Code of Conduct (the Codes) with their Letter of Appointment. The Codes sought to regulate aspects of Bechtel employees' conduct both at work and outside work (specifically when in the local community of Onslow).

The disputed conduct occurred in September 2016, when Mr Clarkin and Ms Horsey were staying overnight at a hotel in Onslow after celebrating a friend's birthday.

Around 11:45pm after a night out of drinking, Mr Clarkin and Ms Horsey returned to the hotel room and argued loudly. The FWC accepted that the loud arguing lasted for about 15-30 minutes. There was also damage to the shower, including a ripped shower curtain and smashed shower screen. Mr Clarkin voluntarily paid for the repairs.

Occupants in both adjacent rooms were awoken and became alarmed by the disturbance, with an elderly couple considering calling the police. The next morning, both occupants complained to the hotel, who referred the complaint to Chevron's community relations team, expressing frustration and stating that the hotel was becoming impatient with the impact of Wheatstone workers on other guests.

The next day, statements were taken by Mr Clarkin and Ms Horsey and the following day interviews were conducted. Mr Clarkin was stood down from working pending further investigation and, after considering what Mr Clarkin had put forward in his show cause meeting, Bechtel ultimately decided that his employment should be terminated. With respect to Ms Horsey, the investigation concluded that she was 'more of a victim rather than an instigator' and so she was issued with a final written warning only. Mr Clarkin argued that an employee's behaviour outside of working hours should only impact employment if it breached a term of the contract, and argued that the Codes did not form part of his employment, nor did it relate to the subject matter of it. Alternatively, he argued that his behaviour did not constitute 'serious misconduct' and only constituted 'misconduct' (as each was defined by the Codes), and therefore did not warrant summary dismissal.

In terms of the reach of the Codes, the Commission was satisfied that, given the peculiar arrangements between Onslow and the Project (for example, where the number of employees vastly outnumbered the total permanent population of Onslow), the Codes governing employee behaviour in the local community were reasonable in scope and content.

Bechtel provided evidence that in the past, 128 workers had been removed from the Project, including 29 in the past 12 months for breaching the Codes.

Therefore, it was not problematic that Mr Clarkin's alleged misconduct occurred in Onslow and outside working hours.

However, the termination letter provided to Mr Clarkin stated that he was dismissed because he had engaged in "serious misconduct" by "(1) causing wilful damage to community facilities and amenities and (2) Drunken behaviour in public that causes a disturbance or a nuisance to others".

On the evidence, in regards to the first allegation, the FWC accepted Mr Clarkin's evidence that he fell in the shower which resulted in the shower curtain being ripped and the shower screen damaged. Therefore, the FWC accepted that the damage to the shower was 'by accident' and was insufficient to constitute 'wilful damage'. It followed that the damage caused to the shower by Mr Clarkin was insufficient to constitute 'serious misconduct' as defined by the Codes. The second allegation was incorrectly categorised as 'serious misconduct' because drunken behaviour was defined as only "misconduct" in the Codes.

The upshot of this was that, again under the Codes, misconduct gave rise to disciplinary action and required repeated breaches of the Code before termination of employment could be warranted. Therefore, the FWC held that Mr Clarkin's termination was inconsistent with the Codes, and was consequently unjust. Separately, the FWC also held that the dismissal outcome was disproportionate to the gravity of misconduct, and therefore the dismissal was also harsh.

The FWC also found Bechtel's conclusion that Mr Clarkin was the 'instigator' and Ms Horsey the 'victim' was 'baseless', with the evidence establishing only that Mr Clarkin spoke in a louder voice and was shouting more than his partner. Therefore, there was an inadequate foundation for Bechtel to provide a stronger sanction against Mr Clarkin, when compared to Ms Horsey. This unreasonable disparity of treatment was a further indication that Mr Clarkin's termination of employment was harsh and unfair.

In assessing remedy, the FWC took into account that Mr Clarkin had been an employee on and off with Bechtel for 3 years and previously had an unblemished employment record. Reinstatement, being the primary remedy under the FWA, was found to be appropriate particularly given that the misconduct exclusively concerned behaviour outside of the workplace and therefore did not pose an immediate threat to his performance. The FWC did not accept the assertions from Bechtel that there has been a loss of trust and confidence between Bechtel and Mr Clarkin, and also noted that any such loss was based on Bechtel's incorrect assessment of Mr Clarkin's misconduct.

Mr Clarkin was also remunerated for 28 weeks lost wages pending trial, however the FWC deducted 8 weeks' pay as he was not blameless in the matter.

What does this mean for employers?

- Another reminder to employers that when considering dismissing an employee, the punishment must fit the crime – proportionality is important
- A code / policy can regulate an employee's conduct outside of work, provided it is reasonable
- Employers must comply with their own policies – in this case, under the Code, drunken behaviour was defined as only 'misconduct' and there was not capable of constituting 'serious misconduct' – therefore, ensure that your policies are properly drafted and provide sufficient flexibility
- Disciplinary outcomes must be consistent – the same facts must yield the same disciplinary outcome

High earning real estate sales director protected from unfair dismissal

Kaufman v Jones Lang LaSalle (VIC) Pty Ltd T/A JLL [2017] FWC 2623

In the context of considering a jurisdictional objection raised against an unfair dismissal application made by a high earning real estate employee, the FWC has reinforced that the coverage of a modern award (thereby providing eligibility to make an unfair dismissal application) will not exclusively be determined by position title or level of remuneration, rather classification and award coverage will be determined by the duties performed.

James Kaufman commenced working for the business now operated by Jones Lang La Salle (JLL) in September 1989 until his position was made redundant in December 2016. At the time of the dismissal, Mr Kaufman was employed in the position of Regional Director, Capital Markets (Director). Following his dismissal, Mr Kaufman made an application to the FWC under section 394 of the FW Act making a claim of unfair dismissal.

The FWC decision considered the first of two jurisdictional objections advanced by JLL, specifically that Mr Kaufman was not protected from unfair dismissal as he received income in excess of the high income threshold and was not covered by a modern award. An individual who earns above the high income threshold remains protected from unfair dismissal if they are covered by an enterprise agreement or modern award.

In order to determine if an employee is covered by a modern award it is necessary to identify the industry within which the employer is substantially engaged, and whether the characteristics of the duties and the particular work carried out in the role is covered by the classifications of an industrial instrument. There was no dispute that Mr Kaufman was engaged in the real estate industry and that employees in that industry may be covered by the Real Estate Industry Award 2010 (Award).

JJL submitted that the Director role was a senior management position beyond the Award's classifications. It submitted that the Director had "significant leadership, mentoring and business generation responsibilities". Given the seniority, the remuneration structure, significant leadership, business development and general requirements and accountabilities of the Director, JJL contended that the position was not covered by the Award. It was also argued that comparing Award minimum weekly rates against the remuneration paid to Mr Kaufman demonstrated the Director was not covered by the Award.

The FWC:

- disagreed that the Director was a senior manager and found there was no substantial evidence that the Director was charged with responsibilities or regular duties that could be described as a "managerial" function or direct reporting;
- considered there was no inconsistency with being a leader or a member of a diverse team of leaders and the position being covered by the Award. The FWC considered the hierarchal structure of JLL and the role of Director;
- stated that the high level of remuneration was indicative only of the employer's view that the employee was valuable to the business and successful performance. The high level of remuneration did not outline the principle purpose for the Director and therefore did not go to establishing and determining Award coverage; and
- was satisfied that the title was effectively "a rank or accolade" and modern award coverage is to be determined based upon duties performed.

The FWC concluded that the fundamental and principle purpose of the Director role was to sell real estate, and the inherent duties of the role corresponded with the indicative tasks for a Property Sales Representative classification set out under the Award. Whilst it was considered that some duties performed by the Director may fall within the Property Sales Supervisor classification, the Director could not meet that classification as it had no direct reports.

The FWC was therefore satisfied that, at the time of dismissal, Mr Kaufman's position of Director was classified as a Property Sales Representative under the Award, and therefore was covered by a modern award. Mr Kaufman was therefore protected from unfair dismissal notwithstanding his remuneration exceeded the high income threshold. The FWC dismissed JLL's first jurisdiction objection and decided to determine the second jurisdictional objection (as to whether the dismissal constitutes a genuine redundancy) in conjunction with the merits of the application.

What does this mean for employers?

- An employee may be protected from unfair dismissal, notwithstanding that their income exceeds the high income threshold, where they are covered by a modern award or enterprise agreement
- Title and remuneration does not automatically ensure that a position is not covered by a modern award
- An employee may be protected by unfair dismissal if it can be established that, by virtue of the duties performed by the position in which they are employed, the position falls within a classification that is covered by that industrial instrument
- Prior to proceeding with termination, an employer should exercise care to ensure and accurately identify whether an employee is covered by a modern award to ensure it meets any obligations provided by that industrial instrument

Real estate agency that dismissed pregnant employee engaged in adverse action

Mahajan v Burgess Rawson & Associates Pty Ltd [2017] FCCA 1560

An administrative assistant whose employment was terminated in the last hour of her probationary period has been successful in her adverse action application, after the Federal Circuit Court (the Court) found that a "significant and substantial reason" for her dismissal was due to her pregnancy.

Ms Mahajan was employed in administration by real estate agency, Burgess Rawson & Associates Pty Ltd (Burgess Rawson) in December 2015. In March 2016, Ms Mahajan met with two of her superiors, including the leader of the valuations team Mr Perrin, for her three-month probation review. During the meeting Mr Perrin said that he was happy with her progress, and instructed Ms Mahajan to start part-time work in the accounts department with a pay rise. Towards the end of the meeting, Ms Mahajan advised Mr Perrin that she was pregnant and intended to take maternity leave in September that year. Mr Perrin conceded he was "surprised by the news".

In the following 3 months, Ms Mahajan took sick leave to a total of seven days due to morning sickness and four days of annual leave to attend medical appointments, producing medical certificates for these days and advising Mr Perrin via text. Ms Mahajan was also late to work on six or seven occasions by 5-10 minutes, primarily due to public transport difficulties. During this time, Mr Perrin did not raise any performance concerns with Ms Mahajan nor concerns with her punctuality.

At a board meeting on 29 April the minutes included a note that "*Tiffany 6 months 6 June. Situation needs to be dealt with.*"

Mr Perrin gave evidence that at the board meeting he had brought up two primary concerns regarding Ms Mahajan, relating to her unsatisfactory performance and punctuality. However, notably, the minutes of meeting also highlighted that other team members were underperforming, however there was no suggestion as to why Ms Mahajan's performance 'need[ed] to be dealt with' whilst the others did not.

At 4pm on the last day of her probation, Mr Perrin asked Ms Mahajan to attend a meeting. The Court accepted Ms Mahajan's evidence that at the meeting Mr Perrin had said: "*Due to your current circumstances, your employment has become unreliable and we have decided not to continue with your employment.*"

Ms Mahajan brought proceedings that the real estate agency had taken adverse action against her in breach of the Act by dismissing her because she exercised a workplace right and because she was pregnant. She also bought a claim that she was dismissed because of her sex.

Under section 342 of the FW Act, an employer takes adverse action against an employee if the employer:

a) Dismisses the employee; or
b) Injures the employee in his or her employment; or
c) Alters the position of the employee to the employee's prejudice; or
d) Discriminates between the employee and other employees of the employer.

An employer is prohibited from taking adverse action because of an employee's pregnancy (s. 351), or because an employee is temporarily absent from work because of illness (s. 352).

Under a General Protections application, the FW Act creates a reverse onus, which requires an employer to prove that if they are taking adverse action, they are not taking it because of a reason that is prohibited.

Though Mr Perrin submitted that Ms Mahajan's intention to take maternity leave and sick leave from time to time formed no part of the reasons for his decision, the Court did not accept his evidence and found that her pregnancy and sick leave were a "substantial and operative factor". The Court found that Mr Perrin's comment "due to your circumstances" could only have referred to Ms Mahajan's pregnancy. In coming to this conclusion, the Court rejected Mr Perrin's evidence to the contrary and commented that it "beggars belief" that Ms Mahajan would' have been dismissed because she was a little late for work on six or seven occasions during a three month period and because of some minor formatting issues, particularly given that none of these concerns were previously raised in a formal manner (Mr Perrin's evidence was that he had spoken to Ms Mahajan about formatting errors on a number of occasions, but only informally). The Court concluded that:

> *Having seen Mr Perrin in the witness box, it seems to me to be implausible that he would have dismissed the applicant for being a little late on occasion, and for making formatting errors that he did not formally raise with her, but would not have wanted to dismiss her for being absent from work on 11 days in a period of about 12 weeks.*

Put simply – the idea that Mr Perrin was unconcerned about her absences but saw the slight lateness and minor formatting errors as sackable just didn't' stack up.

His evidence was described as "vehement and somewhat rehearsed", particularly where he conceded that he did not have a specific recollection of the meeting to terminate Ms Mahajan's employment. The available evidence for Burgess Rawson was insufficient to discharge the reverse onus. To the contrary, the Court was positively satisfied that the reason that Ms Mahajan was dismissed was because of her pregnancy and taking of types of leave. The Court also commented that it was significant that Ms Mahajan was dismissed during her last hour of the probationary period, and reasoned that if her performance had been genuinely lacking, she should have been dismissed much earlier.

The Court did not accept that Burgess Rawson had dismissed Ms Mahajan because of her sex. The Court noted that:

> *I do not accept that the respondent dismissed the applicant because of her sex. (The prohibition on sexual discrimination would seem to apply more naturally to circumstances where a prospective employer refused to employ a person of a particular sex.)*

Accordingly, the Court held that Burgess Rawson had breached the General Protections provisions of the FW Act.

As to remedy, the Court will hear the parties on orders in relation to compensation and penalties (for breaching civil remedy provisions of the FW Act).

What does this mean for employers?

- Employers do not have free reign to dismiss employees for any reason during a probationary period – they must ensure that the reason for dismissal does not include unlawful reasons, such as because an employee has taken personal leave or is pregnant
- An employer should advise probationary employees of any performance / conduct concerns early during the probationary period and to provide employees with the opportunity to improve on their performance
- When raising issues during a probationary period with an employee that may ultimately lead to the employee's probationary period not being successful, the Employer should ensure that the issues are raised formally – for example, in writing, noting that the particular issue may lead to the employee's employment being terminated during the probationary period if improvement is not demonstrated

Pre-modern award coverage precludes long service leave entitlement

Marschall v Mckechnie Iron Foundry Pty Ltd [2017] SAIRC 13

In a rare decision regarding the interaction between LSL legislation and other industrial instruments, the South Australia Industrial Relations Court (the Court) has found that the proper interpretation of an EA, relevant legislation and industrial instruments precluded the obligation for payment of LSL at resignation.

Mr Marschall was employed as a jobbing moulder with McKechnie Iron Foundry Pty Ltd (McKechnie) from March 2006 for a total of 9 years and 11 months. In May 2016, Mr Marschall resigned. At the time of his resignation, Mr Marschall was covered by the McKechnie's 2015 EA. At relevant times, Mr Marschall's employment was covered by predecessor EA's.

Prior to the operation of the *Long Service Leave Act 1987 (SA)* (LSL Act), the Metal, Engineering and Associated Industries 1998 Award (Metals Award) was operative and provided an LSL entitlement and McKechnie had EA's which provided a LSL entitlement at 10 years. Contrastingly, the state based LSL Act required a pro rata LSL payment at termination for employees with more than 7 years' and less than 10 years' service. McKechnie did not make payment of LSL upon termination and Mr Marschall commenced proceedings claiming payment pursuant to the LSL Act. The Court was therefore required to determine the source and terms of LSL pertaining to Mr Marschall's employment.

In relation to the interaction between enterprise agreements, pre-modern instruments and applicable state legislation, the Court referred to the application of section 113 of the Act, specifically that where an 'award derived' or 'agreement derived' long service leave entitlement is contained in an industrial instrument that was in force before the Act came into operation, it will continue to apply to the exclusion of state based long service leave legislation. In this matter, the LSL provision in the 2007 EA was not found to be award or agreement derived entitlement as the required FWC order was not made to enable the LSL provision to meet that definition.

Consideration was given to the 2015 EA, which included a sentence in the relevant provision which stated "*From the 1 July 2004 employees will be entitled to the provisions of the South Australian Long Service Leave Act. Any service before this date is as detailed below…*" Mr Marschall submitted that this wording meant the entire LSL Act applied, meaning employment commencing on 17 March 2006 resulted in the LSL Act applying and entitling him to receive pro-rata LSL payment. McKechnie argued that the submission regarding the wording of the provision was incorrect, as the LSL Act would apply to service after 1 July 2004 with the wording confining the LSL Act's application to the rate and use of accrual, but the EA did not incorporate the LSL Act.

The Court considered:

- the provisions contained in predecessor EA's and the evolution of the LSL provisions;
- wording in place since the 2004 EA which restricted payment of LSL upon termination (where 7 years but less than 10 years of service is achieved) to circumstances of redundancy, which would not be required if the LSL Act was incorporated;
- the interaction between subclause of the LSL provision in the 2015 EA, which only operated in accordance with McKechnie's submissions;
- the Metals Award contained LSL provisions, and as at 31 December 2009 it was in existence, meaning it continued to apply by operation of the Act until the parties entered into an EA which provided for LSL;
- that no application to the FWC was made at relevant times to provide an agreement derived LSL entitlement.

It was therefore concluded that there was no point in time that the LSL Act, as a matter of law, became the applicable instrument in respect of LSL. This decision was formed considering that the 2007 EA contained a long service leave clause, and but for the making of the EA's, the Metals Award would continue to apply by operation of the Act. This left "no vacuum" into which the LSL Act could have become applicable.

Accordingly, the Court then considered the LSL provisions of the EA's and identified that:

- the LSL accrual rate at the time of the 2004 EA was as provided by the Metals Award and provided a higher accrual rate for employees with 10 or more years of service (an accrual the same as the LSL Act);
- the 2004 EA provision was clear in that the Metal Award continued to regulate LSL, save for the increased accrual rate and did not adopt the content of the LSL Act; and
- • where employment terminated after 7, but less than 10, years' service, an employee was only entitled to LSL payment where the termination is due to redundancy.

The Court therefore dismissed the application.

What does this mean for employers?

- The Act contains complex provisions as to which industrial instruments may provide for an employee's LSL entitlement
- An LSL entitlement prescribed by an EA does not automatically result in it constituting an 'agreement derived' entitlement, meaning other instruments may be relevant in determining a LSL entitlement
- Employers should seek specific advice as to applicable LSL entitlements to ensure they meet their lawful obligations regarding the accrual and/or payment of LSL

Employer unlawfully treated part-timers as casuals

United Voice v Philip Cleaning Service Pty Ltd [2017] FCA 392

A school cleaning contractor has breached provisions of its enterprise agreement and letters of appointment by treating 23 permanent workers as casuals by unilaterally altering working arrangements during school holidays.

Phillip Cleaning Services (PCS) was a cleaning contractor for 10 government schools in the ACT. Working arrangements of PCS's employees were covered by an Enterprise Agreement (the Agreement) and letters of appointment. The letters of appointment fixed the number of hours of work per week, the time during which that work was to take place and the location of the work. The location of the work was subject to a provision under the Agreement, which allowed PCS to vary the location with a minimum of 7 days' notice. A clause in the Agreement also expressly prohibited unilateral variation of the letters of appointment.

The evidence demonstrated, however, that the Director felt "*entitled to run PCS as he thought fit irrespective of any legal obligations of PCS to its employees.*" The ongoing practice was that on the last day of the school term, the Director advised the limited employees whom he had chosen to work during the holidays the location for the following Monday and thereafter the employees were directed on a day-to-day basis. The workers were not paid unless directed by PCS to carry out work during time which was often different from usual hours. During the December/ January holidays, workers were paid their annual leave in lump sum, whether or not they had requested to take annual leave. PCS also failed to pay leave loading and provide off-site inductions required by the Agreement.

PCS advanced a defence that most of the employees, many of whom would often go on holiday during this time, were not "ready, willing and able to work" during these periods. There were three employees who PCS conceded remained ready, willing and able to work, and PCS offered no defence that they had been underpaid.

The FCA dismissed PCS's argument, stating that none of the employees were provided the opportunity to work in accordance with their legal right and so the readiness, willingness and ability of the employees to work during this time was beside the point. The applicants also demonstrated that they would have been ready, willing and able to work in accordance with their legal obligations, however they were not bound to accept PCS's unilateral direction to work at a different location without 7 days' notice.

The FCA remarked that permanent employees can expect to be paid the amount due in respect of ordinary hours each week even if no work is available, also citing the Union's submission:

> *Unpredictability of working hours and uncertainty of income is the burden of casual employees, and a burden offset by payment of 25% casual loading. Permanent employees are in an entirely different category*

The FCA rejected PCS's alternative defence that it provided stand down notices to employees in accordance with the terms of Agreement. The FCA held that there was no notice given regarding this by PCS, let alone six weeks' notice as required by the clause. Further, the FCA commented that the employer bears the onus of proof to establish an exception to its obligation to pay ordinary wages and on the facts, no exception was proved by PCS.

A clause in the Agreement also required that in drafting letters of appointment, the employer will have regard to the language skills of the employees. Nearly all of the effected employees were members of a Burmese ethnic minority and had spent two decades in refugee camps in Thailand, with limited English capacity. Despite the fact that the vast majority of the workforce were unlikely to be fluent readers of documents such as letters of appointment written in English, no efforts were undertaken by PCS to prepare accessible alternatives.

These issues led inescapably to the conclusion that PCS had contravened civil remedy provisions of the FW Act.

In contravention of s 345 of the FW Act, PCS was found to have misrepresented to some employees their workplace rights by continuing to identify in letters of appointment the *Cleaning Services Award 2010* as the applicable workplace instrument even after commencement of the Agreement.

Further, the payslips were found to be "haphazard and self-interested" by not being provided in a timely manner and failing to include information prescribed by the Fair Work Regulations. This was in breach of section 536 of the FW Act.

The FCA also made findings that the Director was accessorily liable for PCS's contraventions as the evidence disclosed that PCS, at all times, acted under his sole discretion.

In regards to the Agreement breaches, section 50 of the FW Act prohibits contraventions of enterprise agreements. In brief, the contraventions included:

- failing to pay employees their ordinary rate of pay for their usual hours during school holidays;
- failing to have regard to the language skills of employees (this was required by the terms of the Agreement);
- not providing off-site induction; and
- not paying leave loading.

PCS also breached the general protections provisions of the FW Act by making a false and misleading representation to three workers about their workplace rights (PCS indicated that the workers were covered by the modern award, when they were properly covered by the Agreement).

The sole Director was found to be 'involved in' the contraventions, and accordingly liable as an accessory to each contravention.

Each of the above provisions is a civil remedy provision, with a penalty of $63,000 per contravention for a corporation and $12,600 per contravention for an individual.

The FCA made declarations as to the nature of the breaches by PCS and the Director and will hear further submissions regarding the calculation of amounts owing (considered to be in excess of $300,000) and the monetary penalties to be imposed on PCS and the Director.

What does this mean for employers?

- Employer's looking to discharge obligations to pay permanent employees their ordinary hours of work bear the onus of proof in establishing that an exception applies – whether by reason of stand-down or otherwise
- Obligations imposed by enterprise agreements are protected by the Fair Work Act – employers must ensure compliance with all terms of their agreement
- Given the above, employers should be mindful about all bargaining claims during negotiations – for example, a term that requires the employer to consider the language needs of workers when providing a letter of appointment may create an enforceable obligations on the an employer and result in breach if not complied with

Nes protections protect only minimum standards: federal court

Construction, Forestry, Mining and Energy Union v Glendell Mining Pty Limited [2017] FCAFC 35

In a split-decision the Full Court of Federal Court of Australia (the Court), it has been held that public holidays may be deducted from Annual or Personal/Carer's Leave if an employee's entitlements under an enterprise agreement are more generous than those contained within the NES. The decision involved an Appeal from the FCCA brought by the CFMEU on behalf of a mining employee who claimed that his employer had contravened the NES by deducting 7 public holidays from his accrued leave entitlements.

Mr Noyes had been employed since 2008 by Glendell Mining Pty Ltd (Glendell) and was relevantly covered by the Black Coal Award (the Award) and later two enterprise agreements (the Agreements). Under these arrangements Mr Noyes was entitled to five and subsequently six weeks of annual leave, which exceeded the minimum four week period prescribed by the FW Act.

The primary legal issue concerned whether Glendell had contravened the NES and enterprise agreement protection provisions under s 44 and 50 of the FW Act when it deducted from public holidays annual leave and sick leave entitlements on days which Mr Noyes was away from work.

Section 89(1) of the FW Act provides that:

> "If the period during which an employee takes paid annual leave includes a day or part-day that is a public holiday in the place where the employee is based for work purposes, the employee is taken not to be paid annual leave on that public holiday"

The judgment turned on the statutory construction of this clause.

The Court rejected the CFMEU's submission that on a literal reading, s 89 refers to "paid annual leave" without reference to the source of the entitlement, and that the provision should extend to all paid annual leave, not just the NES minimum amount. The CFMEU raised arguments to the practical difficulty of a two-tiered entitlement whereby employers would need to determine whether a public holidays falls on a NES minimum or greater entitlement leave.

The majority accepted Glendell's interpretation that s 89(1) should be read in conjunction with the definition s 12 of the FW Act, which provides that:

> "Paid annual leave means paid annual leave to which a national system employee is entitled under section 87"

Consequently, the requirements of s 89(1) applied only to the four mandated weeks and not the additional one or two prescribed by the Glendell enterprise agreements.

As an alternative argument Glendell turned on statutory provisions which elucidate the interrelationship between enterprise agreements and the NES. The applicable provisions as (paraphrased) are:

55(1) Modern Awards or Enterprise Agreement cannot exclude the NES

55(4) Modern Award or Enterprise Agreements are permitted to include terms that are "ancillary" or "incidental" to the operation of an entitlement under the NES, and which "supplement" the NES, provided they are not detrimental to the employee

55(5) Enterprise Agreement may include terms which have the same effect as provisions of the NES regardless of sub-section (4)

55(6) To avoid doubt, if a modern award or enterprise agreement includes terms permitted by sub-section (4) then to the extent that the terms give an employee an entitlement that is the same as an NES entitlement:

a) The terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit;
b) The provisions of the NES relating to the NES entitlement apply as a minimum standard to the agreement or award
   - Note: For example, if the award or agreement entitlement is to 6 weeks of paid annual leave per year, the provisions of the NES relating to the accrual and taking of paid annual leave will apply, as a minimum standard, to 4 weeks of that leave

Glendell contended that the annual leave entitlements under the Award and Agreements were terms that "supplemented" NES provisions as permitted by s 55(4) and that being so, there was no contravention of s 55(1).

The majority were satisfied that section 55(6) acknowledged that employee entitlements may be derived from separate sources and that, to the extent that the terms of the Award and Agreements are the same as the NES, the two entitlements operate in parallel and not as a double benefit. Accordingly, the NES entitlements do not extend to Award and Agreement entitlements that are in excess of the NES. Further, though the Court acknowledged that the "Note" did not form part of the Act, it provided clear guidance in support of Glendell's contention.

In relation to the CFMEU's arguments that such a finding would be that there would be 'practical difficulties' for employers and employees in complying with Glendell's argument, the Court commented that practical difficulties cannot justify a different interpretation of the FW Act.

Though the analysis focused primarily on the annual leave provisions, the Court indicated that the same reasoning could be applied to the personal/carer's leave analysis as per section 98. The NES minimum prescribes 10 days of personal/carer's leave for each year of service while the Agreements entitled employees to three weeks of paid leave.

The Court also rejected the CFMEU's alternative argument that notwithstanding Glendell's interpretation of clause 89 and 98, the deductions were unauthorised because the paid annual leave had been taken by Mr Noyes as part of the NES minimum and not as part of the additional entitlements under the Agreements. The Court found that on the facts the deductions could have been withdrawn from a non-NES entitlement.

Justice Siopis dissented, observing that the two-tiered approach would introduce an unintended level of complexity requiring employees, when applying for leave, to specify whether it was for an NES or additional entitlement. He further commented that the references to section 55 provided only limited support to Glendell's contention and the definition section should not be used to "enact substantiative law" but rather to "provide aid in construing statute".

What does this mean for employers?

- Annual leave and personal/carer's leave entitlements that are in excess of NES minimum standards are not subject to the public holiday non-deduction requirements of the NES
- Therefore, for employees covered by more-beneficial leave entitlements (compared to the NES), the restrictions in the NES may not apply

FWC express 'dismay' at hospital's termination of a long-standing nurse

Dorris Maharaj v Northern Health [2017] FWC2997

A nurse seriously injured in a car accident has been reinstated after a hospital made no enquiries into her capacity to work at the time of her termination and denied her procedural fairness.

Ms Maharaj was employed by Northern Health (NH) as a graduate nurse and at dismissal, 17 years later, held the position of ICU Liaison Nurse / Clinical Specialist – Acute Services. In May 2015, she was involved in a serious car accident, suffering injuries to her vertebrae and psychiatric symptoms. During her period away from work, Ms Maharaj stayed in contact with her unit manager and expressed in March 2016 that she was 'looking forward to returning'. Around July 2016, Ms Maharaj and her GP had a discussion and agreed that she had the capacity to return to work. The GP completed a TAC certificate of capacity in August 2016 which suggested a graduated return to work plan.

In September 2016, Ms Maharaj's return to work coordinator at the TAC contacted NH seeking a meeting to discuss her return. The co-ordinator was advised that there was no return to work available, because NH had implemented a new return to work policy. Later that month, Ms Maharaj received a letter from the Director of HR at Northern Health that she had been terminated "effective immediately".

The decision to terminate Ms Maharaj's employment was made at a meeting of the executive team in September 2016, where NH formed the view that she had 'no capacity' to return to work after 16 months absence and that there were no alternative suitable roles.

In finding that Ms Maharaj's dismissal was unfair, the FWC found that NH had no basis to conclude that Ms Maharaj had 'significant restrictions' on her ability to perform her pre-injury job or that she was likely to have 'incapacity into the foreseeable future'. It found that, notwithstanding the certificate of capacity that indicated a return to work plan could be developed and communication from the return-to-work coordinator, the executive committee formed the view that Ms Maharaj could only return to a modified role. In fact, the evidence from the GP was that modifications would require a gradual increase in hours but an ultimate return to the pre-injury position. Given a work plan could have been developed, the FWC did not believe that the reason for dismissing Ms Maharaj was "sound, defensible or well-founded" and therefore that there was no valid reason for dismissal.

Further, the FWC commented that prima facie, it appeared NH had breached *Disability Discrimination Act 2009* (Cth) (DDA), which requires employers to make reasonable adjustments for a person with a disability, with the exception that it is not unlawful to discriminate against a person with a disability if that person cannot carry out the inherent requirements of the particular work even if the adjustments were to be made. Because NH had made no inquiries as to Ms Maharaj's capacity, it had seemingly abrogated its responsibilities under the DDA.

The FWC also made findings that Ms Maharaj was denied procedural fairness, and "*express[ed] dismay that an organisation of that size, with its array of specialist human resources staff, did not think that Ms Maharaj should have been advised of what it was considering nor given an opportunity to put anything to it prior to making the decision to send the letter terminating her employment*".

In consideration that NH did not have a valid reason to terminate the employment, and procedural fairness was not provided, and other relevant evidence, the FWC determined that reinstatement was an appropriate remedy. Ms Maharaj was reinstated into the position she was employed in immediately before dismissal as an ICU Liaison Nurse. NH was ordered to consult as to an appropriate means of return to her pre-dismissal hours through a graduated return to work plan.

What does this mean for employers?

- To minimise exposures in respect of unfair dismissal applications, employers should undertake a structured process which may include seeking information from appropriate medical practitioners, regarding an employee's capacity to return to work and modifications that could be implemented
- Even where an employee cannot perform the inherent requirements of their position, an employer remains required to undertake a procedurally fair process where consideration is being given to terminate the employment
- The DDA requires employers to make reasonable adjustments to the employment of person with a prescribed disability, unless this person would still be unable to fulfil the inherent requirements of their job. Similar obligations may arise under state or territory legislation
- Concerns regarding capacity for work will not preclude the FWC from ordering the reinstatement of a successful applicant in respect of an unfair dismissal application

Penalty Update

Balemain v Mobilia Manufacturing Pty Ltd & Anor

The FCCA has found that an employee was underpaid more than $230,000 by being misrepresented as an independent contractor for over 20 years.

In 1994, the applicant, Mr Balemain, commenced working at Auscraft Constructions Proprietary Limited (Auscraft), a business involved in the fabrication of fittings for buildings. His working arrangement was never formally discussed and no contract was ever drafted. Rather, the working arrangement was a "*word of mouth and trust.*"

In 2015, Auscraft was placed into administration and the sole director advised Mr Balemain that he would now work for Mobilia Manufacturing Pty Ltd (Mobilia). Two months later, Mr Balmain resigned. Mr Balemain was advised that the director had been declared bankrupt and that he was an unsecured creditor in the sum of $200,000.

Throughout the course of his work Mr Balemain undertook work in estimating, purchasing and managing building supplies, but ultimately he worked solely as an estimator, preparing quotations for projects for tender. Decision-making was undertaken by both Mr Balemain and the director, and it was conceded by the Director that Mr Balemain "couldn't make a decision unsupervised". Further, the FCCA was satisfied that Mr Balemain:

- regularly worked at least 45 - 50 hours per week;
- had an office and factory key; and
- had regular access to the company car (including, on one occasion, for a 2-week holiday);
- submitted fortnightly invoices for the hours he worked; and
- was directed to and did complete detailed timesheets.

The above features were put to the FCCA in support of the proposition that Mr Balemain was an employee. Despite this alleged relationship, Mr Balemain did not receive the entitlements of employment such as overtime penalty rates, superannuation, long service leave, paid public holidays, and annual leave (including leave loading).

The FCCA found that Mr Balemain was "not free to use his own discretion for the most part", could not delegate any aspect of his work and was under the control of Auscraft / Mobilia.

Accordingly, the FCCA found that Mr Balemain was clearly in an employment relationship, which was "recklessly disguised" as that of an independent contractor.

The Director was found to be an accessory to the contraventions and will face pecuniary penalty of up to $12,600 per contravention.

The underpayments included $26,000 for being paid at the wrong rate, over $102,000 for annual leave (for 425 days of annual leave), over $51,000 for public holidays, over $22,000 for long service leave (for 18 weeks of long service leave) and over $29,000 in superannuation.

Fair Work Ombudsman v Gaura Nitai Pty Ltd & Anor

A Coffee Club franchise and its director have been penalised $150,900 and $30,000 respectively for 19 contraventions of the FW Act involving the gross exploitation of an overseas 457-visa worker.

Mr Mathew began working as a casual employee at the Coffee Club in Nundah and was sponsored by the same in October 2013. Shortly thereafter Mr Matthew and the director, Mr Chokhani, attended the migration office where the parties signed a contract employing Mr Mathew as a full time cook with a $53,900 plus superannuation salary.

During Mr Mathew's full time employment he was paid a flat rate irrespective of the number of hours, days or times he had worked, thereby without any overtime or penalty rates as prescribed by the applicable Restaurant Industry Award. Further, for three separate periods of Mr Mathew's employment he received no wage, for a total of 29 weeks.

In April 2015, Mr Mathew was concerned about not being paid his wages and brought this up with Mr Chokhani. The two attended a bank where Mr Chokhani deposited into Mr Mathew's account an agreed amount that was owing. This was calculated at $19,334.26. Immediately after the money was deposited in Mr Mathew's account Mr Mathew was forced by Mr Chokhani to withdraw $18,000 in cash and provide it to Mr Chokhani. Though the evidence was conflicted, the Court accepted that Mr Chokhani threatened Mr Mathew that if he did not pay the money back, he would organise to cancel Mr Mathew's visa – a demand described by the Court as "especially egregious".

In November 2015, the franchise terminated Mr Mathew's employment without notice.

Following his termination of employment, Mr Mathew requested records relating to wages during his employment. The records provided by Mr Chokhani were false and misleading, incorrectly recording amounts owed and paid and in particular, recording payments to Mr Mathew during periods where he, in fact, received no pay at all.

As above, the FCCA found a total of 19 contraventions of the FW Act, which included:

- failing to be paid casual loading whilst a casual employee (s. 45 FW Act);
- underpayment of wages and other entitlements as prescribed by the Restaurant Industry Award, including non-payment of wages, overtime, public holidays, penalty rates, annual leave entitlements (s. 45 FW Act);
- failing to pay Mr Mathew on an agreed weekly, fortnightly or monthly scheme (s. 45 FW Act);
- failing to provide notice or payment in lieu of notice (s. 44 FW Act);
- unreasonable requirement to spend an amount payable to an employee by way of the $18,000 cashback transfer (s. 325(1) FW Act);
- failing to record hours worked by Mr Mathew (Regulations 3.34, 3.35, s. 535 FW Act); and
- making use of false and misleading records (Regulation 3.44).

In opening, Judge Michael Jarrett commented: "*the exploitation of workers from other countries who are inspired to live and work in Australia with the hope of achieving permanent residency needs to be discouraged, in the strongest terms whenever it is apparent that it has occurred*".

Penalty Rates

Investigation into Domino's possible involvement in workers' underpayments

The FWO are currently investigating the potential culpability of Domino's in the highly publicised underpayments scandal to workers across multiple Domino's franchisees. The FWO will assess enforcement outcomes for the allegations, initially discovered nearly two years ago, depending on the "culpability of all parts".

Spokesperson Natalie James from the FWO has commented that Domino's has made an effort to discover what has been going on in its franchisees however they have been unable to yet understand "the nature of underpayments and remedial action".

In recent years Domino's has entered into two compliance partnerships with the FWO, which each were aimed at promoting compliance with workplace laws, however, the most recent expired last year.

In March this year, Ms James expressed concern about the negotiation of a new partnership, commenting that "certainly, we've got some work to do with our investigation before we decide what our posture is towards this company".

Ms James has stated that they are still in very early stages of the investigation process.

3% Wage increase in the private sector

The latest Trends in Federal Enterprise Bargaining (released 24 April 2017 and relating to enterprise agreements approved in the December 2016 quarter) has disclosed that the average annualised wage increase (AAWI) in private sector agreements has dropped to 3 per cent. This can be compared to the September 2016 quarter result of 3.4 per cent.

This figure stands just above the record low of 2.9% (recorded three times - in the last quarter of 2015 and the first two quarters of 2016).

The AAWI was taken from 1292 private sector enterprise agreements.

Wage increases in public sector agreements increased from 3% to 3.2%, with the largest increase being 3.6% awarded to 53,507 Victorian nurses and midwives.

Across all sectors (public and private), the average dropped from 3.3% to 3.1%.

Separately, the March 2017 Consumer Price Index revealed that consumer prices are growing faster than wages, with headline inflation increasing from 1.5% to 2.1% for the year. Wages, meanwhile, have increased by an average of only 1.8%.

Bill introduced attempting to increase number of skilled staff in aged care sector

Aged Care Amendment (Ratio of Skilled To Care Recipients) Bill 2017

On 6 September 2017, Senator Hinch introduced the *Aged Care Amendment (Ratio of Skilled to Care Recipients) Bill 2017* (the Bill), which proposes to introduce a mandated ratio of skilled staff to care recipients in aged care residential facilities. Currently the Aged Care Act 1997 (Cth) does not specify a minimum staffing standard and does not define what constitutes an adequate number of appropriately skilled staff.

In the Senate, Senator Hinch said that the Bill was necessary to protect those who have given so much to society and provide this 'highly vulnerable' group with a guaranteed standard of care. In a message of support the Australian Nurses and Midwifery Federation thanked Senator Hinch for introducing the Bill.

The Bill seeks to amend the responsibilities of approved providers to include what is an alleged maintenance of an 'adequate and safe ratio of appropriately skilled staff to care recipients'. Adequate and safe ratio is defined by the Bill as being equal to or greater than the minimum ratio required by the Quality of Care Principles for:

(a) The number of care recipients receiving care through the aged care service at the time; and
(b) The type of care and level of care provided.

Under the Bill, the Staff to Care Recipient Ratio Standards would be set out in the Quality of Care Principles. The Bill outlines that the Staff to Care Recipient Ratio Standards will provide the standard for quality of care and quality of life for the provision of aged care. In determining the minimum ratio of appropriately skilled staff to care recipients at a particular time, the following would be taken into account:

(a) The number of recipients receiving care at that time:
(b) The type of care provided; and
(c) The level of care provided.

In the Second Reading Speech, Senator Hinch stated that the calculated mandated ratios would provide considerations for day and night shifts, higher and lower care residents and for metropolitan, rural and regional areas.

It is understood that Senator Hinch consulted with a number of stakeholders during the development of the Bill. Whilst there is political support for reforming staffing ratios both the Government and the Australian Greens have indicated that they will not support the current Bill. The position of the Opposition and other crossbenchers is currently unclear.

Unfair dismissals

John Finnegan v Komatsu Forklift Australia Pty Ltd [2017] FWC 2433

Whilst criticising the HR department of a large scale employer during an unfair dismissal application, the FWC has reminded employers that "employees are human beings, they can be easily damaged, and when faulty should be handled with more care than machines", stressing the need to engage in an appropriate process prior to terminating employment. The applicant, initially engaged as a technician and later promoted into the Customer Service team at Komatsu Forklift Australia (Komatsu), started experiencing difficulties shortly after a promotion and increasing issues with his manager. It soon became apparent that the applicant was suffering from a mental illness.

Directed onto such leave, after a period away from the workplace, the applicant failed to comply with Komatsu's direction to return to work and instead submitted multiple sick leave certificates for a period of 5 months. Ultimately, Komatsu requested that the applicant submit material regarding his capacity to return to work, for which the applicant requested two extensions of time, the second of which was rejected. Instead, Komatsu sent an email to the applicant which attached a letter of dismissal, stating that Komatsu had formed the view that the applicant had refused to work and it had 'no other option other than to terminate' his employment.

Strongly criticised for its deficient and callous process, the FWC found that dismissal was harsh, unjust and unreasonable, sufficient to substantiate unfair dismissal under the FW Act. It was particularly aghast that Komatsu misconstrued the applicant's incapacity to work as a refusal to work and held this rendered the reason for dismissal invalid. Komatsu's failure to provide an opportunity to respond or to provide a warning about unsatisfactory performance was also criticised and determined unreasonable. FWC commented that "mental health issues are difficult matters which need to be treated with considerable care and compassion. In particular, mental health issues should not be artificially elevated as barriers to continued employment."

Given the FWC's assessment that the applicant would not have continued for any significant period of time and at the time of dismissal was taking unpaid sick leave, the applicant was paid one month's remuneration in lieu of notice and one week's remuneration as compensation. However, the decision provides a strong message to employers to ensure they adapt a thorough and appropriate process prior to terminating an employee, especially in such circumstances.

Mrs Nicole Webb and Ms Lauren Webb v The Trustee for SWC Unit Trust T/A Salisbury Day Surgery

In another decisions stressing the need to follow process, the FWC has found an abortion clinic's unfair dismissal of a mother and daughter was driven by "commercial and interpersonal factors" and undermined by significant procedural failures. The Practice Manage, Nicole Webb and her receptionist daughter, Lauren Webb, (heard together), were dismissed for allegedly bullying other employees and incorrectly recording hours on their timesheets, which the Clinic maintained amounted to fraud and theft.

The FWC determined that the bullying claims, which related to the applicants' allegedly 'threatening' conduct towards two nurses, in absence of any evidence of formal complaints being made by the relevant nurses, were unsubstantiated. While both women had been stood down the FWC held, the allegations would not have met the statutory criteria for bullying, which requires a person to "repeatedly behave unreasonably towards a worker….and the behaviour creates a risk to health and safety" (s 789FC(1) FW Act) and no proper assessment of their conduct was undertaken.

In regards to the allegation the women incorrectly recorded working hours, an investigation by the Queensland Police reported that the fraud and theft claims were 'unfounded'. The FWC noted that dishonesty is a requisite element of criminal allegations and could not be discharged in this case. To substantiate claims of serious misconduct, the Clinic relied on building access records, however, in circumstances where multiple people were accessing the building during construction, the FWC described the evidence as "inexact proofs" and "indirect references". While they may have been sufficient to support a finding of misconduct, they were insufficient to support a finding of serious misconduct. The FWC also commented that pursuant to s. 535 and 536 of the FW Act, employers ultimately carry responsibility in ensuring that timesheets and wages paid to employees are accurate.

The FWC ultimately held that the procedure for dismissal was significantly flawed, noting that the applicants were given only 2 days to provide a response to allegations stretching over a period of 18 months, and were not provided with copies of important documents (such as timesheets) which formed the basis of the allegations. Further, during disciplinary meetings, the applicants were denied support persons.
The FWC recognised and took into consideration the contention that the dismissals were constructed to enable the Director's wife and daughter to take up the roles of manager of the business and administrative assistant, replacing the applicants.

The Practice Manager was awarded four weeks' compensation however the Commissioner declined to make orders in regards to the receptionist, who had promptly secured alternative employment.

Unfair dismissals

Ashley Duddington v Mario and Clara Enterprises Pty Ltd and Morgan Trading Pty Ltd

A restaurant owner has been ordered to pay compensation to an ex-employee after a finding that being disrespectful, whistling and 'physically manhandling' a female employee was not sufficiently serious to justify immediate dismissal under the Small Business Dismissal Code (the Code).

The applicant, Mr Duddington, was employed as a Restaurant Manager for Oscar's Restaurant Currambine (Oscars) after the owner, Mr Morgan, retired. He was dismissed for allegedly disrespectfully asking Mr Morgan to leave the restaurant, whistling in front of customers and for 'manhandling' a female employee. After a year and a half of employment, the manager was struck off the roster and after questioning Mr Morgan as to why, he was advised that he was "no longer employed".

Of the allegations, Mr Duddington conceded that the incident with the female employee had occurred and that he had directed Mr Morgan to leave the restaurant on a number of occasions (albeit both differently from Mr Morgan's evidence). Although the FWC found that the first incident could not be used as a valid reason for termination, given that it had occurred 8 months prior to dismissal without any clear admonishment by Mr Morgan, it found that "to be told…to leave the restaurant…is not conducive to the maintaining of an employment relationship" and therefore this conduct could provide a valid reason for termination.

However, under the Code, to summarily dismiss someone, the conduct must be "sufficiently serious to justify immediate dismissal. Serious misconduct includes theft, fraud, violence and serious breaches of occupational health and safety procedures." Here the FWC held that the alleged conduct was not in the same genre as theft, fraud, violence or serious breaches of safety, and therefore the summary dismissal was not consistent with the Code. If it is not a summary dismissal and rather a dismissal with notice, the Code prescribes minimum procedural requirements including:

- Valid reason based on the employee's conduct or capacity to do the job
- Verbal or preferably written warnings
- An opportunity to respond
- Providing a chance to rectify the problem

These were also not complied with. Because the termination was inconsistent with the Code requirements, the test to be applied reverted back to s. 387 of the FWA which assesses whether the dismissal was 'harsh, unjust or unreasonable'. Taking all matters into consideration, the FWC found that the termination was unfair, being unjust and unreasonable on the basis that Mr Duddington was terminated without notice, provision of a reason for his termination, warnings or the opportunity to rectify his conduct. The FWC took into consideration the size of the business and the absence of a human resource team in assessing remedy, and is to determine compensation following further submissions.

What does this mean for employers?

- To avoid the probability of an unfair dismissal application, employers must ensure that they provide employees with procedural fairness (such as having a valid reason for dismissal, notifying the employee of the reason for dismissal, providing an opportunity to respond, etc.)
- Further, employees must provide an employee with a proper opportunity to respond to allegations, preferably that are put in writing
- Employers cannot artificially elevate 'misconduct' to 'serious misconduct' for the purpose of implementing dismissals, and should understand the distinction between the two by reference to the applicable legal instruments
- It remains a relevant and genuine obligation to enable an employee to have a support person during relevant disciplinary meetings

Glossary

Abbreviation	Term
DDA	Disability Discrimination Act 2009 (Cth)
DP	Deputy President
EA	Enterprise Agreement
FCCA	Federal Circuit Court of Australia
FCA	Federal Court of Australia
FW Act	Fair Work Act 2009 (Cth)
FWC	Fair Work Commission
FWCFB	Fair Work Commission Full Bench
FWO	Fair Work Ombudsman
GP	General Practitioner
ICU	Intensive Care Unit
LSL	Long Service Leave
LSL Act	Long Service Leave Act 1987 (SA)
NES	National Employment Standards
TAC	Transport Accident Commission

To ensure that SIAG continues to provide the most efficient services to your organisation, it is vital that the contact details we have for our clients are correct and current. Please ensure you notify us of any changes to the nominated persons you wish to have access to the national advisory service, website, and HR / IR updates.

To obtain a client detail form or to inform us of any changes,
please contact Darcy Moffatt at dmoffatt@siag.com.au.