The Advisor

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Industrial Relations Omnibus Bill

Senate inquiry due to report on 12 March after extensive stakeholder engagement

The federal government's omnibus IR Bill *(the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020)* is facing an uncertain future, with vocal opposition from key stakeholders and its passage through the Senate to be challenged by Labor and the Greens. To pass, the Bill is likely to require support of five crossbench senators, including One Nation Senators Malcolm Roberts and Pauline Hanson.

Attorney-General Christian Porter has indicated that 'the Government is open to sensible, evidence-based suggestions that can improve the Bill, but remains committed to its over-riding goal of helping protect jobs, create more jobs and drive wages growth as we recover from the impacts of the COVID-19 pandemic.'

The Bill has been referred to a Senate inquiry and will go to a vote after the report is delivered on March 12.

Key provisions of the IR Bill

The Bill is founded on five key areas.

1. Casual employees

A statutory definition of 'casual employee' is to be introduced into the *Fair Work Act 2009* (Cth) (**FW Act**). A person will be considered a casual employee if

> *an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person.*

The Bill also includes a list of considerations for determining whether or not, at the time of the offer, the employer made 'no firm advance commitment to continuing and indefinite work according to an agreed pattern of work'. These include whether:

- the employee can elect to accept or reject work;
- the employee will work only as required;
- the employment is described as casual employment; and
- the employee will be entitled to a casual loading or a specific rate of casual pay.

Employers will be required to offer casual employees the conversion to part-time or full-time employment after 12 months if they have worked on a regular, ongoing basis for at least six months, unless there are reasonable business grounds not to do so. Employers must not attempt to avoid this obligation by reducing or varying the employee's hours.

It will be the employee's choice to an offer of permanent employment; there will be no automatic conversion to permanent employment. Further, employers will not be obliged to offer the employee a greater number of hours of work after the employee has converted to permanent employment.

The Bill also addresses concerns that employers may have to pay employees' leave entitlements and other benefits on top of casual leave loading, following last year's decision of the Full Court of the Federal Court in *WorkPac Pty Ltd v Rossato* [2020] FACFC 84. The proposed amendments would allow, in certain circumstances, for casual loading amounts to be offset against other entitlements in the event that an employee is found to be misclassified as a casual employee.

2. Enterprise Agreements

The Bill aims to address complaints that enterprise bargaining under the FW Act is hampered by unnecessarily technical and prescriptive requirements. In an effort to address these concerns, the Bill proposes the following amendments:

- Extending the timeframe for the provision of the Notice of Employee Representational Rights (**NERR**) from 14 to 28 days after the employer initiates, agrees, or is required to bargain.
- Amending the test for ensuring an enterprise agreement is 'genuinely agreed' to by requiring employers to take 'reasonable steps' to give employees a 'fair and reasonable opportunity decide whether or not to approve the agreement.'
- In determining whether to approve agreements, the Fair Work Commission (**FWC**) will be required to accept submissions from the bargaining parties. Intervention by other parties will generally not be allowed, unless exceptional circumstances exist.
- The FWC will be required to approve agreements, as far as practicable, within 21 working days. If they are unable to do so, they will be required to provide written notice of the exceptional circumstances to explain the delay.
- The FWC will no longer need to be satisfied that the enterprise agreement does not exclude the National Employment Standards (**NES**). Rather, Enterprise Agreements will need to include a provision explaining the interaction between the NES and enterprise agreements.
- Eligibility of casual employees to vote on an enterprise

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agreement will be clearly set out (i.e., if the casual employee is employed during the access period).
- New franchisees will be allowed to opt-in to existing single enterprise agreements made with a group of employers operating under the same franchise.
- Parties that can be heard by the FWC at approval stage will be restricted, and non-bargaining representatives will only be heard in exceptional circumstances.
- A unilateral application to terminate an enterprise agreement after its nominal expiry date will not be able to be made until at least 3 months after the nominal expiry date.
- Industrial Instruments will not transfer where an employee voluntarily transfers between associated entities.
- Enterprise agreements made prior to the commencement of the FW Act and during the 'bridging period' (i.e., between 1 July - 31 December 2009) will automatically cease to operate by 1 July 2022.

A further key change proposed with respect to enterprise agreements involved the Better off Overall Test ('**BOOT**'). This would have given the FWC the power to approve enterprise agreements in which workers are not 'better off overall' compared to the relevant modern award where it was 'appropriate to do so taking into account all the circumstances, including the views and circumstances of the bargaining parties and their representatives and the impact of COVID-19 on the relevant enterprise.'

After strong opposition from Labor and One Nation, the Coalition has abandoned the BOOT changes, with Attorney General Christian Porter explaining the modification was necessary so as not to 'distract from other elements of the package which will help employers and employees recover from the economic impacts of the pandemic.'

The opposition IR spokesman Tony Burke told parliament that, 'when the government first announced it was planning industrial relations changes Labor set a very simple test: we would support the legislation if it delivered secure jobs with decent pay. The government's legislation still fails that test…Labor has always made it clear that while the BOOT change was the most egregious attack on job security and workers' pay in the government's bill – it is certainly not the only one.'

3. Compliance and enforcement

The Bill introduces the Coalition's long awaited 'wage theft' laws, by including a criminal offence for dishonest and systematic wage underpayments.

An employer will be caught by the provisions if they 'dishonestly engage in a systematic pattern of underpaying employees'.

Fines will be imposed of up to $1.11 million for an individual and imprisonment for four years. The proposed maximum company fine is $5.55 million.

Additionally, higher civil penalties will be introduced for existing FW Act contraventions, and the small claims cap for employees to claim underpayments will be increased from $20,000 to $50,000.

4. Award simplification

It is proposed that part-time employees covered by modern awards in the retail, trade, accommodation and food services industries and who work at least 16 hours per week, will be able to make a simplified additional hours agreement with employers to work extra hours at their usual rate of pay – rather than at penalty rates.

Employers will also be permitted to give employees reasonable directions as to flexible work and flexible work location for two years after the Bill is passed, as long as the direction is a necessary part of a reasonable strategy to assist in the revival of the employer's enterprise.

5. Greenfields agreements

The life of a Greenfields Agreement may be extended to up to eight years for major projects valued at more than $500 million or for projects valued at more than $250 million if the Minister makes a declaration that approval can be sought.

The ALP's response

The ALP caucus has resolved to block the current Bill in its entirety, citing in particular concerns about its effect on insecure work. In a speech at TAFE Queensland, federal opposition leader Anthony Albanese criticised the bill as 'a full-frontal attack' on workers' pay, conditions and job security. He went on to announce the first eight elements of Labor's Secure Australian Jobs Plan:

- To insert 'job security' explicitly as a key objective into the FW Act, requiring the FWC to consider it when making decisions.
- To extend FWC powers to include 'employee-like' forms of work, allowing it to protect those in the gig economy from dangerous and exploitative working conditions.
- To create portable entitlements for annual leave, sick leave and long service leave for Australians in insecure work.
- To legislate a 'fair test' to define casual work.
- To ensure that workers employed through labour hire companies receive at least the same pay as workers employed directly.
- To limit the number of consecutive short-term contracts that may be offered for the same role.
- To create more secure public sector jobs by ending inappropriate temporary contracts in the Australian Public Service.
- To ensure that the government contracts with companies and organisations that offer secure employment.
- Mr Albanese also committed to opposing any repeal of the legislation guaranteeing Australian workers a minimum 12% superannuation.

One Nation's response

One Nation's opposition might also prove to be a major stumbling block. Senator Malcolm Roberts told the *Australian Financial Review* the Bill's definition of casual has 'not passed the pub test' for many Australians and 'needs further discussion [to ensure it is] good for business and the casual worker'.

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Senator Roberts also flagged as priorities the need to 'ensure flexible employment agreements and clear rules and protection for low-paid workers, casuals and small to medium-size business.'

Other stakeholders

Employer groups

In its submission to the Senate Inquiry, the Australian Industry Group (Ai Group) supports the provisions defining a 'casual employee' and protecting employers against 'double dipping', stressing their importance in light of the Federal Court's recent decisions in the *Skene and Rossato* cases.

The submission also supports the Bill's changes to enterprise agreement provisions as a means of 'reinvigorat[ing] the enterprise bargaining system' and leading 'to productivity improvements and wages growth at the enterprise level.' The Ai Group does, however, object to the higher civil and criminal penalties in the Bill, on the grounds that the 2017 increase in civil penalties has already led to higher compliance and self-reporting rates.

Unions

Several unions have criticised the changes proposed by the Bill, with the ETU and CFMEU launching an advertising campaign encouraging workers to contact the five crossbench senators and voice their opposition.

The ACTU's submission to the Senate inquiry expresses concern about the casualisation of permanent jobs, the shift in power to employees as a result of changes to the enterprise bargaining system and the extension of JobKeeper IR provisions beyond the end of JobKeeper payments.

ACTU Secretary Sally McManus said, 'From the start of the consultation process we were very clear that we would never support legislation that left workers worse off; this Bill does not pass that test. At a time when we need certainty, security and wages in the pockets of working people, this bill would push us in the opposite direction – cutting pay and increasing insecurity.'

COVID-19 pandemic - key updates for employers

The shockwaves of 2020 will continue to resonate at the workplace in 2021

Part 1 - Mandating vaccines in the workplace

The phased rollout of COVID-19 vaccines has commenced in Australia, with the first doses now available to the 'Phase 1a' subgroups of:

- quarantine and border workers
- frontline healthcare workers
- aged care and disability care staff, and
- aged care and disability care residents.

The next phases will cascade in the order of:

- Phase 1b: elderly adults aged 80 years and over, elderly adults aged 70-79 years, other health care workers, Aboriginal and Torres Strait Islander people aged over 55, adults with an underlying medical condition, including those with a disability, critical and high-risk workers including defence, police, fire, emergency services and meat processing.

- Phase 2a: adults aged 60-69 years, adults aged 50-59 years, Aboriginal and Torres Strait Islander people aged 18-54, other critical and high-risk workers.

- Phase 2b: the balance of adult population, catch up any unvaccinated Australians from previous phases.

- Phase 3: children under 16 if recommended.

- The Australian Government, and agencies including the Fair Work Ombudsman and Safe Work Australia, have repeatedly advised that the 'overwhelming majority' of employers should assume they have no power to force employees to be vaccinated. It is, however, the Government's policy to have as many Australians vaccinated as possible.

Whilst there are no laws specifically empowering employers to mandate employee vaccinations, there are limited circumstances where it will be appropriate to do so. Vaccination as an inherent requirement of employment has been in the spotlight over the past year in the context of influenza vaccines for certain groups of workers, and the same principles are likely to apply to the COVID-19 vaccine.

In Victoria, *the Health Services Amendment (Mandatory Vaccination of Healthcare Workers) Act 2020* came into operation on 25 March 2020. As a result, all healthcare workers in public, denominational and private hospitals, and ambulance services with direct patient contact are required to be vaccinated for influenza. This includes doctors, nurses, paramedics, dentists, orderlies, cleaners, and public sector residential aged care services staff. The Victorian Government strongly recommends, but has not mandated, flu vaccination for private residential aged care workers.

There are public health orders in New South Wales, Western Australia, South Australia, the Northern Territory, the Australian Capital Territory and Tasmania for residential aged care workers to be vaccinated against influenza. An exception exists for cases of medical contraindication. Queensland does not have a mandatory vaccination requirement.

The FWC has made some recent relevant observations. In *Arnold v Goodstart Early Learning [2020] FWC 6083*, the FWC considered the dismissal of a child care worker who had refused to comply with her employer's mandatory vaccine policy, without specifying any medical grounds for her objection.

Deputy President Asbury noted:

> *Prima facie the Respondent's policy is necessary to ensure that it meets its duty of care with respect to the children in its care, while balancing the needs of its employees who may have reasonable grounds to refuse to be vaccinated involving the circumstances of their health and/or medical conditions. It is also equally arguable that the Applicant has unreasonably refused to comply with a lawful and reasonable direction which is necessary for her to comply with the inherent requirements of her position, which involves the provision of care to young children and infants.*

That decision was followed by *Glover v Ozcare [2021] FWC 231*, concerning an in-home care worker who was dismissed after refusing an influenza vaccine on the basis of her allergies.

Commissioner Hunt commented that:

> *…each circumstance of the person's role is important to consider, and the workplace in which they work in determining whether an employer's decision to make a vaccination an inherent requirement of the role is a lawful and reasonable direction. Refusal of such may result in termination of employment, regardless of the employee's reason, whether medical, or based on religious grounds, or simply the person being a conscientious objector.*

These decisions indicate that, although an employer must make decisions about compulsory vaccinations on a case-by-case basis, there will be some circumstances in

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Part 1 - Mandating vaccines in the workplace - continued

which vaccination will be an inherent requirement of an employee's role.

However, at this stage, and in light of the Government's position of not expressly mandating vaccines for any occupation, employers should be on notice that there will be risks associated with a decision to dismiss or otherwise alter the position of an employee because they have refused.

In terms of the health and safety analysis, the Safe Work Australia website (www.swa.gov.au) includes the following advice:

- Under Work Health and Safety laws, an employer has a duty to eliminate or if not possible, minimise, so far as is reasonably practicable, the risk of exposure to COVID-19 in the workplace.
- An employer must do all that is reasonably practicable to minimise this risk and vaccination should be considered as one way to do so in the context of a range of COVID-19 control measures.
- It is unlikely that a requirement for workers to be vaccinated will be reasonably practicable.
- However, whether an employer should require its workers to be vaccinated will depend on the particular circumstances at the time it undertakes its risk assessment.

Arguably, at certain workplaces the COVID-19 vaccine will be the best way of ensuring the health and safety of employees, visitors, residents and/or patients.

Further, if an employee at a high-risk workplace is required to work alongside unvaccinated colleagues, that in itself could possibly create a health and safety risk for which the employer would be responsible.

Some factors for employers to give weight to in making a policy decision on COVID-19 vaccines should include:

- Industry recommendations, for example from the Australian Health Protection Principal Committee.
- Whether or not employees will be at risk of infection as part of their work.
- Whether or not employees work with people who would be vulnerable to severe illness if they contracted COVID-19.
- The likelihood of COVID-19 spreading in the workplace, e.g., if employees must work in close proximity to one another.
- Whether employees interact with large numbers of other people that could result in a 'super-spreading' event if they contracted COVID-19.
- The availability and likely effectiveness of other infection control measures at the workplace.

What does this mean for employers?

- In the absence of legislation or a public health order to the effect that COVID-19 vaccines may be mandated in the workplace, employers must assess whether or not they can reasonably direct an employee to be vaccinated.
- Although any objections should be considered on a case-by-case basis, we are of the view that in certain workplaces, there will be an overriding risk to health and safety if the workforce is not vaccinated.

- Please contact SIAG for a legal assessment of the particular circumstances that apply to your workplace

COVID-19 pandemic - key updates for employers

Part 2 - JobKeeper 2.0 extends flexibility for employers

The Coronavirus Economic Response Package (JobKeeper Payments) Amendment Act 2020 (**JK Act**) remains in force until 28 March 2021.

In his second reading speech, Federal Treasurer Josh Frydenberg explained that the measures contained in the JK Act, 'will provide continued workplace flexibility at a time when businesses are still in distress and recovering from the economic impact of the coronavirus pandemic. Ensuring the viability of businesses in these circumstances will help preserve Australian jobs and assist employees to remain connected to their workplaces.'

JobKeeper wage subsidy

From 4 January 2021 the JobKeeper wage subsidy was further reduced to $1000 per fortnight.

This rate applies to employees who worked more than 20 hours per week on average in the four pay periods before either 1 March 2020 or 1 July 2020. Other eligible employees (i.e. those who worked less than 20 hours per week in the relevant periods) qualify for a $650 per fortnight payment, as of 4 January 2021.

Businesses and not-for-profits are required to nominate which payment rate they are claiming for each of their eligible employees (i.e. whether the employee is eligible for the higher or lower rate of pay).

In relation to the assessment of an employee's hours, the Commissioner of Taxation will have discretion to set out alternative tests where an employee or business participant's hours were not usual during the February and/or June 2020 reference period. For example, this will include where the employee was on leave, volunteering during the bushfires, or not employed for all or part of February or June 2020. For employees with 1 March 2020 eligibility, the period with the higher number of hours worked is to be used as the reference point.

Employers who qualify for JobKeeper 2.0

Employers' eligibility for the scheme was reassessed from 4 January 2021, based on a decline in turnover in the June, September and December 2020 quarters. Specifically, businesses and not-for-profits need to demonstrate that they have experienced a decline in turnover of:

- 50 per cent for those with an aggregated turnover of more than $1 billion;
- 30 per cent for those with an aggregated turnover of $1 billion or less; or
- 15 per cent for Australian Charities and Not for profits Commission-registered charities (excluding schools and universities).

JobKeeper remains open to new recipients, provided that they meet the eligibility criteria.

Employers who have re-qualified continue to have access to the current JobKeeper-related provisions in the FW Act, including the ability to issue directions changing employees' duties, place, time/s or day/s of work and reducing working hours to as little as zero.

Directions in relation to the taking of annual leave

From 28 September 2020, employers are no longer able to issue directions relating to annual leave. If an agreement has been reached, such agreements will no longer be enforceable.

Reasonableness of JobKeeper enabling directions

Under the FW Act, employers may not issue a direction to an employee if the direction is 'unreasonable in all the circumstances.' The Act adds a note providing that 'directions which reduce hours given by an employer to a category of employees may be unreasonable if they have an unfair effect on some of those employees compared to others of those employees who are also subject to those directions.'

Eligible Employees

The test for eligible employees remains largely the same. This means that JobKeeper payments will apply to employees who:

- are currently employed by an eligible employer (including if they were stood down or rehired)
- are engaged as a full-time, part-time or fixed-term employee at 1 July 2020, or employed as a long-term casual employee (on a regular and systematic basis for at least 12 months) as at 1 July 2020 and not a permanent employee of any other employer.
- were aged 18 years or older at 1 July 2020 (those aged 16 or 17 can also qualify if they are independent or not undertaking full time study)

- were either:

    - an Australian resident (within the meaning of the Social Security Act 1991); or
    - an Australian resident for the purpose of the

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Income Tax Assessment Act 1936 and the holder of a Subclass 444 (Special Category) visa as at 1 July 2020.

- were not in receipt of any of these payments during the JobKeeper fortnight:
    - government parental leave or Dad and partner pay under the Paid Parental Leave Act 2010; or
    - a payment in accordance with Australian worker compensation law for an individual's total incapacity for work.

Only one employer can claim the JobKeeper Payment in respect of an employee.

Employers previously entitled to JobKeeper payments who no longer qualify ('Legacy Employers')

Under the JK Act, employers previously entitled to JobKeeper payments who no longer qualify for the wage subsidy may apply for a '10% decline in turnover certificate' if they can demonstrate their turnover has declined by 10% in a designated quarter compared to the same quarter in 2019 (**Legacy Employers**). Employers can seek such a certificate from an eligible financial services provider or, for small businesses (defined as employing fewer than 15 employees), a statutory declaration from an individual who is authorised by the employer and has knowledge of the employer's financial affairs, will be sufficient.

Legacy Employers holding a certificate will retain access to a number of existing provisions, including the ability to direct an employee to work other duties or at a different location, alter by agreement the day/s or time/s of work.

Legacy Employers may also issue employees with a stand-down direction to work fewer days or hours than they ordinarily would if they cannot be usefully employed due to the pandemic. However, unlike for employers eligible for JobKeeper 2.0, the stand-down direction must not require the employee to work a reduced number of hours less than 60% of their ordinary hours of work at 1 March 2020, nor to work less than 2 hours a day.

Employers must give written notice of any direction made under these provisions to the employee at least 7 days before the direction is given; during this period, they must also consult with the employee or to a representative appointed by the employee for this purpose.

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Part 3 - Paid pandemic leave – Schedule Y extended

The FWC has extended the temporary entitlement to paid pandemic leave for eligible award-covered employees until 29 March 2021. The temporary new 'Schedule Y' applies to employers and employees covered by the Aged Care Award, the Nurses Award and the Health Services Award who work in the aged care industry.

Under Schedule Y, employees may receive up to 2 weeks of paid pandemic leave at their base rate of pay if they are unable to work (including from home) because:

- their employer, or a government or medical authority, requires them to self-isolate or quarantine;
- they have to self-isolate while waiting for a COVID-19 test result;
- they are symptomatic and have been advised by a medical practitioner to self-isolate;
- they have come into contact with a person suspected of having contracted coronavirus; or
- they are affected by measures taken in response to coronavirus.

Employees must have a COVID-19 test as a condition of eligibility for each occasion of leave.

The leave is available in full to full-time, part-time and regular and systematically engaged casual employees, and up to 2 weeks' paid pandemic leave is available each time the specified circumstances arise.

An employee will not be eligible for paid pandemic leave if they are also entitled to take paid sick or carer's leave, for example, if they cannot work because of a personal illness or injury, or because they need to provide care or support to a family or household member.

The leave needs to start before, but can finish after, 29 March 2021.

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Part 4 - Pandemic-related stand down decisions

In its decision of *Wilfred Lam v Mobile Technology International Pty Ltd [2020] FWC 436 (20 August 2020)*, the FWC found in favour of an employee who claimed a stand-down direction reducing his working hours to zero was unreasonable on the grounds he was treated differently to other members in his team.

Mr Lam is an employee of Mobile Technologies International Pty Ltd (**MTI**), a subsidiary of A2B Australia, whose primary role is assisting customers and resolving their enquiries. He works as part of a Support Team alongside five other employees.

In June 2020 Mr Lam requested to work from home due to the ongoing COVID-19 pandemic: he believed continuing to work from MTI's Melbourne premises was both in contravention of the Victorian Government's COVID-19 Restrictions and a risk to his health and safety. While he briefly believed he was able to do so with the consent of his local manager, he was soon informed that his application had been refused. On 7 August 2020, Mr Lam completed a JobKeeper Employee Nomination Notice, agreeing to be nominated a JobKeeper eligible employee; on the same day, he received a JobKeeper enabling stand down notification from MTI on the grounds MTI did 'not have the ability to usefully deploy (him)' either in his usual role or in another area of the business.

Reasonableness of the stand-down direction

Commissioner Wilson concluded that the stand-down direction was authorised for the purposes of s.789GDC(1) of the FW Act, on the grounds Mr Lam 'cannot be usefully employed for (his) normal days or hours' due to MTI's decline in business as a result of the COVID-19 pandemic.

Under s.789GK of the FW Act, a JobKeeper enabling direction 'does not apply to the employee if the direction is unreasonable in all of the circumstances,' including whether the direction is 'inequitable, unfair or unjustifiable'

Commissioner Wilson said that by reducing Mr Lam's working hours to zero, MTI's direction did not uphold the objects of the FW Act, namely allowing for the employees' continued productive employment and ability to contribute to the employer's business. Furthermore, MTI stated they made the decision to stand down Mr Lam as part of a process to scale back operations in response to the reduction in business. Of the other five Support Team members, three received no reduction in hours and two were subject to minor reductions not below 15 hours per week. No evidence was submitted suggesting Mr Lam's performance had been markedly different to that of the other employees nor that he had been subject to any performance management prior to his standing down. This differential treatment, Commissioner Wilson found, renders the stand down direction unreasonable.

Commissioner Wilson rejected Mr Lam's claim that the reason for this differential treatment was his prior request to work from home, finding there no evidence of a connection between the two.

Requirement to consult

s.789GM of the FW Act requires that employers give at least three days' notice before a JobKeeper enabling direction is given and to consult with the employee before giving the direction, obligations which MTI did not make a 'meaningful' attempt to fulfil.

Orders

Commissioner Wilson ordered that Mr Lam's normal working hours be reduced by 25% to 28.5 hours per week (due to a lack of evidence, this was based on the presumption of an ordinary work week of 38 hours).

Commissioner Wilson further suggested that MTI had been inflexible on the question of whether Mr Lam should be able to work from home. As such, he ordered MTI to consult with Mr Lam on this matter, including whether a medical condition puts Mr Lam at heightened risk of contracting coronavirus if working from MTI's premises and any security or technological requirements that must be met if Mr Lam is to work from home.

What does this mean for employers?

- Before issuing stand-down directions, employers must consult with employees or their representative and keep a written record of the consultation.
- Directions reducing working hours must be reasonable with particular attention paid to ensuring, as far as possible, employees' 'continued productive employment and ability to contribute to the employer's business'.
- Differential treatment of employees may render a stand-down direction unreasonable, if unsupported by evidence regarding poor employee performance.

Award variations – payment of overtime penalty rates for casual employees

On 30 October 2020, the FWC handed down a decision confirming updates to the casual and overtime clauses in 97 awards – which applied from the first full pay period on or after 20 November 2020.

Earlier in the year, the FWC had examined the interaction of the casual loading on the overtime penalty rates under various modern awards, and then undertook a consultative process before making award variations. Some provisions to note include:

Aged Care Award 2010

- The expressions 'time and a half', 'double time' and 'double time and a half' used in relation to overtime penalty rates for casual employees refer to the ordinary rate of pay inclusive of casual loading.
- Therefore, the casual overtime rate is to be assessed using the loaded casual rate of pay as the base.
- Weekend/public holiday penalty rates will not be impacted as they are expressed to be exclusive of casual loading in the Award.

Health Professionals and Support Services Award 2020

- The expressions 'time and a half', 'double time' and 'double time and a half' used in relation to overtime penalty rates for casual employees refer to the ordinary rate of pay inclusive of casual loading.
- Therefore, the casual overtime rate is assessed using the loaded casual rate of pay as the base.
- The award variation published on 18 June 2020 included a clause excluding casual loading from the calculation of overtime. However, the FWC found this clause 'did not represent the existing position and amounted to a substantive change'.
- The Award has been varied to restore the earlier position, as above.

Medical Practitioners Award 2020

- Confirmed that under the award casual employees are entitled to overtime for work in excess of 38 hours per week.
- Declined to adopt the Health Services Union's proposal that casual employees be entitled to overtime when they work in excess of 10 hours in a day.

Nurses Award 2010

- 'Casual employees are entitled to overtime when they work in excess of 38 hours per week, 76 hours per fortnight or 152 hours in a 4-week period, or where they work in excess of 10 hours in one day.'
- The entitlement of part-time workers to overtime when they work in excess of their rostered daily ordinary hours is not applicable to casual employees (where they do not exceed 10 hours in a day).

Pharmacy Industry Award 2010

- Declined to adopt the Health Services Union's proposal to vary casual employees' existing entitlement to overtime when working 'in excess of 38 hours per week (or 76 ordinary hours over two consecutive weeks)' to 'in excess of 38 hours per week'.
- The FWC found this would remove 'the capacity to average non-overtime hours over a period of two weeks' and that there is no evidence to support the need for this change.

What does this mean for employers?

- Employers should review applicable Awards and ensure that the calculation of casual employees' overtime penalty rates is consistent with the FWC's decision.
- Payroll systems and employee contracts should be updated to reflect these changes.

Employee fired for Hitler meme wins compensation for unfair dismissal

Scott Tracey v BP Refinery (Kwinana) Pty Ltd [2020] FWCFB 4206 (10 August 2020)

The FWC has awarded a BP worker sacked for sharing a Hitler meme mocking the company $200,000 in compensation for unfair dismissal.

Scott Tracey was fired by his employer BP in January 2019 after he posted a meme using an image from the film Downfall on a closed employee Facebook group: BP claimed the meme likened Hitler and Nazis to BP's management team.

While an initial claim of unfair dismissal was rejected by the FWC, the Full Bench on appeal ordered BP to reinstate Mr Tracey on the grounds the meme was not posted to compare BP management to Hitler or Nazis 'in the sense of suggesting their conduct was comparable in inhumanity or criminality' but rather as a satirical criticism of BP's position and conduct in the enterprise bargaining process. Anyone familiar with the popular meme, the Full Bench noted, would have understood its satirical intent. Further, such a criticism should have been 'understandable' to BP as a reasonable part of a lengthy and heated bargaining process. As such the Full Bench found it was not 'offensive or inappropriate' and thus not grounds for dismissal.

On the matter of compensation, the FWC assessed the amount owed to Mr Tracey prior to making deductions was $225,347 for his lost salary and bonuses plus $27,042 in lost superannuation for the 60-week period between his dismissal and reinstatement. The FWC rejected Mr Tracey's claim that, because prior to his suspension he had been told he would be promoted, his salary should be assessed on the basis of the rate he was due to receive once he started work in the higher classification. As a 'reasonable and lawful disciplinary response might have included the revocation of Mr Tracey's promotion to the (higher) classification', he was assessed at the lower, pre-existing rate.

Deductions were made for the payment made to Mr Tracey in lieu of notice of his dismissal and the wages and superannuation he earned from alternative employment prior to his reinstatement. However, the FWC rejected the suggestion by BP that further deductions be made for Mr Tracey's 'misconduct' when he 'breached BP's policy by using a work computer to show the video to another employee during working hours'. While acknowledging that this was misconduct, the FWC noted that any deduction on account of the misconduct would be 'arbitrary' – especially given the amount owed for lost salary was to be assessed at the lower classification – and thus inappropriate.

BP was ordered to pay Mr Tracey $177,325 for lost salary and bonuses plus $24,070 for lost superannuation.

What does this mean for employers?

- Mr Tracey's reinstatement and successful compensation claim indicates the FWC is willing to consider contemporary cultural ideas about appropriate workplace behaviour and use of social media in assessing unfair dismissal cases.
- The case also provides a good example of the FWC using its powers of reinstatement, noting that employers should bear this in mind when making decisions to dismiss where the factual background leading to that decision is not necessarily strong, as they may subsequently be required to re-employ that individual in the workplace.

Relief for employers as Mondelez prevails in High Court

Mondelez Australia Pty Ltd v. AMWU & Ors, Minister for Jobs and Industrial Relations v. AMWU & Ors, [2020] HCA 29

The High Court has handed down its judgment in the landmark Mondelez case over personal leave entitlements, clarifying the meaning of 'day' for the purpose of calculating paid personal leave entitlements under s.96(1) of the *Fair Work Act* (**FW Act**). The decision confirms the widely accepted industry practice that personal leave is calculated by reference to an employee's ordinary hours of work.

Ms Triffitt and Mr McCormack are employed by Mondelez at a Cadbury chocolate factory. Ordinarily, they work 36 hours per week in three 12-hour shifts. Under their enterprise agreement, Ms Triffitt and Mr McCormack are entitled to 96 hours of paid personal/carer's leave per year of service. When they take paid personal leave for a 12-hour shift, Mondelez deducts 12 hours from their accrued personal leave balance. This means over the course of one year of service, they accrue paid personal/carer's leave equivalent to cover eight 12-hour shifts.

In response to Ms Triffitt and Mr McCormack's claim that Mondelez's above practice is inconsistent with the entitlement of employees to 10 days of paid personal/carer's leave for each year of service under s.96(1) of the FW Act, the Full Court of the Federal Court found that one 'day' refers to 'the portion of a 24-hour period that would otherwise be allotted to working'. This meant that the employees were entitled to ten 12-hour shifts of paid personal/carer's leave per year.

However, on appeal, the High Court overturned this decision by a 4:1 majority. The High Court found, instead, that one 'day' refers to a 'notional day' consisting of 1/10th of an employee's ordinary hours of work in a two-week period, and '10 days of paid personal/carer's leave' is to be calculated and paid at the rate of 1/26th of an employee's ordinary hours of work in a year.

The High Court majority said that the construction of a 'day' as working hours in a 24-hour period would give rise to 'absurd results and inequitable outcomes', entitling part-time employees who work fewer days per week to the same or more personal leave than full-time employees who work in a standard 5-day per week pattern. Similarly, workers with multiple employers would, on this construction, be entitled to 10 days of personal leave from each employer, which would undermine the FW Act's objectives of fairness and promotion of economic growth. The High Court majority was also concerned that the 24-hour day construction would discourage employers from creating 'flexible working arrangements' by encouraging them to hire employees to work only a standard 5-day week.

The majority held that the only way to give effect to the purpose of the FW Act and promote 'fairness, flexibility, certainty and stability' is to calculate personal leave based on the employee's ordinary hours of work.

What does this mean for employers?

- Full-time and part-time employees, including shift workers, are entitled to 10 days of paid personal/carer's leave per year, with a 'day' equating to 1/10th of an employee's ordinary hours of work in a two-week period, and '10 days' being calculated and paid at the rate of 1/26th of the employee's ordinary hours of work in a year.
- Employers should review any changes made to payroll systems on the basis of the Full Federal Court's decision and amend them in accordance with the High Court's judgment.

Uniting signs Enforceable Undertaking, agrees to back-pay $3.3 million

After conducting a review in response to a number of complaints, the Uniting Church in Australia Property Trust (NSW) admitted to underpaying more than 9000 employees by $3.3 million between 2013 and 2019. Uniting, a registered charity which operates more than 70 aged care homes in NSW and the ACT has signed an Enforceable Undertaking with the Fair Work Ombudsman (**FWO**) to rectify the underpayments and review its systems to avoid future breaches of workplace law.

The FWO found a number of breaches led to the underpayments, including:

- Failing to pay a laundry allowance and uniform allowance 'as a result of inconsistent systems…errors in the implementation of the laundry allowance and uniform allowance in relation to particular leave codes, and errors in manual processes in relation to the allowances.'
- Failing to identify employees as shift workers and therefore not providing them with their entitlement to an extra week of annual leave per year 'as a result of reliance on a manual process for the identification of employees who were shift workers.'
- Paying an incorrect rate of vehicle allowance to employees 'because the payroll code used to reimburse workers for this form of travel was not updated' when new enterprise agreements with different reimbursement rates were implemented.

Uniting has undertaken to ensure its compliance with the relevant agreements by:

- Reviewing and rectifying underpayments and crediting annual leave.
- Engaging an external and independent expert to audit the outcomes of Uniting's internal review and compliance with the repayment undertaking and to verify their payroll and record keeping systems are compliant with the Fair Work Act.
- Maintaining a telephone hotline for four months to enable current and former employees to enquire about their entitlements and underpayments.
- Issuing a letter of apology to affected employees.
- Publishing a media release and public notice on its website regarding its breaches.
- Fair Work Ombudsman Sandra Parker noted that Uniting has already back-paid employees, which meant the Enforceable Undertaking was an appropriate measure likely to ensure Uniting's future compliance with workplace law.

What does this mean for employers?

- It is essential that employers keep accurate records and ensure systems relating to their obligations under workplace law are up-to-date and compliant with the Fair Work Act.
- Specific to residential aged care, as these breaches relate to common entitlements within the industry, it is crucial to ensure applicable enterprise agreements are properly translated to pay rules and that, to the extent possible, minimal reliance is placed on manual checking / data entry.

$5.2 million payout in record general protections case

The Federal Court has ordered a software company to pay a former employee a record $5.2 million in damages and compensation after finding that he was dismissed because he had complained multiple times about bullying at work.

Background

Behnam Roohizadegan had been employed at software company TechnologyOne for ten years when, in 2016, his employment was terminated.

Mr Roohizadegan lodged a General Protections claim, arguing this decision was made because he had exercised his right under the FW Act to complain about workplace bullying. The complaints made to TechnologyOne's executive chairman Adrian Di Marco included allegations of victimisation, unfair treatment and abusive language.

TechnologyOne contended that its decision was based on concerns about Mr Roohizadegan's conduct towards his team members and ability to work with his direct managers, as well as the company's poor performance in Victoria, Mr Roohizadegan's area of responsibility.

Decision

Justice Kerr stated that in a case alleging adverse action because an employee had exercised a workplace right, the exercise of that right must be 'individually or collectively a "substantial and operative" reason for his termination'. This requires a consideration of the decision-maker's actual thought processes.

In this case, Justice Kerr found that Mr Di Marco was the sole decision maker responsible for Mr Roohizadegan's termination. He 'understood himself to have been, and was, the king of the jungle within TechnologyOne', and Mr Roohizadegan's employment was under his personal control.

As the sole decision maker, Mr Di Marco had full knowledge of the complaints before he made the decision to terminate Mr Roohizadegan's employment. Furthermore, though Mr Di Marco claimed his decision was based on poor performance, Mr Roohizadegan's treatment by the company – including receipt of a 'chairman's award' and share options – suggests he was in fact a 'strong performer'.

These factors combined led Justice Kerr to infer that Mr Roohizadegan's exercise of his workplace rights was a 'substantial and operative factor' in Mr Di Marco's adverse action against him, and therefore that his dismissal contravened the general protections provisions of the FW Act.

Remedies

Justice Kerr assessed compensation, damages and penalties as follows:

- A penalty of $40,000 for TechOne and $7,000 for Mr Di Marco, considering the need for specific and general deterrence and to reflect the seriousness of the contravention. In particular, Justice Kerr noted that Mr Di Marco 'twice rejected professional HR advice that it would be unfair to dismiss Mr Roohizadegan' and 'his choice was to stand with the bullies rather than the bullied'. These factors justified the imposition of a penalty at the higher end of the scale.
- Damages of $756,410 for share options withdrawn from Mr Roohizadegan upon his dismissal.
- General damages of a 'relatively modest' $10,000 due to the 'hurt and humiliation' caused to Mr Roohizadegan by the unlawful conduct.
- Compensation of $2,825,000 for foregone salary and incentives, assessed over the period from Mr Roohizadegan's dismissal until 30 September 2020.
- $1,590,000 in damages for breach of contract.

What does this mean for employers?

- Employers must properly investigate and respond to employee complaints of bullying and other unacceptable behaviour in the workplace.
- It is essential to establish who an employer's 'decision-maker' will be in the course of a workplace investigation or disciplinary process, and to ensure that person has access to proper advice before dismissing or taking other disciplinary action.
- An employer bears the onus to prove that adverse action is not for a reason prohibited by the *Fair Work Act*, including the exercise of workplace rights – and liability can extend personally to decision-makers and others who are involved in the decision-making process.