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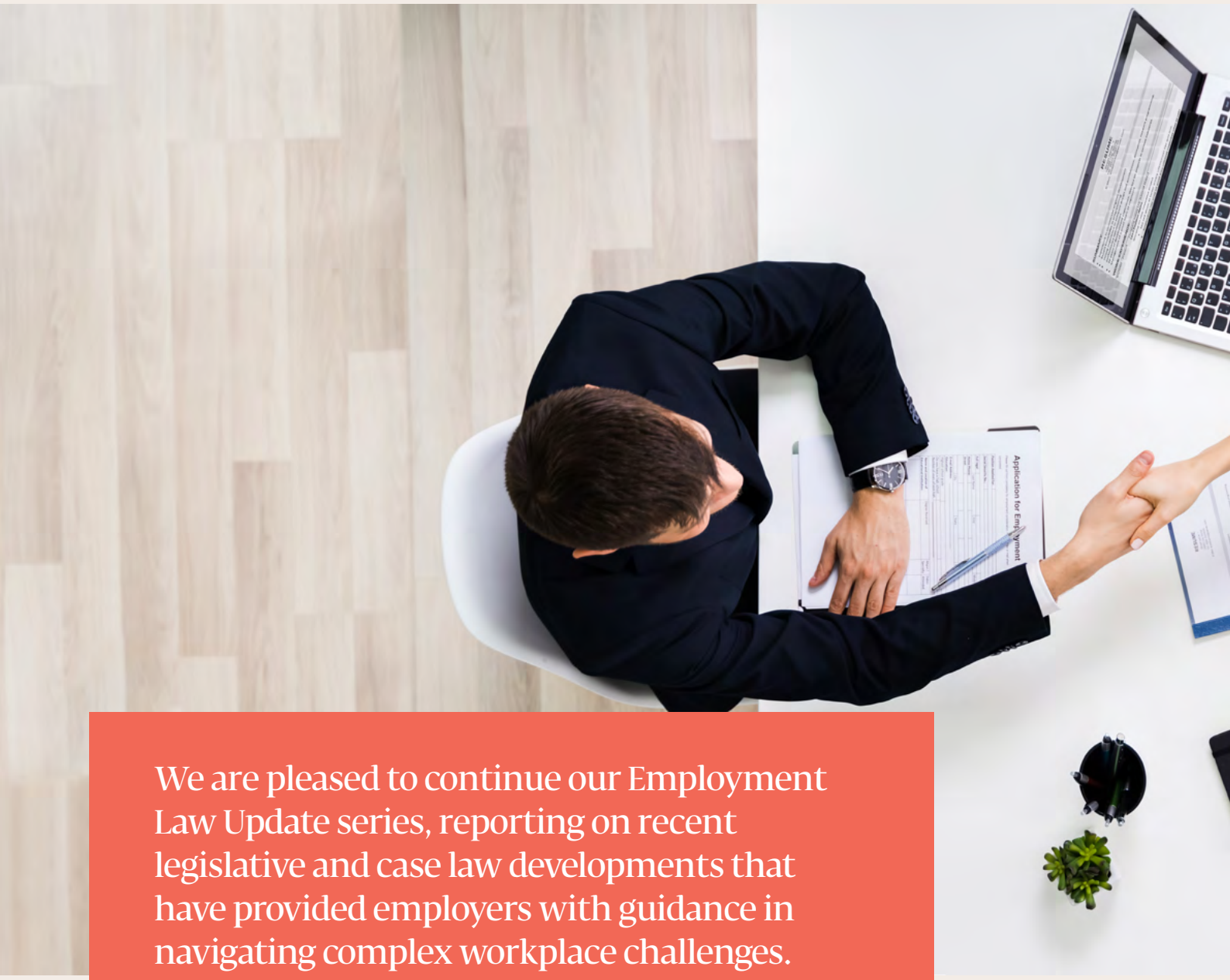
Employment Law Update

Recent developments in managing employees in Australia

March 2025

Outpacing change



We are pleased to continue our Employment Law Update series, reporting on recent legislative and case law developments that have provided employers with guidance in navigating complex workplace challenges.

In this edition, we discuss developments that employers should keep in mind to ensure legal compliance and best practice. These developments include managing AI in the workplace; developments in pay compliance, navigating officer due diligence obligations, and vicarious liability; the use of non-disclosure agreements in workplace sexual harassment complaints; and an update on industrial relations developments.

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AI in the workplace and the future of work

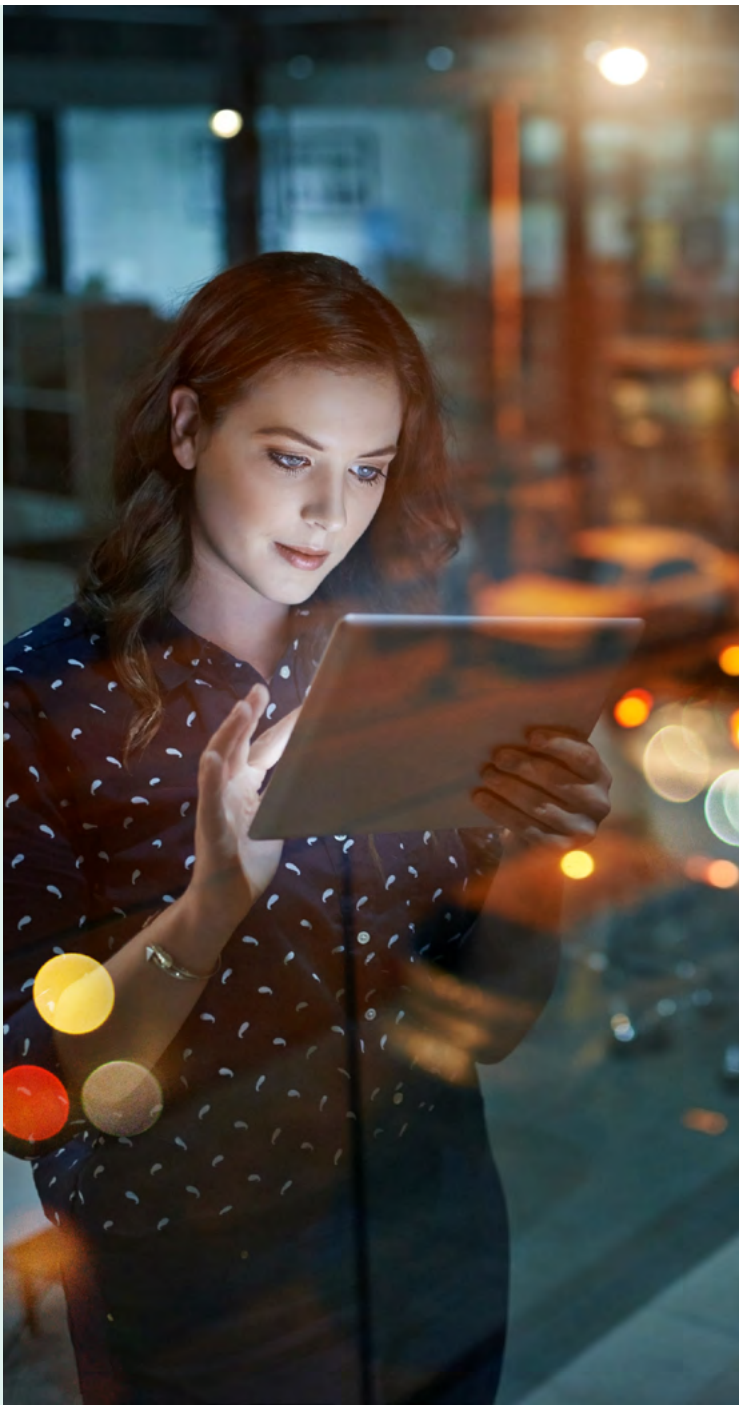
Authors: Trent Sebbens (Partner) and Max Moffat (Lawyer)

In brief:

- Following the rapid uptake of workplace AI in Australia, there has been increasing discourse on the potential opportunities and impacts of AI in the employment law landscape. There has been a particular focus on work health and safety implications, discrimination, transparency of AI-made decisions, and consultation with workers concerning the introduction of AI.
- The report handed down by the Senate Select Committee on Adopting Artificial Intelligence on 26 November 2024 and the report of the Federal Government's Inquiry into the Digital Transformation of Workplaces on 11 February 2025 herald the prospect of regulatory reform.
- Employers should anticipate that the advancement of AI technology will outpace any prospective reforms and look to develop their own strategies for consultation with workers and mitigation of risks in relation to AI.

Lessons for employers:

- Employers should monitor for significant regulatory updates concerning AI in the workplace while proactively implementing measures to minimise risks of adopting specific AI tools, such as by:
  - Developing strategies for consultation with workers when adopting AI tools and after their implementation.
  - Proactively assessing work health and safety risks (particularly psychosocial risks) arising from the implementation of AI tools and implementing control measures accordingly.
  - Conducting training and compiling guidelines for use of AI tools to require human oversight of employment-related decisions which present risks of discrimination or other adverse outcomes to workers.



AI is increasingly prevalent in workplaces and has brought with it a range of new questions about how to harness its benefits while mitigating any detrimental effects. In our May 2024 Legal Development Alert we addressed AI in the employment life cycle with a focus on the risks that arise from AI's use in each stage of employment relationships. Since then, discourse about AI and the future of work has gathered further momentum with the Senate Select Committee on Adopting AI handing down a report on 26 November 2024 into matters including opportunities and impacts of AI for workplaces. The Federal Government has also conducted an Inquiry into the Digital Transformation of Workplaces with a report published on 11 February 2025.

We expect that the scales will eventually tip in favour of regulatory reform, particularly in relation to employers' safety duties to workers relating to AI; transparency requirements about the use of AI in decision-making; and consultation provisions in industrial instruments and regulations relating to the adoption of AI in workplaces.

Safety duties for employers

Work health and safety reforms concerning psychosocial risk have recently led to a shift in regulatory focus to the psychological health and wellbeing of workers. AI has the potential to be disruptive in this space due to its capacity to increase job uncertainty, increase work intensity and place stress on workers through heightened surveillance.

In that context, the Senate Select Committee on Adopting AI has recommended that the Australian Government extend and apply the existing work health and safety legislative framework to the workplace risks posed by the adoption of AI. Few details were provided in this recommendation, but we anticipate that reform may involve amendments to psychosocial risk regulations or amendments to the Model Code of Practice: Managing Psychosocial Hazards at Work to recognise and deal with specific psychosocial hazards that arise from the implementation of AI.

Even in the absence of such a reform, we expect that in 2025 regulators will nevertheless take an increased interest in exploring the application of the present work health and safety regime to AI given its significant impact in workplaces already.

Transparency in AI decision-making

It is evident that relying on AI for employment decision-making can pose real risks of breaching Federal and State anti-discrimination legislation and the general protections regime of the *Fair Work Act 2009* (Cth). This could arise due to bias or erroneous results. For example, AI tools may select candidates for a new role, or redundancy, based on unknown (but unlawful) characteristics; and workplace surveillance AI systems may assess a worker's performance without having regard to relevant considerations such as disability – due to the data set that the AI tools are making decisions from, or machine learning in relation to previous decisions which are being drawn on.

A barrier to the efficacy of the anti-discrimination regime is the lack of transparency in how AI tools make decisions. Accordingly, the Senate Select Committee on Adopting AI recommended that the Australian Government introduce a right for individuals to request meaningful information about how substantially automated decisions with legal or similarly significant effect are made. This may empower workers to bring claims on the basis that AI tools discriminated against them in making certain decisions, exposing employers who rely upon those AI decisions to legal risk.

Conversely, businesses are also affected by the inability to interrogate the reasoning of AI systems. This may have adverse consequences where an employer is unable to demonstrate that an AI tool utilised in a decision did not adopt a discriminatory process. We anticipate that employee claims of this nature will start to present significant difficulties for businesses that implement AI tools in decision-making processes without utilising a range of control measures to prevent discrimination. On this theme, the Federal Government's Inquiry into the Digital Transformation of Workplaces recommended banning the use of AI tools in making final human-resourcing decisions without human oversight.

Consulting workers

The rapid uptake of workplace AI has placed many businesses and workers in uncharted territory as governments and regulators race to catch up. While workplaces adjust to this influential technology, we expect that employees and unions will seek to be consulted prior to any use of AI that could affect them. In a number of instances overseas, this has resulted in the insertion of consultation provisions into industrial instruments regarding use of AI in workplaces.

The Senate Select Committee on Adopting AI was also conscious of the fast pace of change AI has precipitated and recommended that the Australian Government ensure it thoroughly consults workers, unions and employers on the best approach to further regulatory responses. However, organisations should assume that technological development will continue to outpace reform and prepare their own strategies to consult workers and minimise risks of AI adoption, particularly where it may have an impact on the workplace (including ways of working, job intensity or job opportunities).

Developments in pay compliance: Wage theft offence and increased penalties

Authors: Talia Firth (Partner) and Mohamad Ardati (Senior Associate)

In brief:

- Recent legislation has introduced changes to the regulatory regime relating to the underpayment of wages under the *Fair Work Act 2009* (Cth).
- Since 27 February 2024, increased maximum penalties have applied for contraventions relating to the underpayment of wages, and there is a lower threshold to establish a 'serious contravention' of a civil penalty provision under the Fair Work Act.
- Since 1 January 2025, a new criminal offence of 'wage theft' has come into force. The offence occurs where a person engages in intentional conduct resulting in a failure to pay a required amount (other than superannuation and long service leave) to an employee in full. Significant penalties may be imposed, and individuals may also be subject to fines and up to 10 years' imprisonment.
- There is also a new regime allowing the Fair Work Ombudsman to enter into a 'cooperation agreement' with an employer who has self-disclosed a possible wage theft offence. As long as there is no inconsistency with the agreement, the regulator can still issue a compliance notice or enter into an enforceable undertaking with the employer.

Lessons for employers:

- Underpayments continue to be a major focus for the Fair Work Ombudsman. In the last 18 months, the regulator entered into 18 enforceable undertakings with employers, and had a number of successful prosecutions. With stricter and more complex laws now in place, we expect underpayment issues to continue to be a key focus for the regulator in 2025. Employers should continue to ensure that they have adequate systems and processes in place to ensure compliance with pay obligations.
- Employers should be mindful of the lower threshold currently in place for establishing a 'serious contravention', and focus on resolving any known issues resulting in non-compliance as soon as possible.
- Where underpayments are identified, employers should carefully consider whether to self-disclose identified issues to the regulator. There are potential benefits for employers self-disclosing possible contraventions of the wage theft provisions to the Fair Work Ombudsman, including the ability to enter into a 'cooperation agreement'.
- Employers should review their systems and processes around identifying and dealing with underpayments, including corporate governance arrangements, to ensure that there is a corporate culture in place that requires compliance with workplace laws.

Increased maximum penalties

Significant maximum penalties now apply where employees have been underpaid. The maximum penalty for a breach of the Fair Work Act which involves a corporation (with 15 or more employees) contravening an enterprise agreement or modern award which results in an underpayment has increased to the greater of 1,500 penalty units (currently $495,000) or three times the underpayment amount. The maximum penalty for a 'serious contravention' in these circumstances has increased to the greater of 15,000 penalty units (currently $4,950,000) or three times the underpayment amount.

The threshold to establish a serious contravention has also been lowered. Prior to recent amendments, a contravention of a civil remedy provision was considered a serious contravention if a person knowingly contravened the provision and it formed part of a "systematic pattern of conduct". Since 27 February 2024, a contravention is considered serious where it is done knowingly or recklessly. There is no longer a requirement that the contravention was part of a "systematic pattern of conduct". A person will be considered reckless as to whether a contravention would occur if they are aware that there is a substantial risk that a contravention would occur, and having regard to the circumstances known to them, it was unjustifiable for them to take the risk.

New wage theft provisions

Since 1 January 2025, the Fair Work Act has included new wage theft provisions. Employers can fall foul of these provisions and commit a criminal offence if:

1. the employer is required to pay an amount to, on behalf of, or for the benefit of, an employee under the Fair Work Act, a fair work instrument (including an enterprise agreement or modern award) or a transitional instrument; and
2. it intentionally 'engages in conduct' (that is, performs an act, or omits to perform an act); and
3. the conduct results in an intentional failure to pay the required amount to, on behalf of, or for the benefit of, the employee in full on or before the day when the required amount is due for payment.

The new provisions are not in place to punish accidental, inadvertent or genuinely mistaken underpayments, and intention is important. The prosecution must prove beyond reasonable doubt that the employer had intent to engage in the conduct, and intent that the conduct would result in a failure to pay the required amount. However, for a corporation, intent may be established in circumstances where:

- the board, or a high managerial agent of the body corporate, intentionally carried out the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
- a corporate culture existed that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
- the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

While the Fair Work Ombudsman may investigate suspected underpayments, prosecutions under the wage theft provisions may only be commenced by the Director of Public Prosecutions or the Australian Federal Police, and they must be commenced within six years after the offence.

From 1 January 2025, the maximum penalty for a breach of the new wage theft provisions is the greater of three times the value of the underpayment or 25,000 penalty units (currently $8,250,000). Individuals may also be subject to fines (equal to the greater of three times the value of the underpayment or $1,650,000) and up to 10 years' imprisonment.

Entry into a cooperation agreement

A new regime has also been introduced allowing the Fair Work Ombudsman to agree to enter into a "cooperation agreement" with an employer who has self-disclosed a possible wage theft offence.

The regulator will consider factors including the frankness of disclosures, the nature of the conduct and the employer's compliance history. The benefit of this agreement to an employer is, while it's in force, the regulator can't refer conduct which is the subject of the agreement to the Director of Public Prosecutions or Australian Federal Police for prosecution under the wage theft provisions.

Employers who become aware of a possible wage theft offence should consider whether to self-disclose the offence to avoid potential prosecution. It's possible, even if a voluntary disclosure is made, that the Fair Work Ombudsman declines to enter into a cooperation agreement with the employer, still investigates the disclosure and refers the underpayment for prosecution under the wage theft provisions. As long as it isn't inconsistent with the cooperation agreement, the regulator can still issue an employer with a compliance notice or enter into an enforceable undertaking with the employer.

Considering prosecution and enforceable undertakings trends over the last 18 months, now that more stringent laws are in place, we expect that underpayments are going to be a continued and key focus for the Fair Work Ombudsman in 2025, and employers' actions in identifying and dealing with underpayment issues will continue to be under the spotlight.

Navigating officer due diligence obligations

Authors: Julia Sutherland (Partner), Eshani Mendis (Senior Associate) and Gabriella Lubrano (Lawyer)

In brief:

- For some time now, officers, such as company directors, have had a positive duty to exercise due diligence to ensure the person conducting a business or undertaking (**PCBU**), of which they are an officer, complies with Model WHS laws.
- However, despite the age of these laws, there has been comparatively limited guidance from courts on how to comply with this obligation, particularly for larger businesses. Recently, we have seen some guidance emerge.

Lessons for officers:

- An officer's due diligence obligations should not be conflated with the WHS duties owed by a PCBU. The duties owed by an officer and PCBU are ***markedly different***.
- Officers must take a proactive role in understanding and testing the effectiveness of the PCBU's work health and safety management system. What is required to comply is likely to differ between officers (particularly between managerial/operational "officers" when compared with directors). But broadly, an officer's role involves taking reasonable steps to gain an understanding of the hazards and risks associated with the operations of the business or undertaking, and ensuring the business or undertaking has and uses appropriate resources and processes to eliminate or minimise risks to health and safety.
- Directors of large companies are not expected to know everything that is going on within their company at any given time – a level of reasonable reliance on others and delegation of WHS functions to suitably qualified and experienced employees is permitted. However, this will not always be a complete answer.

Unpacking officer due diligence obligations

Under the Model WHS Act (in place in all states and territories other than Victoria), personal obligations are imposed on "officers" to exercise due diligence to ensure that the PCBU complies with its duties under the Model WHS Act. Officers include directors and secretaries of a company and those who have capacity to significantly affect the financial standing of a company, or make or participate in decision making.

To meet their due diligence obligations, the law says that officers must take reasonable steps to:

a. acquire and keep up-to-date knowledge of WHS matters;

b. gain an understanding of the nature of the operations of the business or undertaking and generally of the hazards and risks associated with those operations;

c. ensure the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking;

d. ensure the PCBU has appropriate processes for receiving and considering information regarding incidents, hazards and risks and responds in a timely way to that information;

e. ensure the PCBU has, and implements, processes for complying with any duty or obligation under the WHS Act; and

f. verify the provision and use of the resources and processes referred to in paragraphs (c) – (e).

To meet these obligations, officers need to have a clear understanding of:

- the operations of the PCBU;
- the risks to health and safety that arise from these operations, including as they may change; and
- the control measures that are in place to eliminate or minimise such risks so far as reasonably practicable (which will include assessing the adequacy of the control measures in place).

Relevantly, an officer may be charged with an offence under the WHS Act whether or not the PCBU has been convicted or found guilty of an offence under the Act. This means the failure of an officer to comply with their duty does not need to be tied to any failure or breach of the PCBU in order for the officer to be prosecuted.

Case law developments

Court finds director did not fail to meet due diligence obligations: *SafeWork NSW v Mitchell Doble* [2024] NSWDC 58; *Guilfoyle v Walshaw* [2024] Unreported (Magistrates Court, Queensland, MAG-00149166/21(1))

In *Doble*, the NSW District Court found the managing and sole director of a company did not fail to exercise due diligence to ensure his company complied with its primary duty of care under the NSW WHS Act.

The defendant was an officer of the company, which was a medium-sized operation comprising of eight transport depots spread across NSW. Both the company and defendant were charged with breaches of the WHS Act relating to an incident where a worker was struck by a forklift at a Miller depot.

SafeWork NSW alleged that the defendant failed to:

1. ensure that the company had available for use, and used, appropriate resources and processes to eliminate or minimise risks to safety; and
2. verify that one or more of the resources or processes were provided, implemented and used by workers when undertaking work for or on behalf of the company.

The Court found that SafeWork NSW could not prove beyond reasonable doubt that the defendant failed to exercise due diligence, noting (amongst other things):

- Although the defendant was an officer, this did not mean he had to do everything that the company (as a PCBU) had to do to ensure safety.
- Unlike a one or two person business, a managing director in the position of the defendant cannot know everything that is going on at any given moment. To run a corporation there must be a level of delegation.
- The defendant engaged a compliance manager specifically to deal with WHS matters. The engagement of the compliance manager was a key resource which the defendant used to ensure that the company met its WHS duties.
- The evidence indicated that the defendant was not a "hands-off" director. For example, safety matters were addressed at board meetings and required the manager to monitor and report on safety matters. The defendant also reviewed whether safety matters that were drawn to his attention were subsequently followed up.

- The fact that the compliance manager failed to mandate the separation of forklifts and pedestrians was a failure by the company. In itself, this was not a failure by the defendant to exercise due diligence.

In *Walshaw*, the Magistrates Court in Queensland acquitted a former managing director charged with breaching their due diligence obligations under the Qld WHS Act. The defendant operated a zipline tourism business in Queensland. Several months after the defendant left the company, an incident occurred where a zipline failed, causing the death of a patron and serious injuries to his spouse.

In this case, the Court found (amongst other things) that:

- The defendant was the managing director, and in this role could not know everything that is going on at any given moment and there must be some level of delegation.
- The operations manager was employed with direct responsibility for operations including WHS matters. He was solely responsible for developing WHS policies and procedures and for operationally managing infrastructure projects. There was no suggestion of criticism in the evidence about the operations manager's experience and the way he discharged his responsibilities to indicate the trust and reliance on him was misplaced.
- The operations manager was supported in his role as operations manager by having unfettered access to outside contractors, consultants and other sources of information and advice relevant to safety.
- The evidence suggests the defendant and the operations manager met regularly to discuss operations and there was a free flow of information within the organisation.
- There was no evidence adduced by the prosecution from which the Court could discern failing in the management structures and processes of the company relating to safety risk management.

The Court also noted that the officer duties do not require that an officer undertake reasonably practicable measures *on behalf of the PCBU* and that the duties are "markedly different".

Both of these cases highlight that the extent of an officer's due diligence will depend on the nature, size and complexity of their PCBU's operations. The Courts also acknowledge that running a corporation inherently involves some level of delegation, including to qualified and experienced employees with accountability for work health and safety matters.

Court finds director did fail to meet due diligence obligations: *SafeWork NSW v Scopeview Projects Pty Ltd; SafeWork NSW v Doueihi* [2024] NSWDC 323

In *Doueihi*, a sole director of a renovation company was fined $60,000 (initially $80,000 reduced for a guilty plea) for failing to exercise due diligence. The company and the defendant were charged under the NSW WHS Act after a worker was instructed to clean out sand from new foundations, which caused a section of brick wall to collapse and strike the worker, partially burying him.

Relevantly, the sole director pleaded guilty to the offence, being that as an officer of Scopeview, who had a duty under the NSW WHS Act to exercise due diligence to ensure that the company complied with its primary duty, he failed to comply with that duty and thereby exposed two workers to a risk of death or serious injury.

In *Doueihi*, the defendant failed to ensure that the company had taken all reasonably practicable steps to eliminate or minimise the risk to its workers, which included failing to:

- require or ensure that the company had appropriate resources and processes to eliminate or minimise risks to safety;
- require or ensure that an adequate risk assessment was undertaken;
- ensure the company engaged a geotechnical engineer to undertake an assessment of the soil and groundwater conditions at the site;
- direct or instruct the company to develop and implement adequate safe work method statements;
- direct or instruct the company to develop a system for the timely exchange of essential information between all persons at the site as to the hazards and risks associated with the works;
- verify by enquiries, site observation, meetings, independent auditing or inspection of documentation, that the company had put in place appropriate resources and processes.

In *Doueihi*, the Court found that the risk of an unsupported wall collapsing was *actually foreseeable* by the defendant and the company. The Court found a geotechnical report spelled out the general risks of unsupported walls, but the recommendations were not applied at the site.

The sole director of the contractor was also convicted for failing to exercise his due diligence obligations, however, is yet to be sentenced (see *SafeWork NSW v Rahme Civil Pty Ltd* [2024] NSWDC 231).

Landmark New Zealand case against officer of large organisation: *Maritime New Zealand v Gibson* [2024] NZDC 27975 (26 November 2024)

The New Zealand District Court has found a former CEO of a large organisation guilty of a failure to exercise due diligence after a worker was crushed by a falling shipping container while working within an exclusion zone near an operating crane (which was in breach of the company's safety policies).

Relevantly, the officer due diligence obligations imposed under NZ WHS laws are largely the same as the Australian Model WHS laws.

In this case, the prosecution argued that the defendant failed to exercise the care, diligence and skill that a reasonable officer would exercise in the same circumstances:

- to take reasonable steps to ensure that the company had available for use, and used, appropriate resources and processes to eliminate or minimise risks to health and safety from work carried out as part of the conduct of the business or undertaking, including by having:
  - clearly documented, effectively implemented, and appropriate exclusion zones around operating cranes; and
  - clearly documented, effectively implemented, and appropriate processes for ensuring coordination between lashers and crane operators,
- to take reasonable steps to verify the provision and use of those resources and processes.

The Court found the defendant failed to meet his due diligence obligations, noting (amongst other things):

- The defendant was ultimately responsible for health and safety and was tasked with a number of key health and safety responsibilities. He was "hand one" in relation to health and safety issues.
- The defendant relied too heavily on his subordinate managers without personally verifying the adequacy of safety measures or ensuring proper oversight.
- The defendant failed to act on critical and known risks, including the risk of working in close proximity to an operational crane which is well established and known in any industry.
- The defendant was aware of an audit report which included recommendations and the lack of timely response by the company to progress matters. The Court considered it was the defendant's duty as CEO and interface between the executive team and board to ensure that the company progressed matters in a timely fashion.
- The Court considered that the statutory duty imposed on directors and officers requires more than relying on those with specific health and safety responsibilities in the management chain below them.
- In circumstances where persons are assigned WHS obligations or roles, or who may have specialised skills and experience, it is still the responsibility of the defendant to monitor and review the performance of those persons.
- By virtue of previous convictions, the defendant was on notice that the company had demonstrated ongoing difficulties in adequately monitoring works. It was the defendant's responsibility as CEO to ensure that appropriate systems and processes were in place to address failures.

Although this decision is not binding on Australian courts, it will be interesting to see how this decision will be relied on in Australia in interpreting the scope of the duty to exercise due diligence under model WHS laws, noting that the judge in this case questioned the recent acquittal of an officer in the decision of the District Court of NSW in *Doble*.

Use of non-disclosure agreements in workplace sexual harassment complaints

Authors: Jane Harvey (Partner) and Renae Harg (Senior Associate)

In brief:

- Non-disclosure or confidentiality agreements (**NDAs**) are commonly used in the context of workplace sexual harassment complaints to keep details of a settlement between an employer and the complainant confidential.
- NDAs can be drafted quite broadly and extend to details of the sexual harassment that was alleged, the identity of the harasser and any investigation into the matter.
- This has given rise to concerns that NDAs may contribute to a "culture of silence" around sexual harassment and be used to protect the employer and alleged harassers, rather than the person alleging workplace sexual harassment.
- In the wake of the MeToo movement and the Australian Human Rights Commission's Respect@Work Report, the use of NDAs has been in the spotlight. In 2022, the Respect@Work Council issued Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints. The Guidelines recommend that an employer consider whether an NDA is necessary in the particular workplace sexual harassment matter and, if it is, that the duration and scope of the NDA be as limited as possible.
- In response to recommendations by the Victorian Ministerial Taskforce on Workplace Sexual Harassment, the Victorian Government is progressing legislative reform to restrict the use of NDAs in workplace sexual harassment cases. The Victorian legislation would be the first of its kind in Australia and among the first in the world. The Taskforce recommended that Victoria use the *Irish Employment Equality (Amendment) (Non-Disclosure Agreement) Bill 2021*, and lessons from other jurisdictions, including the United Kingdom and the United States, as the model of reform in Victoria.
- We expect that any Victorian legislation will restrict the use of NDAs to specific circumstances, limit the scope of NDAs and potentially include a civil penalty regime for non-compliance by employers.
- Regardless of any legislative developments in this area, in our experience, the practice of using NDAs to resolve sexual harassment complaints in the workplace is changing. Employers are increasingly willing to tailor confidentiality terms within settlement agreements (e.g. to permit the complainant to speak with friends and family or medical advisers; and in some cases, to speak about the impact of the alleged conduct), or to not require confidentiality terms at all. Careful consideration of the use of NDAs is critical for employers seeking to meet their positive duty to take reasonable and proportionate measures to eliminate sexual harassment in the workplace as well as their workplace health and safety obligations.

Lessons for employers:

- Employers have a positive duty under section 47C of the *Sex Discrimination Act 1984* (Cth) to take reasonable and proportionate measures to eliminate sexual harassment in the workplace. Employers also have obligations under work health and safety legislation.
- NDAs may contribute to a culture of silence within an organisation, which may impact an employer's ability to proactively eliminate sexual harassment in the workplace and manage work health and safety risks.
- When settling proceedings relating to workplace sexual harassment complaints, employers should consider the Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints issued by the Respect@Work Council before requiring an NDA. If an NDA is to be implemented, employers should carefully consider the scope of the NDA, including relevant carve-outs, timeframes during which the restrictions on disclosure will apply and the parties to be covered.
- Given the proposed legislative change in Victoria, employers should also stay abreast of any developments that may impact their use of NDAs.

What are non-disclosure agreements?

When a matter relating to workplace sexual harassment is settled, the employer and the employee or worker alleging sexual harassment generally enter into a settlement agreement or deed of release. The settlement agreement or deed will provide for the employer to give the employee or worker alleging sexual harassment something, which may be financial or non-financial, in exchange for the employee or worker agreeing not to take further action against the employer.

In most settlement deeds or agreements, clauses are included which provide that the employee or worker alleging the sexual harassment is required to maintain confidentiality over certain matters. Matters which may be covered by the confidentiality obligation include that the employee or worker cannot disclose the sexual harassment that is alleged to have occurred, the identity of the harasser, details of any investigation into the matter and the terms of the deed or settlement agreement itself.

Where we refer to "non-disclosure agreements" or NDAs, it is these confidentiality terms we are referring to.

Respect@Work Report recommendations

In December 2020, the Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report considered the use of NDAs in workplace sexual harassment matters.

The Respect@Work Report recommended guidelines be developed regarding the use of NDAs. The Australian Human Rights Commission said it heard that NDAs have often been used to silence victims and conceal behaviour of harassers. However, it did not recommend a blanket ban on NDAs, recognising that in some circumstances they can provide benefits to individuals alleging workplace sexual harassment.

The Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints were developed in 2022. In brief, the Guidelines provide for the following approach to NDAs:

- The need for a confidentiality clause should be considered on a case by case basis.
- The scope and duration of the confidentiality clause should be as limited as possible.
- The clause should not prevent organisations from responding to systemic issues and providing a safer workplace.
- All clauses should be clear, fair, in plain English and translated or interpreted where required.

- The person making the allegations should have access to independent support or advice.
- Negotiations regarding a settlement agreement should ensure the wellbeing and safety of the person who made the allegation and be trauma informed, culturally sensitive and intersectional.

Approach in Victoria

In July 2022, the Victorian Government handed down its response to the Recommendations made by the Victorian Ministerial Taskforce into Sexual Harassment, accepting in principle a recommendation to introduce legislation to restrict the use of NDAs in relation to workplace sexual harassment cases in Victoria.

In August 2024, the Victorian Government released the Restricting Non-Disclosure Agreements in Workplace Sexual Harassment Cases Discussion Paper regarding the use of NDAs in sexual harassment complaint matters. The Victorian Government Discussion Paper did not propose a blanket ban on non-disclosure agreements but proposed restriction on their use "*by balancing the need to support the rights and interests of complainants in creating individualised settlement contracts, against the need to ensure that the community is adequately protected from repeat offending patterns of sexual harassment perpetrators and to provide general deterrence.*"

The Discussion Paper posed a range of questions for consideration including:

- whether NDAs should be prohibited unless requested by the complainant;
- whether complainants should be offered independent legal advice on NDAs;
- how it can be ensured that an employee has not been unduly pressured or influenced to enter into an NDA and that the NDA does not adversely impact others;
- whether there should be the ability to waive an NDA and in what circumstances;
- whether a maximum duration of an NDA should be set and what that should be;
- whether there should be a review and "cooling off period";
- whether there should be permitted disclosures under an NDA and how far should these extend;
- whether there should be a prescribed form for NDAs and what form that should take;
- whether non-disparagement clauses should be included;
- whether there should be any duty to report on the use of NDAs;
- who should be the parties to an NDA, for example should it exclude the alleged harasser; and
- how can the use of NDAs best be enforced, including whether a civil penalty regime is required.

The Victorian Government has stated that the feedback on these questions would be reviewed in late 2024, with the aim of legislation being developed in 2025.

At this stage, there has been no update on the progress of the legislation or what may be included. However, we consider that should legislation be implemented, there will be restrictions on the use of NDAs in workplace sexual harassment matters and limits on the scope of these clauses, potentially with a civil penalty regime for non-compliance.

High Court of Australia confines vicarious liability to employment relationships

Authors: Jennie Mansfield (Partner) and Andrea Motbey (Counsel)

In brief:

The High Court of Australia has confirmed in *Bird v DP (a pseudonym)* [2024] HCA 41 that an employment relationship is necessary for a finding of vicarious liability. The Court declined to extend the concept to "employment like" arrangements, such as independent contracting.

Vicarious liability is the attribution of liability of a wrongdoer to a defendant, despite the defendant being free of fault, where the act occurs in the course or scope of the relationship. The Court said that it is for the legislature to determine whether to extend vicarious liability beyond employment, and was not prepared to ascribe vicarious liability for the actions of a contractor or volunteer to the 'principal'.

However, liability can arise separately through agency relationships, or from breach of a non-delegable duty (outlined below).

Lessons for employers:

When engaging contractors, volunteers or other workers who are not employees:

- Draft contracts so it is clear that the relationship is not one of employment;
- Ensure that the practical reality of the relationship, and the way in which work or services are performed, are consistent with the intended relationship being other than employment; and
- Consider whether an agency relationship arises, or whether non-delegable duties may be owed to others, and if so, how any related risks are to be managed.

How this arose

DP was sexually abused and assaulted as a child during pastoral visits to his parents' home by a Catholic assistant parish priest of the Port Fairy parish church, part of the Roman Catholic diocese of Ballarat.

In 2020, DP commenced proceedings in the Supreme Court of Victoria claiming damages for psychological injuries resulting from the priest's conduct. DP claimed the diocese was vicariously liable for the actions of the priest, and also claimed that the diocese was liable in negligence by reason of failure by the diocese and the Bishop at the time to exercise reasonable care in its authority, supervision and control of the conduct of the priest.

Proceedings were commenced against the current Bishop of Ballarat, Paul Bird, as the nominated defendant pursuant to the *Legal Identity of Defendants (Organisational Child Abuse) Act 2018* (Vic) (**Legal Identity Act**).

Primary judgement

It was accepted throughout that the priest was not an employee of the diocese. However, the primary judge held that the relationship between the priest and the diocese or the Bishop was capable of giving rise to a finding of vicarious liability on the part of the diocese for the priest's conduct. This was based on:

1. the close nature of the relationship between the Bishop, the diocese and the Catholic community in Port Fairy, the diocese's general control over the priest's role and duties in the parish, the priest's pastoral role, and the relationship, being one of intimacy and imported trust, between DP, his family, the priest and the diocese; and
2. a finding that the while the conduct was unlawful and far outside the priest's clerical role, the priest's role provided both the opportunity and the occasion for the wrongful acts.

Accordingly, the primary judge held that the diocese was vicariously liable.

The negligence claim was unsuccessful as it was held to be not reasonably foreseeable that in performing his functions, the priest would cause harm to a child parishioner of the kind suffered.

Court of Appeal judgement

The diocese appealed the primary judgement to the Court of Appeal of the Supreme Court of Victoria. The Court of Appeal referred to the usual test for vicarious liability as being whether the individual was an employee, and if so, whether at the time the act was committed, the employee was acting in the course of the employment.

However, the Court of Appeal rejected the argument that vicarious liability is confined to employment relationships, and found the nature and circumstances of the relationship between the diocese and the priest was such that it could, in an appropriate case, attract the principle of vicarious liability of the diocese for a wrongful act by a priest in the performance of his work.

The Court of Appeal further found that, on the second part of the test, the acts were committed in the course of the priest's usual duties in visiting the homes of parishioners and interacting with families, which placed him in a position of trust vis-à-vis DP and his family.

High Court decision

The diocese appealed the finding of vicarious liability to the High Court of Australia, with the majority of the Court (Chief Justice Gageler, Justices Gordon, Edelman, Steward and Beech-Jones) upholding the appeal, and Justice Gleeson dissenting. Justice Jagot in a separate decision agreed with the orders of the majority.

The Court found that, in the absence of an employment relationship, it was not open to hold the diocese vicariously liable for the assaults committed by the priest against DP.

The Court held that in all of its prior decisions, it has found that a relationship of employment is a necessary precursor to a finding of vicarious liability. The Court held that there is no vicarious liability for the acts of those outside of a relationship of employment. If the act complained of is not that of an employee, then the defendant is not, without more, liable.

The test is whether the alleged wrongdoer was an employee of the defendant, and if so, whether the relevant act or omission took place in the course or scope of that employment.

The Court declined to extend the boundaries of vicarious liability to relationships that are "akin to employment", referring to its prior decisions over the previous 25 years in which it has refused extension to include independent contractors, or extension of the doctrine by reference to policy considerations. The Court said any extension of vicarious liability is for the legislature to action, noting that the Legal Identity Act did not alter the requirement for an employment relationship.

The Court referenced the extension of vicarious liability in Canada and the United Kingdom on policy grounds on which DP and the lower courts had relied. The Court said the Court had previously considered and rejected such an extension.

Vicarious liability distinguished

The Court distinguished vicarious liability from agency, where acts of another person are attributed to the defendant on the basis the acts were done for the defendant with the defendant's express, implied or apparent authorisation, or the acts are ratified by the defendant. There was no finding that the priest was an agent of the diocese as the acts were not done with the diocese's authorisation, or ratified by the diocese.

The Court also distinguished vicarious liability from a breach of a non-delegable duty, which arises where the nature of the relationship between the defendant and the other person to whom the duty is owed is one where the defendant has assumed a particular responsibility to ensure that care is taken, rather than merely to take reasonable care.

DP sought to have the Court affirm the decision of the Court of Appeal on the basis that the diocese, through the Bishop, was liable for a breach of a non-delegable duty owed to DP to protect him from the risk of sexual abuse by its priest in the course of his functions and duties. The Court dismissed this request, the imposition of a non-delegable duty not having been raised in the courts below.

Settling into the new reality: An update on industrial relations

Authors: Peter McNulty (Partner) and Simon Moore (Senior Associate)

In brief:

- Employers have been coming to grips with the various "Closing Loopholes" changes which commenced over the last 12 months and will continue to develop over the coming months with a number of the reforms set to be tested in the Fair Work Commission.
- 2025 will provide employers with an opportunity to review and refine their industrial relations strategies and consolidate their policies and practices to ensure they reflect the changed industrial relations landscape.

Lessons for employers:

- **Have a strategy for resolving bargaining early:** With employers facing increasing levels of industrial action, and the prospect of intractable bargaining declarations where protracted bargaining reaches an impasse, employers need a clear strategy for reaching agreement early.
- **Delegates' rights and right of entry:** In light of the new rights and protections for union delegates, and an increase in the exercise of right of entry by union officials, employers should ensure that they have clear processes for delegates' facilities and right of entry.
- **Monitor "same job, same pay" outcomes:** Forthcoming decisions of the Fair Work Commission will provide important guidance to labour hire providers and hosts in assessing the risks of regulated labour hire arrangement orders being made.
- **Review independent contractor and casual engagements:** Businesses should be scrutinising their independent contractor agreements and practices, to ensure they properly reflect a principal/contractor relationship. Employers should also ensure they have processes for dealing with the new "employee choice pathway" for casual employee conversion.

- **Road Transport:** The Fair Work Commission is currently considering a number of applications for minimum standard orders and contractual chain orders for employee-like workers and road transport contractors. Businesses operating in the road transport industry should carefully consider the possible implications of the terms being sought, and consider participating in consultation processes being conducted by the Commission.
- **Federal election:** While the industrial relations landscape has changed significantly over the last two and a half years, it is yet to be seen whether IR plays a prominent role in the upcoming Federal election. Employers should monitor parties' IR policies as they are released and consider the possible impact of those policies on their IR strategies and plans.

Enterprise bargaining and industrial action

As reported in our Bargaining Trends Survey at the end of last year, employers continue to face protracted negotiations when bargaining for new agreements and increasing levels of protected industrial action.

Bargaining is also occurring in the shadow of the intractable bargaining regime, where issues that are not agreed between the parties can be arbitrated by the Fair Work Commission if bargaining becomes intractable. Any term determined by the Commission must be no less favourable than the term of an existing agreement dealing with that subject matter (with the exception of wage increases).

Employers will get a better sense of the Commission's approach to resolving outstanding issues in bargaining as more intractable bargaining workplace determinations are made this year.

The current environment means that employers need to start planning for bargaining early, and develop a strategy for reaching agreement and mitigating risks before bargaining commences.

Employers should also be aware of their obligation to include a delegates' rights term in an enterprise agreement that is no less favourable than the corresponding term in the relevant modern award, and of recent changes to the model consultation, dispute resolution and flexibility terms published by the Fair Work Commission.

The Commission will give further consideration to whether the model consultation clause should include "pre-decision" consultation later this year.

Delegates' rights and right of entry

On 1 July 2024, a new workplace delegates' rights term took effect in modern awards which sets out the entitlements of workplace delegates to communicate with employees, access the workplace and workplace facilities and undertake training on paid time. These modern award terms build on earlier changes which introduced a number of specific rights and protections for workplace delegates.

From 26 August 2024, the statutory protections were extended to non-employee workers, that is, employee-like workers and independent contractors in the road transport industry.

We are also seeing an increase in union officials exercising right of entry in workplaces.

Employers should ensure that managers have a clear understanding of the role and responsibilities of delegates (and the facilities to which delegates are entitled) and the requirements for right of entry. Having clearly documented processes and guidance for these matters can assist employers to comply with their obligations, and also ensure that the requirements and responsibilities placed on union delegates and officials are met.

Regulated labour hire arrangement orders ("same job, same pay")

The Commission's jurisdiction to make "same job, same pay" orders for labour hire workers to be paid the same rates as employees of a host employer is now up and running.

A number of early applications for regulated labour hire arrangement orders were not contested, meaning there has been little guidance on the thresholds for making orders to date.

There are, however, applications currently before the Commission which are expected to provide some clarity around key issues including:

- Whether a business is providing a service to, or supplying labour to, a person (noting orders can only be made where a business is supplying labour);
- The circumstances in which it might (or might not) be fair and reasonable for the Commission to make a labour hire arrangement order; and
- How to determine the "protected rate of pay" for labour hire workers if an order is to be made by the Commission.

Employers relying on labour hire arrangements will need to consider the implications of these decisions on their labour engagement models.

Contractors and casuals

The changes to the definitions of "employee" and "employer" in the Fair Work Act mean that the "real substance", "practical reality" and "true nature" of a relationship will be considered when determining whether a given worker is an employee or an independent contractor for the purpose of the Fair Work Act (rather than the focus being on the written terms of the engagement).

The "contractor high income threshold" has been set at $175,000, which is relevant to:

- A contractor's ability to "opt out" of the new definitions of employment applying to the relationship (thereby maintaining the relationship as one of principal/contractor);
- The jurisdiction in which a contractor may bring a claim in the Fair Work Commission regarding unfair terms in their services contract; and
- The ability for an employee-like worker or a road transport contractor to bring a claim of unfair deactivation/termination.

We expect to see an increase in contractor claims this year, as the new provisions take full effect.

The new definition of "casual" employment in the Fair Work Act means that a range of factors are taken into account in determining whether an employee is properly a casual employee. From 26 February 2025, the "casual conversion"

requirement for employers to proactively make offers of permanent employment to eligible casuals in particular circumstances has been phased out in favour of the new "employee choice pathway" under which employees can provide written notice to their employer to change to permanent employment if they believe that they are no longer properly characterised as a casual employee. Employers have an obligation to respond to such a notice within 21 days.

If employers have not already done so, they should take the time to audit their current independent contracting and casual arrangements, to identify risks and regularise arrangements where necessary.

Road transport

On 28 August 2024, the TWU brought three applications for the new "minimum standards orders". The minimum standards orders (which will operate essentially similar to modern awards, but for non-employees) are sought to apply to:

- Employee-like workers (ie gig economy workers) who deliver food and beverages by road; and
- Employee-like workers and contractors who deliver goods, wares or other things by road.

The applications seek a number of terms including minimum rates of pay (though no figures have been specified), unpaid leave, paid and unpaid breaks, minimum payment times and notice of termination.

Subsequently, on 26 September 2024, the TWU filed a further application for a "contractual chain order" in respect of contractors who transport goods, wares, merchandise, material "*or anything whatsoever*" by road. The contractual chain order, if made, would apply to *all parties* in any contractual chain that is within coverage of the order, requiring payments to contractors within 30 days (without automatic deductions or set-offs) and compulsory rate reviews.

The "Road Transport Advisory Group" (an advisory body comprised of Vice President Ingrid Asbury, Peter Anderson of the Australian Road Transport Industrial Association and Richard Olsen of the TWU) has been directed by the Commission to undertake an initial 6 month consultation period in relation to the TWU's applications. During this time, subcommittees formed by the RTAG will consult with contractors and persons/organisations that will be affected by the new instruments, and will provide advice to the Commission regarding the matters within each application where consensus can be reached, versus matters which will require determination by the Commission.

Following the consultation period (and the determination of any issues or other matters required of the Commission), the next step for each application is that the Commission publishes a notice of intent along with a draft of the relevant order. Affected entities will have an opportunity to make written submissions on any such draft, and if the order is to be made, it will take effect 12 months after the notice of intent was published (or six months if declared urgent by the Commission).

Upcoming Federal election

A Federal election will be held by May 2025.

While the industrial relations landscape has changed significantly over the last two and a half years, it is yet to be seen whether IR plays a prominent role in the upcoming Federal election.

Employers should monitor parties' IR policies as they are released and consider the possible impact of those policies on their IR strategies and plans.

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