Fwd: Thinking

EMPLOYMENT AND WORKFORCE ISSUES IN AUSTRALIA

January 2017

What are your top priorities for 2017?

ROC, paper, scissors: the unpredictable year ahead in workplace relations

2017 is another important year for workplace relations in Australia, with developments on the cards in employment, industrial relations, safety and anti-discrimination.

With the Federal Government having secured the passage of two key IR bills through the Federal Parliament in late 2016, it will be interesting to monitor the impact of the Registered Organisations Commission (once it is in place) and the re-establishment of the Australian Building and Construction Commission. The Federal Government is likely to have an increased appetite for pursuing other long-awaited workplace relations reforms, especially some of the recommendations of the 2015 Productivity Commission report on workplace reform.

In Queensland, a new *Industrial Relations Act 2016* will commence which includes provisions mirroring the Federal general protections and anti-bullying laws. These provisions will be another area to watch.

We expect to see a continuation of increased use of accessorial liability provisions to claim against managers and HR staff, especially in adverse action proceedings. Paid leave developments, in the form of family/domestic leave and paid parental leave are also on the cards for review and/or implementation in 2017.

We may even see an Australian test case about the status of independent contractors in the sharing economy, following wins overseas against Uber's independent contractor model.

This year will also see the first prosecutions for category 1 offences under harmonised safety laws in both NSW and South Australia, and the formal triggering of the Brexit process slated for March 2017. There are many workplace issues on the horizon that will warrant close attention.

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Employment developments

Employee or contractor? "Employment" in the sharing economy

Non-traditional working arrangements and the casualisation of labour in Australia are likely to continue in 2017. Organisations will be looking to the sharing economy for clues about how they might transform their own traditional workforce to one better suited for the changes ahead.

By contrast, employees and unions are likely to rely on well-established law regarding independent contractors and employees to seek the protection of an employment relationship, to replicate wins achieved overseas (such as those against Uber in the US and the UK). Employee representatives and unions have publicly indicated that they are preparing to bring an Australian test case on the legal framework of the contractor relationship in the sharing economy.

While legislative intervention could bring an appropriate balance between innovation, flexibility and workers' rights, that legislative intervention is unlikely to be on the Federal Government's agenda in 2017.

Although regulating the changing nature of work may not itself be on the legislative reform agenda, the regulation of contractors will continue to be an issue of national importance, especially as the states are likely to seek national reform in the regulation of labour hire companies through COAG.

Last year, Queensland, Victoria and South Australia all conducted parliamentary inquiries into labour hire, with all inquiries recommending COAG meetings to contemplate national reform. The inquiries in both Victoria and South Australia separately made recommendations that there be a national licensing regime for labour hire contractors to be established through COAG.

The increased state-based focus on this issue correlates with the Federal Government's interest in increasing the powers of the Fair Work Ombudsman (FWO) to protect vulnerable workers, who may be incorrectly classified as contractors when they are in fact employees.

457 visas – scrutiny over foreign workers

Following substantial media coverage of the 7-Eleven scandal, the FWO commenced a number of proceedings in 2016 against individual franchise holders (many of whose employees are foreign) with respect to underpayments. Franchisees who reverse calculated payslips to hide underpayments were given penalties as large as $150,000.

Against this backdrop, unions have called for changes to the 457 visa system to tighten eligibility criteria (including market testing requirements) and require employers who employ 457 visa holders to demonstrate their contribution to local employment. In November 2016, Opposition Leader Bill Shorten introduced a private member's bill (the *Migration Amendment (Putting Local Workers First) Bill 2016*), designed to give effect to some of these proposals. The Bill remains before the House of Representatives.

Employers who employ foreign workers are likely to face continued scrutiny in 2017 as the FWO and unions continue to scrutinise the possible exploitation of foreign workers. The start of the new year is a good time to confirm compliance with entitlements, particularly where any legislative or award changes have recently commenced.

Penalty rates review

The review of penalty rates by the Fair Work Commission as part of its four yearly modern award review is expected to be handed down in 2017. It is unclear how the FWC will decide, or how the Federal Government will respond to the decision, especially after the Productivity Commission's Inquiry Report in December 2015 described Sunday rates as "inconsistent" and "anachronistic".

Domestic violence leave

Domestic and family violence remain on the agenda in 2017. In 2016 the FWC heard the ACTU's claim, as part of the four yearly modern award review process, for an entitlement to ten days' paid, and two days' unpaid, family and domestic violence leave to be included in the majority of modern awards. It is likely that a decision on that claim will be handed down in early 2017. In conjunction with its claims for paid family and domestic violence leave, the ACTU is seeking the inclusion of a "family friendly" work arrangements clause dealing with requests for family friendly work arrangements, rights to return to work and leave to attend pregnancy, ante-natal and/or adoption related appointments.

Whatever the outcome of the modern award proceedings before the FWC, an increasing number of employers are likely to be called upon during 2017 to introduce family and domestic violence policies and/or include family and domestic violence leave entitlements in enterprise agreements.

The Queensland Government has also included domestic and family violence leave for those employees covered by the new Queensland legislation. This is the first government in Australia to do so. See our separate article below.

Paid parental leave

Parental leave and "double dipping" has been in the headlines since 2014 and we expect it to be reviewed again in 2017. The *Fairer Paid Parental Leave Bill 2016* was introduced into the Federal Parliament in October 2016 (and is a revised version of a similar bill introduced in June 2015). The Bill relates to removing "double dipping" and would provide that parents under the scheme can only take a maximum of 18 weeks of Federal Government-funded parental leave. Access to Government-paid parental leave will be limited by the entitlement the parent has to employer-paid parental leave.

Testing the boundaries – FW Act protections

Throughout 2017 employers are likely to continue to test the boundaries of FW Act protections and powers. 2016 saw an increase in the novel use of these provisions, particularly with respect to the conduct of non-employees such as union organisers. These cases demonstrate that individual rights regimes, such as general protections and anti-bullying, are broader than they seem.

Of particular note was the making of anti-bullying orders against the officers, employees and members of two unions as part of the Carlton & United Breweries dispute. The orders prohibited certain conduct at the picket line, including the use of offensive words (such as "scab") and provided protection to the whole of the CUB workforce.

The availability of these regimes provides an alternative avenue for employers to deal with conduct that was once only dealt with by remedies such as injunctions or through liaison with police. Employees and unions are also likely to continue the trend of naming managers, colleagues and HR representatives as respondents to individual rights cases before the FWC and courts, placing significant pressure on managerial employees named as accessories.

Employers should remain cognisant of the accessorial liability provisions and take steps to minimise the risk of any such claims succeeding (for example, by ensuring that managers and HR officers understand the accessorial liability and general protections provisions). Employers should also review their insurance arrangements to check whether employees who might be the subject of accessorial liability claims will be covered.

Industrial relations developments

Registered Organisations Commission

The *Fair Work (Registered Organisations) Amendment Act 2016* received royal assent on 24 November 2016. This Act will establish the Registered Organisations Commission, which will oversee the operation of registered organisations such as unions and employer associations, taking over principal responsibility in this area from the FWC.

The ROC will have broader powers than those previously possessed by the FWC, including enhanced investigation and information gathering powers. In addition, the legislation will increase civil penalties and introduce criminal offences for serious breaches of officers' duties. These provisions will take effect on a date that is still to be proclaimed, probably in the first quarter of 2017. You can read more about the ROC legislation here.

In order to secure passage of the ROC legislation through Parliament, the Federal Government gave a commitment to strengthen whistle-blower protections in the public and private sectors. A Parliamentary Committee will consider whistle-blower protections in the first half of the year.

Australian Building and Construction Commission

The re-established Australian Building and Construction Commission has replaced Fair Work Building and Construction as the Commonwealth regulator for the construction sector. In comparison with the FWBC, the ABCC has an expanded jurisdiction (due to a broader concept of "building work"), along with enhanced investigative powers.

The Minister for Employment, Senator the Hon Michaelia Cash, also issued a new building code on 2 December 2016. The *Code for the Tendering and Performance of Building Work 2016* applies to companies that wish to undertake Commonwealth-funded building work. The new Code contains more prescriptive requirements for the content of enterprise agreements. Those requirements have immediate application to agreements made by Code-covered entities after 2 December 2016. Code-covered entities that are subject to an enterprise agreement made before that time are not required to comply with the enterprise agreement content provisions of the new Code until 29 November 2018. You can read more about the return of the ABCC and the new Code here.

Scrutiny over enterprise bargaining requirements

The *Uniline* decision handed down in August 2016 reinforced the strictness with which the FWC is interpreting FW Act provisions concerning Notices of Employee Representational Rights.

The decision underscores for employers that it is essential that the NERR be correctly issued the first time around and within 14 days from the start of bargaining – failing to do so may prevent an enterprise agreement from being approved. Our Employment Alert about the *Uniline* decision can be accessed here.

Another FWC decision from 2016 emphasised the importance of compliance with procedural provisions of the FW Act concerning bargaining. In *Falcon Mining Pty Ltd* [2016] FWC 5315, the FWC refused an application for approval of an enterprise agreement, partly as a result of a failure by the employer to take all reasonable steps to (i) give a NERR to each employee; and (ii) ensure that the terms of the proposed agreement, and the effect of those terms, were explained to employees in an appropriate manner.

The *Falcon Mining* decision indicates that the potential for procedural failings to undermine an application for approval of an enterprise agreement is by no means confined to deficiencies with NERRs.

Although there have been calls for legislative reform, in the meantime, employers must continue to be assiduous in complying with the FW Act's bargaining provisions as there is little, if any, margin for error.

The past year was also notable for the highly-publicised decision in *Hart v Coles Supermarkets Australia Pty Ltd and Bi-Lo Pty Limited* [2016] FWCFB 2887, in which a Full Bench of the FWC declined to approve a proposed enterprise agreement that would have covered approximately 77,000 employees, on the basis that it did not pass the better off overall test. In addition, there was considerable media scrutiny of the enterprise agreements of several other major Australian employers. It would seem likely that the increased publicity being given to such matters will continue in 2017 and may lead the FWC to take an increasingly cautious stance on the BOOT.

The decision by a Full Bench of the FWC in *Construction, Forestry, Mining and Energy Union v Ron Southon Pty Ltd* [2016] FWCFB 8413 highlighted yet again the technical challenges associated with compliance in this area. In that decision, the Full Bench upheld an appeal by the CFMEU against the approval of an enterprise agreement on the grounds that the agreement's terms contravened the National Employment Standards because the agreement provided for an average of 40 ordinary hours per week. Whilst the Full Bench noted that "an average of ordinary hours above 38 per week does not *ipso facto* mean that it cannot be approved" and that any inconsistency with the NES could probably be resolved through an appropriate undertaking, it quashed the decision below which had approved the agreement, and remitted the approval application to a single Commissioner.

Employers will need to be especially conscientious in performing their own BOOT assessments, including by considering the operation of the proposed enterprise agreement from the perspective of each class of employee to be covered by the agreement.

Proposed union mergers

The CFMEU has entered into two memoranda of understanding with the Maritime Union of Australia and the Textile Clothing & Footwear Union of Australia, respectively. The unions' members will reportedly vote on the proposed mergers early this year.

Separate reports of another possible tripartite merger emerged at the end of last year, with the National Union of Workers understood to have held informal talks with the Australian Manufacturing Workers' Union and United Voice regarding an amalgamation.

Prior to the Federal election in July 2016, the Coalition announced that it would seek to introduce legislation providing for proposed union mergers to be subject to a public interest test. This test would include consideration of the merging unions' history of compliance with workplace laws. Since the election, Minister Cash has reaffirmed the Government's commitment to this policy and described the proposed CFMEU-MUA merger as "extremely concerning". However, no legislation was introduced into Parliament before it rose at the end of 2016. So, it is uncertain whether the slated mergers will be impacted by the Federal Government's policy.

Heydon Trade Union Royal Commission

The Federal Government is expected to introduce legislation in 2017 in response to the recommendations of the Heydon Trade Union Royal Commission. During the election, the Government indicated that it would implement the vast majority of the recommendations made by the Royal Commission, and Minister Cash repeated this in late October 2016.

Secondary boycotts

In response to the recommendations of the Harper Review, the Federal Government has developed exposure draft legislation for consultation that includes increased penalties for the contravention of secondary boycott provisions from $750,000 to $10 million. Legislation arising out of the recommendations from the Harper Review is currently before the Federal Parliament, with the Bill that includes the reforms to the secondary boycott penalties yet to be introduced. This is likely to be introduced in 2017.

Queensland IR changes

In late 2016, the Queensland Parliament passed the *Industrial Relations Act 2016* (Qld). It is due to commence operation on 1 March 2017. The Queensland Act repeals the previous *Industrial Relations Act 1999* (Qld) and amends a host of other Queensland legislation. The Queensland Government's stated purpose is to provide a more streamlined, fair and balanced industrial relations framework that supports the delivery of high quality services, economic prosperity and social justice. The changes align the Queensland industrial relations framework in many respects with the existing Commonwealth framework under the FW Act.

The Queensland Act primarily applies only to those employers in the Queensland industrial relations system, being Queensland Government departments and agencies and the Queensland local government sector. The key exceptions to this are that the Queensland Act also:

- contains the relevant long service leave provisions for the State; and
- includes provisions relating to emergency service leave and jury service leave which apply to all Queensland employers. For example, the jury service leave provisions obligate Queensland employers to pay an employee absent on jury leave for the entirety of the employee's absence and based on the employee's ordinary rate of pay less any attendance monies they have received. This entitlement exceeds the jury service leave provisions contained in the FW Act.

New legal avenues for public sector employees

The Queensland Act introduces a general protections and anti-bullying jurisdiction similar to the FW Act:

- The general protections jurisdiction prohibits employers from taking adverse action against an employee for a prohibited reason. Employees may make general protection claims regarding adverse action taken during their employment or in relation to the termination of their employment. Employers should be aware of the reverse onus of proof in general protections claims. Once the employee establishes that adverse action was taken, the employer is required to establish on the balance of probabilities that the relevant decision-maker's approach had not been tainted by a prohibited reason. Such matters are to be dealt with by the QIRC.
- The QIRC also now has an anti-bullying jurisdiction that mirrors the Commonwealth jurisdiction in the FWC. Various orders are available to employees who successfully establish that a worker or group of workers repeatedly behaved unreasonably, creating a risk to health and safety, but which does not constitute reasonable management action carried out in a reasonable manner. This establishes a streamlined process and the intention is that each anti-bullying application will be dealt with quickly by the QIRC.

It will be prudent for Queensland public sector employers to review their policies and procedures. For example, they should ensure decisions taken which adversely impacts an employee are not affected by any prohibited reasons under the general protections framework. The existing case law regarding the Commonwealth framework should assist Queensland public sector employers to understand better how these provisions will operate and be interpreted by the QIRC.

New entitlements for public sector employees

Queensland public sector employees have also been provided with the following entitlements:

- Employees may access ten days of domestic and family violence leave if they experience domestic and family violence, making Queensland the first state to extend the scope of leave to this category;
- Employees have the right to request flexible working arrangements and such requests may not be refused unreasonably; and
- New employees must be provided with an information statement when commencing employment that details employee entitlements, similar to the Fair Work Information Statement.

Changes to bargaining framework

The new Queensland legislation also introduces changes to the bargaining process which include:

- Bargaining may commence earlier, six months before the nominal expiry date of the existing certified agreement rather than 60 days before; and
- The introduction of good faith bargaining obligations and scope orders.

Duty of mutual trust and confidence?

The Queensland Act also includes as one of its purposes the recognition of mutual obligations of trust and confidence in employment relationships. In 2014, the High Court unanimously held in *Commonwealth Bank of Australia v Barker* (2014) 253 CLR 169 that there is no implied term of trust and confidence in Australian employment contracts. Our Employment Alert on the *Barker* decision can be accessed here.

During the consultation process before enactment of the Queensland Act, the Office of Industrial Relations clarified that the inclusion of this obligation merely supports, rather than expands, existing protections for employees. Nevertheless, there is potentially scope for argument that the inclusion of the obligation in fact provides a further basis for claims about how the provisions of the Queensland Act should be interpreted and applied.

Work related discrimination claims

Under the changes introduced, work related discrimination claims made under the Queensland *Anti-Discrimination Act 1991* will now be determined by the QIRC rather than by the Queensland Civil & Administrative Tribunal.

Anti-discrimination developments

Meeting the challenges of an ageing workforce

During 2016, the Australian Human Rights Commission completed its inquiry into employment discrimination against older Australians and Australians with disability and released a report entitled "Willing to Work". The AHRC found that Australia's mosaic of workplace and anti-discrimination laws is not always effective to ensure that these populations have the opportunity to work at their full capacity. It has encouraged employers to recognise the benefits to business and the Australian economy from increasing workforce participation.

The AHRC has now recommended some significant changes to discrimination law, including the removal of the "comparator test" for indirect discrimination, a new definition of "disability" in the *Disability Discrimination Act 1992* (Cth), disability employment standards and even introducing into Federal anti-discrimination law a positive duty to eliminate discrimination. The AHRC also recommended that the Federal Government consider changes to the flexible working provisions and limitation periods for claims under the FW Act.

So far, the Federal Government has not released any formal policy response to the AHRC's report. If the Government does decide to implement any of the AHRC's proposals, employers will need to be aware of new and increased compliance obligations.

Parliamentary inquiry into freedom of speech

In November 2016, the Federal Government announced an inquiry by the Parliamentary Joint Committee on Human Rights into whether the *Racial Discrimination Act 1975* (Cth) imposes unreasonable restrictions on freedom of speech. Section 18C of the RDA has been the subject of much public scrutiny and debate, including in relation to some high profile cases, such as the complaint made against three Queensland university students which the Federal Court dismissed in late 2016.

This inquiry will ensure that in 2017, the debates about free speech and protection of vulnerable individuals and groups will continue.

Work health and safety developments

First prosecutions for category 1 WHS offences in NSW and South Australia

The NSW regulator has commenced the first category 1 ("reckless conduct") proceedings in the State under section 31 of the NSW WHS Act. The charges were laid after a woman suffered a fatal electric shock allegedly caused by the business operator's "non-compliant electrical work combined with the absence of critical electrical safety devices and damaged electrical plant and equipment".

If convicted, the business operator could face a maximum penalty of $3 million and the two individuals also named could be fined up to $600,000 each and/or be jailed for up to five years. These matters are currently before the NSW District Court.

Further, an engineering company and its director were charged in 2016 with recklessly causing the death of an 8 year old girl on a ride at the Royal Adelaide Show in 2014. These are the first parties to be charged with category 1 offences under section 31 of the WHS Act in South Australia.

The respondents argued before a single Judge in the South Australian Industrial Court that their responsibilities in guaranteeing the ride's safety ended once they physically handed over the safety certificate. The respondents argued they could only be liable for the period when the inspection was physically carried out. The Court heard it was a question of law which had not previously been considered in an Australian court.

The matter (*Boland v Safe is Safe Pty Ltd & Munro*) has been referred to the full South Australian Industrial Court to be heard on 24 April 2017.

It is likely that we will see further prosecutions under other provisions of the harmonised laws. This is particularly so given that 2016 saw the first conviction for breach of the consultation provisions of the model WHS Act. This involved a South Australian not-for-profit defendant who was penalised $12,000 (60% of the maximum penalty) for failing to "consult, co-operate and co-ordinate activities" with another duty holder on a construction site.

Employer criminally liable for workplace bullying under WHS laws

In light of a precedent set last year, 2017 may see further prosecutions of bullying under WHS laws.

In June 2016, a Victorian employer was convicted of a criminal offence under WHS laws over the persistent bullying of an apprentice carpenter and was fined $12,500. The WorkSafe Victoria investigation established that the employer had failed to provide a safe system of work and the necessary information, instruction, training and supervision to employees in relation to workplace bullying. The case was unusual as the employer was prosecuted under WHS laws rather than the FWC's anti-bullying jurisdiction being utilised.

Harmonised WHS Laws in Western Australia

General industry – Work Health and Safety Regulations

On 1 June 2016, WorkSafe WA published a discussion paper outlining its 138 recommendations to adapt the model WHS regulations for general industry in Western Australia. The new regulations would replace the existing *Occupational Safety and Health Regulations 1996* (WA). WorkSafe's recommendations were summarised in our Safety Matters Alert of 25 July 2016 – *"The road to harmonisation"*. The period for public submissions on the discussion paper closed on 31 August 2016. WorkSafe is analysing the submissions and will prepare a report for the Minister of Commerce for consideration.

There is no fixed timeframe for adoption of the WHS laws in Western Australia. Timing will depend, in part, on the substance of the submissions received during the public comment period for the WHS regulations.

Resources industry – *Work Health and Safety (Resources and Major Hazards) Bill*

The Department of Mines and Petroleum is consolidating the safety and cost recovery aspects of current mining, petroleum and major hazards facilities legislation in Western Australia into one regime – the proposed *Work Health Safety (Resources and Major Hazards) Act* and *Work Health Safety (Resources and Major Hazards) Regulations*.

Public consultation on the WHS (R&MH) Bill took place throughout 2015. The period for public consultation on the WHS (R&MH) Regulations ended on 9 September 2016.

The DMP had planned for the WHS (R&MH) Bill to be introduced into Parliament in August 2016, with the legislation coming into operation on 1 July 2017. It is now anticipated that the elected Government will determine the timing for introducing any Bill into Parliament following the State election in March 2017.

Global developments

Brexit – what next?

One of the biggest global events of 2016 was the referendum result that Britain exit the European Union. Australian employers with operations in the UK and Europe will need to prepare for the impact of Brexit.

On 24 January 2017, the UK Supreme Court handed down a decision stating that the government will require authorisation from Parliament before the government can trigger the Brexit process. Despite this, Prime Minister Theresa May's plan for Article 50 to be triggered by the end of March 2017 is still likely to proceed. However, there is still uncertainty as to exactly what Brexit will look like and its effects. It is certain that some UK employment legislation will need to be repealed; however, that will not occur under the Article 50 trigger, and until UK legislation incorporating EU law into UK law (the *European Communities Act 1972*) has been repealed. There is also uncertainty in relation to the effect Brexit will have on the courts, and whether not being bound by an EU court judgment will over time change the jurisprudence of UK courts.

In 2017, Australian organisations with UK based operations should consider conducting an audit of their workforce, to determine whether there are UK nationals working abroad in the EU, or EU migrants working for them in the UK. Employers should consider secondment arrangements and whether there are termination clauses in employment contracts that could trigger rights relating to repatriating those employees.

You can read more about Brexit developments here.

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