HFW

HFW WORKPLACE RELATIONS UPDATE
2020 - THE YEAR AHEAD

2019 in numbers

<1%

of unfair dismissal applications resulted in a remedy being granted

93.6%

of unfair dismissal applications settled without a decision

1.1%

of unfair dismissal applications were dismissed for want of jurisdiction

83%

of the 5,476 general protections applications were dismissal disputes

26.7%

of general protections dismissal disputes resulted in the FWC issuing a certificate

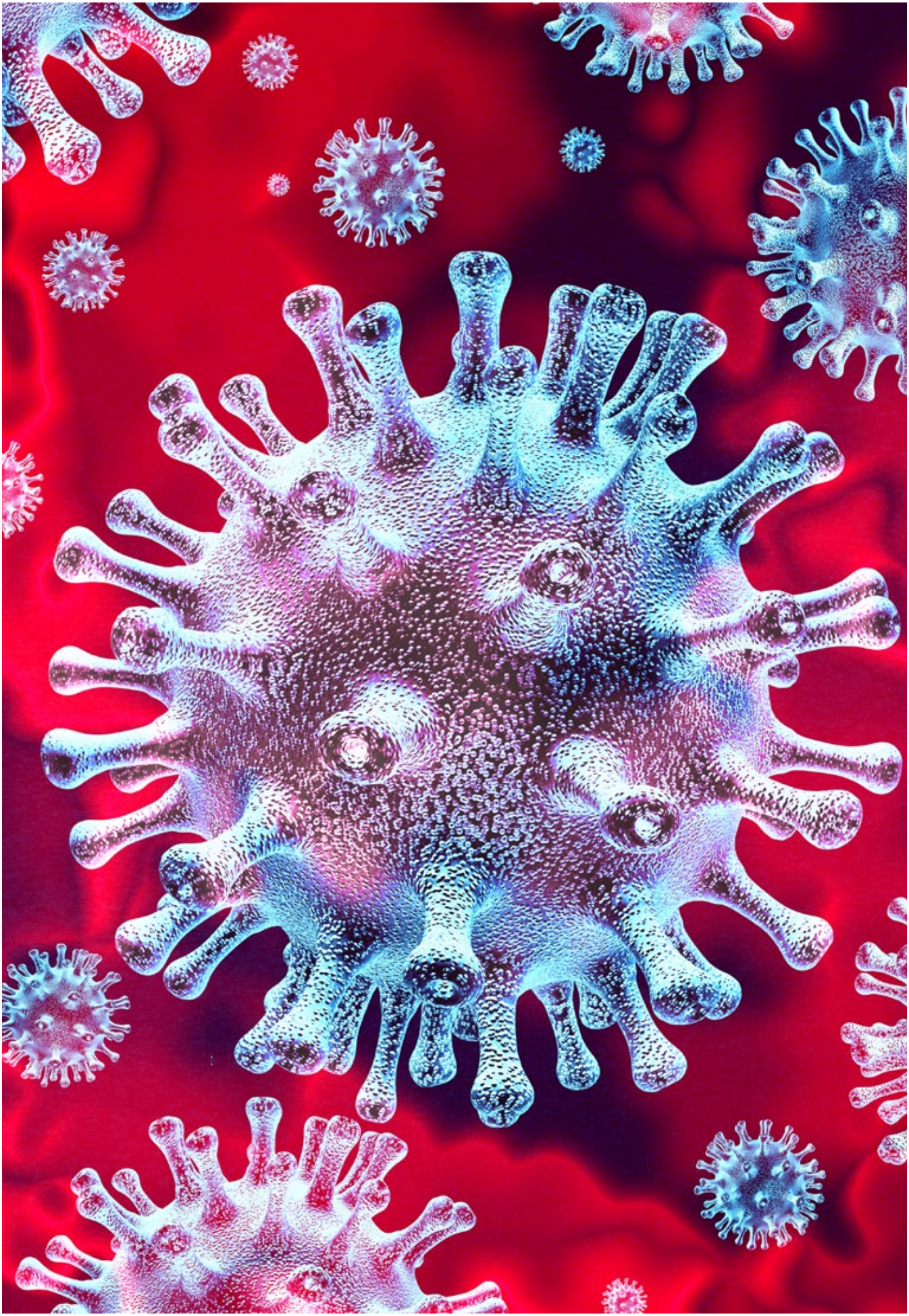
92.2%

of protected action ballot applications resulted in a protection action ballot order

1 out of 744

bullying applications resulted in a stop bullying order

2020 – The Year Ahead



Novel coronavirus and the Australian workplace

As the world watches closely the continuing spread of the novel coronavirus originating from Wuhan in the Hubei Province of China (2019-nCoV), on 1 February 2020, the Australian government announced that any foreign travellers who have left or transited through mainland China on or after 1 February 2020 will be refused entry to Australia, in order to minimise the potential spread of novel coronavirus, and that while Australian citizens and permanent residents will be exempt from these measures, they will be required to self-isolate for a period of 14 days from their arrival into Australia. This will impact on the employment of Australians in this position.

The Biosecurity Act 2015 (Cth) empowers the Australian Government to take measures to manage the risk of diseases entering Australia and causing harm to human health. On 21 January 2020, the Biosecurity (Listed Human Diseases) Amendment Determination 2020 added 'human coronavirus with pandemic potential' to the list of human diseases permitting action to manage and respond to the biosecurity risks to human health caused by that virus.

In these circumstances, it appears that Australian citizens and permanent residents returning from mainland China from 1 February 2020 will be subject to 'human biosecurity control orders' made under the Biosecurity Act, by which they may be required, among other things, 'to go to, and remain at, the individual's intended place of residence' for the specified 14 day period. It is a criminal offence punishable by imprisonment for 5 years or a penalty of $63,000, or both, to fail to comply with a human biosecurity control order.

Most Australians in this position will have jobs. The effect of the requirement to self-isolate for 14 days from their arrival into Australia is that they must not attend work. We have had enquiries from companies with employees in this position about pay and leave entitlements in these circumstances. The effect of the requirement on these employees to self-isolate is that the employees (who cannot work from home or otherwise work remotely) are not ready, willing or able to perform work. This means that an employer would not have a legal obligation to pay the employee while they did not perform work.

A permanent employee would be able to access any accrued paid personal leave if they meet the usual requirements to access this leave (eg they are unfit for work because of a personal illness and have complied with the relevant notification and evidence requirements). If the employee does not have any accrued paid personal leave, they will be on leave without pay unless they apply for another form of accrued paid leave entitlement (eg annual leave) and the employer approves the leave.

While this reflects the strict legal position, some employers may wish to take a more generous position in light of an affected employee's personal circumstances.

In relation to employees who may be at risk of infection who fall outside the scope of the human biosecurity control order measures introduced from 1 February 2020 (either because they have returned from mainland China before 1 February 2020, or otherwise had recent close personal contact with someone who recently travelled from mainland China), there may be concerns about their ability to safely attend the workplace within 14 days of their return or last contact with a person at risk of infection.

An employee who presents to work sick may be required to take paid personal leave. However, an employee who is not displaying any symptoms of illness cannot be required to take personal leave. In these circumstances, where there are genuine concerns about work health and safety, there will be a reasonable basis for the employer to direct an employee (who cannot work from home or otherwise work remotely) not to attend work for up to 14 days from the date of their return or last contact with a person at risk of infection, on full pay. This is because, while we consider it would be reasonable for health and safety purposes given the risk of 2019-nCoV infection for an employer to direct an employee to stay away from work, an employee who is not actually sick and presenting ready, willing and able to work, is entitled to work and be paid. If the employee were to become sick, it may be possible to re-characterise the period as paid personal leave.

"...some Australian employers may wish to consider whether they will require employees hosting visitors from China to identify themselves."

As cases of human-to-human transmission of 2019-nCoV outside China have now been identified, some Australian employers may wish to consider whether they will require employees hosting visitors from China to identify themselves, and consider whether they should also be required to work from home or otherwise take paid leave on the basis we have noted. In any case, to avoid unlawful discrimination risks, all employees in relevant circumstances (not just employees with Chinese heritage) should be treated the same.

#METOO - A year to watch

Sexual harassment remains a persistent scourge in Australian workplaces. Countless surveys report that sexual harassment in Australian workplaces is prevalent and not abating. The most recent survey released in October 2019 by the Australian Human Rights Commission, involving a survey of members of the Shop, Distributive and Allied Employees Association, reported that:

- 39% of survey respondents had experienced workplace sexual harassment in the last 5 years, with 54% having experienced sexual harassment either personally, or as a bystander, or both;
- the most commonly experienced type of workplace sexual harassment was sexually suggestive comments or offensive jokes;
- 82% of survey respondents indicated that the majority of harassers were men; and
- one in three incidents of workplace sexual harassment involved harassment by a customer or client.

For the last 12 months, the Australian Human Rights Commission, led by Sex Discrimination Commissioner, Kate Jenkins, has been undertaking a National Inquiry into Sexual Harassment in Australian Workplaces to better understand the causes of the problem. A report is expected within the next few weeks.

Having reviewed the submissions made to the Inquiry, we anticipate that Australian Human Rights Commission will make a number of far-reaching recommendations focused on legislative reform and cultural and societal change. As to potential legislative reform, we anticipate the Australian Human Rights Commission is likely to recommend:

- that legislation be introduced to impose a positive duty on employers, and officers and senior managers, to ensure, as far as reasonably practicable, that workplaces are free of sexual harassment. This would be similar to the duty on employers under work health and safety laws to ensure employees are safe at work. The legislation would also seek to impose penalties on employers, and officers and senior managers, for failing to discharge this duty.
- the introduction of a right for employees who are experiencing sexual harassment to approach a tribunal for orders that the sexual harassment cease. This remedy would not be dissimilar to the stop bullying jurisdiction of the Fair Work Commission, introduced in 2014, where there is initially a focus on conciliation, and where conciliation fails, or it is inappropriate in the circumstances, arbitration.
- where claims of sexual harassment are settled, there would be a prohibition on the imposition of confidentiality obligations on claimants, so that they may disclose their experiences to others, including the media, and warn other employees of the potential conduct of harassers; and
- the relaxing of strict time limits to lodge sexual harassment complaints to the Australian Human Rights Commission. Currently, a claimant is required to lodge a complaint within 6 months of the alleged conduct, although the Australian Human Rights Commission has a discretion to investigate complaints made outside this timeframe.

As to cultural and societal change, we anticipate that the Australian Human Rights Commission will call on further public funding of education campaigns, with a focus on helping men, including young men entering the workforce, to better understand what constitutes sexual harassment and the impact of the conduct on others. We also anticipate that the Australian Human Rights Commission will recommend that the government further encourage (by legislation and other incentives) Australian businesses to improve diversity at leadership levels, in particular, senior management and board level. There is much data demonstrating that where there is diversity in leadership in a business, there are reduced levels of sexual harassment.

Employers should get ahead of these developments and embrace a duty to ensure, so far as reasonably practicable, that their workplaces are free of sexual harassment. Zero-tolerance of sexual harassment should be the mind-set of all Australian employers to help eliminate sexual harassment in our workplaces.

"Zero-tolerance of sexual harassment should be the mind-set of all Australian employers to help eliminate sexual harassment in our workplaces."

Continued scrutiny of casual employment

Last year, we reported on the decision of *Workpac v Skene* [2018] FCA 131, in which the Full Federal Court of Australia (FCA) found that employment arrangements lacking 'the essence of casualness' (being flexibility and a lack of regularity), are not necessarily casual arrangements for the purposes of determining entitlements under the National Employment Standards (NES), even if the employee is treated as such under a modern award or enterprise agreement.

Following the *Skene* decision, the Federal Government amended the *Fair Work Regulations 2009* (Cth) to give employers the ability to argue that casual loading paid to an employee may be offset against any subsequent legal claims for entitlements under the NES. These amendments only apply in limited circumstances and do not give an employer a general right to argue that offsetting of the casual loading should apply.

Since the *Skeen* decision, we have seen a number of further developments regarding casual employment.

Class actions

A number of class actions have been filed in the Federal Court by 'casual' employees claiming that they are, in fact, permanent employees entitled to the benefits of permanent employment, including a claim against Workpac filed on behalf of more than 600 employees (*Petersen v Workpac*). Workpac filed their own application for a declaration that a former employee, Mr *Rossato*, was a true casual employee who was not entitled to annual leave under the *Fair Work Act 2009* (Cth) (FW Act) (*Workpac v Rossato*). The *Rossato* proceedings sought to provide more clarity around the application of the *Skene* decision to casual employees.

The Federal Government intervened in the *Rossato* proceedings. The *Peterson* and *Rossato* proceedings were referred to the Full Court of the Federal Court for hearing. The *Peterson* proceeding were adjourned and the *Rossato* proceedings were heard on 8 May 2019. To date, the judgement of the Court remains reserved.

Casual conversion

In 2018, a number of modern awards were varied to include a casual conversion clause. The model casual conversion clause required employers to advise casual employees who had worked for a period of 12 months or more and who had worked a pattern of hours on an ongoing basis which they could have worked as a full-time or part-time employee, of their right to convert to full-time or part-time employment by 1 January 2019. Unsurprisingly, our clients have reported that many of their casual employees did not want to convert because they did not want to lose their casual loading.

Claims against employers

We have seen a number of clients receive claims from unions on behalf of casual employees to be provided permanent entitlements, despite the employee being entitled to be classified as a casual employee under the relevant award or enterprise agreement. Commonly, those claims are being made when the employee is dismissed. We anticipate these sorts of claims will be likely to increase if the decision in *Skene* is upheld by the Full Court in the Rosatto proceedings.

Employers may help to reduce legal risk in this area by:

- proactively undertaking an analysis of their casual workforce to make sure that they are working sporadic hours and are not being given any commitments about ongoing work;
- where they are covered by an award or enterprise agreement that contains casual conversion provisions, offering conversion to casual employees who are working a pattern of hours on an ongoing basis they could have worked as a full-time or part-time employee;
- keeping a record of casual employees who reject the opportunity to convert to permanent employment to assist the business to resist any future claim by these employees for permanent benefits; and
- reviewing casual employment contracts to ensure they contain appropriate set-off clauses.

"We have seen a number of clients receive claims from unions on behalf of casual employees to be provided permanent entitlements..."

Fair Work Commission sets new model annualised wage provisions

In 2019, the Fair Work Commission (FWC) conducted a review into the effectiveness of annualised wage provisions in a number of modern awards. Those provisions allow an employer to pay an employee a fixed annual salary under the award, which compensates them for any overtime, penalty rates and allowances and in some cases annual leave loading.

The FWC has issued a series of draft determinations for various awards, based on different standard clauses prepared dependent upon whether hours worked by employees under an award are relatively stable or highly variable (with significant ordinary hours attracting penalty rates). Not all modern awards will be varied to include the new draft annualised wage provisions.

In respect of the *Clerks (Private Sector) Award 2010* (Clerks Award), the *Contract Call Centres Award 2010*, the *Legal Services Award 2010*, the *Pastoral Award 2010* and the *Horticultural Award 2010*, it is anticipated that the variations to these awards will take effect from 1 March 2020.

Consultation is occurring in relation to the balance of the draft determinations, including draft determinations for the *Hospitality Industry (General) Award 2010* (HIGA); the *Restaurant Industry Award 2010* (Restaurants Award) and the *Marine Towage Award 2010* (Marine Award).

Model clause for awards where employees work reasonably stable hours[1]

This model clause has the following features:

- an annualised wage provision may be implemented without agreement with a full time employee (and in the case of some awards, only employees in certain classifications);
- employees must be advised of, and a record kept of:
  - the annual wage that is payable;
  - which of the provisions of the award will be satisfied by the payment of the annualised salary;
  - the method by which the annualised wage has been calculated, including specification of each separate component of the annualised wage and any overtime or penalty assumptions used in the calculations;
  - the outer limit of any ordinary hours or overtime hours which do not attract additional payments each pay period or roster cycle (after which the employee must be paid penalties and overtime);
- employees cannot be paid less than the amount which they would receive under the award for the work performed over the year (or proportion of the year);
- the employer must, each 12 months, or on termination of employment, conduct a

1 Banking, Finance and Insurance Award 2010; Clerks (Private Sector) Award 2010, Contract Call Centres Award 2010; Hydrocarbons Industry (Upstream) Award 2010; Legal Services Award 2010, Mining Industry Award 2010, Salt Industry Award 2010; Telecommunications Services Award 2010; Water Industry Award 2010; Wool Storage, Sampling and Testing Award 2010

reconciliation of the amounts paid under the annualised wage arrangement against what the employee would otherwise have been paid under the award, and pay any shortfall within 14 days;

- the employer must keep a record of the starting and finishing times of work and any unpaid breaks taken for the purposes of undertaking the reconciliation. This record must be signed by the employee or acknowledged as correct in writing each pay period or roster cycle.

Model clause for awards where employees have highly variable, or significant ordinary, hours[2]

At present, the FWC is proposing in some awards that the above clause is introduced, but may only be implemented with the agreement of the employee (and limited to some classifications in certain awards) (see for example that *Manufacturing or Associated Industries and Occupations Award 2010*).

Model award provision specific to the hospitality industry and maritime towing industry[3]

In the hospitality industry, the FWC has issued draft determinations for HIGA and the *Restaurant Industry Award 2010*, for consultation.

In respect of managerial employees under HIGA, the FWC is proposing that they are paid 25% in excess of the minimum annual salary of $49,025 in satisfaction of award entitlements, with some constraints about time off and public holiday work.

In respect of non-managerial employees under HIGA, and employees under the *Restaurant Award 2010*, the FWC is proposing that these employees are paid an annualised salary that is at least 25% more than the minimum rate (multiplied by 52). However, the limitations in points 2, 3, 4 and 5 above will apply to those employees. In addition, the employee cannot be required to work more than an average of 16 ordinary hours that would attract a penalty rate or 10 overtime hours each week, without the payment of penalty rates and overtime.

Similar provisions with different percentages and hours are proposed in the Maritime Award.

Common law annualised salary set off arrangements

The FWC has made it clear that employers remain able to engage an employee under a common law salary and set off arrangement, despite the fact that the award contains an annualised wage arrangement.

However, these arrangements are not without risk for the following reasons:

- the rates are often set having regard to market conditions, without any real consideration of whether the salary will satisfy underlying award entitlements;
- these arrangements will not satisfy an employer's obligations under an award to pay wages in full each pay cycle, or record keeping obligations under the *Fair Work Regulations 2009* (Cth) (FW Regulations), unless the employer has a system in place to undertake a reconciliation of hours worked each pay cycle against award entitlements, and
- unless the set off clause is properly drafted, there may be difficulties in arguing that the award entitlements are effectively set off against any specific financial benefits under the award.

Challenges in introducing an award annualised wage arrangement

While there are some advantages in introducing the award annualised salary arrangement (as it eliminates some of the risk outlined with common law arrangements), the introduction of these arrangements can bring significant challenges for employers.

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An employer will need to have a clear understanding of what employees are entitled to under these arrangements. An employer will need to have a clear understanding of the hours being worked by these employees in order to deconstruct the rate payable to employees to show the wage, penalty and overtime assumptions and to set the outer limit of hours. Setting the outer limit of hours for each employee could be difficult. The FWC has given limited guidance in how this can be achieved, other than that the outer limits are not set having regard to the average overtime/penalty hours that are being worked, but rather at a point which allows for a reasonable fluctuation in the amount of overtime and penalty time each week. It may also take away an employer's option to offer time in lieu of overtime for those hours.

Overall, an employer will need proper systems in place to:

- record starting and finishing times of work and any unpaid breaks taken by employees, as well as a system for employee acknowledgement of those hours each pay cycle;
- make payments where employees work outside their outer limit of hours; and
- undertake annual reconciliations (or reconciliations on termination).

2 Broadcasting and Recorded Entertainment Award 2010, Horticultural Industry Award 2010; Manufacturing and Associated Industries and Occupations Award 2010; Rail Industry Award 2010; Local Government Industry Award 2010; Oil Refining and Manufacturing Award 2010; Pastoral Award 2010.

3 Marine Towage Award 2010; Hospitality Industry (General) Award 2010 ; Restaurant Industry Award 2010.

"In the USA, a large number of class actions have been brought against employers for systemic wage theft caused by these very time and attendance systems."

Wage theft

'Wage theft' is a term used by unions and the media to refer to situations where an employee isn't paid for all the work they perform. It might be that a manager tells an employee to "clock off" but requires them to continue to work to finish the task they have been assigned.

Increasingly, employers are deploying time and attendance systems which require employees to use a computer login, ID badge, phone or biometric data (finger, eyes or face) to clock on and off for their shift.

Many of these systems have features involving rounding and automatic break deductions. These features could expose employers to claims of wage theft (underpayments and penalties). The liability could be significant.

Take the following example to illustrate the risk:

> An employee is rostered to work from 8 am to 5 pm, with a 30-minute unpaid break between 12 noon and 12.30pm. To be ready to start their shift at 8 am, the employee must be at work by no later than 7.50 am and complete a range of pre-operational activities including signing in, reviewing a handover report from the prior shift, and collecting special safety equipment. While the time and attendance system records the time that the employee clocked on at 7.49 am, it rounds this time to the nearest 15 minutes, so 8 am is recorded as the start time for the purposes of payroll. Likewise, the employees has a customer call starting at 11.50 am which means that they don't take their break until 12.10 pm and the break is just 20 minutes because the employee is very busy. At the end of the shift, the employee remains at work until 5.07 pm to complete a task they are half way through, however, the time and attendance system rounds the finish time to 5 pm.

Case law would suggest that the time when the employee was undertaking pre-operational activities was work, for which the employee should have been paid. Likewise, the time worked after 5 pm was also work for which the employee should have been paid. Furthermore, the 10 minutes that the employee worked through their lunch break should have also been paid time and the employer may be exposed to a penalty for breach of the applicable industrial instrument for not providing the employee with the required minimum 30 minute meal break.

In the Fair Work Commission decision of *Construction, Forestry, Maritime, Mining and Energy Union v Peabody Energy Australia PCI Mine Management Pty Ltd* (2 September 2019), Deputy President Ashbury examined whether employees working at a mine should be paid for the time they were required to report to work to complete pre-operational activities. Finding in favour of the employees, Deputy President Ashbury stated *"I accept that employees have a duty to be at work in sufficient time to undertake activities so they are ready to start work at the specified start time.... However, where the employer requires an employee to be at work at a specified time and the activity that the employee is undertaking before the commencement of operational duties is not a private activity but provided a benefit to the employer, the activity will be more likely to be found to be work."* And in such circumstances, the employees are required to be paid.

When you add all of the unpaid time up in the above example, the employee was not paid for a total of 28 minutes. If you assume that this happened every day of the week and the employee works 48 weeks of the year this would total 112 hours of unpaid work over a 12 month period. Assuming that the average rate of pay was $25 per hour and the employer had a workforce of 200 employees, this exposure would be in the order of $560,000 (excluding any penalties and on-costs). Assuming a claim for the 6 year limitation period for underpayment claims, this totals $3,360,000 (excluding any penalties and on-costs).

In the USA, a large number of class actions have been brought against employers for systemic wage theft caused by these very time and attendance systems. Based on the activity of the Fair Work Ombudsman, we don't think it will be long before the issue is litigated in Australia.

Underpayment of wages prosecutions and Senate committee inquiry

In 2019, the Fair Work Ombudsman (FWO) prosecuted a significant number of well-known Australian brands for underpayment of wages and non-compliance with modern awards. The FWO has placed a particular focus on investigating and prosecuting employers who operate fast food chains, restaurants and cafes, culminating in a number of high-profile cases reaching the media. In one prominent underpayments case, it was revealed that one of Australia's largest supermarkets chains had underpaid its workers around $300 million.

This has resulted in the Senate establishing a committee inquiry into:

- the causes, extent and effects of unlawful non-payment or underpayment of employees' remuneration by employers; and
- measures that can be taken to address the issue.

The committee is currently accepting submissions which are due to close on 14 February 2020. The committee is due to report to the Senate by the last sitting day in June 2020.

Is your Whistleblower Policy in place?

Australia's new whistleblower laws came into effect on 1 July 2019. Historically, these laws were generally matters within the domain of the company secretary and legal counsel, with little direct impact on human resources. Following the commencement of the new laws, we have seen increasing numbers of whistleblower disclosure compliance issues falling squarely on the desk of human resources.

For compliance purposes, from 1 January 2020, all public companies and 'large proprietary companies' must have had in place a compliant whistleblower policy that is made available to officers and employees (a 'large proprietary company' is one satisfying at least two of (i) consolidated group revenue of $50 million or more, (ii) consolidated group assets of $25 million or more, and (iii) group employees of 100 or more). While only public and large proprietary companies are required to have a compliant policy by law, the whistleblower laws apply to all companies.

To be compliant, a whistleblower policy to contain particular mandatory content, such as information about the protections

Quick refresher – who is a whistleblower?

Human resources managers are used to dealing with complaints, but not every complaint is a whistleblower disclosure. It is vital for human resources to be aware of the circumstances in which a complaint may be a whistleblower disclosure to limit the risk of inadvertent breaches of whistleblower protection laws, including by the 'innocent' disclosure of a protected whistleblower's identity to anyone (like your own manager) without the consent of the whistleblower.

A disclosure of information by an individual qualifies for whistleblower protection under the Corporations Act 2001 (Cth) only if the following three criteria are met:

- The discloser is an **'eligible whistleblower'**. An 'eligible whistleblower' includes a person who is a current or former employee of the company. Disclosures may be anonymous, and need not be motivated by good faith
- The disclosure is made to an **'eligible recipient'**. An 'eligible recipient' includes an officer (eg a director or company secretary) of the company or a related body corporate, or a senior manager of the company or a related body corporate (a 'senior manager' being a person, other than a director or secretary, who makes, or participates in making decisions that affect the whole, or a substantial part, of the business of the company, or have the capacity to affect significantly the company's financial standing), or a person who is nominated by the company as an eligible recipient.
- The discloser has reasonable grounds to suspect that the information concerns a **'disclosable matter'**, ie if the discloser has reasonable grounds to suspect that, among other things, the information concerns misconduct, or an improper state of affairs or circumstances, in relation to the company or a related body corporate, or breaches of prescribed corporations laws.

“The employer is vicariously liable for the conduct of an employee that causes a detriment to a whistleblower.”

available to whistleblowers, to whom protected disclosures may be made and how an eligible whistleblower may make a protected disclosure.

Beware the ‘personal work-related grievance’ disclosing broader concerns

The disclosure of a ‘personal work-related grievance’ by a current or former employee does not qualify for whistleblower protection (no such exemption applies to a disclosure by a current or former director, officer, contractor, consultant, volunteer etc. – it is also not clear if the employee must be a current or former employee of the regulated entity to which the disclosure relates or if, for example, an employee of a supplier may make a protected disclosure in relation to a regulated entity that is a customer of the employee’s employer).

A ‘personal work-related grievance’ is a grievance about a matter in relation to the discloser’s employment, or former employment, having or tending to have implications for the discloser personally, including interpersonal conflict involving the employee, or performance management or disciplinary matters. This does not include a grievance about a detriment or threatened detriment to the employee because the employee has otherwise made a protected whistleblower disclosure, or a grievance that raises concerns likely to have significant implications for the company or other regulated entity beyond those for the employee personally.

While not every human resources manager will be an ‘eligible recipient’ (unless designated as such under your company’s Whistleblower Policy), we have advised a number of clients in recent months on the management of cases involving an employee’s personal work-related grievances (not protected) that include an element of alleged improper conduct towards another worker (protected where the disclosure was made to an ‘eligible recipient’). Human resources managers must therefore be careful and consider whistleblower protections when managing employee grievances that include allegations of impropriety towards other workers.

Maintaining confidentiality and avoiding detriment

It is an offence and a breach of a civil penalty provision if a person discloses either the identity of the whistleblower, or information that is likely to lead to the identification of the whistleblower, if they obtained the information directly or indirectly from a protected disclosure and they are not otherwise authorised to make the disclosure under the Corporations Act. A whistleblower may consent to the disclosure of their identity and so in many cases it will be desirable to seek a whistleblower’s consent to identify them in relation to any protected disclosure made – but this will not always be appropriate.

If a whistleblower suffers a detriment because of actual detrimental conduct, or a threat of detrimental conduct, towards the whistleblower, a claim may be brought against the person or company engaging in the detrimental conduct. If successful, a whistleblower may, among other things, seek orders for uncapped damages.

Avoiding vicarious liability

The employer is vicariously liable for the conduct of an employee that causes a detriment to a whistleblower.

All companies, including smaller companies that are not strictly required to have a policy, should identify and train those who will receive whistleblower disclosures, promulgate compliant whistleblower policies, upskill on conducting investigations, exercise due diligence to ensure compliance, avoid detrimental conduct towards whistleblowers and expressly prohibit the victimisation of whistleblowers, to assist them to reduce the risk of vicarious liability for employee conduct that causes a detriment to a whistleblower.

The *Religious Discrimination Bill (Cth)*

Religious discrimination featured heavily as key issue in Australian employment law in 2019, and this trend is set to continue well into 2020. In June 2019, a prominent rugby league player brought proceedings against his former employer, alleging that the employer unlawfully terminated his employment on the ground of his religious beliefs as expressed in his social media posts. Several months after proceedings were filed in the Federal Circuit Court, and after substantial media attention, the parties reached a confidential settlement on 4 December 2019.

In the midst of these proceedings, the Morrison Government introduced an exposure draft of the proposed *Religious Discrimination Bill 2019* (Cth) (Bill) for public consultation, to give effect to the recommendations of the Religious Freedom Review commissioned under former Prime Minister, Malcolm Turnbull.

The first exposure draft of the Bill was released on 29 August 2019. The exposure draft sparked considerable debate from a number of stakeholders and attracted over 6,000 written submissions. A second iteration of the Bill was released on 10 December 2019, which included a number of key changes arising out of the consultation process. The date for making submissions on the second draft of the Bill closed on 31 January 2020, and we can expect that the legislation will be introduced to parliament at in early 2020.

In releasing the second draft of the Bill for consultation, the Attorney-General, Christian Porter, made the following comments about the Bill:

> *"Any form of discrimination cannot and will not be tolerated by our Government. We already have in place laws that protect people from discrimination on the basis of their race, sex, age or disabilities. It makes sense that religion should be included so that Australians are free to live their lives in the way they choose to. We also understand that this process is about striking a balance. That is why we have said from the outset that the protections we deliver must be a shield from discrimination, not a sword."*

Broadly, the Bill seeks to prohibit discrimination on the grounds of religious belief or activity in areas of public life. 'Religious belief or activity' is defined in the Bill to mean:

- the holding, or not holding, a religious belief; or
- engaging, not engaging, or refusing to engage, in lawful religious activity.

From an employment perspective, the Bill includes a number of features familiar to existing discrimination laws, including prohibitions on direct and indirect discrimination, and the establishment of a statutory Office of the Freedom of Religion Commissioner, with similar functions to the Disability Discrimination Commissioner, Sex Discrimination Commissioner, Age Discrimination Commissioner, and Racial Discrimination Commissioner. However, the Bill also contains a number of novel provisions which, if made into law, would present new issues for employers to navigate.

For employers with over $50 million in annual revenue, the Bill would require those employers to demonstrate that any 'employer conduct rules' (rules which restrict or prevent an employee from making statements of belief other than in the course of the employee's employment) impose an unjustifiable financial hardship on the business, otherwise the conduct rule would be rendered unlawful. This may mean that large employers may need to re-think their social media policies, particularly where those policies deal with out of work conduct impacting on the workplace. The Attorney-General gave the following example:

> *"in most instances, something said at an office Christmas party would likely be in the context of someone's employment... [but] something said at home or posted on Facebook on Sunday afternoon [would be outside the course of an employee's employment]"*

In addition, the Bill provides that a 'statement of belief' does not constitute discrimination under other Commonwealth, State, or Territory discrimination laws. Statements of belief may be written or oral and must be made in good faith. The Bill would also introduce a requirement for a court to consider whether a person of the same religion as the maker of the statement could reasonably consider the statement to be in accordance with the doctrine, tenets, beliefs or teaching of that religion.

In light of this provision, the question of whether the Bill strikes the appropriate balance between religious freedom with other rights protected by discrimination legislation (for example, the prohibition on discrimination on the basis of sexual orientation or sexual identity) remains hotly contested.

With religious discrimination featuring as a key component of the Morrison Government's legislative regime for 2020, employers should keep a watchful eye on the progress of the Bill. Given that the underlying public policy position behind discrimination laws is to provide an even playing field and equal opportunity for everyone to participate in public areas of life, it will be interesting to see how the debate over potentially increased religious freedoms in Australia will play out.

Appeal of controversial personal/ carer's leave case is bitter sweet

In August last year, the Full Court of the Federal Court handed down the controversial decision in *Mondelez v AMWU* [2019] FCAFC 138, in which a majority of the Court held that the meaning of a 'day' for the purposes of personal/ carer's leave entitlements under the *Fair Work Act 2009* (Cth) (FW Act) means the entire portion of a day dedicated to work, rather than a notional 7.6 hour day.

The decision has left a bitter taste for employers, many of whom have applied (and use payroll systems that apply) the notional day interpretation since the inception of the FW Act. For these employers, the decision means that their personal leave accruals are likely to be imprecisely accounted for (likely under-estimated) and that the employer may be exposed to underpayment claims for prior instances where employees have taken personal/carer's leave. It also means that current payroll and accrual systems are no longer fit for purpose and need to be reworked.

As the High Court of Australia prepares to hear an appeal of the decision in 2020, we take a closer look the Full Court of the Federal Court's decision to understand how what seemed like a clear-cut entitlement, became so complicated.

How did this all come about?

The case was primarily about two employees working at the Cadbury factory in Hobart. Both employees were engaged to work an average of 36 hours per week. Their weekly ordinary hours of work were spread across three shifts, each being 12 hours in length. The employees were employed under an enterprise agreement, which provided that employees on 12-hour shifts were entitled to 96 hours of paid personal leave per annum (the equivalent of eight 12-hour shifts).

The AMWU commenced proceedings on behalf of two employees claiming that the entitlement to personal leave under the enterprise fell short of the minimum standards required in the NES. That is, an employee is entitled to accrue a minimum of 10 days of paid personal/carer's leave per annum.

The critical area of dispute was what constituted a 'day' for the purposes of the FW Act.

Different meanings of 'day'

The AMWU argued that the use of the word 'day' should have its ordinary meaning, being a calendar day or a 24-hour period. They argued that the purpose of personal/carer's leave was there to allow an employee to be absent from work without loss of pay for up to 10 calendar days per year. This means that on a day when an employee is absent on personal carer's leave, they should be paid the same amount that they would have been paid had they attended work. In the case of the two Cadbury employees, this meant they should have been entitled to take 10 days of leave, each paid as if they had worked a 12-hour shift. Accordingly, in order to comply with the FW Act, it was submitted that 12-hour shift workers should be entitled to accrue 120 hours of paid personal/carer/s leave per annum, instead of 96.

Mondelez, the employer at the Cadbury factory, argued that for the purposes of the FW Act, the

word 'day' should be construed in an industrial context. That being so, it was submitted that a 'day' meant a 'notional day' consisting of an employee's average daily hours based on an assumed five day working week. Therefore, in the case the two Cadbury employees, their notional day equated to 7.2 hours, being 36 hours spread equally over five days. As a result, the entitlement being received under the applicable enterprise agreement exceeded the minimum entitlement under the FW Act.

Mondelez sought to counter the adoption of the AMWU's 'calendar day' interpretation on the basis that:

- **It leads to inequality as between employees** – an employee who worked longer length shifts would inevitably be entitled to accrue a greater number of hours of personal/carer's leave when compared to another employee who worked shorter shifts. Accordingly, the monetary value of personal leave entitlements may not be the same between two employees performing the same work at the same rate of pay, simply because they work of the way they work their ordinary hours. For example, the two Cadbury employees would be entitled to accrue 120 hours of personal/carer's leave per year, whereas another Monday-Friday worker might only accrue 76 hours.
- **It is inequitable** – the monetary value of a unit of personal/carer's leave is dependent on the number of hours an employee is rostered to work on the day they take the leave. For example, the monetary value of a unit may be higher if an employee take leave on a day where they are rostered for nine hours, as opposed to three. This made it difficult for employers to accrue leave and make appropriate financial provision for the entitlement in advance.
- **It creates anomalies as between full time and part time employees** – under the calendar day interpretation the monetary value per unit of personal leave may be higher for a part time employee than a full time employee. For example, a part time employee who works a 9 hour day would have a greater entitlement than a full time employee who works a 7.6-hour day.
- **It creates anomalies when accounting for part day absence** – an employee who has accrued a half day of personal leave can be absent for a full day while only using a half a day of personal leave.

The Minister for Small and Family Business, the Workplace and Deregulation was granted leave to intervene in the proceedings, and supported the adoption of the 'notional day' interpretation articulated by the employer.

The Federal Court decision

A majority of the Full Court of the Federal Court rejected Mondelez's interpretation of the 'notional day'. Instead, adopting the interpretation that a 'day' means the portion of a 24-hour period that is allocated to work, 'the working day'. In effect, this is the same interpretation adopted by the AMWU. It meant that the two employees from the chocolate factory were entitled to 10 days of personal/carer's leave, each of 12 hours in length (valued at 120 hours per annum).

In making its decision, the Court relied heavily on the intention and purpose of the entitlement to personal/carer's leave, which is, in effect, to provide income protection to employees when they are absent from work due to illness or the need to care for a family member who is ill. That is, an employee should be entitled to be absent without loss of pay, which the 'notional day' interpretation did not guarantee.

The Court rejected Mondelez's view that only the working day interpretation would lead to inequality; rather acknowledging that both interpretations resulted inequality. The notional day interpretation led to inequality because employee's working shifts of more than 7.6 hours in length would suffer a loss of income when exercising the entitlement. Whereas, under the working day interpretation the value of the entitlement might be higher for some employees (ie those who work longer shifts), than others. The persuasive factor for the Court was that under a working day interpretation, no employees would suffer a loss of income by exercising the entitlement.

Further, in dismissing Mondelez's arguments about anomalies resulting from a working day interpretation, the Court referred to the random nature of personal/carer's leave. The Court noted that randomness was an inherent concept of the entitlement and that there was no way to know when or if an employee would require the entitlement. To that end, the Court refused to accept that the entitlement needed to be capable of being ascertained in advance (including for the purposes of accruals). Rather, an employer need only be able to ascertain the value of the entitlement on the day it is sought to be exercised. The employer can do this by:

- accruing days of leave in days, ie an employee will accrue 1 day of leave for each 5.2 weeks of service; and
- where an employee seeks to access the leave on a particular day, calculate the value of the leave by multiplying the employee's base rate of pay by the employee's ordinary hours of work for that day.

The majority also held that this interpretation would allow employees to take part days of leave.

Where to from here?

For employers, the High Court appeal is bittersweet. While many may hope that the High Court will disagree with the majority of the Full Federal Court and adopt the 'notional day' interpretation, finality remains many months away, and comes with no guarantees as to the outcome. Regardless of the High Court's decision, there may still be a need for legislative clarity.

A long road to integrity...

Late last year, only days after the Senate rejected a similar bill, the Morrison Government introduced a further version of its 'ensuring integrity' legislation to Parliament. Like its immediate predecessor, the *Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019* (Bill) seeks to amend the *Fair Work (Registered Organisations) Act 2009* (RO Act) to:

- allow the Federal Court to cancel the registration of a registered organisation (effectively, unions and employer associations);
- automatically disqualify a person from acting as an officer of a registered organisation where they are convicted of a serious criminal offence that is punishable by five or more years' imprisonment;
- allow the Federal Court to disqualify an officer from holding office where he or she:
  - has been convicted of an offence against a 'designated law';
  - has been ordered to pay a pecuniary penalty for contravening a workplace law (where the maximum penalty for the contraventions amount to at least 180 penalty units);
  - has repeatedly failed to take reasonable steps to stop a registered organisation from breaking the law;
  - has contravened his or her duties as an officer of a registered organisation; and
  - is otherwise not a fit and proper person to hold office;
- make it an offence for a person to act as a 'shadow' officer, or influence the affairs of a registered organisation, once they have been disqualified from acting as an officer;
- expand the grounds on which the Federal Court may order remedial action to deal with governance issues (for example, where the organisation is not serving the interests of its members or there has been financial misconduct) in an organisation, including by appointing an administrator; and
- requiring the Fair Work Commission to decide whether a proposed amalgamation should be subject to a public interest test based on the compliance history of the relevant organisations, and provide for the application of the public interest test to a proposed amalgamation that meets the requisite compliance history threshold (i.e. where there are at least 20 compliance records events for an organisation within the 10 year period prior to the proposed amalgamation).

Despite a concerted effort by the opposition and the ACTU against it, the Federal Government has, since early 2017, steadfastly pursued the introduction of its 'ensuring integrity' legislation, and despite having little success to date, is expected to maintain that pursuit in 2020 and, where necessary, beyond.

Complying with Australia's modern slavery regime

Australia's federal modern slavery regime commenced on 1 January 2019, introducing a statutory modern slavery reporting requirement for larger entities operating in Australia. Under the reporting requirement, certain entities must publish annual Modern Slavery Statements on an online, central register. The statements must explain what the entity is doing to assess and address risks of modern slavery occurring in its global and domestic operations and supply chains.

In late September 2019, the Department of Home Affairs released a document that provided guidance to reporting entities on the reporting requirement. The guide recommended entities follow a five-step process:

1. **Determine if the entity is required to report:** Commercial and not-for-profit Australian entities and foreign entities (that carry on business in Australia) that have a consolidated revenue (total revenue of the entity and any entities the entity controls) of at least AU$100 million over the applicable twelve month reporting period must report.
2. **Develop a statement addressing the seven mandatory criteria:** A statement must:
   - clearly identify the reporting entity;
   - describe the reporting entity's structure, operations and supply chains;
   - describe the risks of modern slavery practices in the operations and supply chains, including by considering how the reporting entity and any entities it owns or controls may cause, contribute to, or be directly linked to modern slavery (the entity should consider each industry, product, geographic and entity-specific risks);
   - describe actions taken by the reporting entity to assess and address the risks, including due diligence and remediation processes (this might include, for example, implementing training, supplier checklists, updating supply contracts to include modern slavery obligations, introducing a whistleblower hotline, or implementing a modern slavery policy);
   - describe how the reporting entity assesses the effectiveness of the actions (this might include, for example, conducting an audit, obtaining feedback, or partnering with relevant industry groups);
   - describe the process of consultation with any entities the reporting entity owns or controls; and
   - provide any other relevant information (for example, whether the reporting entity has participated in external forums or otherwise contributed to addressing the root causes of modern slavery).
3. **Approve the statement:** An entity must have the statement approved by the entity's principal governing body and signed by a responsible member of the reporting entity.
4. **Submit the statement:** An entity must begin reporting on its first full reporting period after 1 January 2019 and submit a statement to the Australian Border Force within six months after the end of that reporting period. The table below explains the timing for reporting for entities using common reporting periods.
5. **Re-assess:** Consider how the reporting entity can improve its next statement.

Timing for reporting for entities using common reporting periods

Entity's annual reporting period	First reporting period	Due date for statement
1 July - 30 June (Australian Financial Year)	1 July 2019 - 30 June 2020	No later than 31 December 2020
1 January - 31 December (Calendar Year)	1 January 2020 - 31 December 2020	No later than 30 June 2021
1 April - 31 March (Foreign Financial Year)	1 April 2019 - 31 March 2020	No later than 30 September 2020

Common defects in the making of enterprise agreements

In mid-2019, the Fair Work Commission identified common mistakes or defects made by employers when making enterprise agreements or seeking to have them approved by the Fair Work Commission:

Common content defects

Not describing or defining an employee as a shift worker for the purposes of the NES – an agreement must define or describe an employee as a shift worker for the purposes of the NES if the modern award that covers the employee does.

Annual leave and/or personal/carer's leave entitlements expressed incorrectly (e.g. the agreement stating that employees are entitled to 20 days of annual leave per year rather than four weeks) – a 'day' of personal/carer's leave is an authorised absence from the working time in a 24 hour period and a 'week' of annual leave is an authorised absence from work during the working days falling in a 7 day period.

Crediting annual leave and/or personal/carer's leave at a certain point in time – annual leave and personal/carer's leave accrue progressively during a year of service and cannot be credited at a later point in time.

Limiting the amount of personal leave that can be taken as carer's leave – all accrued personal/carer's leave may be taken as carer's leave.

Compassionate leave expressed as an entitlement per year – an employee (other than a casual employee) is entitled to 2 days' paid compassionate leave for each occasion.

The agreement does not include state/territory public holidays – the NES recognises any days or part-days declared or prescribed by relevant state or territory law as public holidays.

The nominal expiry date is 4 years from commencement of operation of agreement – the nominal expiry date must be no more than four years after the date the agreement was approved by the Fair Work Commission and, as the earliest commencement date of an agreement is seven days after it is approved, a nominal expiry date of four years 'from commencement' will exceed this.

Default superannuation fund does not offer a MySuper product – agreements cannot include a term that requires superannuation contributions for default fund employees to be made to a superannuation fund unless that fund offers a MySuper product (or is an exempt public sector scheme or is a fund of which a relevant employee is a defined benefit member).

The agreement gives rights of entry other than in accordance with the Fair Work Act – Agreements must not include rights of entry that are inconsistent with the Fair Work Act.

The agreement states that it 'should be read in conjunction with the award' or uses other language which does not clearly indicate whether the parties intend for the award to be incorporated or not – if the award is incorporated, the agreement should make clear whether the agreement or award clause will apply where the clauses are inconsistent in any way, otherwise, the Commission may not be satisfied that the employees properly understood the terms of the agreement at the time of voting for it.

“Although these defects (or at least some of them) may seem trivial, they are more than capable of delaying the approval of an enterprise agreement, or even worse, might prevent the Fair Work Commission from approving the enterprise agreement.”

Common process defects

Not providing sufficient information in the Form F17 as to the steps taken to provide the notice of employee representational rights to employees – the Form F17 requires employers to provide information as to the steps taken and dates on which the NERR was provided to employees.

Not taking all reasonable steps to ensure that employees were given or had access to a copy of the agreement and incorporated material in the access period – employers must take all reasonable steps to ensure the employees are given a copy of the agreement and incorporated materials (including any policies incorporated into the agreement) during the access period or have access to the agreement and those materials throughout the access period.

Not taking all reasonable steps to explain the terms of the agreement and their effect to employees – employers must take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to the employees in an appropriate manner.

Not providing sufficient information in the Form F17 as to how the effect of the terms of the agreement were explained to employees – employers are required to describe the steps taken and when they were taken, what was explained, and how the particular circumstances and needs of employees were taken into account.

Agreement not signed correctly – the agreement lodged must be signed by the employer and at least one representative of the employees covered by the agreement and include the full name and address of each person who signs the agreement, and an explanation of their authority to sign the agreement.

Although these defects (or at least some of them) may seem trivial, they are more than capable of delaying the approval of an enterprise agreement, or even worse, might prevent the Fair Work Commission from approving the enterprise agreement. As such, employers should familiarise themselves with these common defects and take care to avoid them

Our services

At HFW, we have expertise in all aspects of workplace law, from assisting with day-to-day human resources enquires to developing workplace strategies that are consistent with business objectives and in line with reputational requirements. We have extensive experience acting for clients in contentious and non-contentious matters and our lawyers have been involved in some of Australia's most significant and complex workplace disputes.

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

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- Workplace change and restructuring
- Enterprise bargaining
- Union management
- Outsourcing/insourcing

Workplace disputes

- Restraints and confidential information
- Defending employee claims
- Enterprise bargaining and other collective and industrial disputes
- Work health and safety prosecutions
- Executive claims

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