COVID-19 (AUSTRALIA): MUCH HAS HAPPENED ON THE EMPLOYMENT FRONT DURING COVID-19

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**This information is accurate as of 4:00 P.M. Tuesday 30 June 2020 and is subject to change as this situation evolves.*

For many of our clients the past three months passed by in a blur as they attempted to get their head around unprecedented issues facing their business including staff working from home, stand down, lock down, JobKeeper, restructures and now staff returning to work and their workplaces.

While we have been focused on COVID-19 a number of things have been happening in the area of employment and workplace health and safety law. As we all hit the end of the financial year, and hopefully take a breath, we thought it might be a good time to summarise the key updates.

WHEN A CASUAL IS NOT A CASUAL

In the midst of COVID-19, a Full Bench Federal Court decision has held that a casual labour hire worker, Mr Rossato, was not in fact a casual employee, and instead he was entitled to paid accrued leave and public holiday entitlements.

This decision has left employers questioning casual engagements, in particular wondering how they can mitigate the risk that their casual employees assert they are permanent employees and thus claim unpaid annual leave and personal leave entitlements.

The Court in *Rossato* has reiterated, the essence of casualness is that there is no firm advance commitment to indefinite work, work is irregular, uncertain and conducted on an intermittent basis with no regular or predictable work or work patterns.

The decision serves as a timely reminder for employers to revisit their casual engagements and assess whether there are any casuals who demonstrate characteristics of a permanent employee (e.g. regular and predictable work patterns). If there are, it is prudent to consider whether these employees are better suited to a more permanent engagement.

We recommend that casual employees' engagements are automatically assessed every 6 to 12 months to ensure the essence of casualness does in fact remain intact throughout the entirety of their casual engagement.

A full article regarding the *Rossato* decision can be found here.

WORKPLACE MANSLAUGHTER UPDATE

Last year saw a flurry of activity on the workplace manslaughter front with Bills being introduced into Victoria, Western Australia and the Northern Territory.

On 1 July 2020, Victoria joins Queensland and the ACT with the commencement of its industrial manslaughter legislation. The Northern Territory has now passed the *Work Health and Safety (National Uniform Legislation) Amendment Act 2019* (NT) which commenced operation on 1 February 2020 and the Western Australia *Work Health and Safety Bill 2019 (WA)* remains before parliament.

The Victorian legislation makes workplace manslaughter a criminal offence with penalties of up to AUD16.5 million for employers and AUD1.65 million for directors and officers. Directors and officers can also face up to 25 years imprisonment due to recent changes to the Crimes Act.

The significant penalties are intended to deter organisations and officers from breaching their workplace health and safety duties.

Under the new sections in Victoria, a body corporate or individual may be guilty of the offence of workplace manslaughter if they have engaged in negligent conduct in breach of an applicable duty and that conduct causes the death of a person. Negligent conduct is defined as a great falling short of the standard of care that would have been taken by a reasonable person in the circumstances in which the conduct was engaged in. The standard of care to be applied when assessing the conduct is that which would have been taken by a reasonable body corporate in the circumstances.

And in the first test of the industrial manslaughter provisions in Queensland in *R v Brisbane Auto Recycling Pty Ltd & Ors* [2020] QDC 113, earlier this month two directors were sentenced to ten months imprisonment (wholly suspended) and the company ordered to pay AUD3 million in penalties after a worker was crushed between a forklift and a truck in the workplace and later died from his injuries. The Court noted that the directors "knew of the risk to the safety of their workers, but consciously disregarded that risk".

WAGE THEFT

On 18 March 2020 the Victorian Government introduced the Wage Theft Bill into Parliament. The legislation passed unamended through both Houses and was given Royal Assent on 23 June 2020.

The Victorian legislation will not take effect until 1 July 2021 but again is a timely reminder to employers to ensure that they are making correct payments to employees and keeping appropriate records of those payments.

Following a spate of high profile underpayments by employers throughout Australia, this new legislation is an attempt by the Victorian Government to criminalise the underpayment of employee entitlements. It is aimed at employers who deliberately withhold payments due to employees and those that try to hide wage theft by falsifying or dishonestly failing to keep employee wage records.

The legislation creates three new offences:

1. Dishonest withholding of employee entitlements
2. Falsification of employee entitlement records, and
3. Failure to keep employee entitlement records.

A breach of the new offences carry a maximum penalty for a company of AUD991,320, while individuals may face fines of up to AUD198,264 and imprisonment for up to 10 years.

The legislation also establishes a new regulatory body, the Wage Inspectorate Victoria, charged to investigate and enforce wage theft offences.

The Federal Government has announced that it intends to introduce a Commonwealth wage theft bill following a White Paper released on 19 September 2019, but interruptions caused by COVID-19 mean that this has not yet happened.

SEXUAL HARASSMENT STILL ON THE WORKPLACE AGENDA

This past week we have once again seen a sexual harassment scandal make front page news with an independent investigation commissioned by the High Court of Australia finding that six former associates were sexually harassed by former High Court judge Dyson Heydon.

It seems that no workplace is immune from this conduct.

This news makes the Australian Human Right Commission's 'Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces' Report, released on 5 March 2020, essential reading.

The Inquiry reported that almost two in five women (39%) and just over one in four men (26%) had experienced workplace sexual harassment.

For those of you that missed the Report, it includes a call from Sex Discrimination Commissioner Kate Jenkins to all employers to undertake positive action to create safe, gender-equal and inclusive workplaces.

Among the 55 recommendations made in the Report, the Commission recommends a range of amendments to the *Fair Work Act 2009* (Cth), including the introduction of a 'stop sexual harassment order' similar to the 'stop bullying order'. Clarifying that, sexual harassment can be conduct amounting to a valid reason for dismissal and updating the definition of 'serious misconduct' to include sexual harassment.

To effectively achieve the goal of creating safe, gender-equal and inclusive workplaces, employers have been called upon to shift from the current reactive model that responds to victim complaints and instead take positive actions and implement transparency, accountability and leadership.

The full Report can be accessed here on the Australian Human Rights Commission's website.

UBER DRIVERS ARE NOT EMPLOYEES

While the world has been in COVID-19 induced lockdown, delivery drivers have been among the unsung heroes, catering to our every culinary need.

On 21 April 2020, a Full Bench of the Fair Work Commission held that an Uber Eats delivery driver was barred from making an unfair dismissal application because she was not an employee.

The majority held that Ms Gupta was not an employee of Uber Eats because the relationship lacked some of the "essential hallmarks of an employment relationship".

In particular, the majority referred to three key reasons:

- Uber Eats exercises no control over when drivers logged onto the app, and for how long. Once logged on, there is no obligation for drivers to accept any particular delivery request.

- Even when drivers are logged on, they are able to, and in practice do perform other types of passenger or delivery work, including from other competing food delivery services.
- The drivers are not required to wear a uniform, bear company logos, or in any way represent the Uber Eats business beyond collecting the meal and delivering it.

The Uber model presents some unique features of engagement, and it is interesting to see established legal tests applied to virtual platforms such as these. Watch this space to see how the law attempts to develop along with the booming gig economy.

WHISTLEBLOWER POLICIES

This is a reminder for those of you who missed the 1 January deadline for the implementation of a whistleblower policy and thought you would get around to drafting a policy when things quietened down in March!

Last year's amendments to the Corporations Act made broad ranging changes including expanding the protections available to whistleblowers from all corporate employers. Importantly it also introduced the requirement for public companies, large proprietary companies and corporate trustees of APRA-regulated superannuation entities to have a whistleblower policy in place by 1 January 2020.

In November 2019, ASIC released a Regulatory Guide setting out the information that needs to be included in a whistleblower policy for it to be compliant with the Act. The Guide includes detailed requirements for policies to explain the reporting and investigation processes and the legal protections available to whistleblowers.

If you have not already implemented a policy, we strongly recommend you do so. If your organisation is not required to have a policy, we still recommend reviewing your internal whistleblower regime to ensure that it is compliant with the new laws.

You can read more about the ASIC Regulatory Guide and whistleblower policy requirements here and here.

AND YES, IT'S 1 JULY SO SOME FINANCIAL THRESHOLDS ARE CHANGING!

And finally, the national minimum wage and modern award rates will increase by 1.75% over three different dates depending on different groups of awards commencing 1 July 2020. The rate increase, a modest amount compared to the 3% increase in FY2019-2020, has been affected by economic turmoil caused by the COVID-19 pandemic.

In addition, the unfair dismissal threshold for non-award/agreement covered employees will increase from AUD148,700 to AUD153,6000 per annum. Commonwealth penalty units are also increasing, which will increase penalties payable under the Fair Work Act.

We have updated our handy employment-related key thresholds table for the 2020/21 financial year. Click here to view the table.

What Should You Be Doing?

To ensure that your organisation is complying with its legal obligations we recommend you should:

- Review annualised salary arrangements to ensure that the annualised wage rate is sufficient to meet or exceed your employees' minimum award/minimum wage entitlements taking into account the 1.75% increase.
- Update payroll systems and processes to ensure the increased rates are paid from the first full pay period starting on or after 1 July 2020.
- Review enterprise agreement pay rates (where applicable) and ensure the pay rates do not fall below the applicable modern award base rate or the national minimum wage (as applicable).

TRAINING AND INFORMATION SESSIONS

We are currently delivering information sessions and training to boards and senior management on industrial manslaughter, whistleblower reforms and the new wage theft legislation.

If you are interested in organising a session or have any questions regarding the topics addressed above, please do not hesitate to contact us.

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