



# Employment Law Matters

Welcome to the November-December 2018 edition of the Employment Law Matters newsletter.

In this month's edition:

## The silly season is upon us:

- The FWC upholds dismissal of Xmas party, glass-throwing employee
- Navigating the Christmas season in the #metoo era: 5 tips for planning a fun (and liability-free) work event

## The changing face of employment:

- The Gig economy: landmark unfair dismissal determination
- What happened to casual employment? A look at Workpac vs Skene
- When is a casual actually a permanent employee?
- Flexible working arrangement changes

## Terminations:

- Rubbing salt into the wound of an applicant in unfair dismissal proceedings
- Employee termination payments: how long do you have to pay?
- How managerial positions have been affected by changes to the skilled visa scheme

## Gender equality, gender equity and pay equity:

- The Workplace Gender Equality Agency (WGEA) report data release
- Equal pay: we need to change our laws and our outlook
- Removing barriers to pay equity – the NZ Government introduces Equal Pay Amendment Bill

## IR, ER, Awards and skilled Visas:

- The Full bench expands right to request flexible working arrangements
- Are the days of enterprise bargaining numbered?
- Australia introduces unpaid domestic and family violence leave into Modern Awards
- Model term for family friendly working arrangements to be included in modern awards
- How will the "Whistleblower Bill" affect Australian companies?

## Work Health & Safety:

- Can an employee be compelled to give evidence in a coronial inquiry where the employer is facing a WHS proceeding?

## New Zealand:

- The NZ Government introduces Equal Pay Amendment Bill
- Employment law legislative changes are fast approaching

## Events:

- For exclusive and practical strategic, operational and legal HR insight

## As always: Regulator insights

- The latest Fair Work decisions
  - The latest news from the Fair Work Ombudsman
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## CHRISTMAS CHEER:

### **The silly season is upon us, and the FWC upholds dismissal of Xmas party, glass-throwing employee**

The Fair Work Commission has made a significant decision on out-of-hours conduct in finding that ALDI had a valid reason to dismiss an employee for throwing a full glass of beer over the heads of other employees at a work Christmas function: The incident; Employee claimed that he was unfairly dismissed; Commissioner found that ALDI had taken reasonable steps to ensure compliance with behaviour standards; Lessons for employers. Click [here](#) for the full article. Courtesy of Landers & Rogers.

### **Navigating the Christmas season in the #metoo era: 5 tips for planning a fun (and liability-free) work event.**

The spotlight on sexual harassment in the workplace has never been brighter. The #MeToo movement has empowered people to draw a sharp line in the sand about inappropriate sexual behaviour in the workplace. The number of high profile men – politicians, entertainers and business leaders, plus the many, many others whose conduct escapes the public scrutiny, continues to escalate. [Here](#) are five tips for planning a fun work event during the festive season. Courtesy of Herbert Smith Freehills

## THE CHANGING FACE OF EMPLOYMENT:

### **The Gig economy: landmark unfair dismissal determination**

In a landmark unfair dismissal case against Foodora The Commissioner's report stated that "the true substantive reason for the dismissal of the applicant was not sound, defensible or well-founded." Following public criticism of working conditions Josh Kluger, a food delivery driver, was dismissed. The decision found he was an employee of the company, not a contractor, as Foodora had argued. This is a game changer for the changing face of the workplace and the gig economy.

**To find out more on this evolving situation, be sure to attend the [HR Law Masterclass conference](#) in March.** K&L Gates will be speaking on the topic of recent and emerging compliance requirements relating to work models: Changes to casual and part-time entitlements; Independent contracting arrangements; & Future work models. Cities & Dates: **Brisbane** 12th March; **Sydney** 14th March; **Melbourne** 18th March; **Perth** 20th March; **Canberra** 21st March 2019.

### **What happened to casual employment? A look at Workpac vs Skene**

A recent Federal Court decision found casual employment needs to retain the "essence of casualness". What does that mean, and what do HR and businesses need to do? What is a casual employee? So where to from here? Insight courtesy of Landers & Rogers [here](#).

### **When is a casual actually a permanent employee?**

In a recent decision, the Full Federal Court found that an employee who was described by his employer as a 'casual' was actually a permanent employee, meaning that he was entitled to payment for his untaken annual leave. Courtesy of Maurice Blackburn, we explore both the case and the intricacies of casual employment. Read [here](#).

### **Full bench expands right to request flexible working arrangements**

The Full Bench of the Fair Work Commission has expanded the right to request flexible work arrangements through a new model term to be inserted into all modern awards. The model term supplements the employer obligations in respect of an employee's right to request flexible work arrangements under s65 of the Fair Work Act 2009 (Cth) (FW Act). What are the additional obligations on employers under the new model term? Click [here](#) for the full article. Courtesy of Moray & Agnew.

### **TERMINATIONS:**

#### **Rubbing salt into the wound of an applicant in unfair dismissal proceedings**

An applicant whose claim was "doomed to fail", and was pursued by her to inflict as much damage as possible on her former employer, has led to severe consequences when the Fair Work Commission ordered her to pay indemnity costs to her former employer. Partner, David Ey and Senior Associate, Gemma Twemlow from Piper Alderman review the decision [here](#).

#### **Employee termination payments: how long do you have to pay?**

The Fair Work Commission (FWC), in its four-yearly review of modern awards, has varied nearly all modern awards to require that employers make termination payments within seven calendar days of the effective date of termination. Read a full article [here](#), Courtesy of Landers & Rogers.

### **GENDER EQUALITY, GENDER EQUITY AND PAY EQUITY:**

#### **The Workplace Gender Equality Agency (WGEA) report data has been released**

"The Minister for Women said this morning that she's "frustrated" men are still being paid more than women. If she's frustrated, maybe she should do something about it." Tanya Plibersek, Deputy Leader of the Opposition, Shadow Minister for Women 13/11/18. In reality neither the Liberal or Labor parties of Australia have done a whole lot to legislate pay equity and pay equality, and not that much has really changed in the workplace either in Australia. For recently released data from the WGEA click [here](#).

**Or perhaps, Australian legislators could take a leaf from New Zealand's playbook and their 'Pay Equity & Equal Pay' bill which was recently introduced.**

**NEW ZEALAND: Removing barriers to pay equity – the Government introduces Equal Pay Amendment Bill. Late September saw the introduction of the Equal Pay Amendment Bill.** The Bill incorporates the new recommendations of the Joint Working Group on Pay Equity Principles to make it easier for women to lodge pay equity claims. The team at Buddle Findlay examine proper management of pay equity claims [here](#).

**"Equal pay: we need to change our laws and our outlook"**, see this commentary from Maurice Blackburn [here](#).

### **IR, ER, AWARDS AND SKILLED VISAS:**

#### **Are the days of enterprise bargaining numbered?**

Australia's top union official Sally McManus is calling on the Labor Government to back a radical reform to Australia's Fair Work Act if it wins the next election. As part of the reform Ms. McManus is ramping up pressure for industry wide bargaining stating the "enterprise-only bargaining system is failing." Read [here](#) for a short article on this topic, courtesy of FCB Workplace Law.

#### **Australia introduces unpaid domestic and family violence leave into Modern Awards**

Employees in Australia, to whom a Modern Award applies, now have access to 5 days unpaid domestic and family violence leave a year, following a ruling made by the Fair Work Commission earlier this year as part of its four-yearly review. Click [here](#) for an article, courtesy of Norton Rose Fulbright.

### **Model term for family friendly working arrangements to be included in modern awards**

As part of the Commission's four-yearly review of modern awards, the Full Bench of the Fair Work Commission (Commission) recently handed down a decision (Decision), to insert a new model term (Model Term) into all modern awards, which will: complement the flexible working provisions contained in s 65 of the Fair Work Act 2009 (Cth) (Act); and impose further obligations on employers when responding to an employee's request for family friendly working arrangements. Click [here](#) for background information, the new obligations imposed on employers, and the impact of the Model Term for employers. Article courtesy of Norton Rose Fulbright.

### **Employees in Australia, to whom a Modern Award applies, now have access to 5 days**

**unpaid** domestic and family violence leave a year, following a ruling made by the Fair Work Commission earlier this year as part of its four-yearly review. Read [here](#), Courtesy of Norton Rose Fulbright.

### **How will the "Whistleblower Bill" affect Australian companies?**

If the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 is passed by the parliament, new legislation will see major amendments to the Corporations Act 2001, creating an expanded regime under which both public and large private corporations will be required to implement internal whistleblower policies. Coleman Greig Lawyers reviews this [here](#).

## **WORK HEALTH & SAFETY:**

### **How managerial positions have been affected by changes to the skilled visa scheme**

On 18 March 2018, the Temporary Work (Skilled) (subclass 457) visa, more commonly known as the '457 visa' was abolished and replaced with a new skilled visa scheme, called the Temporary Skill Shortage (subclass 482) visa ('TSS visa'). Now that the dust has somewhat settled, employers are once again enquiring about the requirements for sponsoring skilled workers. Courtesy of Coleman Greig Lawyers, read on [here](#).

### **Can an employee be compelled to give evidence in a coronial inquiry where the employer is facing a WHS proceeding?**

A coronial inquiry being conducted at the same time as a criminal proceeding may constitute interference with the due administration of criminal justice amounting to contempt of court. A recent Federal Court decision<sup>[1]</sup> has considered whether the examination of an employee witness at an inquest will constitute 'interference' for the purposes of the criminal proceeding against the employer. Read [here](#) for insight, courtesy of Norton Rose Fulbright.

## **NEW ZEALAND:**

### **Employment law legislative changes are fast approaching**

The New Zealand Government is progressing with its package of employment law reforms. Together, these reforms will have a significant effect on New Zealand's employment law landscape. Topics covered in this article on upcoming legislation, timeframes and advice for employers are: The Employment Relations Amendment Bill 2018, Employment Relations (Triangular Employment) Amendment Bill, Domestic Violence - Victims Protection Bill, Fair Pay Agreements, Parental Leave, the Holidays Act Review, Privacy Bill, and Pay Equity. To read this article, provided by Simpson Grierson, click [here](#).

## AS ALWAYS: REGULATOR INSIGHTS

For the latest Fair Work decisions click [here](#).

For the latest news from the Fair Work Ombudsman, click [here](#).

## EVENTS

### FOR CURRENT AND EMERGING UP TO THE MINUTE PRACTICAL LEGAL INSIGHT

Be sure to attend the following market leading events in Australia & New Zealand

The [6th annual HR Law Masterclass conference Australia](#) to engage with up to 12 leading lawyers in one day on the most significant HR, IR & ER issues.

**Brisbane:** March 12 | **Sydney:** March 14 | **Melbourne:** March 18 | **Perth:** March 20 | **Canberra:** March 21

Up to the minute insight and case law reviews on:

- Reducing personal implications for HR professionals
- Managing difficult employee behaviour
- The effect of changes to casual, part time and contracting arrangements
- Workplace mental health and wellbeing
- Workplace investigations
- Psychological injury claims risk
- Injury management & Return-to-Work
- Adverse Actions, General Protections and protected rights
- Terminations and unfair dismissal claims

[Performance Management Processes and HR Risks](#) one day workshop  
Held in conjunction with the 6th annual HR Law Masterclass conference.

**Brisbane:** March 11 | **Sydney:** March 13 | **Melbourne:** March 19 | **Perth:** March 19 | **Canberra:** March 20

The negative impacts of poorly managed performance management processes can result in bullying or harassment claims, can be a trigger for Adverse Actions claims, and workplace investigations can be a consequence of a performance process. Attend to effectively manage performance process risks, implications and triggers.

[6th annual HR Law Masterclass conference New Zealand](#): New Zealand's most comprehensive workplace law, covering the most significant HR, IR & ER issues.

**Wellington** 5th March & **Auckland** 7th March 2019.

The pace of change in workplace relations and employment / HR law is ramping up, with several changes set to take effect. Amendments to the Employment Relations Act 2000 are underway, pay equity, and other issues are increasing in prominence and complexity to manage, including mental wellbeing, performance management, bullying and harassment, sexual harassment, and other forms of inappropriate workplace conduct.

**Workforce Analytics & HR Data**

**Sydney:** 18th – 20th February 2019

Strengthening HR practices & business outcomes through workforce data and analytics

**Strategic HR Business Partnering New Zealand**

**Auckland:** 26th – 28th February 2019

New Zealand's only conference looking at driving business performance through better strategic use of HR Business Partners

**Psychological Injury Claims & Return-To-Work**

**Sydney:** 26th – 28th March 2019

Managing the complexities of psychological injury case management & return to work

**Resources Workforce**

**Perth:** 19th – 21st March 2019

Driving recruitment, talent management, engagement & performance in mining, oil & gas