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STRATEGEYES:

Workplace Perspectives

People+Culture Strategies
Labour & Employment Law

A LOOK INSIDE:

Message

from Founder and Managing Principal

It was such a pleasure to see a record number of clients attend our sixth Key Breakfast Briefing, held once again at the spectacular Shangri-La Hotel, Sydney. Attendees heard from Jesse Parahi (current Australian Mens Rugby Sevens player) and Carlien Parahi who have set up an amazing organisation, Sense Rugby, that allows children who may have certain physical challenges to embrace all that rugby has to offer. PCS is delighted to be Sense Rugby's inaugural and principal sponsor and we look forward to supporting the great work done by Jesse and Carlien.

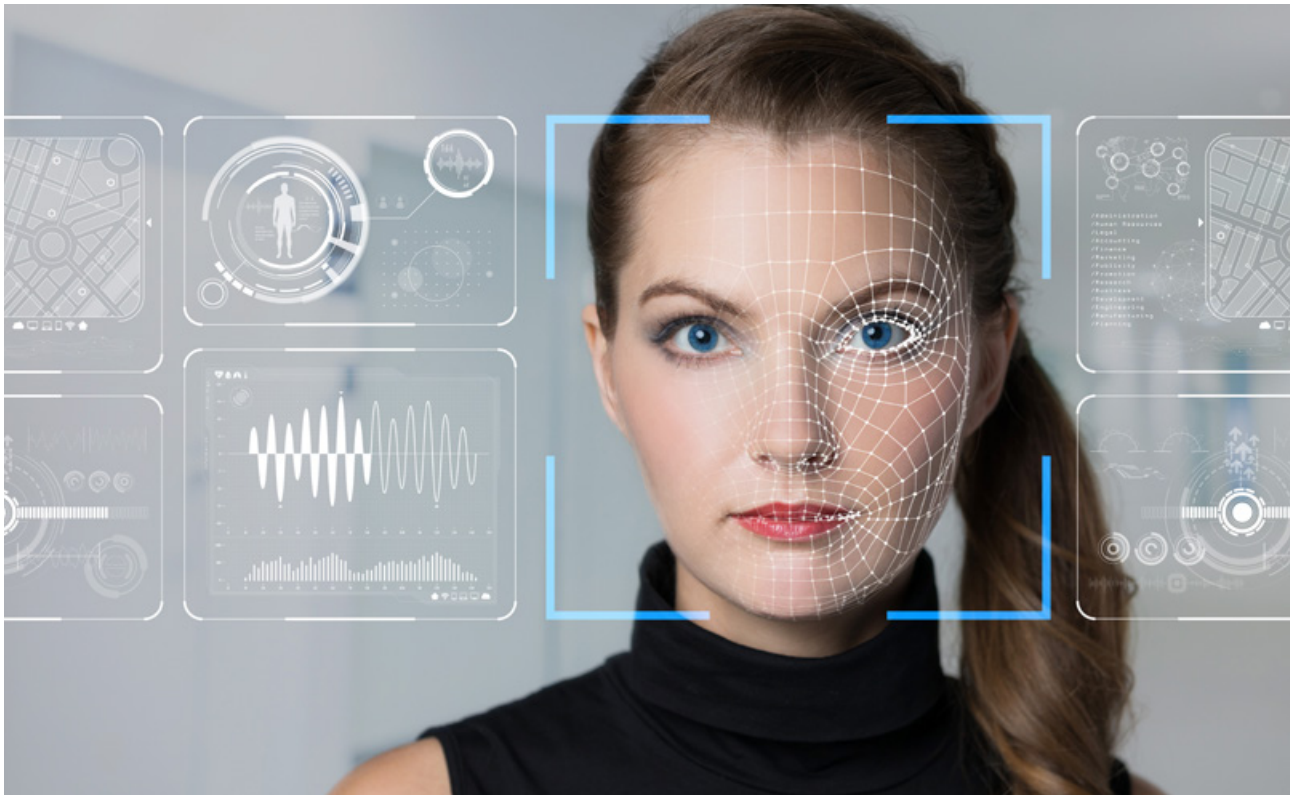
The main focus of the breakfast was, of course, the panel discussion which I had the great privilege to facilitate involving Andrew Hore (the current CEO of NSW Rugby and the Waratahs) and John Thomas who is unquestionably one of the great aviation industry experts. John and Andrew were both extremely generous in the sharing of their thoughts and ideas on what the role of a leader is in high performance cultures. Clients who have worked with me and the PCS team on this subject will be familiar with the two core models we use as a firm when building or auditing high performance culture in client organisations being the People Management Quadrants and the V-S-C framework. To have both models validated and endorsed by John and Andrew was particularly reassuring!

The sponsorship of Sense Rugby continues the firm's vast array of philanthropic pursuits across the platforms of education, sport and the arts and we are so proud to have invested over 20% of our firm's profits in the community in this way as well as "in kind" contributions on a pro bono basis amounting to a similar investment. We have thoroughly enjoyed being the Official People Partner of Cricket NSW and the Waratahs and we hope that the Waratahs will continue their good form in Season 2018. Our valued relationships with Packemin Productions, the Manly Marlins and the wonderful scholarship opportunity we have provided to Srey Oun (a Cambodian student) are all relationships of which we are very proud.

On the services side, the PCS team has continued to hold critically true to our PieCeS values with many clients continuing to benefit from our commitment to innovation particularly in the fees and pricing space. More importantly, we are now truly providing our leadership skills development in the people management arena as a global product with the Maersk group of companies committing to using the firm as part of its global leadership development program. We would welcome the opportunity to discuss how we can improve your organisation's line management capability, instil a high performance culture and ensure you get the best for and out of your people.

As we head into a new financial year (at least in an Australian context) I take the opportunity to wish all our clients the very best.

Joydeep Hor
FOUNDER AND MANAGING PRINCIPAL



The face of your organisation:

managing the social media presence of your employees

Chris Oliver, Director

A quick review of both traditional and new forms of media provides a clear indication that employers of all sizes continue to struggle with the intersection between the interests of the business, and an employee's use of social media. So why does this struggle continue? While its form is undoubtedly still expanding, the existence of social media is not new. Indeed, it has been part of the social and work landscape now for over a decade. Employers also have experience in overcoming the challenges presented by the introduction into the workplace of earlier waves of technology advancement, such as photocopiers, facsimile machines, email, the internet and mobile phones.

Perhaps, at least for some, the continued struggle arises as a consequence of the way in which resistance by employees to the imposition of limits on their social media usage is framed – that their posts are "private", were undertaken outside of work hours, and involve the exercise of their perceived "right" to freedom of speech.

By confronting these potential roadblocks, employers are better placed to manage the risks with greater confidence, and give their employees greater clarity as to what is and is not acceptable social media usage. After all, prevention is always better than the cure.

"Private" posts

Despite the common reliance on this claim, an employee's use of social media rarely remains in any sort of "private" domain. It ceases to be private and intersects with the interests of the employer in a range of situations, including

- where material is posted that directly 'tags' or references one or more co-workers;
- using a social media account which expressly identifies their employer;
- posting material which names or otherwise identifies the employer (including posting material in which the employee is wearing the uniform of the employer);
- posting material which is inconsistent with the 'values' or objectives of the employer's business;
- posting material of an inappropriate nature to co-workers; and
- posting that involves the use of devices or other facilities supplied by the employer.

Undertaken outside working hours

The rights of an employer to manage out of hours conduct was addressed by the Full Bench of the then Australian Industrial Relations Commission in *Rose v Telstra*[1], where the Commission confirmed that employers do have the capacity to regulate the out of hours conduct of their employees where the conduct:

- viewed objectively, is likely to cause serious damage to the relationship between the employer and the employee;
- damages the employer's interests; or
- is incompatible with the employee's duties as an employee.

Freedom of speech

It may come as a surprise to many, but there is currently no legal "right" to freedom of speech in Australia. The common response that an employee is exercising their freedom of speech in the context of social media was addressed in the unfair dismissal case of *Little v Credit Corporate Group Limited,*[2] where the Fair Work Commission stated "*...the Applicant is perfectly entitled to have his personal opinions, but he is not entitled to disclose them to the 'world at large' where to do so would reflect poorly on the Company and/ or damage its reputation and viability".*

While in a disciplinary context these three dimensions will ultimately be determined by the specific circumstances, they also provide a framework in which to proactively manage the use of social media and to make clear to employees what is expected of them.

Proactive Management

An important foundation in the proactive management of the social media activity of employees is the publishing of, training in, and promotion of, an appropriate and comprehensive Social Media Policy. While the design of the policy will often depend on a variety of issues (including the identified values and culture of the organisation, the industry in which the organisation operates and the organisation's business objectives as they develop over time), all Social Media Policies need to cover off on a number of key elements. These include:

- the scope and application of the policy (including situations where the employee is using the employer's computer, internet facilities, network, or time);
- the expectation that an employee should not assume that content is private, or will be kept private, irrespective of the privacy settings the employee has chosen;
- clearly stating that the employee will be held responsible for anything they post on social media, including if that content is shared or reposted by others;
- content should always be considered permanent and searchable – irrespective of the social media platform on which it is placed;
- convey to employees that they should always assume that they can be identified and their association with the employer will be apparent to anyone who reads the content; and
- clearly identifying the range of content and activities that is unacceptable, including specific examples wherever possible.

1 (1998) AIRC 1592.

2 (2013) FWC 9642.

Managing Social Media Fallout

There are at least two key focal points to dealing with social media fallout – managing the employee as the publisher of the material, and managing the impact of the publication on others.

Managing the publisher

The manner in which an employer will deal with a current employee whose use of social media has collided with the interests of the company will generally depend on a range of factors, including the circumstances in which the post or publication occurred (such as the time of day, use of company resources or otherwise, and content), and any terms of the employee's contract of employment. These factors also include not only the existence of an appropriate Social Media policy, but the extent to which the company can demonstrate that the employee was made aware of the policy and trained in its terms.

Assuming the employer intends to deal with the social media post as a potential disciplinary matter, it is essential that:

- the employer keeps a cool head, and avoids making any assumptions (including with respect to the employee's intentions or the imputed messaging behind ambiguous posts);
- any relevant circumstances are promptly and thoroughly investigated;
- the employer adopts a process that ensures the employee is given a reasonable opportunity to both understand the concerns, and to respond to them; and
- all of the circumstances are taken into consideration before deciding what, if any, disciplinary action should follow.

Caution should be exercised to ensure that time pressures and the emotional drain of managing the outward looking aspects of the situation (eg dealing with any third party or external communications), does not inappropriately impact on the manner and process for addressing the conduct of the individual employee in question.

Managing everyone else

In the face of social media fallout, the common and arguably natural reaction of many employers is to respond quickly, and aggressively. While each situation needs to be assessed on its merits, organisations should at least pause and reflect on the following:

- why am I responding, and what do I hope to achieve by doing so?;
- who am I responding to, and will my means and messaging reach them?;
- in a fast-paced news cycle, by the time I get around to responding, will the rest of the world have moved on?;
- am I comfortable with the flow on effects of my response? Am I helping close things out or am I just giving this oxygen?;
- am I maintaining or surrendering the moral high ground in both the terms and manner of my proposed response?; and
- can I turn this into a positive?

Key takeaways

1. It is vital that employers are clear with employees as to an organisation's values and expectations, and that they remain engaged on an ongoing basis with the proactive management of social media usage by employees.
2. Employers should reflect on the circumstances that may lie behind many of the more objectionable uses of social media, and assess whether the conduct may be a product of disappointed expectations and an individual's perception of having not been fairly heard.
3. The access that employees have to a wide variety of platforms, which facilitate the widespread dissemination of intemperate comments, should encourage employers to have systems in place to address employee grievances in a prompt, reasonable and constructive manner.

Under the spotlight:

changes to labour hire licensing regimes

Chris Oliver, Director
Daniel McNamara, Graduate Associate

2018 has been a year of change in state-based labour hire licensing regimes. New reforms have imposed greater regulation on labour hire arrangements, with new requirements imposed on labour hire operators and those availing themselves of labour hire services. This article examines why labour hire has been a focus of regulation, overviews the recent legislative reforms in a number of states, as well as the potential for reforms in other jurisdictions and in the federal sphere. It also considers what changes organisations will need to implement to satisfy the requirements of the new licensing regimes.

Why is labour hire under the spotlight?

In recent years, a number of labour hire firms have engaged in non-compliant activities, including:

- sham contracting (where an employer wrongfully classifies an employment arrangement as a contract for services);
- phoenixing (the process of winding up a non-compliant company, and starting up a new company so as to avoid liability for past wrongdoings);
- failing to meet obligations under the National Employment Standards, including breaches of maximum working hours, leave and termination requirements; and
- breaching obligations under work health and safety and workers' compensation legislation.

The Fair Work Ombudsman has prosecuted a number of labour hire operators in the Federal Court and Federal Circuit Court. An example of serious non-compliant conduct by a labour hire operator is the case of *Fair Work Ombudsman v Greenan.*[1] A Melbourne-based labour-hire operator, Mr Greenan, failed to pay a worker

1 [2017] FCCA 2059.

close to three months' wages for work as a mechanic, amounting to approximately $7,066. The worker was of Pakistani origin, working in Australia on a Bridging Visa C, and was subsequently terminated from his position.

The Fair Work Ombudsman issued Mr Greenan with a Compliance Notice requiring him to back-pay the labour hire worker his outstanding wages. Mr Greenan failed to comply with the Compliance Notice and also failed to comply with basic record keeping obligations under the *Fair Work Act 2009* (Cth) (the "**FW Act**"). As a result, the Court imposed a penalty of $10,800, and referred the matter to the Commonwealth Director of Public Prosecutions in respect of additional allegations that Mr Greenan fraudulently created invoices for the worker's wages, when in reality, these payments were put to the purchase of Mr Greenan's new car.

Increased scrutiny of and concerns about labour hire arrangements have contributed to an environment where state governments have taken up the option of greater regulation of the industry, in order to minimise the potential for worker exploitation.

Where are the changes occurring?

The changes have occurred in Queensland and South Australia.

Queensland

Queensland is the most recent state to legislate in relation to labour hire, with the introduction of the *Labour Hire Licensing Act 2017* (Qld) (the "**Queensland legislation**") which came into operation on 16 April 2018.

The purpose of the Queensland legislation, which is accompanied by a set of regulations, is to establish a licensing scheme for labour hire operators.

Notably, the Queensland legislation:

- prohibits unlicensed labour hire services from operating in Queensland, with a maximum penalty of over $130,000 or three years' imprisonment for individuals, and penalties of over $378,000 for corporations;
- prohibits individuals without a reasonable excuse from using the services of an unlicensed provider, subject to the same penalties as those imposed on unlicensed labour hire operators as above; and

- requires labour hire organisations, in order to successfully obtain and maintain a license, to show that they are a financially viable business, run by a "*fit and proper person*" (including that the person has no past convictions for relevant criminal offences and has not been involved in phoenixing), and have a history of compliance with relevant legislation, including work health and safety, tax, superannuation and anti-discrimination laws.

The Queensland legislation excludes high-income earners (using the FW Act indexed threshold), individual executives of corporate providers, in-house employees provided temporarily (such as secondment arrangements), and certain internal labour hire arrangements.

South Australia

South Australia was the first Australian state to have a labour hire licensing scheme, through the *Labour Hire Licensing Act 2017* (SA) (the "**South Australian Legislation**"). This scheme operates similarly to the Queensland regime, including the "*fit and proper person*" requirement and prohibitions on both conducting *and* engaging in unlicensed labour hire services. The pecuniary penalties for individuals are slightly higher in this jurisdiction, with a maximum of $140,000 for individuals, and $400,000 for corporations if found to be operating without a license. An additional feature of the South Australian legislation is that it attempts to prohibit the *advertising* of labour hire services without a license, with a maximum penalty of $30,000. This may have a preventive effect in seeking to protect workers prior to labour hire offences occurring.

Those exempt from the application of the South Australian legislation are group training organisations "*registered in South Australia on the Group Training Organisation National Register*" who supply "*apprentices or trainees to do work for other persons*", and those granted an exemption by the Commissioner for Consumer Affairs. The South Australian legislation and regulations are otherwise silent as to who is exempted.

Will future changes occur?

The next state that is likely to be affected by a revamped labour hire framework is Victoria. At present, labour hire legislation is currently before the Victorian upper house after the passing of the *Labour Hire Licensing Bill* (Vic) by the Legislative Assembly on 8 February 2018.

If this legislation is successfully passed in its current form, it will establish a Labour Hire Licensing Authority, in addition to an Office of Labour Hire Licensing Commissioner. Although many of the provisions are similar to the Queensland and South Australian legislation (including a "*fit and proper person*" test, the liability of people/organisations who provide *and* use labour hire services, and prohibitions on advertising unlicensed labour hire), and any possible exemptions are not as yet clear, given that the proposed regulations have not been published at this stage.

Additionally, numerous commentators have anticipated that Western Australia may introduce labour hire legislation in the future.

Who is affected?

The new regimes apply to both "*providers*" and those who "*enter into arrangements*" of labour hire. Generally speaking the new regimes apply to "*a person … if, in the course of carrying on a business, the person supplies to another person a worker to do work*". This applies irrespective of:

- "*whether or not the worker is an employee of the provider;*
- *whether or not a contract is entered into between the worker and the provider, or between the provider and the person to whom the worker is supplied;*
- *whether the worker is supplied by the provider to another person directly or indirectly through one or more agents or intermediaries; and*
- *whether the work done by the worker is under the control of the provider, the person to whom the worker is supplied or another person".*

The new legislation also applies to entities that "*enter into arrangements*" with labour hire providers. In the states which have already passed labour hire licensing legislation, engaging in such conduct can result in an identical penalty to that imposed on "*providers*" who breach their legislative obligation.

The new labour hire licensing schemes may affect businesses that are based outside Queensland or South Australia where the legislation has been introduced. Given the application of the new legislation to both providers and customers of labour hire, an Australian business that is not itself based in the jurisdiction but engages the services of a labour hire provider based in one of these states, may come within the scope of the new schemes.

The Prospect of Federal Regulation?

Some states have called upon the Federal Government to implement a national regulatory response to govern labour hire arrangements. Those states that have introduced legislation have noted their intention for the legislation to act as an impetus for a national scheme. The primary legislative response to date on the part of the Federal Government relating to worker exploitation, has been the introduction of the *Fair Work (Protecting Vulnerable Workers) Act 2017* (Cth), which targets certain types of businesses, and increases penalties for non-compliance.

Union organisations (including the Australian Council for Trade Unions) have called for a national labour hire framework, with ACTU Secretary Sally McManus in March 2018 calling for an overhaul of the current labour hire system in Australia. However, the current government has asserted that legislating with respect to labour hire licensing regimes should remain a matter to be dealt with by the states.

Key takeaways

1. Employers who are based in Queensland, South Australia or who engage in labour hire in those states must ensure that they are complying with the new state labour hire licensing legislation.
2. If you are a labour hire *provider* in a state with labour hire licensing legislation, it is important that you meet the obligations under that legislation. This includes meeting various statutory requirements and obtaining a license within a specified period.
3. Entities that *enter into arrangements* with labour hire providers in states with labour hire licensing legislation have a responsibility to ensure that the provider is licensed. This may be best achieved by requesting proof of the provider's license prior to engaging in a labour hire arrangement or imposing a contractual requirement that the provider warrant that it holds the appropriate licences.

A harsh reality:

considering "harshness" in unfair dismissal cases

Therese MacDermott, Consultant
Michael Starkey, Associate

The focus of much of the debate on the merits of a dismissal is usually the substantive and procedural fairness of the termination. Often, our litmus test is whether there was a valid reason to terminate, and whether the termination was carried out in a procedurally fair manner. However, the legislative regime governing unfair dismissals has three dimensions – not only whether the termination was unjust or unreasonable, but also whether it was harsh.

In this article we explore the terrain of "harshness", and we distinguish this criterion from the other dimensions of dismissal to give you a clearer picture of what factors are pertinent to a finding that a termination is unfair in the circumstances. A consideration of these factors can then be incorporated into your organisation's processes for managing situations requiring a disciplinary response, in a manner that minimises the risk of a successful unfair dismissal claim.

What constitutes harshness?

The range of mitigating circumstances that may be relevant to the question of harshness is much broader than one might expect, and includes not only the circumstances of an employee's employment (for example, their work history and disciplinary or performance record), but also their personal circumstances (such as their age, mental health or likelihood of successfully finding alternative employment based on their skill set). Harshness is also relevant in that it extends to situations where termination of employment is a disproportionate response to the conduct in question. The Fair Work Commission ("**FWC**") is vested with a wide discretion in its consideration of harshness, as the legislation specifies a wide range of criteria that can be considered, including "*any other matters that the FWC considers relevant*".[1]

1 *Fair Work Act 2009* (Cth) s 387.

While factors such as an employee's personal circumstances are not matters that employers have any direct control over, they are matters about which an employer can make enquiries prior to imposing any disciplinary sanctions. It is prudent for an employer to ask an employee in broad terms to provide any information the employee believes may be relevant to the employer's deliberations regarding the most appropriate form of disciplinary action to take (for example, as part of a "show cause" process). This allows an employee to draw to the employer's attention any factors of a personal nature before the disciplinary process is finalised, and ensures that the employer is fully appraised of relevant matters, before opting for termination as the appropriate disciplinary response.

On the other hand, there are matters relevant to the question of harshness that are clearly within the employer's control. One of the regular points that emerges in disputed terminations is the question of whether there was a culture that tolerated certain conduct, or where there has been inconsistency in enforcing compliance with standards of behaviour.

Case study: Swearing at work

The cases that deal with swearing at work offer a good illustration of the types of mitigating circumstances that should factor into an employer's deliberations before a decision is made to terminate employment for conduct related reasons. The cases show that the presence of mitigating factors does not always make termination inappropriate. Rather, it is a question of showing that due consideration has been given to such factors. In some situations, the mitigating circumstances will not be sufficient to weigh against termination as the appropriate disciplinary outcome.

The FWC has observed that:

"...one can readily hypothesise a case where the breach of a swearing policy would not be seen by any reasonable person as justifying dismissal. In a workplace where swearing occurs without warnings or disciplinary response, selecting a single instance of swearing by a stressed employee with long and unblemished service as a basis for dismissal would be seen by any reasonable person as harsh and unfair".[2]

2 *B, C and D v Australian Postal Corporation* [2013] FWCFB 6191 at [65].

In this context, the failure of the employer to respond to prior occurrences of similar behaviour, the one-off nature of the incident, the long and unblemished record of the employee, and the employee's "stressed" condition all constituted mitigating factors which, when given appropriate weight, should have led the employer to a disciplinary outcome other than termination. In a similar case, while the use of profanities and threats of violence by a mine worker constituted a valid reason for dismissal, the employer was found to have not given the mitigating circumstances sufficient consideration, which resulted in the termination being harsh in the circumstances.[3] Those circumstances included the fact that the incident was a "one-off", that the worker had an eleven-year record of service with no known prior disciplinary action, and was suffering personal health difficulties. In addition, the Full Bench of the FWC observed that language of this type had been allowed to be used without criticism by the employer for many years.

In another case, the FWC ordered the reinstatement of an employee who had seven years of unblemished service, and whose skills and age (50) meant he had limited prospects of finding alternative work.[4] The incident leading to termination arose when certain employees took protected industrial action. The applicant left a message on the mobile phone of another employee, who he believed not to have participated in the protected industrial action, and said "*Hi mate, just wondering if you are working. If you are, you're a f...ing scab*". A complaint was made, the employer investigated the matter, and then summarily dismissed the employee for misconduct. The FWC found that while the employee's conduct was a valid reason for termination, the dismissal was a disproportionate response to the conduct, which was out of character for the employee, appeared to be inconsistent with disciplinary action taken in other similar matters, and did not have due regard to the employee's previous good service and work performance.

Key takeaways

1. An employer retains a discretion to decide on the most appropriate disciplinary sanction, but this needs to be viewed not only through the lens of a valid reason and a fair process, but also whether the sanction will be judged to be harsh, taking into account all the relevant circumstances.
2. Where termination is being considered, the process necessitates a thorough consideration of the circumstances of an employee's employment history, any previous misconduct and the employee's personal circumstances.
3. It is also necessary to consider past disciplinary responses of the organisation to similar incidents. This does not mean that it is never possible to change the culture where conduct has been tolerated in the past, but it does mean that an employer needs to communicate its attitude to such conduct, before it seeks to "make an example" of a particular individual. Clear policy documentation and tailored training are therefore required.
4. Proactively making enquiries and seeking input from an employee will avoid mitigating factors only coming to light when the parties are before the FWC, and will hopefully prevent what might otherwise be a fair and reasonable termination from being tarnished.

3 *Illawarra Coal Holdings Pty Ltd T/A South32 v Matthew Gosek* [2018] FWCFB 1829.

4 *Treen v Allwater – Adelaide Services Alliance* [2016] FWC 2737.

Lights, camera, action:

lawful industrial action and how employers can respond

Sam Cahill, Associate
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For an employer, the process of negotiating or re-negotiating an enterprise agreement can give rise to a number of strategic challenges. This is especially true when an employer is required to deal with industrial action, or the threat of industrial action. In this article, we look at the steps that must be taken by employees (or their representatives) before employees can lawfully take industrial action in respect of a proposed enterprise agreement. We also highlight an employer's legal options, in this context, for preventing or minimising any undue or unlawful disruptions to its business in response to proposed industrial action.

What is "industrial action"?

Industrial action is unlawful, unless it is "protected industrial action". Under the *Fair Work Act 2009* (Cth) ("the **FW Act**"), the term includes a stoppage of work (ie, a conventional "strike") as well as a ban, limitation or restriction on the performance of work and/or the performance of work by an employee in a manner different from that in which it is customarily performed.

Industrial action does not include actions that are authorised by the employer or by the terms of the applicable enterprise agreement. For example, in the recent case of *ABCC v CFMMEU (The Nine Brisbane Sites Case) (No 3)*,[1] union officials would regularly conduct meetings at the employer's work-site, which had the effect of delaying the start of work. Sometimes the meetings forced the cancellation of concrete pouring. The Court found that this action did not amount to "industrial action", as the meetings were authorised by a clause in the relevant enterprise agreement.

1 [2018] FCA 56.

When employees can take "employee claim action"?

This article focuses on the category of protected industrial action called "employee claim action". This is where employees take industrial action in support of claims for a proposed enterprise agreement.

Employees may only take employee claim action in circumstances where:

- the existing enterprise agreement (if any) has passed its nominal expiry date;
- the parties have commenced bargaining for a new enterprise agreement; and
- the employees (or their union) are genuinely trying to reach an agreement with the employer.

If employees attempt to take industrial action in other circumstances, the employer may apply to the Federal Court or Federal Circuit Court for an injunction to stop or remedy the effects of the industrial action.

Protected action ballots

If a union wishes to initiate industrial action, it must first apply to the Fair Work Commission ("**FWC**") for a "protected action ballot order". The application must specify the group of employees who are to be balloted and the question (or questions) to be put to those employees, including the nature of the proposed industrial action.

A recent FWC decision has confirmed that the question put to employees in a protected action ballot can be framed permissively and give scope for a range of "proposed industrial action". However, if the subsequent written notice of *the action* provided to the employer is insufficiently specific, this may enable the employer to apply successfully to the FWC for an order to stop the industrial action.

Responding to an application for a protected action ballot order

If a union makes an application to the FWC for a protected action ballot order, it must provide the employer with a copy of the application documents. This gives the employer an opportunity to consider how it wishes to respond to the application.

An employer may oppose an application for a protected action ballot order in circumstances where the application does not meet the requirements under the FW Act. For example, the employer may be able to oppose an application on the basis that:

- the employees (or union) have not been genuinely trying to reach an agreement regarding the matters in question;
- a question that is proposed to be put to the employees does not relate to "industrial action", as defined by the FW Act (for example, where a question relates only to the wearing of union clothing); and
- the claims being supported by the proposed industrial action are not about "permitted matters" (eg, terms that do not relate to the relationship between the employer and its employees).

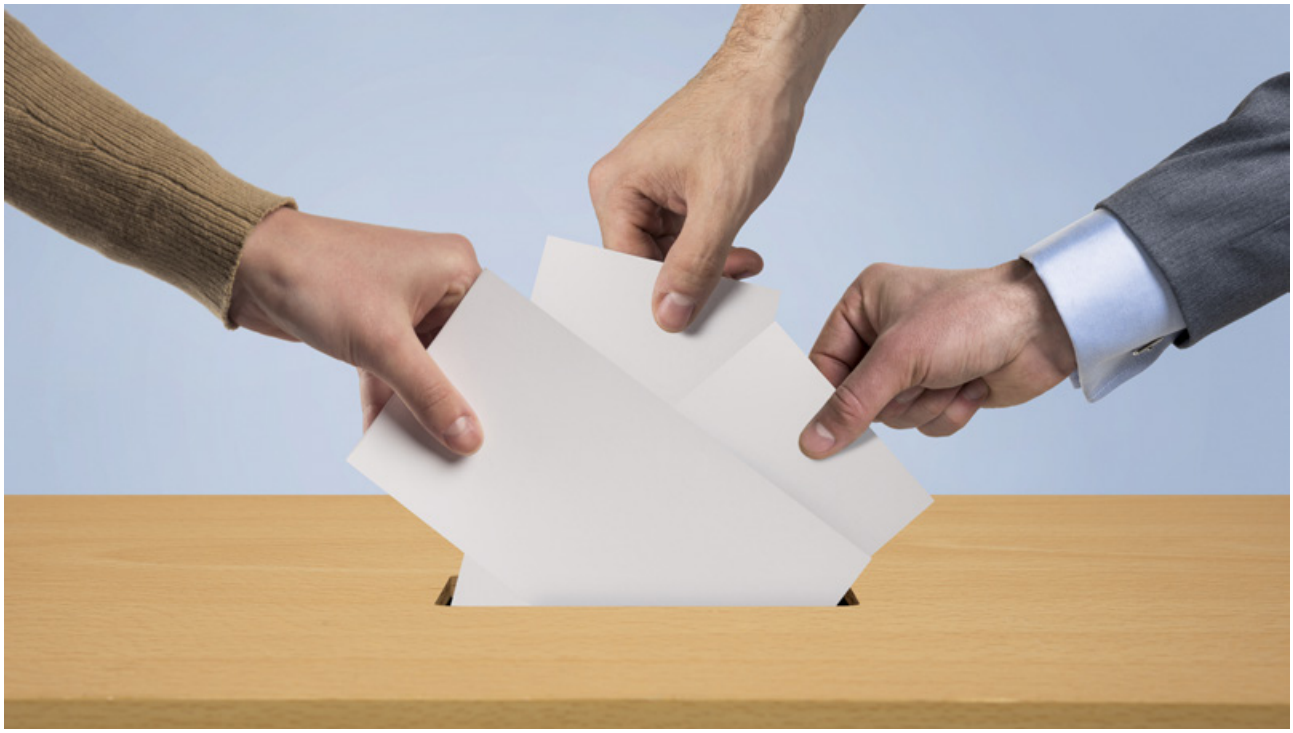
If the employer has grounds for opposing the application, it can make submissions when the application is heard before the FWC, or it can contact the union and require that the application be withdrawn or amended.

Conduct of a protected action ballot

If the FWC makes a protected action ballot order, the ballot must be conducted by a "protected action ballot agent", as specified in the order. This will usually be the Australian Electoral Commission.

The ballot agent is required to work with the employer and employees to compile a "roll of voters". This gives the employer an opportunity to ensure that it does not contain individuals who are not eligible to vote on the proposed industrial action. An employee will only be eligible to be included on the roll of voters if he or she will be covered by the proposed enterprise agreement and is included in the group of employees specified in the order.

After voting closes, the ballot agent must make a written declaration of the results and advise the parties (and the FWC) accordingly. If the proposed industrial action is approved (ie, if at least 50% of eligible employees cast a vote and more than 50% of those employees voted in favour of industrial action), the employees may (and may only) take the proposed industrial action during the 30-day period starting on the date of the declaration of the results of the ballot, unless this period is extended by the FWC.



Notice of industrial action

A union must provide the employer with three days' notice in writing of any industrial action, including the nature of the action and the days on which the action will start and finish.

In the recent case of *National Patient Transport Pty Ltd T/A National Patient Transport v United Voice; Australian Nursing and Midwifery Federation*,[2] the union gave notice to the employer stating that employees would be taking industrial action that would involve "stopping work for up to ten minutes duration on each occasion to explain the campaign-related material to patients, their families and the public".

The FWC found it was not strictly a requirement of the FW Act for a notice to prescribe the commencement and conclusion times of the industrial action, as generally the rationale for industrial action is to cause a degree of inconvenience and expense to the employer. However, there must be enough specificity to avoid legal uncertainty and litigation over whether the action taken subsequent to the notice is protected industrial action.

When assessing the adequacy of a notice, the FWC must consider all the circumstances, and examine the wording of the notice in its industrial context. The person receiving the notice must be able to understand what action is proposed, and when it will occur so that they have an opportunity to consider their position and respond appropriately. The adequacy of the notice may depend on the nature of the employer's operations, including their size, the number of locations, the time at which the action is to occur, and the number of employees potentially taking the industrial action.

Depending on the type of industrial action, the employer may be prohibited from paying employees while they are taking industrial action.

Options for responding to industrial action

An employer may have a number of options in responding to protected industrial action by employees.

Employer response action

The employer may take its own industrial action against the employees, called "employer response action". This is usually in the form of a "lockout". This is where the employer prevents the relevant part of its workforce from

2 [2018] FWC 2068.

attending work. If taking employer response action, the employer must provide written notice to the employee union, and take all reasonable steps to notify employees of the lock out. A recent FWC Full Bench decision held that employees do not need to be paid, and are not entitled to accrue annual or long service leave during a lockout.

Stand down

The employer may exercise its right under the FW Act to stand down employees in circumstances where employees cannot "usefully be employed" due to industrial action. The employees may be stood down without pay.

Reduce pay (if partial work ban)

The FW Act provides that, if an employee is engaged in industrial action that is a "partial work ban" (ie, industrial action that falls short of a total stoppage of work), the employer will have the option of reducing the employee's rate of pay. This must be done in accordance with the requirements set out in the Act. For all other types of industrial action, the employer will be prohibited from paying the employees during the period of industrial action.

Dispute resolution

The employer may apply to the FWC to deal with the dispute. This application can be made by one union without the agreement of any other unions involved. However, for the FWC to arbitrate the dispute (i.e. make a binding determination on the dispute), the parties must agree on the terms on which the arbitration is to take place.

Seek an order to suspend or terminate industrial action

The employer may apply to the FWC for an order to suspend or terminate the protected industrial action. The FWC can make such an order if it is satisfied that:

- the industrial action is causing significant harm to the employer;
- the industrial action is creating a risk to health and safety or damaging the economy; or
- the suspension of the industrial action will assist in resolving the dispute.

Key takeaways

1. Any industrial action and any responsive action must comply with the legal technicalities of the FW Act.
2. Employers have a range of options to consider in responding to industrial action (or threatened industrial action), and should utilise these options to minimise unnecessary disruption to their workforce and to support their commercial objectives.
3. The most appropriate action for an employer to take will depend on the employer's overall strategy, and should take into account a range of factors beyond the legal technicalities of the FW Act (such as the impact of any industrial action or responsive action on the reputation of the organisation).

Events

▽ *Key Breakfast Briefing at Altitude Restaurant*

Another very successful Key Breakfast Briefing at Sydney's spectacular Altitude Restaurant at the Shangri-La. In addition to announcing our latest partnership with Sense Rugby, a full house of guests heard from Waratahs CEO Andrew Hore and aviation industry expert John Thomas on "The Role of Leaders in High Performance Cultures", facilitated by Joydeep Hor.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