Market Intelligence

LABOUR & EMPLOYMENT 2021

Global interview panel led by DLA Piper

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Labour & Employment 2021

Australia

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Joydeep started his career at one of Australia's largest commercial law firms, before moving to a specialist workplace relations firm, where he was made an equity partner at the early age of 28. He was managing partner of that firm from 2005 to 2010, before founding PCS in July 2010.

Joydeep has been a keynote speaker at countless international conventions, conferences and industry events, and for many years has been appearing on television programs for Channel 7, the ABC, Sky News, and ausbiz.tv as a thought leader and commentator in his areas of expertise.

Since 2016, Joydeep has represented Australia at the prestigious 'International Forum on Employment Law' and he regularly presents at International Bar Association conferences. He is the author of no fewer than 10 books in this area.

Joydeep is a graduate of Harvard Business School's Owner-President Management Program and one of Australia's most high-profile lawyers and legal entrepreneurs.

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1 What are the most important new developments in your jurisdiction over the past year in employment law?

2021 has been a big year in employment law with a number of important developments.

Among the most notable developments include those made to the casual employment laws. Recent amendments to the Fair Work Act 2009 introduced changes to workplace entitlements and obligations in relation to casual employees.

The changes included a Casual Employment Information Statement, which employers are now required to provide to every new casual employee before, or as soon as possible after, they start employment. The Act has also been amended to include a new definition of a 'casual employee', being an employee who accepts a job offer knowing there is no firm advance commitment to ongoing work with an agreed pattern of work. Most significantly, casual employees now have an entitlement to become permanent employees (either part-time or full-time) in some circumstances. We note that there are certain eligibility requirements and exceptions that apply, including that small business employers are not required to offer casual conversion to their casual employees.

Another significant development was the progress of the reforms recommended in the Respect@Work Report, which was published following a 2018 government-commissioned national inquiry into sexual harassment and discrimination in Australian workplaces.

The Respect@Work Report found that sexual harassment is a pervasive and widespread issue across Australian society and that the existing legal framework for addressing sexual harassment in workplaces is complex and confusing for both workers and employers. The Report set out 55 recommendations for how the legal framework could be changed to better prevent and address sexual harassment at work. The government published its response to the Report, which endorsed a number of the recommendations (in one form or another).

2 What upcoming legislation or regulation do you anticipate will have a significant impact on employment law in your jurisdiction?

The Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 has very recently passed Parliament and will amend the Fair Work Act 2009 and the Sex Discrimination Act 1984 to introduce a number of reforms which will have a significant impact on the workplace sexual harassment and discrimination framework.

The changes to the Fair Work Act 2009 include extending the existing anti-bullying regime to enable workers to apply to the Fair Work Commission for an order


Joydeep Hor

to stop sexual harassment in the workplace. The Fair Work Commission may make such an order if it is satisfied that sexual harassment has occurred and that there is a risk of the harassment occurring in future. Unlike anti-bullying orders, there is no requirement for the sexual harassment to be repeated behaviour. 'Sexual harassment' is now expressly included in the definition of 'serious misconduct' with the Fair Work Regulation. Of course, it will remain necessary for employers to properly investigate alleged sexual harassment before making a decision to terminate employment on that basis. The changes also introduce a statutory entitlement to two days' paid compassionate leave for employees who experience a miscarriage.

The changes to the Sex Discrimination Act 1984 include an expansion to the coverage of protections in the Act to encompass interns, volunteers, self-employed workers, judges, and members of parliament and staff at all levels of government, who had previously been excluded from the coverage provisions of the Act. The changes also introduce a prohibition against victimisation (such as threatening someone or disadvantaging someone for taking action, including lodging a complaint). Victimisation can amount to unlawful discrimination (in addition to a criminal offence) under the Act.

It will be critical for all employers to ensure that their policies, training and systems are up-to-date and fit for purpose in order to meet these changes. This will include ensuring that employers have systems in place for the prompt and confidential handling of complaints. Employers should also give careful consideration to an external cultural audit as a proactive means of aligning micro-cultures within a business to the overall values promoted by policy and management.

3 How has the #MeToo movement impacted the investigation or settlement of harassment or discrimination claims in your jurisdiction?

Historically, most sexual harassment complaints in the workplace have been resolved confidentially and few go to court. The reasons for this can be myriad. The potential media interest in a sexual harassment claim is almost always a key reason for both complainants and employers to explore settlement. The risk of significant costs, and negotiated settlement payments often in excess of what courts are likely to order, is another reason complainants will elect to not pursue complaints through the courts.

In our view, the #MeToo movement has not displaced these motivations for settling sexual harassment complaints. Similarly, the #MeToo movement has not resulted in any change to the existing legal obligations and requirements that govern how employers must investigate sexual harassment or discrimination claims.

The #MeToo movement has certainly shed light on the prevalence of sexual harassment in Australian workplaces and we consider that it has raised awareness with employers as to the pervasiveness of the problem as well as the psychological damage and impaired work performance that can result from these behaviours. This has led many large employers to audit their sexual harassment and discrimination policies, processes and training to ensure they are 'fit for purpose', implement updated training to staff around sexual harassment and discrimination (including in relation to how complaints should be made and handled), as well as offering 'employee assistance programs', which can be utilised by staff who may be experiencing sexual harassment or discrimination in the workplace.

4 What are the key factors for companies to consider regarding the enforcement of restrictive covenants against departing employees?

The key factor for employers to have in mind when considering whether to enforce a restraint against a departing employee is 'reasonableness'. The reasonableness of a restraint must be established by the employer as the party trying to enforce the restraint. In assessing whether a restraint is reasonable, the courts will consider a

"Historically, most sexual harassment complaints in the workplace have been resolved confidentially and few go to court."

number of factors including whether the business has a proprietary interest (such as a trade secret), which it is seeking to protect, whether it is reasonable for the departing employee to be restrained from carrying out the specific work they intend to, and whether the period and geographic limits of the restraint are reasonable.

Employers should also consider utilising garden leave if there is a contractual ability to do so. During an employee's notice period they remain an employee which means that, for the duration of their notice, they continue to be bound by the obligations in their employment contract and by the obligations that arise by virtue of the employment relationship (including obligations of confidentiality). Garden leave provisions can be used whereby the employee is not required to work during the notice period but continues to receive their usual remuneration. Because the employment continues until the end of their notice, an employee cannot work for another employer and must do nothing to damage the interests of the business (such as soliciting a client's business or disclosing information to a competing business) during the period of garden leave.

Because post-employment restraints start to run from when the employment ends, it is from that date that reasonableness is determined. So, while it may only

be reasonable to restrain a particular employee for, say, three months to protect the proprietary interests of the business, if they can be required to take three months' garden leave instead of working out their notice period, the business will have a total of six months' protection. Unsurprisingly, it is common for employers to use garden leave in this way rather than paying notice in lieu, particularly when dealing with departing senior employees.

While the above has focused on enforcement of a restraint provision, the importance of proper drafting of restraint provisions cannot be underestimated, as a 'one-size-fits-all' approach can cause real difficulties when it comes to enforcing a restraint. In short, a restraint should be tailored to the particular role and, to that end, it will be important to consider what the business is seeking to protect (eg, client relationships, confidential information, intellectual property) and ensure that these matters are properly covered in the wording of the provision.

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5 In which industry sectors has employment law been a hot topic recently? Why?

With the impacts of covid-19 being felt by almost all Australian businesses, employment law has been a hot topic for employers in industries across the board.

Covid-19 has given rise to a large number of specific employment-law related issues and challenges for employers, from the need to implement remote-working arrangements in response to lockdowns through to mandating vaccinations to ensure compliance with health and safety obligations.

While these issues have been faced by the majority of employers, the challenges have been most pronounced in industries that operate high-risk sites, including in health and aged care facilities, which are governed by special laws relating to covid-19, as well as in the aviation industry, which has had to respond very quickly to changing border controls and manage grounded personnel.

6 What are the key political debates about employment currently playing out in your jurisdiction? What effects are they having?

There have been a number of key political debates in the employment context taking place over recent months.

What measures employers have been able to implement vis-à-vis their staff in response to covid-19 has been one such debate. In particular, there has been much debate as to whether employers are able to lawfully require staff to get vaccinated and what employers can do about staff who refuse to get vaccinated. Unfortunately, this debate has not resulted in any clear guidance for employers on the matter and it has been necessary for employers to take a 'first principles' approach. It has been our strong view that unless the work and health and safety framework around covid-19 and vaccinations changes, employers should be introducing mandatory vaccination policies, although it is critical that any mandatory vaccination programme be introduced and managed carefully.

The government's response to the Respect@Work Report has given rise to a significant debate about the efficacy of the current legislative framework around sexual harassment in the workplace. One of the most significant changes recommended by the Respect@Work Report was the introduction of a positive duty on employers to take reasonable measures to eliminate sexual harassment and discrimination in workplaces and giving the Fair Work Commission enforcement powers to that end. This recommendation was not endorsed by the government and did not find its way into the laws that were passed earlier this month. The

government's decision not to endorse this recommendation has drawn criticism that, without such a positive duty on employers, the changes lack real substance.

Earlier this year, Australia's Fair Work Ombudsman announced a number of strategic priorities for focus in 2021. One of these priorities was underpayments and 'wage theft', arising in direct response to a number of high-profile employers either self-reporting instances of underpaying employees in 2020, or the Fair Work Ombudsman prosecuting employers for instances of underpayment. As a consequence, 2021 has seen many large employers on the front-foot commencing their own internal auditing of payroll compliance. In Victoria, new laws have been passed this year making it a crime to dishonestly withhold an employee's wages or other entitlements.

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The Inside Track

What are the particular skills that clients are looking for in an effective labour and employment lawyer?

The skills that clients are looking for in an effective labour and employer lawyer are a commitment to achieving commercial outcomes to the full spectrum of employment issues that employers face, through gaining an understanding of the client's business objectives and how the business wants to manage its people.

What are the key considerations for clients and their lawyers when handling employment disputes?

Employers and their lawyers should take employment disputes seriously and have policies and processes in place to address issues quickly and effectively.

Key considerations include understanding the nature of the dispute, the parties involved, and what options are available for resolving the dispute so that formal legal proceedings can be avoided.

For example, a dispute about an employee's entitlements will need to be dealt with differently to, say, a dispute involving alleged behaviour by one employer against another. Employers should seek assistance from their advisors to understand what obligations the employer may have in any given case, including applicable laws and any relevant policies that may prescribe what process needs to be followed. Understanding the causes of conflict will help employers minimise or avoid disputes moving forward.

What are the most interesting and challenging cases you have dealt with in the past year?

One of the most interesting and challenging cases I've worked on in the past year has been an employer response to two former employees claiming that it engaged in misleading and deceptive conduct. The former employees alleged that the employer, through its interview process, made misleading and deceptive pre-employment representations, which they relied on to their detriment, and which resulted in them foregoing secure employment with their former employers. These types of cases are rare in the context of employment. Through excellent case management and an aggressive strategy we were able to secure a settlement that included the dismissal of the case and no orders as to costs.

Lexology GTDT Market Intelligence provides a unique perspective on evolving legal and regulatory landscapes.

Led by DLA Piper, this *Labour & Employment* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

Market Intelligence offers readers a highly accessible take on the crucial issues of the day and an opportunity to discover more about the people behind the most significant cases and deals.

Legislative reform
#MeToo movement
Industry sector focus
Key political debates

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