K&L GATES

WORKPLACE WRAP

Our Workplace Magazine

AUTUMN/WINTER 2017

Welcome

TO WORKPLACE WRAP

Welcome to another edition of Workplace Wrap, where we provide highlights across labour, employment and workplace safety law. In this edition, we have covered important case law developments in employment law, equal opportunity, industrial relations (IR) and safety.

A NOTE FROM OUR PRACTICE AREA LEADER

Welcome to our latest edition of Workplace Wrap. This publication aims to condense some of the most interesting developments in labour, employment and workplace safety law over the past 6 months into one easily digestible read.

Even in the absence of an election, the world of employment and in particular industrial relations continues to be news. The changes to the construction industry regulation in the form of the Building Code and reintroduction of the ABCC has caused and will continue to cause that sector, and the ancillary services to the construction industry, an enormous amount of disruption and change for the rest of this year.

Big issues over the period include the perennial problems caused by soured relationships in the workplace and the difficulties they create once the media becomes involved. The need to actively manage a culture of compliance with Codes of Conduct has never been more apparent.

There has also been a great focus on compliance with minimum wages and conditions fuelled by repeat scandals of underpayments in the franchising sector. The media surrounding the seemingly systematic nature of the problem prompted the Commonwealth Government to introduce the Protecting Vulnerable Workers Act which significantly changes the landscape in the franchising sector placing a heavy onus on franchisors with respect to the employment compliance of franchisees' employees.

We have also seen the Fair Work Commission hand down two decisions which have been the subject of much debate. Firstly, the long awaited penalty rates decision has caused a political furore for the Government, despite it initially arising out of a review put in place by the previous Labor Government. The changes determined by the Commission will likely have a significant beneficial impact on the hospitality, and in time, retail sectors and certainty is required.

The decision on the increase to the minimum wage of 3.3% has also caused great debate. The decision was a surprise to many commentators against the background of stagnant private sector wages growth and public sector wages growth of 2.5% or less.

In the area of workplace safety, there has been an increase in regulator activity, particularly in NSW and Victoria. Many of our clients are concerned about the issue of occupational violence which hits the health care, education and emergency services sectors particularly hard. We examine this difficult issue in this edition.

Further, for those managing workers coming into Australia on section 457 visas the recently introduced changes will have an impact on existing employees as well as future plans for growth. This is an area that you will need to be across.

I do hope you enjoy this edition of Workplace Wrap. As always, please do not hesitate to contact any member of our team if you would like assistance or to discuss any of the issues raised and how they relate to your business.

Alice DeBoos
Partner/Practice Area Leader
Labour, Employment and Workplace Safety
alice.deboos@klgates.com

Our team was recently recognised by *Chambers Asia Pacific 2017* for **Employment Law in Australia**.

Thank you to our clients for making these accolades possible.

Eleven of our Australian Labour, Employment and Workplace Safety lawyers have been recognised by ***The Australian Financial Review*** as ***Best Lawyers*** **in Australia, 2017.**

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K&L Gates LEWS Practice

Our Labour, Employment and Workplace Safety Group is one of the largest and most highly skilled teams in Australia, with more than 40 lawyers nationally, including 11 partners. Our job is to deliver practical outcomes while considering in detail the legal and business implications.

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EMPLOYMENT LAW AND EEO

GENDER DIVERSITY PROGRESSES AS FIRST FEMALE CHIEF JUSTICE APPOINTED

December 2016 saw the Coalition Government announce that serving High Court Justice Susan Kiefel will replace retiring High Court Chief Justice Robert French. Justice Kiefel is the first female chief justice in our High Court's history.

Justice Kiefel was appointed to the High Court in 2007, making her the second female member of the bench at that time. With the appointment of Justice Michelle Gordon last year, the High Court bench has increased its female membership to three out of seven members (Justice Virginia Bell being the third). It is a momentous and significant development in the push towards recognising and promoting gender equality at the upper echelons of public service. Of course, Australian women have also served as prime-minister, deputy prime-minister, governor-general and Commonwealth attorney-general.

Gender diversity in senior and leadership positions does however continue to remain an ongoing struggle. For example, the Workplace Gender Equality Agency's (WGEA) research indicates that five out of six CEOs are men and that the salary difference between genders rises to AUD93,884 at the top level of management; with men taking home the greater salaries.

Progress is being made, but at a sluggish pace. Recent years have seen a slight improvement in the gender pay gap, an increase in the number of key management personnel who are women, an increase in the number of employers with policies to support gender equality and the number of appointments of women to managerial roles. In some perplexing findings in the gender equity insights report released by the Bankwest Curtin Economics Centre and the WGEA:

- men in top tier managerial positions earn on average AUD93,000 more total remuneration than women (approximately 27%)
- where there is a gender balanced leadership team, the gender pay gap shrinks to around 10%
- counter-intuitively, once the management environment becomes heavily dominated by women, the pay gap again increases, reaching around 17% where women comprise more than 80% of managers.
- employers can proactively drive better workplace gender equality across their organisations on a daily basis. Measures can include:
- implementing workplace policies which not only promote equal employment opportunity (EEO) but also support and recognise female participation including

through workplace flexibility and domestic and family violence policies

- reviewing and auditing total remuneration across roles within organisations
- "walking the walk" on EEO policies and appointing managers and senior leadership position based on merit
- ensuring that other gender equality indicators are aligned with diversity values such as equal remuneration between women and men and ensuring the workplace is free of sex-based harassment and discrimination
- industry and business led initiatives to promote workplace gender equality is essential.

With studies demonstrating diversity positively impacts an organisation's bottom line, and with Australian non-public sector employers with 100 or more employees in their corporate structure required to report to the WGEA each year, there is real incentive to "walk the walk".

At the very least, continual improvements for gender diversity will hopefully mean that one day the gender of the chief justice of the High Court won't need to be the subject of discussion at all.

THEY ARE UNHAPPY OUT THERE

Many workplaces are not happy and bullying at the workplace appears on the rise, so the November 2016 Psychosocial Safety Climate and Better Productivity in Australian Workplaces Report and the Bullying and Harassment in Australian Workplaces Report tells us.

We may instinctively know this. It seems despite efforts by workplaces to address this malaise, and legislation to address bullying, the trajectory is going in the wrong direction.

Using the international definition of bullying which is reflected in the definition of bullying under the Fair Work Act, 10% of people reported that they had been bullied at work up from 7% five years ago. This does not account for the people who stated that they had been harassed: where bullying is repeated, harassment can be inferred from a single incident.

Only 52% of participants perceive their workplace to be mentally healthy compared to 75% who consider their workplace offered physical safety.

Bullying is more prevalent in Australia than in Europe and the cost of untreated psychological health problems on Australian workplaces is suggested to be about AUD11 billion per year through absenteeism, presenteeism (where employees go to work but are not productive due to health related problems) and workers' compensation.

Yet the anti-bullying jurisdiction of the Fair Work Commission that has been in place since 1 January 2014 has made only a handful of orders to address bullying with many claims lacking in substance or being misconceived.

We know that management action carried out in a reasonable way is not workplace bullying, yet the problem is that many people feel that they are inappropriately treated. They feel upset or undervalued or 'bullied' even though their dissatisfaction is not a product of bullying.

The Psychosocial Safety Climate and Better Productivity in Australian Workplaces Report says that organisations attempt to lift productivity through negative means, by increasing pressure on their workforce, by reducing job control and limiting available job rewards. In its view, these methods are counterproductive and their outcomes are outweighed by the physical and psychological health problems associated with such demands.

Separating Fact From Fiction

Whilst the reporting of workplace bullying suggests an increase, as pointed out by Alice DeBoos in a recent article, it is important to separate perception from reality. Often grievances dealt with by organisations are allegations of bullying made by employees against their supervisors or managers. These often lead to unsubstantiated allegations that are better described as less than ideal management techniques and communication breakdown creating frustration, tension and often distress, but is not unlawful bullying. Workplace tension, difficult situations and relationships do not necessarily amount to bullying, but are circumstances that need to be addressed through training, discussion and mediation.

So is it us or is it Them?

What else can employers do to address this workplace bullying and workplace malaise?

Employers must be vigilant in stamping out bullying where it is occurring. Sometimes or often they are not.

A Checklist of What can be Done

- Employers must have a policy around bullying and harassment. They must say that this conduct is unlawful.
- There must be training of staff but especially supervisors and leaders about the perils and consequences of bullying type conduct. The evidence shows that claims of bullying are most commonly made against supervisors. Is it crystal clear what is and isn't appropriate conduct under the bullying policy or code of conduct? Are examples given? Are training videos used?
- Is bad behaviour jumped on or just skirted around?
- Are allegations of bullying followed up quickly, taken seriously, subject of a proper investigation or a mediated outcome?
- If the conduct does not constitute bullying or harassment, that is hardly the end of the matter. It's really just the beginning. How does the organisation address the perception of it – what can be done to improve interpersonal relations?
- Should a cultural survey be conducted to determine whether there are organisational factors or pressures which have the effect of creating a culture of bullying and harassment or dysfunctional relations?
- Are there strategies in place to assess productivity and well considered action plans to lift it?
- For all the regulation of the Australian workplace, for all the attempts to provide attractive working conditions and to manage reasonable hours of work, some would say that nothing beats a happy or even a 'not unhappy' workplace. Addressing workplace interactions, ameliorating overzealous or potentially bullying behaviours, and lifting the impediments to "a great place to work" will produce great productivity rewards and minimize legal exposure.

In politics it is said "it's the economy, stupid." In the Australian workplace, "it's human relations, stupid."

DEMYSTIFYING CONTRACTUAL RESTRAINTS OF TRADE

Across the globe, the most valuable companies trade in information, ideas and own information technology. This shift has occurred in the last decade or so.

Information and intellectual property is now amongst a business' most valuable asset, so its protection is paramount. For this reason, it is unsurprising that companies are spending increasing time, effort and money on protecting such assets. This explains why so much court time is spent on enforcing restraints of trade. Notwithstanding this, there remains some mystery about which post employment restraints are effective and enforceable and which are not.

Where the law develops, case by case, that mystery can be heightened. Cases turn on particular facts and outcomes vary markedly. Principles can be hard to decipher, but there are some.

The Broad Principle - Competition is Good, Restrictions on Competition are bad

It is clear that in trade and commerce competition is good. It follows that any restraint of competition is bad. So the rule of broadest application is that all restraint of competition (trade) is unlawful except to the extent it is reasonable. Each restraint must not be contrary to the public interest. Helpful that!

The Practical Application of the Broad Principle

What does it mean? Context is king but some principles can be deciphered from the decided cases.

To do that it is important to understand what typically is sought to be protected.

Generally speaking, the categories of post employment restraints are:

1. protection of confidential (secret) information (confidential information)
2. do not poach our people (employees, contractors) or interfere with our contractual relationships with them (non-poach employees)
3. do not poach our clients, customers and suppliers, or interfere with our contractual relationships with them (non-poach customers)
4. do not work for a competitor or otherwise compete with us (non-compete).

Some Broad Concepts

Some broad concepts are set out below. Obviously, on any given facts there are exceptions to these broad concepts.

As a general rule courts will not interfere with restraint clauses concerning the first 3 categories, particularly if they are appropriately time limited. Why? In most circumstances enforcement will not lessen competition in a market. However, confidentiality clauses can prove tricky to enforce for reasons outlined below.

Courts become most interested in the non-compete category because knocking a person out of a market altogether is often against the public interest - it lessens competition. Further, courts recognise that a clause which prevents a person working to earn a livelihood, in a market in which they are qualified by education, training and experience, is not in the public interest and certainly not in the individual's interest. Such clauses will be read narrowly by courts and as such need to be carefully crafted.

The public interest recognises not only open competition, but also the legitimacy of a need to protect a company's legitimate business interests and confidential information. Striking the right balance involves limiting the breadth of the restriction on working competitively in time and geographical reach - not so long as to give it an unfair advantage in a marketplace. The restraint must also be appropriately tailored to the nature of the employee's role - his or her role within the business, seniority, possession of confidential information and other relevant factors.

The Complexities of Protecting Confidential Information

Courts will uphold the protection of secret and confidential information provided it is treated as, and is in fact, secret and confidential. Clauses which fail court sanction seek to protect material that is not in fact protected as secret by the business, or clauses that try to include material which is neither proprietary nor capable of being described as confidential.

Information which is truly confidential can be protected indefinitely, or until by other legitimate means it comes into the public domain. Knocking a person out of the marketplace because contractually you think you can, will rarely work and should be avoided; preventing poaching for a period is a much safer approach.

A Tale of two Law Firms

In the very recent Supreme Court of New South Wales decision of *Pryse v Clark* [2017] NSWSC 185, involving partners leaving a law firm there was some overlap between non-poach customers and non-compete categories. Leaving aside the judge's comments concerning senior and very experienced lawyers seeking to get out from underneath contractual commitments, the meaning of which they must have known full well, there are learnings.

The case was ultimately resolved but not before the issue of an interlocutory injunction was determined by the Court. In his decision, the judge made plain that the public interest and some measure of the restraint could be maintained by reference to upholding the contracted obligation preventing the departing partners form acting for their old clients for six months. In turn the category non-compete restraint which prevented these departing partners from working in a competing firm for six months (as they had agreed under the restraint not to do) would offend the public interest because when measured against their old firm's need to protect its business it was enough to restrain the departing partners from acting for their old clients for that period, without stopping them from working otherwise.

What's it all Mean?

What the law seeks to do is strike a balance between the freedom to contract privately and the public interest in free and unfettered competition. It is important to focus on the protection of legitimate business interests and not seek to contract for advantage simply because advantage seems available.

When crafting post-employment restraints, employers need to:

- identify the business interest to be protected. Protect that interest only for so long as it takes your business to redress any disadvantage
- limit restraints in time and if possible, so that they only act to protect the legitimate interests of your business
- if you have confidential information make sure it is treated as such within the business
- make sure that you revisit your employees' contractual restraints as the business and roles within it change.

GETTING A CLEARER PICTURE - MORE DETAILS RELEASED ON THE 457 VISA CHANGES

On 18 April 2017 the Australian Government announced its planned abolishment and replacement of the 457 visa framework with a new, two-stream Temporary Skill Shortage (TSS) visa as well as other changes to the migration and citizenship program. Since the announcement, employers, visa holders, visa applicants and migration agents alike have been analysing details of the changes as they have been released to consider strategies for their business, employees and clients.

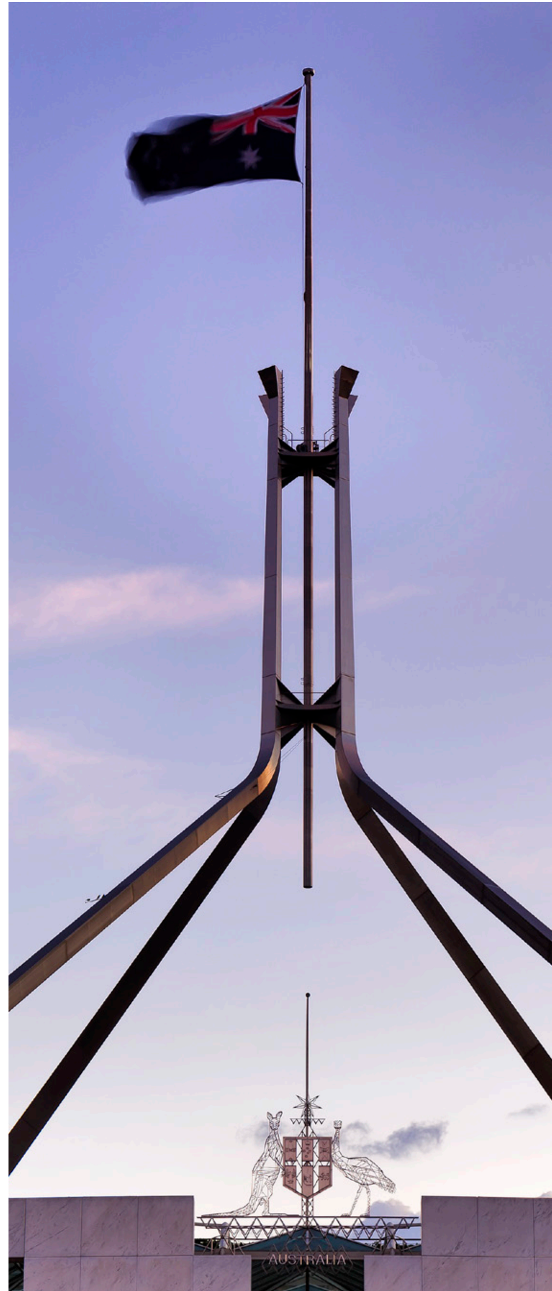
Further information has since been released by the Department of Immigration and Border Protection (DIBP) in order to provide further clarification to people and businesses affected by the changes.

Some of the key details confirmed by DIBP's recent correspondence and their implications on affected employers/employees are set out below.

Current 457 Visa Holders who Wish to Change Employers

Current 457 visa holders who wish to change employers via a new approved nomination will be affected by the change to a degree. Namely that the new nomination will need to be for an occupation still eligible for the 457 visa program and satisfy any requirements placed by relevant caveats if applicable.

However, the remaining duration of their current 457 visa will not be affected by a new nomination, even if the new nomination is for an occupation that is now on the Short-Term Skilled Occupation List (STSOL) that would otherwise only yield a 2-year visa.



Current 457 Visa Holders who Wishes to Apply for Employer-Nominated Permanent Residency

Current 457 visa holders who will become eligible for permanent residency under the Temporary Resident Transition (TRT) stream of the Employer Nominated Scheme visa (Subclass 186) (186 visa) before March 2018 can continue to apply for permanent residency, even if their occupation was removed from the relevant occupation lists.

Applicants who wish to apply for permanent residency under the Direct Entry stream of the 186 visa can continue to do so until March 2018 if their occupation is on either the Medium and Long-term Strategic Skills List (MLTSSL) or the STSOL. After March 2018, only applicants whose occupation is on the MLTSSL can apply for a 186 visa under the Direct Entry stream.

DIBP has advised that further information on any transitional or 'grandfathering' arrangements for 186 visa applicants who held 457 visas before March 2018 will be released closer to the implementation date of the changes.

New Training Benchmarks for Employers

In the 2017/18 Federal Budget, the government announced a new Skilling Australians Fund Levy that will replace the current training benchmarks for employers sponsoring or nominating employees under the 457 and Employer Nominated Scheme visa (Subclass 186 and Subclass 187) programs.

From March 2018, employers will be required to pay the following levy to access the 457 and 186/187 visa programs.

For businesses with annual turnover of less than AUD10,000,000:

- an upfront payment of AUD1,200 per visa per year for each employee on a TSS visa
- a one-off payment of AUD3,000 for each employee being nominated for permanent residency under the 186 or 187 visa program.

For businesses with annual turnover of AUD10,000,000 or more:

- an upfront payment of AUD1,800 per visa per year for each employee on a TSS visa
- a one-off payment of AUD5,000 for each employee being nominated for permanent residency under the 186 or 187 visa program.

We continue to closely monitor the implementation of the proposed amendments and we are ready to assist employers to understand the impact of these changes on their business in line with the new legislative requirements, and to ensure that they remain compliant with obligations under the legislation.

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INDUSTRIAL RELATIONS

PROTECTING THE VULNERABLE: HIGHER PENALTIES AND A WIDER LIABILITY NET

It is expected that the Senate will soon pass the Fair Work (Protecting Vulnerable Workers) Act (the Act). The Act amends the Fair Work Act 2009 (Cth) (FW Act), and represents a key election promise in the wake of very public allegations of the exploitation of vulnerable employees, particularly within franchise networks.

Summary of the Changes

In a nutshell, the changes will:

- introduce substantially increased penalties for 'serious contraventions' by employers of pay related entitlements in the Fair Work Act 2009 (Cth) (FW Act);
- increase the penalties for contraventions related to record keeping and payslips;
- assign liability to holding companies and franchisors for underpayments to employees of their subsidiaries and franchisee entities;
- increase the Fair Work Ombudsman's information gathering powers; and
- prohibit employers from unreasonably requiring employees to make payments

Maximum Penalties Increase ten Fold for Serious Contraventions

Maximum penalties for "serious contraventions" will be increased to AUD108,000 for individuals and AUD540,000 for bodies corporate (a 10 fold increase on current penalties).These fines will apply where a contravention was deliberate (that is, where the corporation expressly, tacitly or impliedly authorised it) and formed part of a systematic pattern of conduct. They will apply to a range of underpayment related contraventions, including contravening a Modern Award, the National Employment Standards, an Enterprise Agreement or Workplace Determination.

Increased Penalties for Record Keeping Failures

The maximum penalty relating to employee records and pay slip contraventions will be doubled to AUD10,800 for individuals, and to AUD54,000 for bodies corporate. These new maximum penalties will also apply to false or misleading employee records. This is aimed at ensuring that employers do not 'fail' to keep proper records as a means of making breaches of industrial instruments difficult for an employee, union or the regulator to prove.

Franchisors and Holding Companies Potentially Liable for the Contraventions of Franchisees and Subsidiaries

Under the new law, holding companies and franchisors may be held liable for the payment

related contraventions of their subsidiaries or franchisees as the case may be.

If a franchisor has a significant degree of control over the affairs of its franchisee, and it knew or could reasonably be expected to have known that the contravention would occur. Similarly, a holding company will be liable for the contraventions of its subsidiaries if it knew or could reasonably be expected to have known that the contravention would occur.

A Franchisor or holding company will not be liable where it can demonstrate that it took reasonable steps to prevent the contraventions from occurring.

The provisions are designed to ensure that turning a blind eye to contraventions will no longer be an option.

These provisions will operate in addition to and will not replace the accessorial liability provisions that are already in the Fair Work Act.

Prohibition on Unreasonably Requiring Employers to Make Payments

These provisions prohibit an employer from directly or indirectly requiring an employee to give 'cashback' or pay any other amount of the employee's money or the whole or part of an amount payable to the employee in relation to the performance of work if:

- the requirement is unreasonable in the circumstances
- the payment is directly or indirectly for the benefit of the employer or a party related to the employer.

These provisions are aimed at alleged schemes in which employees were required to pay back to the employer some of their Award compliant pay - effectively reducing their amount of take home pay.

Fair Work Ombudsman will Have Increased Powers

The evidence gathering powers of the Fair Work Ombudsman will be strengthened, with the view to ensuring that the 'exploitation of vulnerable workers can be effectively managed.' These powers will be similar to those of other regulators such as ASIC and the ACCC. Specifically, the Fair Work Ombudsman will be able to issue a notice if the Ombudsman reasonably believes that a person has information or documents relevant to an investigation, or is capable of giving evidence that is relevant to such an investigation. The notice may require the person to give information, produce documents or attend the Fair Work Ombudsman to answer questions.

What Employers Should do

It has never been more important for employers to ensure that they are compliant with their obligations to employees under Awards or Enterprise Agreements. This is easy to say, but often businesses can be faced with enormous complexity of multiple awards, enterprise agreements and the National Employment Standards. Some strategies to aid compliance include:

- ensure you have up to date, compliant employment contracts that comply with minimum standards
- ensure that your payroll system is robust and well run
- keep abreast of changes in entitlements (for example, changes to award rates through safety net reviews)
- consider whether simplifying your arrangements through the use of Enterprise Agreements is feasible
- if you become aware of any actual or potential entitlement contraventions, act quickly and decisively. These are not issues to be swept under the carpet.

NEW BUILDING CODE FOR CONSTRUCTION SECTOR

Background

The last 6 months saw the achievement by the Government of the Building and Construction Industry (Improving Productivity) Bill (ABCC Bill), following protracted negotiation between the government and the cross bench. Together with the passing of the Registered Organisations Bill on 22 November 2016, the Government successfully brought into law the two bills that triggered the double dissolution election in September 2016.

The ABCC Act is now law and will have significant impacts upon employers in the construction industry. It was not without its last minute drama, with Derryn Hinch, upon returning from the Christmas break, agreeing to bring the operation of the Building Code forward. We are now seeing a potential stand off between employers, Government and Unions in respect of making Enterprise Agreements Code compliant prior to its commencement in September this year.

What Does the Legislation do?

Apart from re-establishing the construction regulator (the Australian Building and Construction Commissioner), the ABCC Bill implements the Building and Construction Industry (Fair and Lawful Building Sites) Code (Code). The Code establishes an enforcement framework under which building industry participants may be excluded from tendering for or being awarded Commonwealth-funded building work if they are non-compliant.

Who is Covered?

Constitutional corporations who are either building contractors or building industry participants are subject to the terms of the Code. Related entities of a tendering entity (which are building industry participants) become covered by the Code the first time the tendering entity becomes subject to the Code. Code coverage commences from the first time building contractors or building industry participants submit a tender or an expression of interest for Commonwealth funded building work on or after the Code commences (21 February 2017).

Once a building contractor or building industry participant becomes subject to the terms of the Code, it and its related entities must comply with the Code on all new projects including projects which are privately funded.

Extension to Supply and Transport Sectors

The Code applies to building work undertaken for, or on behalf of, a funding entity (irrespective of the works value) and building work indirectly or partially funded by the Commonwealth to certain defined proportions and monetary thresholds. The definition of “building work”

underpins the operation of the Code. Building work has been expanded to include the supply and transport of building goods directly to building sites (including resource platforms) for subsequent use in building work.

Workplace Relations Management Plans (WRMP)

Certain Commonwealth funded building work will require a WRMP to be in place which has been approved by the ABCC. The WRMP must demonstrate Code compliance on a particular project.

No Unregistered Written Agreements and Other Agreements

A Code covered entity must not bargain for, make or implement an agreement which the entity knows or believes will not be registered under the Fair Work Act 2009 (Cth) (FW Act) and:

- provides for terms, conditions or benefits of employment of employees of the employer or the employer's subcontractors (which may include above-entitlement payments)
- restricts or limits the form or type of engagement that may be used to engage subcontractors
- deals with matters which would not be permitted in enterprise agreements by virtue of section 11 of the Code.

These provisions do not apply to an agreement that is a common law agreement or individual flexibility agreement made between an employer and an employee.

No Retrospective Restriction on Terms in Enterprise Agreements

The Code prescribes terms which must not be included in an enterprise agreement which covers an entity covered by the Code. This provision applies to Enterprise Agreements entered into after 25 April 2014. Covered entities bargaining for new agreements will need to ensure Code compliance. The effect of this section is to impact on the eligibility for a Code covered entity to tender for Commonwealth funded building work. Excluded clauses are those which:

- impose or limit the right of the Code covered entity to manage its business or to improve productivity
- discriminate, or have the effect of discriminating against certain persons, classes of employees, or subcontractors
- are inconsistent with freedom of association requirements set out in the Code.

Section 11 of the Code provides a non-exhaustive list of non-permitted clauses.

Above-Entitlement Payments and Related Matters

An above-entitlement payment is defined as a payment or benefit above the amount or value of a payment or benefit required to be paid under a Commonwealth industrial instrument or industrial law (as defined in the FW Act – e.g. modern awards).

The Code provides that covered entities must not take action (or threaten action) which compels a contractor, subcontractor or consultant into making an above-entitlement payment.

Further, covered entities cannot compel contractors, subcontractors or consultants to support a particular service, product or arrangement (e.g. compelling adoption of a particular income protection insurance scheme or use of a particular training provider).

Entry to Premises Where Building Work is Performed

Code covered entities must strictly comply with Commonwealth, State and Territory laws that give a right of entry permit holder access to where work is performed (e.g. the FW Act or work health and safety laws).

Freedom of Association

Code covered entities must adopt and implement policies which ensure persons are:

- free to become, or not become, members of building associations
- free to be represented, or not represented, by building associations
- free to participate, or not participate, in lawful industrial activities
- not discriminated against in respect of benefits in the workplace because they are, or are not, members of a building association.

Section 13 of the Code provides a non-exhaustive list of practices which a covered entity must comply with to protect freedom of association.

Consequences of Non-Compliance

Obligations are imposed on Code covered entities to notify the ABCC within two days of a breach or suspected breach and proposed rectification steps. Rectification steps taken must be reported in 14 days.

In the event of non-compliance with any aspect of the Code, the ABC Commissioner may impose an exclusion sanction on the non-compliant Code covered entity, which means that funding entities can no longer enter into contracts with these excluded entities (unless government or Minister permission is granted).

Timing and Recommended Steps for Covered Entities

Initially, the timing for the commencement of the code provided for a 'grace period' for non-compliant Enterprise Agreements until 29 November 2018. That all changed in February this year when Senator Derryn Hinch had a change of heart and agreed to bring the operation of the Code forward to September this year. The impact of this is that many companies, who entered into non-compliant Enterprise Agreements that have expiry dates beyond the end of August this year will need to consider how they may get those Agreements amended in order to be compliant. At the same time, the CFMEU's construction and general division has stated that it is not prepared to re-open Enterprise Agreements to make them compliant with the Code. As September 2017 rapidly approaches, there is every chance that a stand off between unions, employers and government will emerge.

Recommended Steps for Covered Entities

Building contractors and building industry participants and related entities (including entities involved in supply and transport in connection with building work) tendering for Commonwealth-funded or other work covered by the Code should:

- review any site-specific agreements or above-entitlement payments for Code compliance
- ensure all enterprise agreements operating after 31 August 2017 will be Code compliant
- strictly enforce right of entry laws
- review workplace polices to ensure Code compliance in respect of freedom of association.

The Code establishes an enforcement framework under which building industry participants may be excluded from tendering for or being awarded Commonwealth-funded building work if they are non-compliant.

WORK HEALTH AND SAFETY

OCCUPATIONAL VIOLENCE: WHAT YOU NEED TO DO NOW

Workplace violence remains a key focus for duty-holders across Australia and New Zealand, particularly in service-oriented facilities across the health, detention and government sectors.

It is an area of significant interest to regulators and you need to manage the risks associated with client or customer-related violence in your workplace, especially if your:

- organisation provides care to distressed, ill, fearful or incarcerated persons
- operations involve dealing with angry or resentful persons, those who harbour feelings of failure and/or those who do not have reasonable expectations of your role, organisation and what you can do to assist them.

The Context: Lessons From Across the Ditch

In December 2016, the New Zealand District Court found that client-initiated violence was a reasonably foreseeable hazard posed to employees of the Ministry for Social Development, which provides welfare support and related services from more than 300 offices nationwide.

On 1 September 2014, a disgruntled client with a grudge against employees in the Ministry's Ashburton offices shot at four workers with a shotgun, fatally injuring two of them.

WorkSafe New Zealand subsequently charged the Ministry for failing to take all reasonably practicable steps to ensure that its employees were not exposed to the risks posed by violent clients.

The Court identified that the risk of client-initiated violence was present in Ministry workplaces because its:

- clients were (in some cases), dependent on it for their livelihood
- employees had very little flexibility in determining client entitlements, including whether welfare benefits were payable in individual cases.

The Court found that it would have been practicable for the Ministry to have installed a physical barrier to restrict client access to the Ashburton employees.

The Ministry agreed with the Prosecutor that it could also have:

- introduced a zero tolerance policy regarding situational, client-initiated violence
- provided emergency response training to staff and contractors, such as security guards
- implemented a client risk profiling procedure and tailored client management plans
- implemented a process for effectively mining incident investigation data for purposes including evaluating the effectiveness of security measures and developing a security management plan.

What you Need to do

The similarities between the risks associated with the Ministry's workplaces and those of Australian service providers operating in the health care, social welfare and other governmental sectors are clear.

It is no wonder that similar control measures to those identified by the District Court have been identified in the guidance material published by Australian work health and safety regulators to assist duty-holders to manage workplace violence risks in our jurisdictions.

We expect that, although there may be differences between the steps that individual duty-holders can take to reduce occupational violence, the substance of the New Zealand decision is likely to find expression in the judgments of Australian courts given the similarities between our statutory schemes.

In those circumstances, your organisation needs to risk assess its operations in relation to the potential for workplace violence, particularly if you operate in the care, detention, health or governmental sectors.

Industries which involve access to drugs and/or cash should also be vigilant in relation to the development and implementation of robust systems to guard against verbal or physical violence against workers.

The Civil Aspect

Businesses should also be aware that occupational violence can give rise to civil claims for substantial damages, such as those sought by a telecommunications provider's ex-employee after a co-worker attempted to throw him off a roof at a training course.

The assailant and the victim were attending a course at premises in Gordon in 2001 when the former devised a plan to kill someone.

He subsequently randomly selected a co-worker as the victim and after, encouraging him to approach a balcony railing, sought to lift him and throw him off the balcony.

A colleague intervened and the intended murder was aborted, but the victim made a claim for damages which were awarded at first instance in the sum of AUD3,922,116.09.

The claimant was ultimately unsuccessful, but the business had to pursue the matter to the New South Wales Court of Appeal before the original judgment was over-turned.

2016 IN REVIEW: MANSLAUGHTER, RECKLESSNESS, HIGH FINES AND A GEYSER

2016 was a year of interesting developments in health and safety in Australia, particularly from the courts in sentencing decisions. In addition, the regulators have shown a willingness to pursue higher level criminal prosecution against individuals who fail to meet their personal obligations.

Manslaughter in South Australia

A South Australian director was convicted by a jury and sentenced after his principal driver died when the brakes on his company vehicle failed causing him to collide with a pole. The director was aware that the subject 14 tonne truck had been involved in a serious near-collision prior to the worker's death, and that three previous drivers had complained about the brakes before the incident.

The director was convicted and sentenced up to 10 years imprisonment.

While most motor vehicle incidents will be investigated by the police, this case also shows that many incidents straddle the boundary between mainstream crime and workplace safety. There are protocols in place between regulators and other authorities to share information, and organisations must consider all of the potential consequences of not complying with their health and safety responsibilities.

Recklessness in Queensland

The Queensland regulator has laid its first charges under the State's industrial safety recklessness provisions following the death of a 62 year-old worker who died in July 2014 after falling six metres from the roof of a shed that was being refurbished in the Sunshine Coast hinterland.

The roofer was neither wearing fall protection and nor using either of two on-site scissor lifts available on-site when the incident occurred.

Charges have been brought against the business and two of its directors, each of whom face fines of up to AUD600,000 and/or imprisonment for up to five years. The business could be fined up to AUD3,000,000 if it is convicted.

This follows other recent cases in which recklessness charges have been considered by regulators in New South Wales and Queensland.

Fine Increases in Victoria

2016 also saw the Victorian Parliament increase the maximum fines for recklessly breaching the Victoria Occupational Health and Safety Act 2004 to AUD3,033,400.

That is the highest possible maximum fine under any Australian industrial safety legislation, although it remains the case that charges relating to particularly heinous conduct can be brought under the general criminal laws, convictions which can result in gaol terms of up to 25 years.

2016 also saw a transport company fined AUD1,000,000 for the death of a worker who dies as a result of traffic management procedures not being complied with or enforced. This is the highest fine for a single offence in the history of Victorian safety legislation.

What Does This Mean?

While there still remains an inconsistent approach by regulators to enforcement of workplace incidents, and an inconsistency by the courts in various jurisdictions as to the application of penalties for serious offences, 2016 has seen a specific rise in serious charges arising from workplace incidents. This trend accords with the view of regulators and safety commentators that current penalties are nowhere near the maximums allowed by legislation and these need to increase to reflect the community's expectation that workers will be safe while they are work.

THE RIGHT FOR EMPLOYEES TO DISCONNECT - DEVELOPMENTS IN FRANCE AND CONSIDERATIONS FOR AUSTRALIAN EMPLOYERS

In Australia, there is increasing discussion regarding work-life balance and the intrusion of work into the private sphere through smart phones and other devices meaning that employees are always 'connected' to the office.

Whilst in Australia discussion continues, there has not been any appetite to address concerns regarding burn out and the argued detrimental impacts of being connected 24x7, the French legislature has attempted to address this issue by implementing a law that provides employees for the 'right to disconnect.'

The new legal requirements for employers mean that companies with at least 50 employees are required to negotiate with the unions an agreement providing for the modalities of the right for all employees 'to disconnect' in addition to means to control use of IT equipment. The aim is to comply with compulsory rest time and reduce the intrusion of work into private and family life. If no agreement can be reached with the unions, the employer must implement a policy regarding the 'right to disconnect'. This policy should be very practical and clear in relation to actions to be undertaken by the employer. This must include training programs to alert employees about 'reasonable' use of IT equipment outside working hours. The policy should also provide for means to control compliance with the 'right to disconnect', which could include no access to smartphone and emails outside working hours. The obligations do not apply to employees with fewer than 50 employees.

The law is also limited such that employees under a 'global remuneration structure' (a salary) for a certain number of days worked per year, the employer must inform the employee of the modalities of the 'right to disconnect'.

A Right to Disconnect in Australia? Unlikely

We think that it is highly unlikely that the Australian federal or state governments will intervene with legislation in the way that the French legislature has. However, with increasing concerns in Australia regarding mental health of employees, as well as complaints and concerns regarding bullying (see our earlier article) prudent employers will look to the connectedness of their employees in the office and the impact that this may be having on employees.

- Setting clear expectations with employees regarding out of hours work.
- Educating employees about the benefits of genuine 'downtime' and time away from electronic devices.
- Avoiding a culture of technological 'presenteeism', for example, by leaders avoiding sending midnight e-mails/texts, and rewarding output rather than activity.
- Having sound handover practices so employees can disconnect from their devices while on leave.

KEY FINANCIAL THRESHOLDS

FINANCIAL YEAR 2017/2018

National Minimum Wage
(before statutory superannuation)

2016/2017 Financial Year	2017/2018 Financial Year
AUD672.70 per week	AUD694.90 per week
AUD17.70 per hour	AUD18.29 per hour

Annual Free Casual Loading

2016/2017 Financial Year	2017/2018 Financial Year
25%	25%

High Income Threshold
(Unfair Dismissal Applications/Garuntee of Annual Income)

2016/2017 Financial Year	2017/2018 Financial Year
AUD138,900 per annum	AUD142,000 per annum

Maximum Compensation for Unfair Dismissal Applications

2016/2017 Financial Year	2017/2018 Financial Year
AUD69,450	AUD71,000

Annual Superannuation Guarantee Contribution

2016/2017 Financial Year	2017/2018 Financial Year
9.5%	9.5%
Maximum contribution base of AUD206,480 per annum or AUD51,620 per quarter	Maximum contribution base of AUD211,040 per annum or AUD52,760 per quarter

Tax Free Genuine Redundancy Payments

2016/2017 Financial Year	2017/2018 Financial Year
AUD9,936 base	AUD10,155 base
AUD4,969 per completed year of service	AUD5,078 per completed year of service

Taxation rate of ETP Payments

2016/2017 Financial Year	2017/2018 Financial Year
32%	32.5%

Maximum FW Act Penalties for corporation
(300 penalty units)

2016/2017 Financial Year	2017/2018 Financial Year
AUD54,000	AUD63,000

Global Employer Solutions - Webinars

Many businesses today operate on a global scale, employing staff across numerous countries, while others rely on an increasingly mobile global workforce.

It is critical for companies to understand the legal landscapes and cultural nuances specific to regions in which they operate in order to properly mitigate risk in cross-border transactions, ensure benefits compliance, and establish global personnel policies.

We hold monthly webinars where a panel of international lawyers discuss topical global workforce issues. Please email LEWSMarketing@klgates.com if you would like to be notified about these webinars.

CONTACTS

AUSTRALIAN CONTACTS

ALICE DEBOOS
Practice Area Leader - LEWS
Sydney
+61.2.9513.2464
alice.deboos@klgates.com

BRYAN BELLING
Partner
Sydney
+61.2.9513.2541
bryan.belling@klgates.com

DUNCAN FLETCHER
Partner
Perth
+61.8.9216.0923
duncan.fletcher@klgates.com

PAUL HARDMAN
Partner
Brisbane
+61.7.3233.1248
paul.hardman@klgates.com

CHRISTA LENARD
Partner
Sydney
+61.2.9513.2445
christa.lenard@klgates.com

PETER LUPSON
Partner
Melbourne
+61.3.9640.4342
peter.lupson@klgates.com

JOHN MAKRIS
Partner
Sydney
+61.2.9513.2564
john.makris@klgates.com

MICHAELA MOLONEY
Partner
Melbourne
+61.3.9640.4430
michaela.moloney@klgates.com

GERARD PHILLIPS
Partner
Sydney
+61.2.9513.2561
gerard.phillips@klgates.com

NICK RUSKIN
Partner
Melbourne
+61.3.9640.4431
nick.ruskin@klgates.com

MICHAEL STUTLEY
Partner
Perth
+61.8.9216.0967
michael.stutley@klgates.com

GLOBAL CONTACTS

ROSEMARY ALITO
Practice Area Leader - LEWS
Newark
(973) 848-4022
rosemary.alito@klgates.com

PAUL CALLEGARI
Partner
London
+44.(0).20.7360.8194
paul.callegari@klgates.com

Austin
Boston
Charleston
Charlotte
Chicago
Dallas
Fort Worth
Harrisburg
Houston
Los Angeles
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