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# Employment Essentials

**Sladen Legal's newsletter**

Edition 3



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# Welcome

In addition to its usual features, our latest edition of Employment Essentials covers the review into modern awards and the use of recording devices in the workplace.

We also answer your commonly asked question,

**“if an employee goes home sick part way through the work day, is their absence considered paid personal leave given they weren’t away for the entire day?”**

Thanks to everyone who has sent in a question, we will endeavour to answer these in coming newsletters. If you have a question or you would like to see a topic addressed in the newsletter, please contact us at [employmentessentials@sladen.com.au](mailto:employmentessentials@sladen.com.au)

You may have noticed that there have been several changes to our team in recent months. We have now welcomed back **Rohan Kux** from his overseas adventure; you can read more about Rohan in our team member section. We are also pleased to introduce two new additions to our team, **Sally Christou** and **Elizabeth Guarino**.



## NEWS

# Fast facts



- The Fair Work Commission (*Commission*) has released its annual report. There were **34,215 APPLICATIONS MADE TO THE COMMISSION IN 2015-16** (*which was only a small increase on the previous year*). Unfair dismissal claims remain the most common claims dealt with by the Commission, making up almost 43% of all applications made to the Commission. This is consistent with other years. There were 3,270 general protections applications made, which was slightly lower than last year (although these remain significant at almost 10% of all applications made).
- The Commission has also found that it has no jurisdiction to hear bullying applications from Victorian public sector employees because the State has not referred the necessary power to the Commonwealth.
- The Fair Work Ombudsman (*FWO*) made **43 ENFORCEABLE UNDERTAKINGS IN 2015-16**, with cafes and restaurants accounting for 20% of the workplace pacts signed during that period. Take-away food businesses accounted for a further 19% of the undertakings made.
- Research conducted by **SAFE WORK AUSTRALIA (SWA)** has shown that the rate of injury for shiftworkers is more than double the injury rate of other workers, see further: [\*A Comparison of Work-Related Injuries Among Shiftworkers and Non-Shiftworkers.\*](#)

- **SWA** has also published a [\*Guide to Managing Risks of Exposure to Carcinogens in the Workplace.\*](#) which provides information on the prevention of exposure to chemical carcinogens. Nearly 1 in every 3 workers in the construction, agricultural and manufacturing industries is exposed to at least 1 known carcinogen.
- An injured worker has recently been awarded around **\$1.3 MILLION IN AN ADVERSE ACTION CASE.**

## Fast facts continued...

- **SWA'S** notifiable fatalities monthly report for April 2016 (*published in September*) also reveals that there were **18 WORK-RELATED FATALITIES IN APRIL**. For the quarter commencing 1 January 2016, a total of **63 FATALITIES HAVE BEEN RECORDED – 55 OF THOSE WERE MALE**. In related news, **SWA'S 2015 WORK-RELATED TRAUMATIC INJURY FATALITIES** report stated 195 workers were killed in work-related incidents last year – this is the lowest fatality rate per population since reporting began. Almost half of these fatalities occurred within the transport, postal and warehousing and agriculture, forestry and fishing industries.
- Following the fatality of a non-worker, the first category 1 (“reckless conduct”) charges have been laid against an employer and two workers in New South Wales under the State’s harmonised Work Health and Safety Act.
- A new edition of Assessing Fitness to Drive for commercial and private vehicle drivers has commenced.
- **THE NATIONAL COUNCIL OF THE MARITIME UNION OF AUSTRALIA** has adopted a memorandum of understanding and memorandum of agreement, confirming its intention to merge with the Construction, Forestry, Mining and Energy Union (*CFMEU*) to form a maritime division. The Government has pledged to introduce a **“PUBLIC INTEREST TEST”** to enable the Registered Organisations Committee to take into account various factors when considering such amalgamations, including an organisation’s compliance with workplace laws.
- **THE COALITION** has established a new migrant workers taskforce with the predominant aim of improving protections for overseas workers.

## Modern Awards Update

As you may be aware, in 2014 the **FAIR WORK COMMISSION** (*Commission*) commenced a 4-yearly review into all modern awards. This review is mandated by the Fair Work Act 2009 (*Cth*).

The review has attracted a great deal of media attention, largely due to the Commission’s review into penalty rates in the hospitality and retail industries. The claim involved, amongst other things, a reduction in Sunday penalty rates. We are still awaiting the decision in this matter.

Due to the way the review is being conducted (*with an award review stage and a common issues stage*), employers should be aware that decisions are being handed down intermittently which may impact upon their businesses. For example, the Commission has varied the annual leave provisions in most modern awards to, amongst other things, enable the “cashing out” of annual leave for further information, refer to our snippet ([Commission alters modern awards to allow cashing out of annual leave](#)).

The Commission is also trialling the use of **“PLAIN ENGLISH”** drafting to assist employers and employees to better understand their obligations and entitlements in the workplace. The Pharmacy Industry Award 2010 is being used for the pilot, however, the Commission also plans to redraft the following four awards into plain language:

- **Clerks – Private Sector Award 2010**
- **General Retail Industry Award 2010**
- **Hospitality Industry (General) Award 2010**
- **Restaurant Industry Award 2010.**

The modern award review proceedings are set to continue until late 2017, shortly before the next 4-year review commences in 2018. We will continue to provide updates on the more significant aspects of the review process.

**THE COMMISSION** will also consider a claim to allow employers covered by the retail award to pay a “loaded” rate of pay in lieu of other penalties and overtime. The Commission has confirmed, however, it will not consider this claim until the penalty rates decision has been handed down.



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# Did you Miss?



Our recent HR Forum focussed on parental leave. If you missed the Forum, we have summarised below our tips to manage an employee on parental leave and your obligations:

- Familiarise yourself with your statutory obligations regarding parental leave (*these form part of the National Employment Standards (NES) – the basic entitlement is to 12 months' unpaid leave for an eligible employee*).
- Be aware that the NES provides employees on parental leave with a return to work guarantee, allowing them to return to effectively the same position they held before going on leave.
- Sit down with an employee before they go on leave to discuss key contacts and a handover of work, including important dates and milestones during their week.
- Consider agreeing on a time to get in touch with an employee on leave, so the employee's expectations and preferences concerning contact while on parental leave can be considered and managed while they are on leave.
- Ensure that a person is nominated to forward important information about work to the employee on leave (*e.g. structural changes to their role*).
- Maintain a good relationship with the employee on leave by inviting them to work events, training days or team building days.
- Develop useful policies that deal with such things as flexible work arrangements upon the employee's return to work from parental leave, any parental leave pay you may provide and requirements for taking parental leave (*e.g. notice requirements*).



# Workplace Wrap Up – Who's listening?

The use of recording devices in the workplace is restricted by various laws. Despite this, we are observing an increase in the number of occasions where one party covertly records a private conversation in the workplace and later seeks to rely upon it in legal proceedings. This article examines the rules restricting the use of recording devices in the workplace and how this has been applied by the **FAIR WORK COMMISSION** (Commission) and other courts to covert recordings made by employees and employers.

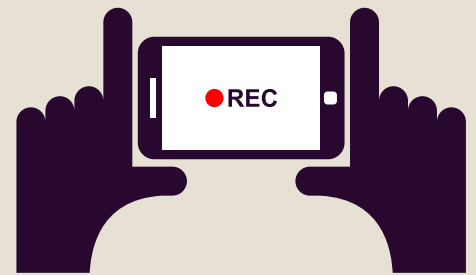


## Relevant Law

Unfortunately, as is often the case, the legislation governing the use of recording devices is inconsistent across the jurisdictions. Therefore, the lawfulness of covertly recording a meeting depends on the State or Territory where the workplace is located. In short:

- **FEDERAL LEGISLATION**, which applies in all States and Territories, prohibits a person listening to or recording communications over a telephone without the consent or knowledge of the parties to the communication. Accordingly, it is generally unlawful for an employer or employee to covertly record private telephone conversations.
- Both **VICTORIAN AND QUEENSLAND** legislation prohibits a person recording a private conversation unless that person is a party to the conversation. The legislation also imposes restrictions on the communication of or publishing a record or report of the recorded conversation.
- In the **AUSTRALIAN CAPITAL TERRITORY, SOUTH AUSTRALIA AND TASMANIA** it is unlawful for a person to record private conversations unless a principal party to the conversation consents and the recording is reasonably necessary for the protection of the lawful interests of that party. Employers in the ACT are also subject to legislation dealing specifically with workplace surveillance and must obtain permission from employees to perform covert surveillance in the workplace.

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## Workplace Wrap Up – Who's listening? continued...

- Legislation in **NEW SOUTH WALES, THE NORTHERN TERRITORY AND WESTERN AUSTRALIA** prohibits people from recording private conversations (*even if they are a party to the conversation*) without the consent of each of the parties to the conversation. Like in the ACT, New South Wales employers are also subject to legislation regarding surveillance in the workplace and must obtain an employee's consent to perform covert surveillance.

It is certainly best practice that before a conversation is recorded, the express or implied consent of all parties is obtained. However, as the above summary demonstrates, the absence of consent from all parties will not necessarily make a tape recording of a private conversation unlawful. Moreover, with most people now having access to technology that can record or video our conversations and activities, it is unsurprising that there has been a spate of recent cases which deals with the admissibility of covert recordings in legal proceedings.

## Use of Covert Recordings in Legal Proceedings



In determining whether to admit a covert recording into evidence, a court or tribunal will usually have regard to both the way the recording was made and the lawfulness of the recording. Evidence obtained improperly or even unlawfully may still be admitted into evidence if the desirability of admitting the evidence outweighs the undesirability of its admission having regard to the following factors:

- the probative value of the evidence, and
- the importance of the evidence in the proceeding, and
- the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding, and
- the gravity of the impropriety or contravention, and
- whether the impropriety or contravention was deliberate or reckless, and
- whether the impropriety or contravention was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights, and
- whether any other proceeding (*whether or not in a court*) has been or is likely to be taken in relation to the impropriety or contravention, and
- the difficulty (*if any*) of obtaining the evidence without impropriety or contravention of an Australian law.

This, of course, makes it tricky for those who make and seek to introduce covert recordings or those having to defend its introduction in a proceeding as each case will turn on its own facts. Although, in our experience, **THE COMMISSION** (*in particular*) tends to be highly critical of this type of evidence and often finds that the secret recordings themselves either give rise to a valid reason for dismissal or weigh heavily against an order for reinstatement.

For example, in one case the Commission said of secretly recording a private conversation that *"there could hardly be an act which strikes at the heart of the employment relationship, such as to shatter any chance of re-establishing the trust and confidence necessary to maintain that relationship, than the secret recording by an employee of conversations he or she has with management... I consider such an act to be well outside the normal working environment and contrary to the well understood necessity for trust and fidelity in the relationship between employee and employer."*

**THE FEDERAL COURT** has also recently ruled on the admissibility of secretly obtained footage obtained of an employee making "colourful" remarks about his employer as part of its subsequent disciplinary investigation. In that case,

**THE BOILERMAKER** (*who was also the site-based union representative*), was meeting with other representatives to inspect the site and discuss a traffic management plan for an upcoming protest. Whilst doing so, he also saw his old friend and they spoke together for around 15 minutes. He told his friend about his frustration with the company and made several offensive (*and racially abusive*) comments about the company's owners and management.

**THE BOILERMAKER'S CONVERSATION** was recorded, without his knowledge, by a nearby security guard hired by the company to monitor the site during the planned protest. This guard wore a lapel camera (*which he has was clearly visible to others and never concealed*) and had moved closer to and joined the conversation with the boilermaker after overhearing some of what had been said.

**THE BOILERMAKER** was then requested to participate in an investigation into his alleged misconduct and the company sought to use the footage obtained by the guard. The boilermaker successfully sought an injunction in the Federal Court, which ruled that the company could not use the recording or take disciplinary steps against the boilermaker in respect of the recording, including dismissal (*although that did not preclude the*

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## Workplace Wrap Up – Who's listening? continued...

company taking some form of disciplinary action against the boilermaker based on evidence/recollections of the guard). **JUSTICE MCKERRACHER** found there was an arguable case that the boilermaker was more than happy for the security guards to be hearing his remarks about the company, but that there was also an arguable case that the conversation was private and should not have been recorded. While declining to form a final view, his Honour granted the injunction.

*Thomson v Newland Food Company Pty Ltd [2013] FWC 8220, [185].*

## Conclusion and Tips for Employers

In the unlikely event that an employer believes it is appropriate to record a meeting or conversation, for example, because witnesses are not available to take notes; they should advise all participants to the conversation of the recording. A failure to do so may result in any recording being inadmissible later.

- Employers who wish to prohibit employees secretly recording conversations should:
- adapt its workplace policies to include a prohibition on covert recordings by employees;
- require employees to switch off their mobile phones during disciplinary and performance meetings; and
- permit employees to have a support person present to take notes for them during important discussions (*employers should also do the same*).

If an employee asks to record a meeting and the employer does not wish for it to be recorded, the employer should explicitly state that it does not consent to the recording. A failure to do so could give rise to an argument by the employee that there was implied consent to the recording. If an employee nevertheless records the conversation, this may be a disciplinary matter.

While most of us would be appalled to know that our private conversations had been secretly recorded, with the increase in smartphones and other technologies, employers should be aware that there is the potential for any conversations they have with employees to be recorded and this reinforces the importance of always acting in accordance with any company policies and procedures.



# Your Questions Answered

“If an employee goes home sick during the course of a day, is their absence considered paid personal leave given they weren't away for the entire day?”



There is no requirement under the **FAIR WORK ACT 2009** (*Cth*) (*Act*) for an employee to take paid personal/carer's leave or annual leave in whole day periods.

If an employee goes home sick during the day and the employee has accrued sufficient personal/carer's leave to cover their absence, then the employee is entitled to be paid for the remaining part of the day. That is, an employer may deduct the period of the absence from the employee's leave balance based on the time they went home. There are no minimum periods specified in the Act and personal/carer's leave can be taken for any number of hours.

Often employers will ask an employee to provide evidence of their illness (e.g. a medical certificate to explain the absence). However, this is less likely to be an issue in these instances as work colleagues can often verify the condition of the employee before leaving work.

**Do you have a question you would like answered?**

Email us and we'll select one to answer in the next edition of Employment Essentials.  
**EmploymentEssentials@sladen.com.au**

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# Legislative Updates

**THE COALITION** has reintroduced its controversial legislation aimed at preventing parents from **“DOUBLE DIPPING”** into government- and employer-funded paid parental leave schemes. Under the Fairer **PAID PARENTAL LEAVE BILL 2016**, a person who is entitled to employer-funded paid parental leave of less than 18 weeks will be able to claim from the government the residual number of weeks left to make up a maximum pay period of 18 weeks, e.g. if an employer provides 4 weeks’ paid parental leave, a parent will only be able to claim up to 14 weeks’ pay from the government. The Bill also removes the employer “paymaster” role. If passed, this legislation could commence as early as January.



## In other Federal legislative news:

- **THE COALITION’S FAIR WORK AMENDMENT** (*Respect for Emergency Services Volunteers*) **BILL 2016** has received Royal Assent. The legislation was enacted in response to the dispute in Victoria involving the CFA. The United Firefighters Union plans to challenge the constitutional validity of the legislation, which amends the Fair Work Act 2009 by:
  - altering the definition of **“UNLAWFUL TERMS”** to include an objectionable emergency management term that cannot be included in an enterprise agreement; and
  - providing that certain volunteer bodies can make submissions to the **FAIR WORK COMMISSION** in relation to enterprise agreements or workplace determinations that affect or could affect the body.
- **THE COALITION GOVERNMENT** will introduce legislation in 2017 to give **THE FAIR WORK OMBUDSMAN** (*FWO*) greater examination powers and which expressly prohibits employers from providing false and misleading information. **THE GOVERNMENT** also plans to increase the penalties relating to the deliberate and systematic underpayment of workers and failures to keep proper employment records.
  - Drafting is underway for legislation that adopts most of the recommendations made by the **HEYDON ROYAL COMMISSION** and is expected to be brought before the Parliament next year.
  - Plans have been unveiled to also increase the maximum penalties that apply to secondary boycotts to \$10 million. This a more than a ten-fold increase and has been included in an exposure draft of legislation to amend the **COMPETITION AND CONSUMER ACT 2010**.
- Legislation which softens the reach of provisional improvement notices (*PINs*) issued by health and safety representatives has been introduced into the Lower House. *PINs* issued pursuant to the **SEAFARERS** and **OTHER LEGISLATION AMENDMENT BILL 2016** will contain “recommendations” rather than “directions”.
  - **BOTH THE FAIR WORK** (*Registered Organisations*) **AMENDMENT BILL 2014** and the **BUILDING AND CONSTRUCTION INDUSTRY** (*Improving Productivity*) **BILL 2013** (*ABCC Bill*) finally passed the Senate. The Coalition’s Bill to establish a dedicated Registered Organisations Commission to monitor and regulate unions and employer organisations successfully passed through the Senate on 22 November 2016, after previously being rejected twice by Parliament, and the *ABCC Bill* passed on 30 November 2016.

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## Legislative Updates continued...

**THE QUEENSLAND PARLIAMENT** (as host jurisdiction) has introduced a new Bill aligning the **HEAVY VEHICLE NATIONAL LAW (HVNL)** with the model **WORK HEALTH AND SAFETY ACT**. The Bill introduces a positive duty on chain-of-responsibility parties and executive officers. Further proposed reforms have been released for public comment, including that employers could be issued with court injunctions requiring them to comply with a vehicle-related notice or to cease contravening the HVNL.

Coal-mining employers in Queensland will also be required to notify safety inspectors on each occasion dust concentrations in mines exceed prescribed limits under new anti-black lung regulations which will commence in January.

**TASMANIA** has introduced new mandatory sentencing laws for people who commit an offence resulting in serious bodily harm to ambulance officers, paramedics, nurses, midwives, child protection workers and correctional staff. **THE SENTENCING AMENDMENT (Assaults on Frontline Workers) BILL 2016** extends protections that already exist for police officers. Persons found assaulting frontline workers will be jailed for a minimum of 6 months.

In **VICTORIA**, the Government has introduced the **COMPENSATION LEGISLATION AMENDMENT BILL 2016** which ensure that age caps on workers' compensation payments are aligned to the new qualifying age for the Federal aged pension and which establishes the Accident Compensation Conciliation Service as a statutory body (so its governance arrangements are brought into line with best practice and ensuring the accountability of the workers' compensation dispute resolution process).



## Team Member Update

### Rohan Kux

I have now settled back into work after spending five months travelling around Europe taking my (rather extended) long service leave. Tactfully, we managed to avoid all of Melbourne's bleak winter whilst weaving our way through Germany, Italy, Spain, Portugal, France and the UK, enjoying equal parts of the beach and city life. My proposal to make this an annual event has so far received a frosty response from other members of the team.

The picture below was taken in a small surfing town in the south west coast of Portugal called Zambujeira do Mar, which has incredible coastal scenery, which you can walk along for miles from an elevated viewpoint.



I was also based in London for one month in August, where I was able to meet with some of our UK based clients in person and discuss how we can better assist with managing their operations in Australia. Although technology is capable of collapsing the sheer distance between our two countries, being able to discuss and break down issues in person is still hard to beat.

### SNIPPETS

Missed our Snippets – they can be accessed here:

**Too little too late - NORR issued after 14 day period is invalid**

**Commission further delays decision on penalty rates**

**Commission alters modern awards to allow cashing out of annual leave**

**Minimum wage to rise 2.4%**



## Key contacts

At Sladen Legal our team of experienced employment and safety lawyers will assist you to navigate the complexities of these areas of the law.



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