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Employment Essentials

Sladen Legal's newsletter

Edition 2

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Welcome

We hope you enjoyed the previous edition of Employment Essentials.

In this edition, as well as our usual features, we:

- review a decision warning employers to avoid "knee-jerk" reactions when considering whether or not an employee facing serious out-of-hours criminal offences should be terminated; and
- reflect on the issues raised in our first HR Forum for 2016, which focussed on personal liability in employment law, by summarising a recent case involving the accessorial liability provisions of the F*air Work Act 2009* (Cth) (**FW Act**) and a decision by the Fair Work Ombudsman (**FWO**) to initiate proceedings against an accounting firm (subsequent to our HR Forum).

We also answer your commonly asked question "do I have to give three warnings before I dismiss an underperforming worker?"

Fast Facts

- A sexually harassed worker has been awarded over $1.3 million in damages after the Victorian Supreme Court ruled that she had no work capacity and would never work again.

- The Fair Work Commission (**Commission**) has reported that the number of general protections claims involving dismissal increased by over 17% from 2879 in 2013-14 to 3382 in 2014-15. General protections claims not involving dismissal also grew significantly with a 12.5% increase from 2013-2014. However, unfair dismissals remain the preferred option, amounting to 42.8% of all applications made to the Commission last year.

- A new version of the Australian Dangerous Goods Code has been released. Either the new or the outgoing Code can be used until 1 January 2017 – after which time, only the new Code (edition 7.4) will apply.

Sladen Snippets are published online periodically, between editions of Employment Essentials, and contain (brief) important updates.

Sladen Snippets can be accessed via our website, tweeted on twitter and posted on LinkedIn, or you can subscribe directly to receive them in your inbox by emailing us at EmploymentEssentials@sladen.com.au

- The Road Safety Remuneration Tribunal has made an order establishing minimum payments and unpaid leave for owner-drivers involved in the distribution of goods destined for sale or hire by a supermarket chain or long distance operations in the private road transport industry. The order comes into force from 4 April 2016.

- A Safe Work Australia (**SWA**) report has identified that the four industry divisions with the highest frequency and incidence rates for serious workers' compensation claims involving a mental condition over the last 5 years were: public administration and safety (with firefighters, police and defence force members making up the occupations most likely to be affected); education and training; health care and social assistance; and transport, postal and warehousing. These four industries accounted for almost two thirds of all such claims.

- SWA has also amended its "Incident Notification Information Sheet" which provides, amongst other things, examples of the types of incidents that must be notified to a work health and safety regulator and which can be accessed at http://www.safeworkaustralia.gov.au/sites/SWA/about/Publications/Documents/690/Incident-Notification-Fact-Sheet-2015.pdf

- Federal government data has revealed that the gender pay gap remained steady over the past 12 months – showing that the full-time base pay for women in organisations with more than 100 employees remains 19.1% lower than men. This figure grows to 24% when bonuses, allowances and super are factored in. In the previous year the gaps were 19.9% and 24.7% respectively.

- Changes to the *Building Code 2013* have commenced, which require, amongst other things, that head contractors develop strategies and a fitness for work policy to help manage drug and alcohol issues, including mandatory drug and alcohol testing on certain Commonwealth-funded construction projects.

- According to data produced by SWA, as at 24 December 2015, 186 workers had been killed at work in 2015 – two fewer than in 2014. This is the lowest number since the report series began in 2003, however, sadly, there was a surge in worker fatality rates in November with Victoria recording 5 deaths in a nine-day period and 8 deaths in total – the worst month in the State for more than 10 years.

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

Your Questions Answered

We answer the commonly asked question,

"Do I have to give three warnings before I dismiss an underperforming worker?"

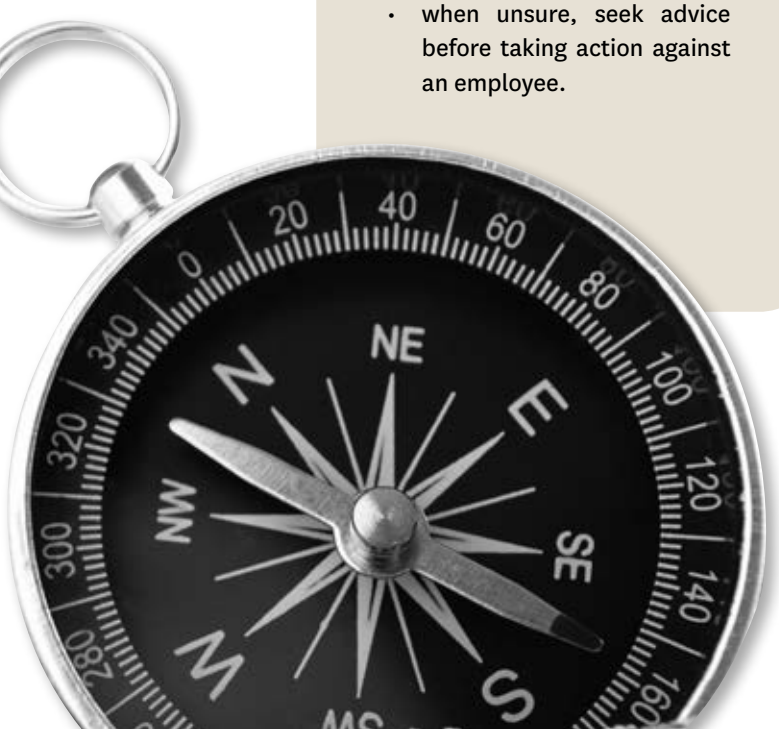
There is no general legal requirement that an employee must be given any particular number of warnings before being dismissed for poor performance. Critically, however, this general position can be varied by the terms of an applicable enterprise agreement or workplace policy, e.g. if an enterprise agreement provides for a strict disciplinary procedure such as the "three strikes rule" then the employer is obliged to comply with such procedural steps before terminating the employee's employment. A failure to do so could give rise to several types of legal claims.

Notwithstanding the fact that there is no generally applicable requirement for an employer to give an employee three warnings, warnings are relevant to a determination of whether a dismissal for unsatisfactory performance is unfair. That is, in determining whether a dismissal is "harsh, unjust or unreasonable" the Fair Work Commission (**Commission**) will take into account:

- whether an employee was warned about their underperformance;
- the appropriateness of the warning (e.g. whether the warning makes it clear that the employee's employment is at risk unless their performance improves and whether the warning identifies the relevant aspects of the employee's performance which is of concern to the employer); and
- the period of time between being warned about their underperformance and their dismissal (e.g was the employee afforded enough time to improve their performance).

Tips

- ensure workplace policies that deal with disciplinary procedures are useful and generally avoid prescriptive rules about warnings;
- have in place proper performance management processes and ensure managers are trained in them – ideally performance management will be a continuous, day to day process so that underperformance is recognised and dealt with early before formal disciplinary action is needed;
- do not include disciplinary procedures in contractual documentation;
- while it can be useful to have disciplinary guidelines in place to assist managers or HR – it is important that any guidelines allow sufficient flexibility;
- review the terms of your enterprise agreements, contracts and workplace policies (where applicable) before taking disciplinary action against an employee;
- when unsure, seek advice before taking action against an employee.



Workplace Wrap-Up

When things get personal – accessorial liability under the Fair Work Act

This article reviews a recent case where a penalty was imposed on a human resources manager for her role in a breach of the NES requirement to pay termination notice.

In recent times there has been an increase in cases where HR managers and other senior managers have been personally prosecuted for their involvement in employers' alleged breaches of the *Fair Work Act 2009* (Cth) (**FW Act**). These prosecutions are generally occurring under the accessorial liability provisions of the FW Act.

What are the accessorial liability provisions under the FW Act?

The "accessorial liability" provisions in the FW Act are extremely broad and apply to any person "involved" in a contravention of a civil remedy provision, such as a breach of the National Employment Standards (**NES**) (eg. failing to pay termination notice or redundancy pay or providing paid annual leave and sick leave), underpayment of minimum wages provided by an award or enterprise agreement, other breaches of an applicable award or enterprise agreement or a breach of the general protections provisions (adverse action claims). A person is "involved" in a contravention if they have:

- aided, abetted, counselled or procured the contravention;
- induced the contravention, whether by threats, promises or otherwise;
- been in any way, by act or omission, directly or indirectly, "knowingly concerned in" or party to the contravention; or
- conspired with others to effect the contravention.

The facts

- The employer was the Australian-arm of an international business that makes glass bottles.

- The employee commenced employment with the company in March 1996.
- In April 2009, the employee sustained a work-related injury and subsequently worked on modified duties.
- In early 2012, the employer sought expressions of interest for voluntary redundancies. The employee applied for a voluntary redundancy, but was unsuccessful.
- On 19 July 2012, WorkCover SA wrote to the employee telling him that it intended to make a decision that would clear the employer of its obligations to effectively provide suitable employment for which the worker was fit under the relevant South Australian workers' compensation laws.

- In August 2012, the employer again sought expressions of interest for voluntary redundancies. This time, the employee did not seek one.
- On 12 October 2012, the employer wrote to the employee advising him that it was terminating his employment (effective 12 November 2012) due to it being unable to provide suitable employment due to the employee's injury/capacity. The employer did not require the employee to work during the period of notice.
- The employee was effectively given 4 weeks and 3 days' notice of termination (which complied with the South Australian workers' compensation legislation to provide 28 days' notice of termination).
- The employee brought proceedings claiming that his employer had failed to provide him with the

required notice of termination, or pay in lieu thereof, required by the FW Act, relevantly in this case 5 weeks' notice.

- Because the employee continued to receive weekly payments, the amount he was effectively underpaid was $181.66.

Findings

In separate proceedings determining liability, Justice Simpson of the Federal Circuit Court rejected the employer's argument that notice was not required to be given because the employment contract had ended by a frustrating event (being the employee's incapacity). His Honour held that the minimum notice provisions contained in the FW Act applied and that the employer had failed to provide the employee with the notice required in breach of the FW Act. His Honour also found that the employer's HR manager was "involved" in the contravention.

In determining penalty, Justice Simpson found that the employer's conduct in terminating the employee's employment without proper notice or pay in lieu was "somewhat bizarre" and that the employer provided no satisfactory excuse for its breach.

In particular, his Honour criticised the employer's stance that it was excused from complying with the FW Act provisions because it had complied with the requirements of the workers' compensation legislation and said that what made the employer's case "even harder to understand" was that its HR manager admitted that she:

- was aware of the NES and that there are minimum notice requirements which vary depending on the length of service of the employee concerned; and
- had the authority to decide whether an employee, on termination, was entitled to four or five weeks' notice; but
- provided no explanation as to why she gave the employee only four weeks' notice rather than the required five.

Given these admissions, his Honour found that the HR manager's and the employer's failures could not be described as "procedural" but that their actions were deliberate. However, his Honour accepted the employer's submission that the HR manager's "involvement" in the breach was "incidental and inadvertent."

In determining an appropriate penalty to be imposed on the HR manager, his Honour further acknowledged that she was not "heavily" involved in the contravention but ordered her to pay a penalty of $1,020. The employer was also ordered to pay a penalty of $20,400. Both of these penalties were payable to the employee.

In circumstances where the employee suffered what was described by the court as a "miniscule" loss, it may be somewhat surprising to employers and HR managers alike that the penalties imposed were so high.

However, the court specifically noted that it was necessary that the penalties imposed reflected the objective seriousness of breaching the important protections created by the NES and to warn employers "of the need to comply with the legislation to the letter."

Tips for HR Managers

- **know your obligations under the FW Act and applicable modern awards or enterprise agreements;**

Ensure compliance with your obligations

– it is important to note that taking actions under direction of a more senior employee may not amount to a defence if such actions breach a workplace law; and

- **implement ways to monitor compliance – e.g. by performing HR health checks or audits.**

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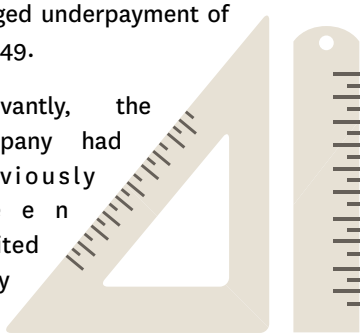
Fair Work Ombudsman targets Accountants

Following on from our recent HR Forum, the Fair Work Ombudsman (**FWO**) has begun prosecuting a Melbourne accounting firm for its alleged involvement in the underpayment of two Taiwanese backpackers working for one of its clients, who operated a fast-food outlet.

The accounting firm provided payroll services for its client.

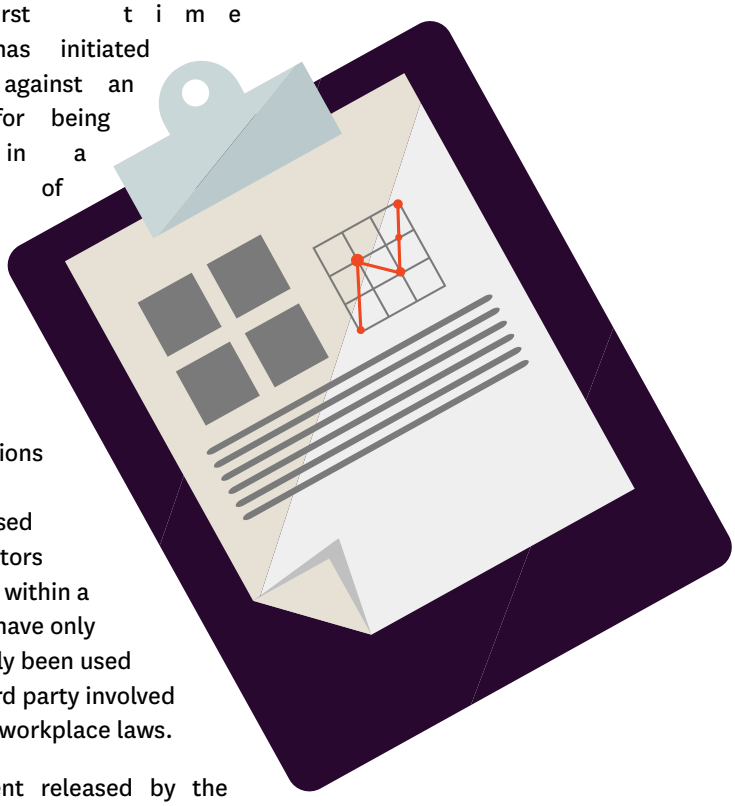
According to the FWO, the workers were paid a flat rate of $16.50 an hour, which was below the minimum hourly rate payable to the workers under the *Fast Food Industry Award 2010* (**Fast Food Award**). The workers were also not paid a casual loading or penalty rates when they worked on weekends, evenings and on public holidays. In just a little over 6 months, this resulted in an alleged underpayment of $9,549.



Relevantly, the company had previously been audited by the FWO as part of its 2014 National Hospitality Campaign and found to have underpaid its workers. At that time, the accounting firm had assisted the company to calculate and rectify the wage underpayments.

The FWO has brought proceedings against the accounting firm alleging that it provided its payroll services to the client knowing that the rates being paid were well below the minimum rates payable under the Fast Food Award.

This is the first time the FWO has initiated proceedings against an accountant for being "involved" in a contravention of the FW Act.

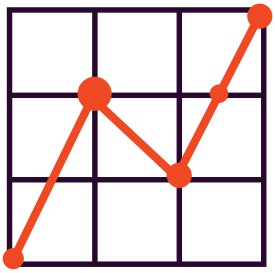


As discussed in the HR Forum, the accessorial liability provisions have been increasingly used to target directors and managers within a company but have only once previously been used to target a third party involved in a breach of workplace laws.

In a statement released by the Ombudsman, Natalie James, she indicated that the FWO had been concerned about the role of key advisors, like accountants and HR professionals, in "serious and deliberate contraventions" for some time. She further said that "in situations where we believe accountants and other professionals knowingly facilitate contraventions of workplace laws, we are prepared to hold them to account."

The accounting firm faces a potential penalty of up to $54,000 for each contravention.

The company and its operations manager are also being prosecuted in relation to the alleged breaches.

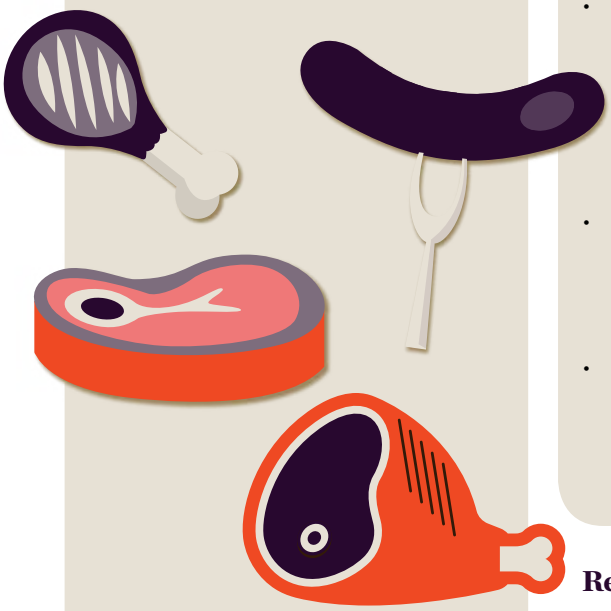


"Knee-jerk" dismissal over murder accessory charge unfair

The Fair Work Commission (**Commission**) has sent a warning to employers to avoid "knee-jerk" reactions when considering whether or not an employee facing serious out-of-hours criminal offences should be terminated and has ordered a small-business employer to pay compensation to an apprentice butcher it sacked when he was charged with being an accessory after the fact to murder.

The facts

- The employer operated a retail butcher store in country New South Wales.
- The dismissed employee was in his final year of his butcher's apprenticeship.



- Some weeks before the termination of his employment, the apprentice threatened aggression while at work (relevantly stating, in front of a co-worker, words to the effect that if "any of them touch me mates [he] would stab them").
- On 21 September 2014, the apprentice was charged with being an accessory after the fact to murder. The following morning, the apprentice's father contacted the manager at the retail butcher store to advise him that the apprentice would not be attending work because he was in custody. Later that evening, the apprentice's father also spoke to the company's director about the situation.
- On the evening of 24 September 2014, the apprentice was granted bail.
- On 25 September 2014, the company's director telephoned the apprentice's mother to discuss the situation and, amongst other things, raised concerns about the impact the apprentice's criminal charge might have on the business.
- On 26 September 2014, the company advised the apprentice's mother that the apprentice's employment was summarily terminated for the following reasons:
- other employees would resign if the apprentice remained employed and so the business would no longer be viable; and
- customers would boycott the butcher store if it continued to employ the apprentice and so its profitability would suffer.

Relevant Law

In accordance with the *Fair Work Act 2009* (Cth)(**FW Act**), a person has been "unfairly dismissed" if the Commission is satisfied that all of the following factors are met:

- the person has been dismissed;
- the dismissal was harsh, unjust or reasonable; and
- the dismissal was not consistent with the Small Business Fair Dismissal Code (**Code**); and
- the dismissal was not a case of genuine redundancy.

The employer submitted that the dismissal was not unfair because it was consistent with the Code. Relevantly, the Code provides that it is fair for a Small Business employer "to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal."

However, for this argument to succeed, the Commission must be satisfied that:

1. the employer held a belief that the employee's conduct was sufficiently serious to justify immediate dismissal; and
2. that the belief was based on reasonable grounds.

Critically, the second element incorporates the concept that the employer has carried out a reasonable investigation into the matter.

Findings

The Commission found that the apprentice's dismissal was inconsistent with the Code.

Senior Deputy President Jonathan Hamberger accepted that at the time of dismissal, the director believed the apprentice's actions were sufficiently serious to justify immediate dismissal (that is, the first element was established). However, his Honour held that the director did not have reasonable grounds on which to believe this because he had failed to conduct a reasonable investigation into the matter (that is, the second element was not established). The Commission found that the company had failed to properly scrutinise

claims that customers would boycott its business and/or employees would resign before terminating the worker.

Having determined that the dismissal was not consistent with the Code, his Honour considered whether the dismissal was harsh, unjust or unreasonable.

In determining whether a dismissal was harsh, unjust or unreasonable, the Commission takes into account a number of factors, which can be summarised as whether there was a valid reason for the dismissal and whether the employer followed a fair process in terminating the worker.

Ultimately, the Commission found that the apprentice's dismissal was harsh and unjust, but not unreasonable.

His Honour considered that the employer had failed to establish a connection between the apprentice's alleged criminal activity and his employment and found that his conduct fell short of what would be reasonable grounds on which to base a finding of serious misconduct. However, there was, because of the "peculiar combination" of circumstances of this case, a valid reason to terminate the apprentice's employment. However, the employer had failed to afford the apprentice with procedural fairness in effecting the dismissal (accordingly, entitling him to compensation).

His Honour was critical of the employer for its "knee-jerk reaction" and for failing to "put sufficient thought" into whether it could retain the apprentice and mitigate the risks it had identified relating to its customers and employees.

Tips for Employers

Terminating an employee for alleged criminal activity committed outside of the workplace can be risky and employers should be aware that:

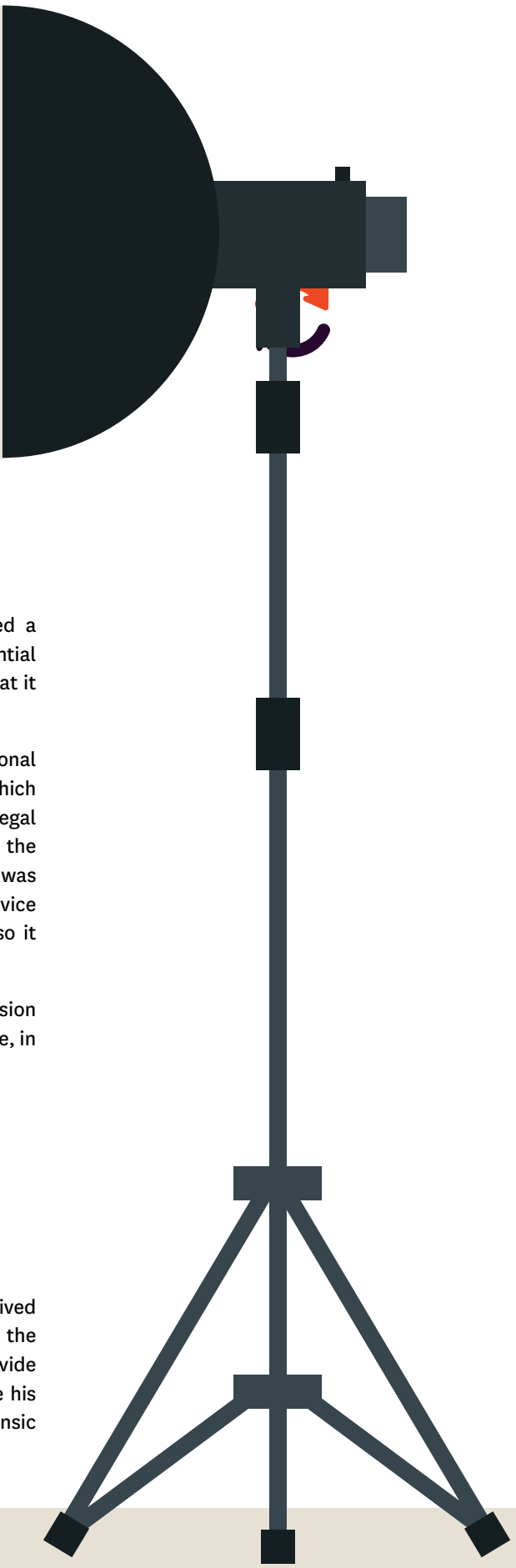
- **the starting point when it comes to out-of-hours conduct is that such conduct is generally a matter for the employee alone;**
- **there is no presumption that a criminal conviction alone is a valid reason for terminating an employee's employment; and**
- **there must be a relevant connection between the criminal activity and the employee's employment in order to do so.**

Accordingly, before terminating an employee's employment, an employer should:

- **consider whether there is a valid reason for the dismissal – where the reason the employer is relying on relates to out-of-hours conduct, the employer should be satisfied that there is a relevant connection between the conduct and the employee's employment; and**
- **ensure the employee is afforded procedural fairness – including conducting a reasonable investigation into the matter and giving the employee a proper opportunity to respond before the employer makes a final decision.**

News Flash

Legal Privilege Upheld for external bullying report



The Fair Work Commission (**Commission**) has refused a bid by an employee to access an employer's confidential bullying report commissioned by its lawyers, finding that it was protected by legal professional privilege.

In order for a document to be protected by legal professional privilege it is necessary that the dominant purpose for which it was created was for the purpose of the provision of legal advice. Deputy President Kovacic held that at the time the report in question was created, its "dominant purpose" was to enable the law firm to provide confidential legal advice to the employer about staff bullying allegations and so it attracted the privilege.

This was true despite the fact that the employer's decision to terminate the employee's employment appeared to be, in part, based on the report's findings.

The Commission said that the "use to which a document is put after it is brought into existence is immaterial".

His Honour also found that the employer had not waived privilege when it partially disclosed the contents of the report, stating that the employer had done so to provide the employee with an opportunity to respond and give his version of events rather than trying to achieve a "forensic advantage".

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Legislative Updates

Fair Work Act amendments

If you missed our Snippet, please take note that amendments to the *Fair Work Act 2009* (Cth) (**FW Act**) have largely been in effect since 27 November 2015. In summary, the amendments:

- provide that an employer must not refuse a request to extend unpaid parental leave unless the employer has first given the employee a reasonable opportunity to discuss their request;
- significantly alter the process for negotiating greenfields agreements – including by introducing a time limit for the negotiation period. If the parties are unable to agree within 6 months, the employer will be able to apply to the Fair Work Commission for a determination of the agreement (note to take advantage of this, the employer must have notified the union of the relevant negotiation period);
- remove the right to "strike first and talk later" by preventing protected industrial action from taking place before bargaining has commenced, or a majority support determination has been made; and
- enable the payment of interest to someone who makes a claim for unpaid monies previously paid to the Commonwealth (came into effect 1 January 2016).

In related news, the Government has introduced legislation containing the provisions previously removed from the above amending legislation. Those provisions dealt with union rights of entry, transfer of business rules and clarified the payment of annual leave loading on termination.

National model WHS laws

Changes to the national model work health and safety (**WHS**) laws have been foreshadowed, including amendments to clarify the reach of provisional improvement notices and increase penalties for WHS entry breaches – the exact nature of most of the amendments are not yet publically available.

Mirror WHS laws in Western Australia

Western Australia's proposed introduction of the mirror work health and safety (**WHS**) laws continues to falter, with the WA government announcing that following public consultation further modifications to the *Work Health and Safety Bill 2014* will need to be put to Cabinet. These are likely to include significant changes to the associated regulations.

New RTW and entry rules proposed for the ACT

The Territory Government has passed the *Workers Compensation Amendment Bill 2015* which requires, amongst other things, large employers and self-insurers to appoint a trained return-to-work (**RTW**) coordinator and allows an inspector to enter a workplace without notifying the employer if doing so would defeat the purpose of the entry. These entry powers will commence as soon as the Bill receives notification. Other changes will not be in effect for three months.

Watch this Space: Long Service Leave & Prohibitions on Workers Discussing Pay

The Senate has resolved to look into portable long service leave schemes and has asked the Education and Employment References Committee

to consider such things as how the schemes might be structured, the role of the federal government in establishing them and the effect of varying state long service leave entitlements on such a scheme.

There is also a Senate inquiry into a bill introduced by the Greens which is seeking to remove legal prohibitions on workers discussing their own pay. The Greens submit that permitting workers to discuss their pay will reduce the gender pay gap. The bill provides that any term of a modern award, enterprise agreement or contract that prohibits an employee from disclosing their remuneration (e.g. to other co-workers) would be unenforceable and prevents an employer taking adverse action against an employee who discusses their own pay. The inquiry is due to report in May 2016.

The Victorian Government has also announced a review of Victoria's long service leave arrangements.

A discussion paper has been released for public comment and can be accessed at:

http://economicdevelopment.vic.gov.au/corporate-governance/legislation-and-regulation/long-service-leave-act-1992

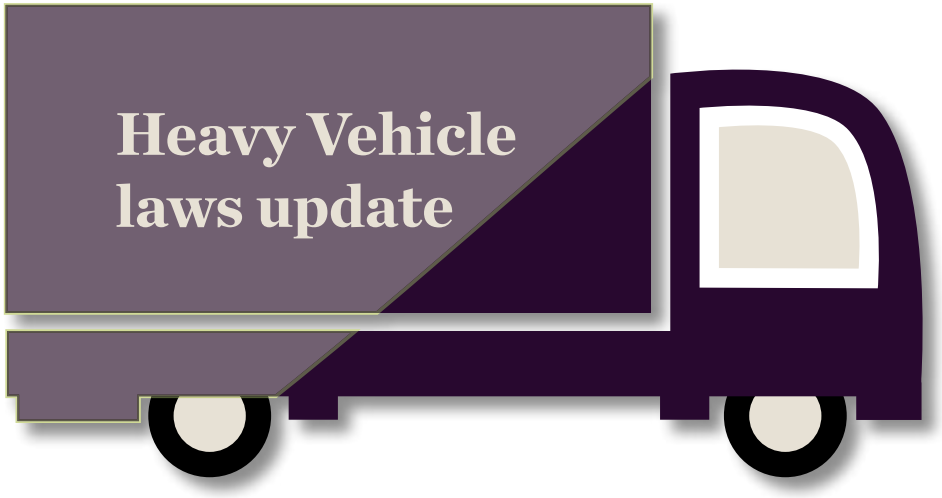
Comments are due by 1 April 2016.

"Payment for Visa" Activities

The federal government has introduced legislation cracking down on "payment for visa" activities. Amongst other things, the *Migration Amendment (Charging for a Migration Outcome) Bill 2015* creates new criminal and civil penalties for people who:

- ask for;
- offer; or
- provide payment or other benefits, in exchange for certain "sponsorship-related events".

Heavy Vehicle laws update



The Heavy Vehicle National Law (**HVNL**) may be better aligned with the model WHS Act following an agreement by Australia's transport ministers to replace a number of existing prescriptive obligations with primary duties of care for each chain-of-responsibility participant and to increase maximum penalties.

Currently, some major offences under the HVNL attract a maximum penalty of $100,000, which is significantly less than the $3 million penalties available under the model WHS Act.

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Did you know ...

As well as offering the usual full service, Sladen Legal offer a "general employment advice" facility which essentially operates like a help line allowing clients to phone or email the team and obtain high level advice

in real time

as it is needed.

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> “Don’t let what you cannot do interfere with what you can do”
>
> John R Wooden

Many of you will know Jane McKay by her former name Jane O’Brien – Jane changed her name following her marriage to Rob late last year.

Jane hails from Adelaide and like most from the region, has an appreciation for fine food and wine. In her spare time, Jane runs a number of social media accounts with her husband, Rob, which promote food, fashion, lifestyle and events in Melbourne. When she is not eating, shopping or attached to her phone updating her Instagram accounts, Jane is plane spotting (yes, she has a love for commercial aviation), travelling or watching NBA.

Jane started her professional career as a tax lawyer (having completed Law and Commerce (Accounting) degrees at the University of Adelaide) but quickly found the lure of employment law too attractive to resist. Jane is now a Senior Associate in the employment, IR and OHS practice area. She enjoys working closely with her clients to understand their business and goals, enabling her to provide targeted service and advice across a wide variety of industries including retail, healthcare, transport and logistics and professional services. She regularly assists HR professionals to understand complex legal issues and empower them to be more effective within their organisations.

Jane is experienced in providing a full-service offering to her clients, administering a broad range of legal advice on the end-to-end processes required by most organisations. This includes terms and conditions of employment, redundancies and restructuring, termination of employment processes, employee entitlements, post-employment obligations and employment disputes.

Jane McKay
Senior Associate

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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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