

## SECRETARIAT

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## COMMITTEE OF MANAGEMENT

### President

Kaye Smith

### Vice President

Justin Ward

### Immediate Past President

Craig Stevens

### Secretary

Rodger Prince

### Treasurer

Glen Seidel

### Committee Members

Kylie Dunn  
Trevor Evans  
Commissioner Peter Hampton  
Sharaze Pentland  
Sandra Dann  
Darryl Anthony

**Note:** The views of the contributors are not necessarily those of IRSSA

### Patron:

**Hon Trevor Olsson, LL.B, AO MBE,  
GCSJ, RFD, ED**

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## PRESIDENT'S MESSAGE

Dear Members

This is my first report to you as President of the Society. I feel incredibly honoured and privileged to hold this position, supported by our new Vice President, Justin Ward. I am extremely proud of our history and standing, and look forward to the exciting changes and challenges that come with such an important role.

I remain grateful for the support, experience and counsel of our Immediate Past President, Craig Stevens. Craig's leadership has ensured the Society remains well respected and well regarded at both a State and National level. I hope to continue to represent the Society and its interests as well as he has done.

I remain fortunate to be assisted by our hard working Committee Members, who each bring a passion for industrial relations, a variety of skills, and a good sense of humour to our meetings. That we can meet together from such different backgrounds, get things done and have fun is truly remarkable. Thank you for continuing to dedicate your personal time to the functioning of the Society. I congratulate all Committee Members on their re-appointment, with a particular thank you to Glen Seidel who continues in the role of Treasurer and does a fantastic job.

It is important to note that we have begun this financial year with a new chapter for the history of the Society. At our Special General Meeting, we approved the Society trading under the name of "the Australian Labour and Employment Relations Association of South Australia", to better reflect the broadening of issues in the field of industrial relations. Since then, we have established a sub-committee which will look at transitioning to a more prominent use of this trading name through changes to our logo, marketing and website. We will report further about that in the coming months.

August 2016 also brought our Annual Patrons' Breakfast to members. A special thank you to those life members who were able to attend and no doubt enjoyed discussion by Equal Opportunity Commissioner, Dr Niki Vincent.

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## PRESIDENT'S MESSAGE (CONT)

We are thankful to the Commissioner for her time and for sharing so openly her views and directions for the Equal Opportunity Commission over the next 5 years.

We are also grateful to Professor Andrew Stewart who delivered a session on *'Uber and Out? Regulating Work In the Gig Economy'*. The Professor is always sure to draw a crowd and did not disappoint on this occasion. We thank Andrew for his continuing support of the Association.

I am also very excited to announce to members the appointment of a new Life Member, Commissioner Peter Hampton. It goes without saying that Peter Hampton's long, meritorious and unwavering support for the interest of the Society, including at a National level, is deserving of this recognition. We are extremely fortunate to claim Peter as our own, and remain thankful for his influence, direction and contribution to the affairs of our Society.

At Committee, we are attending to a number of new matters, that all tell us 2017 will be an exciting year:

1. We are planning a full day State convention initially intended for May, but which may be pushed to June 2017. This will enable members, if they wish, to attend the New South Wales IRS event that is ordinarily held in May 2017. The intended speakers will be of our usual high calibre, including from the South Australian Employment Tribunal and SafeWork SA, addressing topics of interest to members and practitioners. Sessions will include Advocacy in the Commission and enterprise bargaining. This will be a day not to be missed, details coming soon.
2. Networking Christmas drinks and nibbles will be held on 12 December. This will give members the chance to catch up, before the year ends, in a relaxed environment ahead of the festive season.
3. We are discussing the opportunity to engage in a mentor/mentee program for those looking to engage more practically in the field of industrial relations, as undergraduates or looking to focus more specifically in IR. This will be an exciting new initiative that will ensure the continuous interest in this specialist area.

As always, we look forward to seeing all of you at our events and thank you for your support.

**Kaye Smith, President IRSSA**

### DID YOU KNOW?????

The South Australian Law Society has confirmed that all IRSSA seminars are recognised as CPD activities for the purposes of Practising Certificate requirements in South Australia. Legal practitioners in South Australia can claim 1 CPD unit for an active hour at an IRSSA seminar.



IRSSA is now calling for articles for its quarterly newsletter. Articles can be on any topical industrial relations matter and typically should be approximately 400 -500 words. If you are interested in submitting an article please contact Justin Ward, IRSSA Newsletter Editor. Justin's email is [justin.ward@sa.gov.au](mailto:justin.ward@sa.gov.au).

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## **Fair Work Commission - Award modernisation—4 yearly review**

Under section 156 of the *Fair Work Act 2009* (Cth) the Fair Work Commission is required to review all modern awards every four years. All material in relation to the 4 yearly review, including a detailed timetable, is available on the Commission's website. As part of the 4 yearly review, the Commission is redrafting all modern awards to make them more consistent and easier for employers and employees to use. A dedicated page of each of the awards under review has been created.

### **Penalty rates**

As a part of the 4 yearly review of modern awards, the Commission is dealing with a number of applications to vary penalty rates in various awards in the hospitality and retail sectors. The final hearings in the Penalty rates case were held on 11–15 April and final submissions in this matter were received on 21 June 2016.

The Full Bench issued a Statement and directions [2016 FWCFB 6460] on 8 September 2016 concerning two outstanding issues. The Full Bench sought some clarification from Ai Group regarding evidence in relation to the *Fast Food Award 2010*. The second concerned the status of the various claims before the Full Bench. Further submissions were received from parties in response to this statement.

On 28 September 2016 the Full Bench updated and republished three statistical reports [2016 FWCFB 6940]. The Full Bench proposed to take this material into consideration of the various matters before it. Parties were then invited to make submissions on the statistical reports.

### **Annual leave**

In decisions in June 2015 and September 2015 the Commission determined model clauses in respect of:

- excessive annual leave;
- cashing out of annual leave;
- electronic funds transfer and paid annual leave; and
- granting leave in advance.

In May 2016 the Full Bench focused on whether it was appropriate to vary particular modern awards to insert the model terms. All interested parties were provided with an opportunity to make submissions and adduce evidence. The Full Bench proposed to vary a number of modern awards to insert the various annual leave model terms determined in the June 2015 and September 2015 decisions.

The May 2016 decision also proposed some plain language redrafting of three of the model terms:

- excessive annual leave;
- cashing out of annual leave; and
- granting leave in advance.

Interested parties were provided with an opportunity to notify the Commission if they wished to contest the Full Bench's provisional views in respect of any of these matters. No notifications were received so as a result the Full Bench gave effect to the provisionally expressed views. In June 2016 draft determinations were published on the Commission website.

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Final determinations varying modern awards were issued on 29 July 2016. A number of awards, including the maritime awards remained outstanding. These awards were considered in a decision issued on 22 September 2016 [[2016 FWCFB 6836](#)]. Draft determinations were published with the decision.

## TOIL

The July 2015 Award Flexibility decision dealt with a number of claims to vary certain modern awards in respect of time off in lieu of payment for overtime (TOIL) and make up time. Interested parties were provided with the opportunity to make submissions in relation to content of provisional model TOIL term and the proposition that model TOIL term be inserted in 113 modern awards.

The model TOIL term was then redrafted to reflect plain language principles. On 8 July 2016 the Full Bench issued a decision [[2016 FWCFB 4258](#)] which finalised the plain language model TOIL term. A subsequent decision of 11 July 2016 varied 44 awards to include the model TOIL term [[2016 FWCFB 4579](#)]. After a period of consultation for awards with specific issues, a further decision was issued on 31 August 2016 [[2016 FWCFB 6178](#)] varying another 8 awards to include the model TOIL term.

## Casual & part-time employment

Hearings were conducting from 15–19 August for the common claims in the part-time and casual employment matters. Approximately 35 witnesses were cross examined and closing submissions were heard at these hearings. Final submissions were filed in August and September 2016.

Directions hearings for award specific claims and the SDA claim were conducted in August and September 2016. These matters are yet to be concluded.

The hearing of the National Disability Insurance Scheme issue affecting employers and employees under the *Social, Community, Home Care and Disability Services Award 2010*, the *Aged Care Award 2010* and the *Nurses Award 2010* remains outstanding. Oral closing submissions will be heard on 28 November 2016 in relation to this matter.

## Payment of wages

This common issue matter deals with several issues in relation to payment of wages:

- timing of payment of wages;
- timing of payment on termination of employment;
- penalty for late payment of wages, and
- annual leave loading.

Conciliation conferences were held on 27 July 2016 in relation to these issues. Submissions regarding the annual leave loading issue were filed in August 2016. Draft determinations regarding the timing of payment on termination were published on 8 September 2016 and parties were invited to make submissions.

These matters were listed for hearing on 21 October 2016.

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## **Family & domestic violence clause**

Submissions and expert evidence were filed in relation to the Family and domestic violence matter in September. These matters are being heard in November and December 2016.

## **National Training Wage**

The Commission issued statements on 6 July 2016 [[2016 FWC 4495](#)]. Submissions were filed on 28 July 2016 in response to the statement.

## **Plain Language redrafting**

Further to the Plain language modern award pilot (the Pilot) undertaken by the Commission to produce a plain language draft of the Pharmacy Industry Award 2010 (the Pharmacy Industry Award), the Commission has adopted a plain language drafting approach to new provisions developed as part of the 4 yearly review of modern awards.

The Commission has treated award-specific terms in a different way to general terms which have broader application across modern awards during the Pilot and since its conclusion. A Full Bench has been constituted to oversee the Commission's plain language re-drafting of:

- standard provisions that have arisen from previous test cases and are generally replicated in the same form across most awards;
- common provisions that consist of clauses and notes generated during the 4 yearly review of modern awards and inserted into most exposure drafts such as machinery type provisions and simple leave provisions, and
- award-specific provisions for a further four modern awards that have been selected on the basis of levels of award reliance, particularly among small businesses. The Clerks—Private Sector Award 2010 will be the first of the four awards to be re-drafted.

The Commission has sought submissions from interested persons on re-drafted standard provisions and will soon be consulting on Guidelines for plain language re-drafting of modern awards prepared by Mr Eamonn Moran PSM QC on behalf of the Commission. Consultation on the award-specific provisions of the Pharmacy Industry Award is ongoing and will begin for the first of the four awards selected for re-drafting by the end of 2016.

## **Enterprise award modernisation**

During the quarter seven new modern enterprise awards were issued:

- Australian Broadcasting Corporation Enterprise Award 2016 [MA000147]
- Australian Bureau of Statistics (Interviewers) Enterprise Award 2016 [MA000143]
- Australian Federal Police Enterprise Award 2016 [MA000142]
- Australian Government Industry Award 2016 [MA000153]

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- Australian Nuclear Science and Technology Organisation (ANSTO) Enterprise Award 2016 [MA000144]
  - CSIRO Enterprise Award 2016 [MA000148]
  - Northern Territory Public Sector Enterprise Award 2016 [MA000151]

## Review of transitional instruments

In the Annual Wage Review 2015–16 decision, the Expert Panel for annual wage reviews proposed that a review of the transitional instruments must be dealt with as part of annual wage reviews and that it must be the subject of a preliminary hearing for the Annual Wage Review 2016–17. The review will consider the status and effect of transitional instruments, including whether they have been, or can be, terminated by the Commission.

The preliminary hearing was conducted on Monday 24 October 2016 in Sydney.

In the lead up to the hearing a Statement issued on Monday 19 September, a background paper covering the review of transitional instruments was issued.

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## IRSSA SEMINAR 26 OCTOBER 2016

### Professor Andrew Stewart - 'Uber and Out? Regulating Work in the Gig Economy'

IRSSA recently hosted Professor Andrew Stewart, who presented on regulating work in the gig economy.

#### Gig work – an overview

Professor Stewart started by explaining that work in the gig economy involves the use of online platforms to facilitate provision of services. Examples include Uber and Airtasker (household services and errands). He then mentioned that some commentators, such as the International Labour Organisation's Valerio De Stefano, separates this work into two forms – **crowdwork** and **work on demand via apps**, under which the demand and supply of working activities is matched online or via mobile apps (De Stefano's paper on the gig economy can be accessed here: [ILO Gig Economy Paper](#)).

Work in the gig economy potentially involves a paradigm shift in employment relations, with workers being responsible for more responsibilities and risks involving them being engaged via an online platform to perform set tasks, with no continued relationship between the parties. The Productivity Commission noted in its 2016 report '*Digital disruption: What do governments need to do?*' the emergence of this new business model, explaining that whilst these arrangements "can help improve productivity by more accurately matching and scaling resources to the needs of the business", they do however "change the nature of the employment relationship.' The research paper can be accessed here: <http://www.pc.gov.au/research/completed/digital-disruption>

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With this change in the nature of the employment relationship, Professor Stewart flagged concerns about how many of these workers in Australia will be protected in respect of a number of different rights and entitlements: i.e. labour relations and collective bargaining, superannuation, unemployment benefits, sick leave, and so on.

### **Uber as an example of gig work**

Professor Stewart then spoke about Uber as a relatively limited, unique example for analysis of the gig economy, as, in his words, Uber adopts a “reverse contracting model” with Uber drivers. Rather than contracting drivers to provide services to Uber, the arrangement involves a relationship whereby a driver hires Uber to provide the networking and payment services for the driver’s business. This is designed to maximise the autonomy of drivers, however Uber also reserves considerable power: it has the power to determine whether payment should be made against any given journey, the power to change the contract at any time, the power to deactivate drivers, and so on.

Uber has been subject to legal challenges around the world on the basis that its drivers should actually be classed as employees. In the UK, the London Central Employment Tribunal recently held (See <http://www.uphd.org/wp-content/uploads/2016/11/Aslam-and-Farrar-v-Uber-Judgement.pdf> ) that UK Uber drivers are employees.

Professor Stewart explained that we are likely to see a test case in Australia in the near future, but it is not clear how it will turn out.

Of further interest is that fact that whilst there is debate of whether Uber drivers are self-employed contractors or employees, it is well established in Australian law that taxi drivers are neither. They are ‘bailees’ in a joint venture with the taxi company. The term 'bailee' is derived from the word 'bailment', which is the legal term for the kind of arrangement between a Driver and a Permit Holder (Operator) for use of a taxi or taxi plates. The essence of bailment is that possession is transferred from the bailor (Permit Holder) and is voluntarily accepted by the bailee (Driver), but ownership is not.

Taxi drivers are individual small businesses. By entering into a bailment agreement drivers agree to terms with Permit Holders to use their licensed taxi/plates for a period of time, and in exchange, pay a percentage of the earnings from that period to the Permit Holder.

This has been confirmed by the Full Federal Court (see *FC of T v. De Luxe Red and Yellow Cabs Co-operative (Trading) Society Ltd and Ors* (1998) 82 FCR 507) and the Full Bench of the Fair Work Commission (*James Voros v Alan Dick* [2013] FWCFB 9339). This legal principle, which means that taxi drivers are not entitled to the benefits of employees, is problematic in Stewart’s view, but very difficult to change.

### **Applicability of Australian legal frameworks to gig workers**

- For a gig worker to be eligible for the minimum National Employment Standards under the *Fair Work Act 2009* (Cth), they must first be considered to be an employee. Professor Stewart notes that some judges are very strong on the need to look to the reality of the enterprise. On this basis, in the case of Uber it is clear that Uber drivers are working for Uber. However, other courts take more conventional views, and require detailed analysis of the multiple indicia for distinguishing a contractor from an employee - on which basis Uber would possibly be able to avoid a finding that its drivers were employees with careful contract drafting;

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- WHS laws apply to any worker, including contractors. However, it is debatable about whether section 19(1) (the primary duty of care provision) of the *Work Health and Safety Act 2012*(SA) applies to gig workers, as a person conducting a business or undertaking (PCBU) only has a duty to workers that are at work “in the business or undertaking”. Professor Stewart suggests that it is not clear whether the gig worker is working “in the business” of the intermediary;
  - In respect of discrimination laws, Professor Stewart explained that most anti-discrimination laws are unlikely to apply for technical reasons. So where ratings systems are, for example, biased on sexist or racist grounds, current laws are not well-tailored to apply;
  - In the case of superannuation, Professor Stewart said that there is very little chance that gig workers have any right to superannuation contributions unless they are employees; and
  - Professor Stewart suggested that workers compensation regimes are not likely to apply to gig workers, although they are broader in some Australian states than others.

### **The future in Australia of the regulation of gig workers**

Professor Stewart noted that the superannuation system in Australia is the biggest lever for changing the regulation of gig workers - as the main reason for the system is to alleviate future costs of providing Government services to elderly Australians. As such, there is a clear incentive for the Government to capture gig workers.

### **Some of the regulatory options mentioned by Professor Stewart**

- Recognising a new category of worker – the ‘independent worker’ or ‘platform worker’;
- Regulating “workers” instead of “employees”, however this would involve considerable amendments to some systems, such as workers compensation and superannuation; and
- A more radical option - completely reimagining the focus of our existing systems – away from relationships of employment and towards social benefits/protection. This could be achieved through the provision of a universal basic income, an idea floated by the Productivity Commission in its 2016 report ‘*Digital disruption: What do governments need to do?*’- <http://www.pc.gov.au/research/completed/digital-disruption>