

IRS

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NEWSLETTER

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SECRETARIAT

PO Box 2062
Port Adelaide DC, SA, 5015
Email: irssa@adam.com.au
Internet: www.irssa.asn.au
Phone: 1300 918 207
Fax: 08 8125 5631

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PRESIDENT'S MESSAGE

Dear colleagues,

I am pleased to advise that the rules for the Australian Labour and Employment Relations Association (ALERA) have finally been approved by representatives of the constituent State and Territory bodies, as have various procedural documents. The development of the rules for the renamed national body - which required unanimous approval - was a substantial exercise.

Anyone who has had anything to do with inter-jurisdictional negotiations would be unsurprised by how significant the task was and correspondingly, the end result is. I recognise the valuable efforts of our Peter Hampton and Sandra Dann. Their hard work has in no small measure transformed ALERA from a quite amateur, somewhat loose national affiliation into a well-organised peak body with a professional organisational structure, governance and outlook. It would be naïve to think that there will not continue to be State and Territory parochialism from time-to-time, however I hope that this can be kept to a minimum and that ALERA can continue to evolve into a significant presence in Australian industrial and employee relations.

Best wishes,

Craig Stevens
President IRSSA

IRSSA 2013 Annual Breakfast Event

SAVE THE DATE

From 2013 the IRSSA will be holding an annual breakfast event, with this year's theme being "the Celebration of Women in Industrial Relations and Human Resources". The Committee of Management invite members and non-members to save the date for Wednesday 7 August 2013.

DATE: Wednesday 7 August 2013

TIME: 7.45 am registration for 8.00 am start

VENUE: To be advised

We are pleased to advise our host for the breakfast will be Deputy President Bartel, Fair Work Commission, with other notable speakers to address attendees on the topic of conflict management in the workplace. Save the date!

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.

NEW BOOK RELEASE

"Preventing and Managing Workplace Bullying and Harassment: A Risk Management Approach"

By DR MOIRA JENKINS

Preventing and managing workplace bullying, including sexual harassment, is not just a 'feel good' exercise, or something organisations should only do when they are faced with a complaint. It is part of core business. Employers and managers have a duty of care as part of work health and safety laws to prevent hazards that might contribute to workplace injuries. This book shows you how to meet these responsibilities using practical, sensible strategies based on a framework of:

- understanding what bullying and sexual harassment really mean;
- using a risk management approach to identify issues in the workplace;
- implementing procedures to control risk; and
- taking action when things go wrong.

A range of tools and tips are included throughout the text to help the reader get started quickly. Stemming from a solid and extensive research base and with reference to up-to-date legislative requirements, *Preventing and Managing Workplace Bullying and Harassment* is essential reading for anyone in business today. It can be purchased via the following link:

www.australianacademicpress.com.au/books/details/233/Preventing_and_Managing_Workplace_Bullying_and_Harassment_A_Risk_Management_Approach

About the Author

Dr Moira Jenkins began her career as a clinical psychologist eventually shifting her focus to occupational health psychology. She is currently director at Aboto, a South Australian based HR consultancy she founded in 2005. Moira has worked as a mediator and conciliator, and was the Manager of the Complaint Handling Section of the South Australian Equal Opportunity Commission before entering private practice. She has postgraduate qualifications in mediation and conflict management and has undertaken conciliation training with the Australian Human Rights and Equal Opportunity Commission. Moira regularly facilitates workshops and master classes, and presents throughout Australia on different aspects of preventing and addressing workplace bullying and harassment, and has had a number of publications in academic and professional journals. She still works part time in the area of clinical psychology.

'Permanent casual employees' - a new category of employee?

BY JULIA SWIFT, SENIOR ASSOCIATE, COWELL CLARKE

Up until very recently, if an employer employed a casual employee to regularly work full time hours over a long period of time, any employment lawyer would inevitably advise the employer that that employee is potentially not a *genuine* casual employee but is in fact a full time employee.

However, a recent decision of the Full Bench of the Fair Work Commission, *Telum Civil (Qld) Pty Ltd v CFMEU* [2013] FWCFB 2434 ("the Telum Case"), has fundamentally changed the way employers are able to employ casual employees and the traditional position referred to above.

Prior to the Telum Case, in determining whether or not an employee was a casual employee under common law the Courts would consider the substance of the employment relationship rather than simply accepting the employer's assertion that the employee was employed and paid on a casual basis.

The factors which the courts have traditionally accepted as indicating a permanent employment relationship include:

- a regular pattern of hours or full-time hours;
- an ongoing relationship instead of an episodic one;
- the work patterns being chosen by the employer and the employee not generally being able to elect whether or not to work; and
- the employer requiring notice prior to the employee being absent.

One could therefore be relatively confident that if an employee had worked at least 38 hours per week over 12 months or more, that employee would not be considered to be a genuine casual employee and would instead be considered to be a full time employee.

In the Telum Case, however, the Full Bench held that this common law definition of 'casual employee' does not apply to the definition of casual employment under the *Fair Work Act 2009* ("the FW Act").

Rather than considering the factors referred to above, the Full Bench decided that the determination of who is a casual employee under the FW Act depends simply on whether or not the employee falls within the definition of 'casual' under the applicable modern award or enterprise agreement.

Modern awards and enterprise agreements define 'casual employment' according to the same core criteria (with some minor differences in wording) as follows:

- the employee is engaged as a casual employee; and
- the employee is paid a casual loading.

According to the Full Bench, the above definition will be satisfied if the employee is expressly engaged as a 'casual' (i.e. the offer of employment and/or employment contract describes them as a casual) and the employee is paid a casual loading.

If those two elements are satisfied, the employee will be considered to be a casual employee for the purposes of the FW Act regardless of the otherwise permanent characteristics of the employment relationship.

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In the Telum Case this meant that employees who regularly worked full time hours without variation, had consistent start and finish times and who were expected to attend work each working day without being specifically directed to were considered to be casual employees under the FW Act.

Arguably, the Telum Case potentially gives rise to a new category of employee under the FW Act which could be referred to as 'permanent casual employees'. Such a category of employee would be characterised as employees who are called 'casuals' and paid a casual loading but who in most other respects is indistinguishable from a full time employee.

At this stage it does not appear that the Telum Case has been appealed. Given its departure from the traditional position regarding casuals, however, it is certainly possible that the decision could be overturned later and therefore caution should be exercised in relying on the decision.

MANAGING YOUNGER WORKERS

BY SHARAZE PENTLAND, IRSSA COMMITTEE MEMBER

As a best practice employer, it is important that you play a responsible role with younger workers as they are a vulnerable part of the workforce. There are varying factors that you do need to take into account when managing younger workers.

Here is a list of guidelines that may be useful for best practice employers:

- identify, recognise and be supportive of the particular needs young workers, including their study requirements;
- ensure you comply with applicable legislation and industrial instruments (awards or agreements) that apply to the young workers;
- provide information to young workers as to expectations of them in a workplace policy and similar in a tailored manner;
- be particularly aware and have detailed policies in relation to the use of social media by employees. Clearly explain the possible consequences of inappropriate use of social media in a manner that might amount to misconduct (either in or outside of working hours);
- allocate tasks that are appropriate, keeping in mind young workers' lack of experience and their physical and mental development. Expect mistakes and plan for these so consequences are not serious;
- don't assume a young worker understands workplace risks, even if the hazards are visible;
- provide extra, ongoing supervision with significant feedback on performance;

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- consider a mentoring system where a more experienced employee acts as a role model and source of confidential advice for young workers;
 - consider adopting a policy that requires management to ensure workers under 18 years of age are accompanied by a parent, guardian or responsible adult during discussions about alleged unsatisfactory performance or misconduct;
 - keep in mind the age of your employees when booking a venue or event. If a venue is providing alcohol, ensure that the employees under 18 are clearly identified;
 - ensure you keep track of employees' dates of birth so you ensure that they are paid at the correct rate; and
 - lead by example and inspire the younger worker to strive to be the best employee they can. It is worth making the investment in time to help guide your younger workforce, they could be your next future manager of your business.

NEW BOOK RELEASE

"Australian Wage Policy: Infancy and Adolescence"

BY KEITH HANCOCK

\$77.00 | 2013 | Paperback | 978-1-922064-47-9 | 750 pp

FREE | 2013 | Ebook (PDF) | 978-1-922064-46-2 | 750 pp

His Hon. Judge Peter McCusker, in launching the book:

"A work of this nature has until now been generally regarded as too great a challenge, too inscrutable a matter to deal with in any comprehensive way, too mysterious in its many parts to give adhesion or structure to. All those things have a real element of truth. But the challenge has now been brilliantly overcome by one of the very few scholars who could possibly do it using in all cases primary sources. As such a great gap in our history has been filled."

The advent of industrial regulation by tribunal came close to the turn of the century. Wages boards began in Victoria in 1896 and courts of arbitration in 1900.

The first day of the new century was also the first day of the Commonwealth of Australia, endowed with a Parliament that was empowered to institute its chosen models of conciliation and arbitration for the prevention and settlement of interstate industrial disputes.

Continues over

This book is a study of the operation of conciliation and arbitration, especially by the Commonwealth Court of Conciliation and Arbitration, from the inception of the system until World War II. It is not, however, a general history of conciliation and arbitration.

It does not, for example, deal with the successes and failures of the tribunals in preventing strikes and lockouts; or with the manifold legal issues to which the system gave rise, unless they affected significantly the tribunals' exercise of their power to fix wages and conditions.

Rather, it is about fixing the terms of employment; and it attempts to set the tribunals' performance in an economic context. It is about 'wage policy', if the term is interpreted broadly enough to include both prescribed wages and other factors that affect the cost of labour, including working hours and leave.

Phone orders:

Call (08) 8313 1721 and pay over the phone with Visa or Mastercard.

Online orders:

<http://www.adelaide.edu.au/press/titles/wage-policy/>