



MAY 2018 NEWSLETTER

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PRESIDENT'S MESSAGE

Dear Members

This Newsletter reports on some new developments affecting workplaces and is the first time we have showcased our 'new look' logo. The logo construction has been a long-standing agenda item for the Committee and we finally landed on a style of branding that we trust will meet with member approval. This logo aligns us more closely with the national affiliate, ALERA.

On 26 June 2018 ALERA SA will host and deliver a seminar with the Hon Rob Lucas MLC, Treasurer and the Minister responsible for State Industrial Relations matters. Mr Lucas will be giving an overview of State Industrial Relations issues, including the new Labour Hire Licensing regime, and speak to the Government's program for change. Details will be provided to members in the next week but please save the date for the seminar to be held at the Police Club from 3:30 pm.

ALERA National Conference – Barossa Valley

This year will see our Association deliver the National Conference in the beautiful Barossa Valley. Fliers encouraging members to 'Save the Date' have been sent, and we have been busy assembling the agenda programme for the event that will soon be distributed. At this stage plans are well advanced to see a program that begins on Thursday, 18 October 2018 (a welcome dinner), with a full day of speakers on the Friday, with dinner and entertainment by 'Orange Whip' in the evening. Skills based workshops are proposed for the Saturday morning allowing for attendees locally and from interstate to enjoy the offerings in the region over the weekend.

You can download a brief flier outlining the scope of the conference [here](#), covering topics that include:

- The future of enterprise bargaining and wage setting
- Gender equality
- Digital disruption and the impact of the 'Gig economy' on the employment law landscape
- Decisions of the Fair Work Commission and Emerging Trends
- Regulatory Update
- Visa Work Update
- Workshop and mock proceedings conducted by members of the Fair Work Commission

PRESIDENT'S MESSAGE CONTINUED

Association's Uni SA Prize

I extend congratulations on behalf of the Association to Zi Shan Chan who had the highest grade point average in the undergraduate Human Resource Management course with the University of South Australia (School of Management). Zi has been presented with a certificate, book voucher and cash (totalling \$300) and a year's membership to our Association. Congratulations Zi and we look forward to seeing you at future events.

Oral History

Last month our Patron and Life Members were invited to participate in an initiative that will capture the history and unique experiences of our Association. This was a professionally organised production that will allow video to be uploaded to our website, and accessible by the public. We are extremely grateful for the time and the attention given by Commissioner Peter Hampton to this initiative, which will ensure the origins of our Association are remembered for all time. It is an initiative that is intended to be mirrored by ALERA (our National representative) at a Federal level. Further details will follow closer to the release of the material.

Other matters of interest

- The Industrial Relations Society of NSW is holding its annual convention in Terrigal on 25-27 May 2018. Details are available on their website (<https://irsnsw.org.au/event-2632482>).
- Our new logo will now be reproduced on banners and promotional material.

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

DID YOU KNOW?????

The South Australian Law Society has confirmed that all ALERA SA 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 ALERA SA seminar.

WHAT NEXT FOR THE #METOO MOVEMENT? THE US BLUEPRINT FOR RESOLUTION

BY PETER HEALEY, COWELL CLARKE COMMERCIAL LAWYERS¹

The #metoo movement is shining a bright light on systemic issue of sexual harassment in the workplace, not only in the US where the movement began but now across the world.

The hashtag (which appears to have partially evolved into the #timesup movement also) is a form of 'clicktivism' in that it has used social media to advance an important social cause. It has allowed countless many to stand up, say enough is enough and demand changes.

But clicktivism and demands for change can only go so far. At some point change actually needs to be mandated and implemented. A number of US states have heard the call and proposed or already passed legislation to tackle systemic sexual harassment issues.

The epicentre of the #metoo and #timesup movement has been the US so it seems fitting to consider whether the solutions recently proposed in the US are appropriate for Australia.

States such as California, New Jersey, New York, Pennsylvania and Washington have introduced largely similar measures. These can be summarised as follows:

1. If employers wish to participate in competitive tendering processes for Government matters then those employers must certify they have a sexual harassment policy.
2. A Government Department has been commissioned with the task of preparing a model sexual harassment prevention policy and sexual harassment training. Employers must either adopt these models as they are or implement a superior policy.
3. Confidentiality and non-disclosure clauses will be prohibited in connection with sexual harassment matters, unless such a clause is required by the complainant.

The rationale for the first two measures is obviously to ensure that appropriate processes are in place for employers. The rationale for the third measure is that by allowing confidentiality clauses this may foster a culture of cover-up and allow these systemic issues to continue.

The Government tendering requirement (point 1 above) could have some merit in Australia. It is not too dissimilar to measures introduced in the construction industry in Australia whereby seeking Government tenders or projects imposes requirements to comply with certain industrial matters. The *Code for the Tendering and Performance of Building Work 2016* imposes obligations in relation to Workplace Relations Management Plans, compliance with laws such as work health and safety and migration, and drug/alcohol management issues.

The preparation of model policies (point 2 above) could also have merit in Australia. It is not too dissimilar to the Bullying Guides published by SafeWork Australia. Of course one of the tensions with the Bullying Guides that came out during the consultation process was whether these publications should be Codes of Practice (which have particular significance under WHS laws) or Guides. There were also differing views as to what

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constitutes bullying and the best way to address bullying issues. If there were to be a model policy on dealing with sexual harassment then one would expect some of these questions/issues would arise again.

The confidentiality and non-disclosure clause prohibition (point 3 above) would be controversial (as it has been in the US already). Proponents of the #metoo and #timesup causes will recognise the importance in preventing the silencing of victims of sexual harassment. Silencing can foster a culture of cover-up rather than addressing the issue.

For alleged perpetrators, employers and their legal representatives, such a prohibition would potentially remove any impetus to resolve sexual harassment claims if the circumstances of the allegations can still be published or communicated even if there is a settlement reached.

A foreseeable consequence of such a prohibition is there may be less settlements of sexual harassment claims and more trials.

Some might think that such a prohibition ought not be introduced because persons ought to be able to agree as to the disposal of their legal rights as they see fit.

The confidentiality and non-disclosure clause prohibition is one that if it were to be seriously considered in Australia would need to carefully weigh up the benefits and the difficulties.

The time for thinking about the necessary changes is now and for Australia there is merit in considering whether the US measures would be effective here to address this issue.

SA PASSES LABOUR HIRE LICENSING BILL

**BY KAYE SMITH
PRESIDENT ALERA SA**

South Australia has passed the [Labour Hire Licensing Act 2017](#), joining Queensland, which introduced its *Labour Hire Licensing Act 2017* in September 2017. This follows a critical focus on the industry, led in part by a Four Corners investigation which uncovered rampant exploitation in the food production industry, mostly affecting labour hire workers.

Section 6 of the Act defines labour hire services as “a person (a provider) who provides labour hire services in the course of conducting a business.”

Labour hire services are defined as “engagement arrangements” generally understood to mean ‘on-hire’ but which will capture other engagement arrangements. Under this broad definition, engagement arrangements may include, by way of example:

- Host employer arrangements;
- A corporate health service which supplies a nurse to deliver vaccinations to a business;
- Temping agencies; and
- Joint venture participants.

The Act commenced operation on 1 March 2018. However, there is a transitional period to allow industry time to be fully compliant. This means that all labour hire providers must be licensed by 1 September 2018.

Applications must be lodged by 1 August 2018, to allow sufficient time to process applications and ensure that providers are compliant from 1 September 2018.

Businesses must be aware that:

- It is unlawful to operate as a labour hire provider without a licence; and
- It is unlawful for a person to enter into “an arrangement” with another person for labour hire services when they do not hold a licence.
 - Maximum penalty: up to \$140,000 for individuals or 3 years imprisonment and \$400,000 for a body corporate.
- It is unlawful to advertise or hold out that a person can provide labour hire services without a licence
 - Maximum penalty: \$30,000;
- It is unlawful to enter into an arrangement for the supply of a worker to avoid an obligation under the Act (referred to as an avoidance arrangement)
 - Maximum penalty: up to \$140,000 for individuals or 3 years imprisonment and \$400,000 for a body corporate
- Further, there is a positive obligation to report another person who has supplied them with a worker in circumstances where the supply of the worker is an avoidance arrangement.
 - Maximum penalty: up to \$30,000.
- Individuals will be tested as to whether they are a “fit and proper person” to hold a licence, including whether they are honest, have integrity and professionalism.
- Licence holders are required to report annually to the Commission. Reports are to contain a number of matters including (but not limited to) the number of workers supplied by the holder of the licence and a description of the arrangements entered into.
- Licence holders are to pay an annual fee to the Commission as prescribed by the Regulations (yet to be drafted).
- License holders may only be absent from the licence holder’s business for a period of 30 days. In their absence they must appoint an individual who is a responsible person as a substitute responsible person for the licence.
- If a licence holder is absent from the business for a period of more than 30 days the Commissioner may, on application appoint another individual as a substitute responsible person.

What does this mean for businesses?

- An urgent review should be conducted of all service provision contracts;
- An assessment must be made of the requirements to be met by businesses and labour hire employers in time for September 2018;
- Penalties for breach are at the higher end of the scale; and
- Employers who supply labour hire services will be subjected to stringent reporting requirements and annual fees.

If you have any queries about labour hire licensing please telephone Consumer and Business Services on 8204 8512.

4 YEARLY REVIEW OF MODERN AWARDS – UPDATE PREPARED BY THE FAIR WORK COMMISSION

In 2014 the Fair Work Commission commenced the first 4 yearly review of modern awards (the Review) in accordance with section 156 of the *Fair Work Act 2009*.

The Review commenced with an initial stage to determine the scope of the Review. The initial stage has been followed by an award stage and a common issues stage.

Award Stage

The Award stage of the Review deals with award specific issues in each of the 122 modern awards.

The awards are divided into [four groups](#) for the purposes of the review. The Commission has published Exposure Drafts for each award and parties have been provided opportunities to make submissions on each exposure draft.

Information on these matters can be accessed on the [Awards under review](#) page on the Commission's website.

Decisions have been issued relating to each group of awards, and a number of exposure drafts are close to being finalised.

Common issues

Common issues are proposals for significant variation or change across the award system.

There have been a number of major decisions issued relating to common issues as part of the 4 yearly review of modern awards. Some of these major decisions are summarised below.

Family and Domestic Violence Clause

A Full Bench rejected an ACTU claim for ten days paid family and domestic violence leave, however decided to provide five days' unpaid leave per annum to all award covered employees (including casuals) experiencing family and domestic violence. A copy of the decision can be accessed on the [Family and domestic violence clause](#) page on the Commission's website.

Interested parties will be provided an opportunity to make submissions on the final form of a model term that will be inserted into modern awards.

Family Friendly Work Arrangements

The Full Bench rejected a claim by the ACTU relating to 'Family Friendly Working Hours for Parents and Carers', however, the Full Bench went on to reach a provisional view that modern awards should be varied to incorporate a model term to facilitate flexible working arrangements for parents and carers. A copy of the decision can be accessed on the [Family friendly work arrangements](#) page on the Commission's website.

Interested parties will be provided with an opportunity to make further submissions in this matter.

Penalty Rates

On 23 February 2017 a Full Bench issued [a decision about penalty rates](#). They determined that a number of penalty rates would be varied in some retail and hospitality awards as follows:

- Sunday penalty rates will be reduced in the *Hospitality Industry (General) Award 2010*; the *Fast Food Industry Award 2010*; the *General Retail Industry Award 2010*; and the *Pharmacy Industry Award 2010*.
- Public holiday penalty rates will be reduced in the *Hospitality Industry (General) Award 2010*; the *Fast Food Industry Award 2010*; the *Restaurant Industry Award 2010*; the *General Retail Industry Award 2010*; and the *Pharmacy Industry Award 2010*.
- Start and finish times for night shift penalties will be varied in the *Fast Food Industry Award 2010* and the *Restaurant Industry Award 2010*.

A number of award specific issues related to penalty rates remain outstanding. Information regarding these award specific matters can be accessed on the [Award specific matters](#) page on the Commission's website.

Casual and part-time employment

The Full Bench handed down [a decision about casual and part-time employment](#) in July 2017. A [summary](#) of the decision was also published on the same day.

The decision deals with a number of applications to vary provisions concerning casual employment and part-time employment in a number of modern awards, in particular claims related to casual conversion and minimum engagement provisions.

Annual leave

In decisions in [June](#) and [September](#) 2015 the Commission determined model clauses in respect of the following issues related to annual leave:

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- Excessive annual leave
 - Cashing out of annual leave
 - Electronic funds transfer and paid annual leave
 - Granting leave in advance.

A review of [shutdown provisions](#) in modern awards is ongoing.

[Modern award fact sheets](#) have been published on the Commission's website in relation to key issues determined by the annual leave Full Bench.

Plain language

As part of the review the Commission is re-drafting a number of awards in plain language. A Full Bench of the Commission is dealing with plain language re-drafting of award-specific clauses and other matters that affect most or multiple modern awards.

Information on the plain language matter can be accessed on the [Plain language page](#) on the Commission's website.

Award flexibility

A Full Bench has issued a number of decisions dealing with time off in lieu (TOIL) of payment of overtime and make-up time. The [first decision](#) was issued in August 2015. A [summary](#) of this decision was also published.

Provisional model terms were issued by the Full Bench and interested parties were provided with opportunities to make submissions on these terms, along with some individual award specific matters.

Documents related to this matter can be accessed on the [Award flexibility page](#) on the Commission's website.

Other common issues

A number of other common issues are being dealt with as part of the review. Information about these matters is available on the Commission's website:

- [Abandonment of employment](#)
- [Annualised salaries](#)
- [Apprentice conditions](#)
- [Blood donor leave](#)
- [National Training Wage](#)
- [Overtime for casuals](#)
- [Payment of wages](#)
- [Public holidays](#)
- [Transitional provisions.](#)

FAMILY AND DOMESTIC VIOLENCE – 4 YEARLY REVIEW OF MODERN AWARDS - AM2015/1 [2018] FWCFB 1691

BY SANDRA DANN, ALERA SA COMMITTEE MEMBER

On 26 March 2018 a summary of the decision on this matter was published by the Fair Work Commission (FWC).

In its introduction, the FWC summarised the nature and incidence of domestic and family violence, stating clearly that ‘it is an issue that impacts on workplaces and which requires specific action.’

In 2017 a FWC Full Bench rejected an ACTU claim for paid family and domestic violence leave and cited reasons for the FWC preliminary view that all employees should have access to unpaid family and domestic violence leave and its intention to consider whether employees should be able to access personal/carer’s leave for the purpose of taking family and domestic violence leave.

The Full Bench proposed five days’ unpaid leave per annum to all employees (Including casuals) experiencing family and domestic violence. This is in recognition that an employee will often need to do something to deal with the impact of family and domestic violence within working hours.

The findings:

1. Family and domestic violence has a significant adverse impact on those who experience such violence;
2. While men can, and do, experience family and domestic violence, such violence is a gendered phenomenon that disproportionately affects women;
3. The effects of family and domestic violence are far reaching and extend beyond the individual directly affected; to their families and the general community;
4. Family and domestic violence has a real and tangible impact on employees and employers in the workplace;
5. Employees who experience family and domestic violence often face financial difficulties as a result, such as relocation costs or becoming a sole parent; and may suffer economic harm as a result of disruption to workplace participation.

The Full Bench also adopted the conclusion in the Majority Decision that ‘the circumstances faced by employees who experience family and domestic violence require a special response’, and stated that family and domestic violence is a community issue and requires a community response.

Parties had the opportunity to discuss the proposed amount of leave with the Full Bench concluding that five days’ unpaid leave per annum was appropriate.

The unpaid leave entitlement:

- will apply to all employees (including casuals);
- will be available in full at the commencement of each 12 month period rather than accruing progressively during a year of service;
- will not accumulate from year to year; and

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- will be available in full to part-time and casual employees (i.e. not pro-rated).

The Full Bench decided not to adopt the proposal advanced by the Employer parties ie to require employees to access any paid personal/carers' leave entitlement which in their view introduced an unwarranted degree of complexity into the award term.

The Full Bench was satisfied that the model term in relation to family and domestic violence is a term 'about leave' within the meaning of section 139(1) (h) of the *Fair Work Act 2009* (Cth).

The Full Bench exempted from this general finding the Australian Government Industry Award 2016, the Road Transport and Distribution Award 2010 and the Road Transport (Long Distance Operations) Award 2010, which are to be the subject of separate consideration.

The drafting of the model term will be completed soon with interested parties able to comment on its final form, only insofar as the model term reflects the outcome of the Decision, not as an opportunity to re-litigate matters that have been determined.

It is not yet known how widely the proposed five days unpaid leave will be utilised or its impact on business.

The Commission proposes to revisit this issue in June 2021, after the model term has been in operation for three years. At that time they will consider whether any changes are needed to the unpaid leave model term, and whether to allow access to personal/carer's leave. At that time the FWC will also revisit the question of whether provisions should be made for paid family and domestic violence leave.'