STEVENS & ASSOCIATES LAWYERS

MARCH 2019

A VISION IN THE WORKPLACE

This edition includes:

- The new model annualised wage clauses to be inserted into 19 modern awards by the Fair Work Commission's (**FWC**);
- Victoria Police's reasoning for refusing a detective's flexible working arrangement request rejected by the FWC;
- Insight into the WorkPac class action and how claims may be offset by new regulations introduced by the federal government; and
- Aldi enterprise agreement applications rejected by the Full Federal Court due to non-compliance with strict language requirements in their bargaining notices.

A heavy burden on employers – FWC to introduce annualised hours clause

New model annualised wage clauses have been proposed for 19 modern awards covering industries including health, hospitality, mining, banking and legal services, as part of the Fair Work Commission's (**FWC**) 4 yearly review of modern awards. The new clauses, initially drafted in February 2018, have been contested by employer groups, who claim they will impose a, "*major red-tape burden*", on employers which is "*inconsistent with many of the existing annualised salary clauses in awards*".

The clauses will impose new record-keeping and reconciliation requirements, requiring employers to keep records of the hours worked by employees on annualised wage arrangements. Employers will then be required to conduct annual reconciliations, instead of a general review, to ensure that employees are reconciled for any shortfalls between what they have received as an annualised salary and what they would receive under their relevant modern award.

The FWC has drafted four variant model clauses.

One of the proposed model clauses will apply to awards covering employees who work highly irregular and variable hours or a considerable number of ordinary hours that would otherwise attract penalty rates. Employees covered under these awards will have the option of entering into an annualised wage arrangement "by written agreement".

Another of the proposed model clauses will not require a written agreement and will apply to awards in industries with typically stable hours.

An additional model clause incorporates a minimum 25% pay increase above the award rate for non-managerial employees within the restaurant and hospitality awards. In response to concerns expressed by employers that the insertion of the model clauses would result in onerous record keeping requirements for the employer, the Full Bench of the FWC commented that whilst it "*may be more administratively burdensome than under existing*

STEVENS & ASSOCIATES LAWYERS

MARCH 2019

A VISION IN THE WORKPLACE

provisions…it is nonetheless the case that it remains less onerous than calculating wages weekly, fortnightly or monthly in accordance with the normal requirements".

The FWC are seeking submissions from interested parties prior to 27 March 2019, which they will consider before they finalise their decision to insert annualised wage arrangement provisions into modern awards. If you would like to make a submission and would like us to assist you, or if you have any questions about the impact of the model clauses on your business, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

Victoria Police need to be more flexible! What about your workplace?

Victoria Police's recent rejection of a detective's request for flexible working arrangements was held to lack reasonable business grounds in a recent decision before the Fair Work Commission Full Bench (**the FWCFB**). The decision sheds light on the considerations employers must heed when faced with a flexible work request.

The 57-year-old detective wished to "*compress*" his 10 eight-hour shifts per fortnight to eight 10-hour shifts, as part of a transition towards retirement after 30 years of work. The Victoria Police Officer's Enterprise Agreement provides a right to apply for flexible work arrangements under the in circumstances of "*child caring responsibilities, disability carer, experiencing domestic violence or having attained the age of 55 years*", mirroring the flexibility provision contained in Modern Awards.

Victoria Police refused the request on the following grounds:

- Regular overtime and recall to duty are "*inherent requirements*" of the position;
- potential fatigue due to recall following a compressed working week poses OHS risks;
- that the costs flowing from granting the request would impose an "*unreasonable financial burden*";
- that granting the proposal would be damaging to the morale and effectiveness of the unit in which the Detective worked; and
- that because of the nature of the role of the detective, elements of the detective's role would not be suited to the arrangement he proposed.

The FWCFB held that "*there would appear to be no significant impact on [Victoria Police's] business if the request was granted*" and that the purported reasons lacked merit or evidence. The Court also noted that the detective requested the arrangement for a 12-month period rather than indefinitely, providing Victoria Police with the opportunity to review and determine the

STEVENS & ASSOCIATES LAWYERS

MARCH 2019

A VISION IN THE WORKPLACE

suitability of the arrangement. The FWCFB held that the request should be approved.

The FWCFB commented that the matter raised "*important questions about the scope and application of the 'reasonable business grounds' requirement*" for refusing flexible working hours requests, under s 65(5) of the *Fair Work Act 2009* (Cth).

Read the full decision here: Victoria Police v The Police Federation of Australia (Victoria Police Branch) T/A The Police Association of Victoria (C2018/5566)

If you have any questions about when reasonable business grounds may exist to refuse flexible work requests please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

Regulations to offset the amount claimable by "casual" employees following the WorkPac decision

The precedent set by the WorkPac decision is that an employee labelled a casual worker may be entitled to annual leave under the *Fair Work Act 2009* (Cth), if (among other things) the employment arrangements displayed a regular pattern of hours, continuous work and there was a firm advance commitment to such work. One significant implication commentators have identified is that relevant employees may be able to 'double dip', receiving a casual loading in addition to permanent employee benefits such as annual leave.

In response to this concern, the Federal Government introduced the *Fair Work Amendment (Casual Loading Offset) Regulations 2018* (**New Regulations**). The New Regulations prescribes that, in the event that a claim is brought by an employee for access to National Employment Standards (**NES**) entitlements, when establishing whether such NES entitlements are owed to the employee, the employer may make a claim for the casual loading payments to be taken into account.

Under s 2.03A of the New Regulations the following criteria applies as a prerequisite for employers' offsetting claims:

1. The relevant employer engaged the relevant employee as a "casual" employee;
2. the relevant employee is paid a casual loading to compensate the employee for NES entitlements not provided to casuals;
3. the relevant employee was misclassified as a casual for some or all of their employment period and their working patterns were more consistent with that of a full-time or part-time employee; and
4. the relevant employee '*makes a claim to be paid an amount in lieu of one or more of the relevant NES entitlements*.'

The New Regulations became effective on 18 December 2018, however, they also apply retrospectively.

STEVENS & ASSOCIATES LAWYERS

MARCH 2019

A VISION IN THE WORKPLACE

Workpac woes continue

In the wake of last year's landmark decision, WorkPac are facing a class action law suit composed of over 600 mine workers. If successful, the claim could pave the way for over 25,000 coal miners to claim over $325 million in owed annual leave. The workers involved in the class action are on rosters that are regular and systematic and are claiming that they ought to have been accruing annual leave during their work period.

The lead applicant, Mathew Peterson, was engaged as a casual mobile plant operator in 2014 being paid a flat rate of $47 per hour. Mr Peterson claims to have worked a regular pattern of 12.5-hour day and night shifts up until his retirement in September 2017. The class action alleges that Mr Peterson accumulated 113 days of annual leave during his tenure and is owed $32,900.

Workpac contends that the workers were paid a higher hourly wage in lieu of annual leave and other entitlements, and that that the class action *"is advocating 'double dipping' by demanding businesses pay for the same entitlements twice*".

We will soon find out just how effective the New Regulations will be in offsetting the amount claimable in the class action.

If you have any questions about the New Regulations or how the WorkPac decision affects you, or if you require advice on the important distinction between casual and permanent employment please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.

Strict rules for bargaining notices upheld as one word invalidates enterprise agreements

Two enterprise agreements have been deemed defective by the Full Federal Court (**FFC**) after Aldi referred to themselves as "leader" rather than "employer" in their bargaining Notice (**Notice**) to employees about their representational rights.
The FFC upheld the Fair Work Commission's (**FWC**) decision and rejected Aldi's submission that the word change was a "*trivial matter*". Aldi sought to rely on the *Acts Interpretation Act 1901* (Cth) to argue it had "*substantially complied*" with the Notice requirements, and that the notice should be rendered valid. Aldi's lawyers argued that the word was changed to accord with the language Aldi uses within its business.

The FFC rejected Aldi's argument and the Notice was held to be invalid due to the "*strict compliance*" required for such forms as prescribed by Section 174 of the *Fair Work Act 2009* (Cth) (**the Act**), which requires the Notice to "*contain the content prescribed by the regulations; not*

contain any other content; and be in the form prescribed by the regulations."

On this basis, the FFC took the view that there are no "degrees of validity" and for the purposes of upholding a "*tightly regulated notice provision*", confirmed that the departure from the mandatory form was not trivial.

While the Morrison government passed a bill in December 2018 that seeks to provide the FWC with more discretion to disregard minor technical errors in Notices, the decision reaffirms the importance of compliance with the Act and Fair Work Regulations when preparing Notices.

Read the full decision here: ALDI Foods Pty Limited v Shop, Distributive and Allied Employees' Association[2019] FCAFC 35

If you have any questions about or require assistance with drafting enterprise agreements and/or Notices of employee representational rights, please do not hesitate to contact Nick Stevens, Jane Murray or Angharad Owens-Strauss.