Our August edition of Vision includes:

- Mandatory COVID-19 Vaccine Policies;
- High Court Decision in Workpac v Rossato - Casual Employee not entitled to leave entitlements;
- No Long Service Leave for two employees who primarily worked in India; and
- A FWC ruling on Workplace Bullying.

Mandatory COVID-19 Vaccine Policies

In the midst of increasing vaccine policies and conflicting public advice, many businesses are more confused than ever with respect to what they can require of their employees with respect to their vaccination status.

In public statements, Prime Minister Scott Morrison has said that it will be up to individual employers to determine what steps they take with respect to vaccination of their workforce. Meanwhile, the Fair Work Ombudsman, which had initially been criticised for advising that '*In the current circumstances, the overwhelming majority of employers should assume that they can't require their employees to be vaccinated against coronavirus*', has now provided more detailed advice.

There will be a number of considerations that businesses will need to take into account when making decisions about COVID-19 vaccinations. First amongst those considerations will be whether there is a need to be vaccinated in order to perform the inherent requirements of his job. The need to be vaccinated in order to perform the inherent requirements of an employee's job might arise as a result of government regulations, or as a result of your assessment of risk in the current climate, including consideration of:

1. whether workers are exposed to a heightened risk of infection due to the nature of their work;

2. whether workers have contact with people who would be especially vulnerable to severe disease if they contract COVID-19;

3. the risk of COVID-19 spreading in the workplace – for example, some workplaces require workers to work in close proximity to one another; and

4. whether workers have contact with large numbers of people, such that they could be the catalyst for a "super-spreading" event.

There are regular changes to the regulatory framework around COVID-19 vaccination which should be checked frequently, however at present NSW airport and quarantine workers are required to have COVID-19 vaccines in some circumstances. A National Cabinet decision has been taken to require COVID-19 vaccination for workers in residential aged care facilities, which has been implemented in Queensland and is expected to

soon be implemented in New South Wales. In New South Wales, there are also expected to be certain vaccine requirements which would enable vaccinated workers in the more strictly locked-down areas of Sydney to return to construction work.

Prior to implementing a mandatory vaccination, like any other work health and safety decision, an employer is required to consult with its workforce. The consultation process involves sharing relevant information with workers, giving them a reasonable opportunity to express their views and contribute to the decision-making process, and taking those views into account prior to advising workers of the outcome.

Employers will also need to consider what the content of any policy will be. This includes appropriately dealing with the time frame for implementation, evidence requirements and consideration of workers' privacy, any potential discrimination, and dealing with how the employer will approach employees who cannot or will not be vaccinated as a result of vaccine supply, medical contraindication or other objection.

With more and more employers considering the implementation of these types of policies, it is best to seek legal advice in order to reduce any potential risks which might arise. To talk about whether your business should have a COVID-19 vaccine policy, what should be in your business's vaccination policy, and how to implement it, please contact Nick Stevens, Luke Maroney, and Daphne Klianis.

High Court holds Casual Employee not entitled to Leave Entitlements

On 4 August 2021, the High Court reversed a decision of the Full Court of the Federal Court in a landmark decision clarifying the nature of casual employment. In *WorkPac Pty Ltd v Rossato & Ors [2021] HCA 23*, the High Court unanimously found that a former employer of WorkPac Pty Limited (**Workpac**), Mr Rossato was in fact a true casual employee and not entitled to permanent employee entitlements at law, constituting a major victory for employers. The decision could potentially prevent backpay claims that otherwise would have resulted had the 2020 Full Federal Court decision been upheld.

Facts

Labour-hire company Workpac employed Mr Robert Rossato to provide production services to its client (**the Employment**). Between 2014 and 2018, the Employment was comprised of 6 consecutive contracts described as

"assignments" and pursuant to the assignments Mr Rossato would perform work as a casual employee for Workpac' s client on a "fly-in-fly-out" basis. As a casual employee, Mr Rossato was not paid leave or holiday entitlements in accordance with the *Fair Work Act 2009* (Cth) (**the Act**) or Workpac's enterprise agreements.

Although explicitly described as a "casual employee" in his contract of employment with Workpac (**the Contract**), Mr Rossato claimed backpay of leave entitlements purporting that he was not a casual employee based on how he was treated during his employment period with Workpac, such that he was, in his view, treated as a permanent employee. Notwithstanding the fact that Mr Rossato had been paid 25% casual loading pursuant to the Contract in lieu of annual leave, personal leave, and other entitlements, Mr Rossato subsequently claimed for these entitlements. This process of 'double-dipping' constitutes a long-standing dilemma and has troubled courts extensively in recent years.

Federal Court Decision

The Full Court of the Federal Court held that Mr Rossato was not a casual employee in accordance with the Contract and Workpac's Enterprise Agreement and found that Mr Rossato was entitled to the backpay claim and for it not to be off-set against the 25% loading he had already received. Workpac then appealed the matter to the High Court.

Legislative changes and High Court decision

In March 2021, the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021* (Cth) was passed and significantly clarified the definition of 'casual employee' under the Act and the elements necessary to characterise casual employment. A person is a 'casual employee' under the Act if that person accepts an offer for a job from an employer knowing that there is *"no firm advance commitment to ongoing work with an agreed work pattern".*

The High Court held that any "firm advance commitment" will be found in the binding contractual obligations of the parties based on when the parties committed to the terms of their employment relationship. The High Court noted that the contractual arrangement between Mr Rossato and Workpac did not include a "mutual commitment to an ongoing working relationship" following the completion of each assignment. As such, the "express terms of the relationship between Mr Rossato and Workpac were distinctly inconsistent with any such commitment" that was described explicitly as 'casual' pursuant to the Contract.

The High Court reasoned that although Mr Rossato's established shift structure was arranged well in advance by rosters and might foster a sense of 'regularity' or 'consistency' in the relationship, this was not enough to establish a commitment to on-going employment following the completion of each assignment.

Although the High Court's decision in *Workpac v Rossato* was an immensely positive one for employers, it must be noted that the High Court did not ultimately consider the potential for Workpac to 'off-set' unpaid entitlements against the casual loading Mr Rossato had already received (as this was not a necessary exercise for the High Court to undertake). This is still a major issue

that employers face in claims by employees seeking unpaid entitlements. Therefore, employers may afford themselves the best protection by implementing written contracts of employment that:

1. Explicitly characterise an employee as a casual by reference to the definition of a "casual employee" in the FW Act; and
2. Specify the employee's payment arrangements, including the fact that casual loading is payable.

If you require assistance drafting or amending your written contracts of employment for existing or prospective casual employees, please contact Nick Stevens, Luke Maroney, and Daphne Klianis.

Two employees who mainly worked in India not entitled to Long Service Leave Entitlements

In a recent judgment of the Court of Appeal of Victoria (**the Court**), the Court held that two employees were not entitled to long service leave (**LSL**) entitlements because they primarily performed their work outside of the State of Victoria (**the State**).

In *Infosys Technologies Limited v State of Victoria,* the Court was required to determine whether two employees, who had served the considerable majority of their employment in India, were entitled to LSL pay following resignation from their employment with Infosys Technologies Limited (**the Company**).

Background to the Claim

The Company engaged the first employee for a total period of 9 years and 3 months. That employee served the Company for 2 years and 2 months in the State, with the remaining time served in India. The Company engaged the second employee for a period of 12 years. Only 2 years and 8 months of that time were in the State, the remaining service also in India.

Upon their respective resignations from the Company, the employees had not received LSL entitlements. As a result, the employees lodged a complaint with the Wage Inspectorate of Victoria (**WIV**) about the Company and its alleged failure to pay LSL entitlements to them. Following a demand from WIV to pay the first and second employees their LSL entitlements, the Company sought declarations from the Court as it believed it had no such obligation under the *Long Service Leave Act 2018* (VIC) (**the LSL Act**).

State's Argument

The State argued that the employees' employment fulfilled the continuous service test under section 6 of the LSL Act, which entitles employees to LSL entitlement following seven years of continuous service. However,

the Court ultimately rejected the State's view that LSL entitlements were available to the employees. Looking to the relevant rules which apply to interpreting the LSL Act, the Court held that section 6 of the LSL Act (like all other Victorian legislation) must have a "sufficient territorial connection" and that continuous employment means employment 'in and of' the State, for the purposes of the LSL Act.

Result

LSL entitlements, and when they are available to employees, can be tricky territory for employers to navigate, as seen in this case. It is important to note that the relevant rules vary from state to state, with limited uniformity in the approach to LSL entitlements. If you have any questions about LSL entitlement obligations, please contact Nick Stevens, Luke Maroney, and Daphne Klianis.

No Return on Investment for Fund Manager's Workplace Bullying Claim

In an unusually long and detailed decision stretching over 100 pages, the Fair Work Commission (**Commission**) has dismissed an application by an investment fund Portfolio Manager seeking '*stop bullying*' orders against his direct manager (**Head of Strategy**) and his employer (**Funds Management Company**) after six days of hearings.

The Complaint

The Portfolio Manager made a series of more than 20 highly particularised complaints about the Head of Strategy, including alleging that he had made negative comments about the Portfolio Manager's work performance, made various changes to the funds for which the Portfolio manager was responsible, and making allegedly '*unreasonable*' requirements for the way in which portfolios were to be managed. The Commission was also asked to rule on whether it was unreasonable for the Head of Strategy to accept a speaking invitation at a conference instead of allowing the Portfolio Manager to give the presentation.

The Commission's Approach

In assessing the alleged conduct of the Head of Strategy, the Commission repeatedly noted that part of that role was to manage the work of the Portfolio Manager and the manner in which it is performed. The Commission went on to note that '*management will and often do, make decisions and take action that may turn out to be*

incorrect or simply be seen as poor decisions' and that this, or a worker's dissatisfaction with the decisions taken, will not alone be enough to amount to unreasonable behaviour which would amount to bullying. The Commission confirmed this is so, even where the worker's objections '*may have been soundly based*' so long as the Head of Strategy was acting within his authority and for a proper purpose.

However, the Commission was satisfied that some conduct by the Head of Strategy was unreasonable. For example, the Commission considered that the Head of Strategy's email to the Portfolio Manager describing the Portfolio Manager '*trying to go over [his] head*' to the Chief Executive Officer as '*a big move for you*' had a threatening undertone and was unreasonable behaviour. The Commission also considered that the Funds Management Company's decision not to provide the findings of an investigation into his earlier complaints was unreasonable, especially considering that it had a policy stating that usually the findings of such a complaint will be provided.

Notwithstanding that it found certain instances of conduct to be unreasonable, the Commission declined to make any orders. The Commission found that, given the limited and isolated nature of the complaints the Commission found substantiated, there was insufficient evidence that there was a real risk that the behaviour would continue.

What to Know

It is important to bear in mind that the Commission approaches bullying as being defined repeated unreasonable behaviour towards a worker while at work that creates a risk to health and safety. The Commission will only make orders to stop bullying if it considers there is a risk that the bullying will continue, and it is appropriate to do so in the circumstances of a case.

Often, bullying concerns are best handled before a worker gets to the stage of applying to the Commission. Early steps, such as the implementation of appropriate policies surrounding bullying and prompt investigation and handling of complaints can avoid matters progressing to the Commission and assist in defending claims if they are later filed. If you have any concerns about workplace bullying, please contact Nick Stevens, Luke Maroney, and Daphne Klianis.