GLI GLOBAL LEGAL INSIGHTS

Employment & Labour Law

2023

11th Edition

Contributing Editors: **Jason Butwick and Rebecca Turner**

glg global legal group

CONTENTS

Australia

Joydeep Hor
People + Culture Strategies

General labour market and litigation trends

a) Social/legislative/economic developments which have impacted the labour market/legislation

Secure Jobs, Better Pay

In 2022, the Australian Government brought in the most significant reforms to the *Fair Work Act 2009* (Cth) (the "**FW Act**") since it was introduced. The workplace reforms aim to deliver the Government's agenda of providing more secure jobs and better pay for Australian workers and are known as the secure jobs, better pay reforms (the "**Reforms**").

The areas of reform are wide-reaching, but broadly encompass the following:

- Enterprise bargaining and industrial relations: the Reforms give more powers to employees and trade unions to bargain with employers for an enterprise agreement (a type of industrial instrument). The national workplace relations tribunal, the Fair Work Commission ("**FWC**"), has also been given expanded powers to arbitrate bargaining disputes.
- Sexual harassment: the Reforms give workers the ability to make an application to the FWC to deal with a sexual harassment dispute. This provides workers with an additional avenue to bring a sexual harassment claim and seek compensation.
- Employment relations: the Reforms introduce a number of changes which will affect the employer/employee relationship. Notably, employees can now discuss and disclose their pay with others (including colleagues); there are more obligations on employers who wish to reject flexible work arrangement requests and fixed-term contracts can be no longer than two years.

Positive duties to eliminate sexual harassment in the workplace

In 2018 the Australian Government commissioned a national inquiry into sexual harassment in Australian workplaces. The product of this inquiry was the Respect@Work Report (the "**Report**") which found that sexual harassment in the workplace was widespread and that the existing legal framework was complex and confusing for both employers and employees. The Report contained 55 recommendations. One of the most significant recommendations was for the *Sex Discrimination Act 1984* (Cth) (the "**SD Act**") to be amended to impose a positive duty on employers to proactively eliminate sexual harassment, sex discrimination and victimisation in the workplace, by creating an environment where it is unlikely to happen in the first place.

This new positive duty has been legislated and will commence on 12 December 2023. Many, if not all, employers will need to review their internal practices and implement additional measures in advance of the commencement date to ensure compliance.

Gig economy

There has been ongoing debate about workers in the gig economy and their status as either employees or independent contractors. The Full Bench of the Fair Work Commission ("**FBFWC**") heard a high-profile case involving the delivery company Deliveroo, and found that a Deliveroo driver was not an employee, but an independent contractor.

While the decision of the FBFWC reflects the current position in Australia, the Government has signalled that it plans to bring in reforms on "employee-like" forms of work, including gig economy workers. These reforms are due to be introduced to Parliament in 2023.

b) Trends in volume and types of employment claims over the last year

In 2021–2022, unfair dismissal applications were the most common type of employment claim, accounting for approximately 38 per cent of total applications made to the FWC. Applications for "general protections" breaches involving dismissal made up 14 per cent of total applications.

A total of 13,096 unfair dismissal claims were made to the FWC in 2021–2022, a similar figure to the previous year. Most claims were settled without a decision being made by the FWC.

c) Hybrid, flexible and remote working

Even prior to the impact of COVID-19 on workplaces, technological advancements have made it easier for employees to fulfil their job requirements from outside of the office, which has seen a rise in flexible work arrangements. The impact of COVID-19 and government-mandated lockdowns has further accelerated the move away from the traditional workday.

An increasing shift in focus towards "work-life balance" has seen employers allow for more accommodating work arrangements that allow employees to balance their responsibilities and obligations outside of the workplace. While most remote working arrangements are discussed and agreed on a case-by-case basis, employees have entitlements under the National Employment Standards ("**NES**") to make requests for flexible working arrangements in certain circumstances.

Redundancies, business transfers and reorganisations

a) Relevant test for business transfer legislation to apply

The FW Act contains a number of provisions that look to achieve a balance between the protection of employees' terms and conditions and the interests of employers in running their enterprises efficiently if there is a transfer of business.

Certain business transfers operate in such a way that an employee's period of service with their first employer counts as service with the new employer, and the employee retains their entitlements, such as accrued annual leave (unless paid out on termination of employment with the first employer).

For these protections to apply, the transferring employee must commence work within three months of the termination from the old employer, the work performed must be substantially the same, and either the old employer and the new employer are associated entities, or there is an outsourcing or insourcing of business between them, or there is an arrangement concerning the ownership of the assets to which the transferring work relates.

b) Process for electing employee representatives

While there is no legislation establishing a framework for the operation of a works council in Australia, a similar structure does operate in some Australian workplaces in the form of

consultative committees. These committees are often limited to dealing with work, health and safety in the workplace, or overseeing the implementation of provisions of an enterprise agreement, where the agreement establishes such a committee.

Employees are also entitled to belong to a trade union that may act on their behalf. Trade unions are able to represent their members in bargaining over enterprise agreements and can become a party to such agreements. Trade unions can initiate proceedings with respect to breaches of awards, and trade unions can also initiate proceedings with respect to breaches of the NES, national minimum wage orders, enterprise agreements and sexual harassment claims.

c) Consultation

Consultation obligations apply under industrial instruments (for example, an award or enterprise agreement) when a decision has been made by an employer to introduce a major change or proposes to change the regular roster or ordinary hours of work of an employee, other than an employee whose working hours are irregular, sporadic or unpredictable. Consultation requirements include:

- notifying the employees who may be affected by the proposed changes;
- providing the employees with information about these changes and their expected effects;
- discussing steps taken to avoid and minimise negative effects on the employees; and
- considering employees' ideas or suggestions about the changes.

d) Ability of employers to change terms and conditions of employment and method(s) for doing so

There are some terms and conditions of employment that cannot be changed, for example, the FW Act contains a number of NES that are applicable to most Australian employees. These NES include maximum working hours, minimum leave entitlements and minimum periods of notice for termination of employment. Some employees will also have terms and conditions of employment under an industrial instrument such as an award or enterprise agreement. These industrial instruments can only be amended by entering into an individual flexibility arrangement ("**IFA**") between the employer and employee. An IFA can amend certain terms and conditions but the employee must still be better off overall.

If an employer seeks to amend a contractual term, they should first consider the reason for seeking the variation, redundancy, promotion, demotion, relocation or role change and the location of the contractual term, which may be in an employment agreement or policy. The ability to change an employee's terms and conditions of employment will depend on the reason for the variation and the specific terms of the contract. For example, employers wishing to relocate an employee from one office to another may be able to do so if the contract contains a mobility clause.

In relation to contractual terms, an employer has no power to unilaterally change the terms of a legally binding contract. A variation of a contract is an alteration to the legally enforceable obligations which previously bound the parties. However, an employer and employee may agree to a contractual change provided it fulfils the requirements governing formation of contracts.

Business protection and restrictive covenants

a) Duties of confidentiality (express and implied) and good faith

Employees owe a common law duty to their employer that prevents them from misusing

information. This duty has been codified in the *Corporations Act 2001* (Cth) ("**Corporations Act**"), which specifically prohibits a director, officer or employee (or a past director, officer or employee) from improperly using information to gain an advantage for themselves or someone else at the expense of the corporation they serve (or served). The circumstances in which a breach of the duty of confidentiality by ex-employees through the misuse of information is likely to be an issue is where the employer has made some effort to guard against its free circulation.

Employers commonly protect themselves against misuse of information by ex-employees by including post-employment obligations in the contract of employment. This enables the employer to sue for breach of contract if an employee were to compromise trade secrets or confidential information. In some circumstances, an employer may rely on these contractual terms to seek an injunction to prevent a potential or further breach of confidentiality occurring. The obligation to act in good faith and with fidelity is also implied in all employment contracts.

The courts recognise the protection of trade secrets and other confidential business information as a legitimate business interest and will uphold post-employment restraints where an employer can demonstrate the reasonableness of the restraint.

b) Restrictive covenants

Post-employment restraints are not uncommon clauses in the contracts of mid to senior level managers and executives. These clauses are used by organisations to protect their business interests including customer connections, confidential information and the stability of their workforce.

Restraint of trade clauses are usually framed by reference to:

- a geographical area;
- a period of time;
- defined industries, businesses or activities in which the employee cannot be involved; and/or
- classes of people (such as customers, clients or employees) with whom the employee is restricted from dealing.

While restraint clauses were traditionally held to be contrary to public policy and void, over the years Australian law has developed such that restraint clauses may be valid and enforceable to the extent they are reasonably necessary to protect an employer's legitimate business interests.

However, a Court will not enforce post-employment restraints that attempt merely to stifle competition from former employees. The onus is on the employer to identify a specific business interest which reasonably requires the protection of a restraint clause, for example, its confidential information, stable workforce, customer connections, goodwill or commercial interests.

Discrimination protection

a) Protected characteristics

There is a range of federal, state and territory legislation prohibiting discrimination and harassment in employment in Australia. There is no unified legislation operating at the federal level in Australia, with attributes such as sex, race, age and disability each covered by a separate piece of legislation. State and territory anti-discrimination legislation tends to have a more unified coverage of numerous attributes in the one piece of legislation, but

each varies as to the attributes covered, the conduct proscribed and the context in which they operate. Specific prohibitions on sexual harassment and disability harassment operate under federal anti-discrimination legislation, as well as under some state and territory anti-discrimination legislation.

While the attributes covered in each legislative scheme vary, common protected attributes include race, colour, descent, national or ethnic origin, sex, sexual orientation, gender identity, intersex status, age, disability, marital or domestic status, family or carer's responsibilities, pregnancy, religion, political opinion and social origin.

b) Different types of discrimination

In Australia, discrimination can take two forms – direct discrimination and indirect discrimination.

While direct discrimination is defined somewhat differently under various pieces of legislation, the common element is a focus on affording a complainant less favourable or unfavourable treatment on the basis of a prohibited ground.

The focus of indirect discrimination is on the impact of requirements, conditions or practices. Even though a requirement, condition, or practice might be neutral on its face and applied consistently, it may have the effect of disadvantaging people with a particular attribute and may be considered unreasonable.

There are also protections under Australian law against victimisation (that is, to cause or threaten to cause a person detriment) of someone who has made, or proposed to make a complaint, of discrimination or harassment or has alleged that a person has acted unlawfully under anti-discrimination laws.

c) Burden of proof

As a general rule, Australian anti-discrimination legislation places the onus on the complainant to show that the employer treated them less favourably because of a protected attribute, although some statutes take a slightly different approach.

In "general protections" claims, the onus is on the employer rather than the employee to establish why a person was adversely affected in the workplace. If this onus is not discharged, it is assumed that the action was taken for a prohibited purpose.

d) Defences to discrimination

In federal, state and territory legislation there are specific exemptions and exceptions that are tailored for each protected attribute. In the employment context, common exceptions are genuine occupational qualifications, inherent requirements of the job, unjustifiable hardship, acts carried out under statutory authority and employment in a private household or private educational institution. In addition, it is possible under most statutory schemes to obtain a temporary exemption.

e) Compensation and other remedies

The remedies that are available under anti-discrimination legislation include declarations, compensatory damages, injunctions, variations of contract, apologies and retractions.

In a "general protections" claim, an employee may seek remedies including a reinstatement order, payment of compensation, lost remuneration and continuity of service.

f) Equal pay

The FW Act makes provision for applications to the FWC to be made for an equal remuneration order, although few such orders have been made. The application can be made by an affected employee, a union which is entitled to represent an affected employee or the Sex Discrimination Commissioner.

The FWC has the power to make an equal remuneration order requiring that certain employees are provided equal remuneration for work of equal or comparable value. Once an equal remuneration order has been made, it will prevail over an award, enterprise agreement, a FWC order or any other industrial instrument if it is more beneficial than these instruments. An employer who contravenes an equal remuneration order can be liable for a penalty.

Anti-discrimination legislation also makes it unlawful for an employer to discriminate in relation to the terms and conditions of employment provided to employees, which includes pay.

g) Confidentiality

Employment contracts will generally contain terms regarding an employee's use and disclosure of confidential information both during and after their employment. The purpose of such a clause is to prevent employees from using information they obtained during their employment without first seeking permission from their employer. Although there are some circumstances where disclosure of confidential information may be required by law, or required to be used or disclosed by the employee to perform their duties for the employer.

Confidentiality obligations may also be contained in a Deed of Release entered into in relation to the termination of an employee's employment.

Protection against dismissal

a) Potentially fair reasons for dismissal

An employer may dismiss an employee provided the minimum period of notice set out in the FW Act is provided. However, employees may be entitled to a longer period of notice if provided for by a contract, award or enterprise agreement. A dismissal will be open to challenge under unfair dismissal legislation if the termination cannot be substantively justified on the basis of a "valid reason" such as unsatisfactory performance, misconduct, the operational requirements of the business or the dismissal was executed in a procedurally unjust manner.

Serious misconduct can warrant summary dismissal without notice or payment *in lieu*, such as in the case of dishonesty, fraud or other serious conduct that impacts significantly on the employer's interests, operations or reputation so as to amount to a repudiatory breach of contract. Summary dismissal in such circumstances arises as a matter of common law, although many employment contracts also specify the circumstances where summary dismissal may arise. The FW Act also sets out examples of conduct that may constitute serious misconduct, such as being intoxicated at work or refusing to follow lawful and reasonable directions.

Where an employee's employment is being terminated on the ground of redundancy, and the employee is eligible to make an unfair dismissal claim, the redundancy must be "genuine". For a redundancy to be considered genuine, an employer must follow the consultation requirements and have considered reasonable redeployment opportunities.

b) Circumstances in which dismissals may be deemed unfair

A dismissal will be unfair where it is "harsh, unjust or unreasonable". To determine whether a dismissal was "harsh, unjust or unreasonable", the FWC will consider:

- whether there was a valid reason for the dismissal related to the employee's capacity or conduct;
- whether the employee was notified of that reason and given an opportunity to respond;

- if the employer did not allow the employee to have a support person present at any discussions about the dismissal, and whether that was deemed unreasonable;
- whether the employee had been previously warned that their performance was unsatisfactory;
- if the size of the business, or lack of dedicated human resource management specialists or expertise impacted on the procedures that the employer followed when they dismissed the employee; and
- any other matters that the FWC considers relevant.

In addition to the protections offered by the unfair dismissal regime, employees are protected under the FW Act from discriminatory dismissals, those that are targeted at their union activities or the assertion of workplace rights, or where the dismissal is because of a temporary absence from work due to illness or injury.

c) Process to be followed when dismissing

To end the employment, an employer must give the employee written notice or make payment *in lieu* of notice. Some employment policies, enterprise agreements or contractual terms may make provision for a longer notice period. Minimum statutory notice periods apply under the FW Act, based on length of service. Serious misconduct can warrant summary dismissal without notice or payment.

Procedural factors are relevant in the process, including whether the employee was notified of the reason for termination and given an opportunity to respond, and in the case of unsatisfactory performance, whether the employee was made aware of performance concerns and given an opportunity to improve.

In the event of redundancy, severance pay is required in addition to the notice period. The FW Act sets out a scale of severance pay based on years of service as the minimum entitlement for all employees. For a redundancy to be considered genuine, an employer must follow the consultation requirements and have considered reasonable redeployment opportunities.

Where a decision to terminate on the basis of economic, technological or structural factors relating to the employing organisation will affect 15 or more employees, the employer must notify the relevant trade union representatives and give notice to the government employment agency.

d) Compensation and other remedies

Remedies vary in accordance with the particular claim, although employees often seek reinstatement or compensation in claims that are commenced in the FWC. An income threshold applies to some FWC proceedings, as well as a cap on compensation.

Statutory employment protection rights (such as notice entitlements, whistleblowing, holiday, parental and maternity leave, etc.)

a) Statutory notice periods

Minimum notice entitlements for both employers and employees are provided for in the NES in the FW Act and are based on length of service. Notice provisions can be extended by employment contracts or enterprise agreements but cannot be less than the NES entitlement.

b) Restrictions on working time and the right to annual leave

The NES provide that employees must not be required to work more than 38 hours per week, unless additional hours are reasonable. There are provisions for averaging out hours under certain awards and enterprise agreements, or by agreement between an employer and their award/agreement-free employee.

Employees are entitled to four weeks' paid leave per year (with an additional week for certain shift workers).

Annual leave is paid at an employee's base rate of pay, not including extra payments unless an award or enterprise agreement provides for another method of calculation for the payment of leave loading.

c) Family-friendly rights

The NES contain the minimum entitlements to employment rights for all workers in Australia, including various rights in relation to caring responsibilities and parental leave.

Parental leave

Employees with more than 12 months' service are entitled to up to 12 months' unpaid leave on the birth or adoption of a child, with the right to request another 12 months' unpaid leave.

Flexible working arrangements

Employees with more than 12 months' service can request flexible working arrangements, such as changes to hours, patterns or locations of work under the NES where they:

- are the parent or carer of a school aged or younger child;
- are a carer;
- have a disability;
- are aged 55 or older; or
- are experiencing family or domestic violence.

There are additional rights for employees covered by certain awards or enterprise agreements.

Employers can only refuse a request on reasonable business grounds. If a request is refused, the written response to the employee must include the reasons for the refusal.

Personal leave

Employees are entitled to 10 days' paid personal/carer's leave, two days' unpaid carer's leave as required, two days' paid compassionate leave as required and 10 days' paid family and domestic violence leave (in a 12-month period).

d) Special protections for workers against detriment/dismissal

Adverse action protections

Employees are protected from detriment/adverse action or dismissal by the "general protections" provisions of the FW Act. The "general protections" are intended to:

- protect workplace rights stemming from a workplace law, or making a complaint or inquiry in relation to an employee's employment;
- protect freedom of association;
- provide protection from workplace discrimination (for an attribute that is protected under any Australian discrimination legislation, for example, race, sex, pregnancy, age, political affiliations); and
- provide effective relief for persons who have been discriminated against, victimised or have experienced other unfair treatment.

Whistleblower protections

Changes to the Corporations Act consolidate whistleblower protections under Australian law in relation to protected disclosures made after 1 July 2019.

The legislation provides protection for a whistleblower who makes disclosures under the regime in relation to misconduct, or improper state of affairs or circumstances relating to the company of which they are a current or former employee, officer, supplier or other person identified in the legislation.

Whistleblowers who make protected disclosures will be protected from any civil, criminal or administrative liability (including disciplinary action) for making the disclosure. Whistleblowers are also protected from "victimising conduct" as a result of making a disclosure, including dismissal, injury, adjusting job duties, discrimination, harassment or intimidation, psychological harm, as well as damage to their property, reputation or financial position.

Worker consultation, trade union and industrial action

a) Worker consultation

The requirement for employers to consult with their employees is set out in legislation, awards and enterprise agreements. Additional consultation requirements may also be contained in an employment contract or company policies. Generally, consultation is required if an employer has made a decision to introduce major workplace change or proposes to change the roster or ordinary hours of work of employees (other than for employees whose working hours are irregular, sporadic or unpredictable). In a redundancy situation, employers must also consult with a union if they dismiss 15 or more employees and the employer knew or should have known that at least one of the employees was a union member.

Extensive consultation obligations also exist in relation to work, health and safety. In accordance with health and safety legislation, a person conducting a business or undertaking (which includes employers) must, so far as is reasonably practicable, consult with workers when they are likely to be or are directly affected by a situation involving their health and safety. Consultation obligations also require persons conducting a business or undertaking to consult with other duty holders and any health and safety representatives or committees.

b) Trade unions

The regulation of trade unions, employer associations and enterprise associations are dealt with through registration under the *Fair Work (Registered Organisations) Act 2009* (Cth).

One of the most significant powers that trade union representatives have is the power to enter workplaces to engage in discussions with their members and to investigate alleged breaches in order to enforce compliance with awards, agreements and other workplace obligations. Officials of registered organisations who hold entry permits are entitled to enter premises for the purpose of fulfilling their representative role under the FW Act and under state or territory work, health and safety laws. Permit holders can also enter premises to investigate suspected contraventions of the FW Act and fair work instruments, and to inspect documents for these purposes.

Registered trade unions are entitled to represent their members in bargaining over enterprise agreements and can become a party to such enterprise agreements. Employer associations and trade unions can initiate proceedings with respect to breaches of awards, and trade unions can also initiate proceedings with respect to breaches of the NES, national minimum wage orders, enterprise agreements and sexual harassment claims.

c) Industrial action: determining if there is a right to strike, liability for industrial action; trade union immunity; industrial action for prohibited reasons; process for organising industrial action; key procedural requirements; the ballot; employer's rights and remedies when facing industrial action; and consequences for employees during industrial action

In accordance with the FW Act, employees can engage in protected industrial action (that is, lawful industrial action) when they are negotiating a proposed enterprise agreement. There are a number of steps that employees (or their representatives) must take before they can lawfully take industrial action. These steps include:

- the enterprise agreement (if any) has passed its nominal expiry date;
- the parties have commenced bargaining for a new enterprise agreement; and
- the employees (or their representatives) are genuinely trying to reach an agreement.

There is a process employees or a union must follow before taking industrial action in the FWC and notice requirements that must be complied with in advance of taking the industrial action.

In response to protected industrial action, employers may consider a range of response options including taking its own industrial action (usually in the form of a "lockout"), standing down employees without pay, reducing pay, applying to the FWC to deal with a dispute, or seeking an order to suspend or terminate the industrial action.

If industrial action is unprotected, an employer is prohibited from paying the employees and may apply to the court for an injunction to stop or remedy the effects of the industrial action.

Employee privacy

a) Data protection rights for employees and obligations for employers

In Australia, the *Privacy Act 1988* (Cth) ("**Privacy Act**") deals with the collection, use and disclosure of personal information. Under the Privacy Act there is an "employee records" exemption and employers are relieved from meeting the requirements of the Privacy Act regarding the collection, use or disclosure of information of employees that pertains to the employment relationship. The exemption does not apply to records relating to unsuccessful job applicants and contractors.

b) Monitoring/surveillance in the workplace

Surveillance in the workplace, including computer usage or by way of listening, tracking and optical devices, differs amongst the various states and territories. New South Wales and the Australian Capital Territory have the most robust schemes, which prohibit workplace surveillance unless there is compliance with prescribed notice requirements. The extent to which computer surveillance in the workplace is regulated depends, in other States and Territories, on whether a computer can fall within the definition of a "listening device" and, in the case of Victoria and Western Australia, whether it falls within the definition of an "optical surveillance device". Tracking surveillance is regulated in New South Wales, the Australian Capital Territory, the Northern Territory, Victoria and Western Australia.

c) Background checks

Background checks are generally permissible in the Australian employment law context to the extent that such checks are necessary to ascertain a candidate's ability to fulfil the role. Criminal records and working with children checks are generally mandated for roles that involve working with vulnerable individuals. Other justifiable circumstances include checks regarding honesty and integrity; for example, where an employer is seeking to engage an individual in a role that involves responsibility for significant financial transactions.

If a background check is carried out and does not carry some form of justification, there is a risk that it will be considered discriminatory or an infringement of the individual's privacy.

d) Drug testing and other forms of testing in the workplace

In Australia, it is common for employers to have a designated drug and alcohol policy or a general work health and safety policy that deals with drug and alcohol testing in the workplace. Alternatively, the terms of an enterprise agreement may dictate the way drug and alcohol testing can be undertaken in the workplace. Where the health and safety concerns of a work environment warrant a strict testing regime, an employer may be justified in

refusing to hire a prospective employee, or terminating the employment of an employee, who will not submit to a test.

The case law confirms that any drug and alcohol testing process adopted by an employer must be:

- reasonable and appropriate in light of the nature of the work performed by employees;
- introduced and operate in a way that does not prejudice certain groups of employees;
- open and transparent and if random drug testing is to occur, employees must be aware of the procedures in place; and
- applied consistently.

Other recent developments in the field of employment and labour law

a) The role of alternative dispute resolution in employment disputes

Parties can agree to resolve a dispute that has arisen between them using a range of dispute resolution processes. Alternative Dispute Resolution encompasses a wide range of processes designed to resolve disputes without judicial determination. Whether the parties agree to be bound by the outcome of that process depends on the nature of the agreement reached between the parties and the wording of any applicable dispute resolution clause in an enterprise agreement, award or employment contract.

In the FWC, conciliation (a form of mediation) is made available on a voluntary basis, although most parties avail themselves of this process. If the parties are unable to resolve the matter or a jurisdictional objection is raised, the matter goes before the FWC for hearing. "General protections" claims under the FW Act that involve a dismissal must first be dealt with by conciliation, and if a resolution cannot be reached, the FWC must issue a certificate to this effect. Parties may then apply for consent arbitration, or if the respondent is unwilling, the applicant may bring a claim in either the Federal Court or the Federal Circuit and Family Court.

Where there is no dismissal, but a "general protections" breach is alleged, the applicant may bring the matter directly to the Federal Court or Federal Circuit and Family Court if the respondent refuses to participate in a private conference with the FWC.

b) Worker status

There have been three recent decisions in the High Court of Australia ("**HCA**") providing guidance as to whether a worker is a permanent employee, casual employee or independent contractor. These cases confirm the importance of contractual terms when determining a person's employment status. Where the parties have comprehensively committed the terms of their relationship to a written contract, and provided the contract is valid, the contractual terms will determine whether an individual is a permanent employee, casual employee, or an independent contractor. The decisions of the HCA mark a departure from the "multifactorial" test, and a shift away from looking at the totality of an employment relationship and the subsequent conduct of the parties when determining a person's employment status.

c) Training

Australian employers have various training obligations in relation to work, health and safety, sexual harassment and discrimination. Employers undertake this training to comply with their legislative requirements, as part of a best practice approach to behaviour and culture in the workplace and to mitigate their legal risk should a claim be made against them.

Employers should ensure that training is provided on a regular basis and is appropriate for the level of seniority. Recent cases have reminded employers that training is an essential

part of their business operations and failure to implement appropriate and regular training may result in legal risks, including penalties and compensation payable.

It is now widely accepted that even small employers will be required to undertake significant training. Refresher training should be undertaken regularly and training should ideally be face-to-face to allow appropriate engagement with the topics and the opportunity for questions.

d) National minimum wage levels

The FWC's wage panel is required to review annually the national minimum wage and modern award rates. Between 1 July 2022–30 June 2023, the national minimum wage increased by 5.2% to $812.60 per week and minimum modern award rates increased by 4.6%. The national minimum wage will again be reviewed on 1 July 2023 and will apply from the first full pay period on or after 1 July 2023.

Joydeep Hor
Tel: +612 8094 3101 / Email: joydeep.hor@peopleculture.com.au

Joydeep Hor is a graduate of Harvard Business School's Owner-President Management Program having completed earlier undergraduate and postgraduate programmes at the University of Sydney, Bachelor of Laws (majoring in English literature with his Bachelor of Laws (honours)) and Master of Laws (focusing on labour and employment law).

Joydeep started his career at a global firm, before moving to a specialist labour and employment firm where he was made an equity partner at 28 and was also elected Managing Partner from 2005 until 2010. In 2010, Joydeep founded a ground-breaking practice in global workplace law, People + Culture Strategies ("PCS").

PCS was established to be unlike any other legal firm, with an emphasis on working with clients to prevent disputation and legal problems arising within their organisations, as opposed to a mere "reactive" provider. PCS is regarded as one of Australia's most innovative professional services firms, servicing employers of all sizes and across all industries, operating purely in labour and employment law and strategy. PCS is also the Australian member firm for Innangard, an international employment law alliance.

Joydeep has authored 10 books in his career, appears on Australian television as a leading commentator and is a highly regarded keynote speaker at national and international events. Joydeep has been ranked as a leading lawyer in *Chambers* (2010 – present) and *Doyle's Guide*, and he has represented Australia at the prestigious International Forum on Employment Law since 2016. Joydeep regularly presents at International Bar Association conferences and is the only Australian lawyer invited to the American Employment Law Council.

Who's Who Legal says: Joydeep Hor is an eminent labour and employment lawyer whose "international background and experience place him as an excellent partner to work with on cross-border issues".

People + Culture Strategies

Level 29, 255 George Street, Sydney, NSW 2000, Australia
Tel: +612 8094 3100 / URL: www.peopleculture.com.au

www.globallegalinsights.com

Other titles in the **Global Legal Insights** series include:

AI, Machine Learning & Big Data
Banking Regulation
Blockchain & Cryptocurrency
Bribery & Corruption
Cartels
Corporate Tax
Energy
Fintech
Fund Finance
Initial Public Offerings
International Arbitration
Litigation & Dispute Resolution
Merger Control
Mergers & Acquisitions
Pricing & Reimbursement

GLI GLOBAL LEGAL INSIGHTS