THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Editor
Nicholas Robertson

THE LAWREVIEWS

THE LABOUR AND EMPLOYMENT DISPUTES REVIEW

Reproduced with permission from Law Business Research Ltd
This article was first published in March 2018
For further information please contact Nick.Barette@thelawreviews.co.uk

Editor
Nicholas Robertson

THE LAWREVIEWS

PUBLISHER
Tom Barnes

SENIOR BUSINESS DEVELOPMENT MANAGER
Nick Barette

BUSINESS DEVELOPMENT MANAGERS
Thomas Lee, Joel Woods

ACCOUNT MANAGERS
Pere Aspinall, Sophie Emberson,
Laura Lynas, Jack Bagnall

PRODUCT MARKETING EXECUTIVE
Rebecca Mogridge

RESEARCHER
Arthur Hunter

EDITORIAL COORDINATOR
Gavin Jordan

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Robbie Kelly

SUBEDITOR
Martin Roach

CHIEF EXECUTIVE OFFICER
Paul Howarth

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-912228-04-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

© 2018 Law Business Research Ltd

THE LAW REVIEWS

THE ACQUISITION AND LEVERAGED FINANCE REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE ASSET MANAGEMENT REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE AVIATION LAW REVIEW

THE BANKING LITIGATION LAW REVIEW

THE BANKING REGULATION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE CLASS ACTIONS LAW REVIEW

THE CONSUMER FINANCE LAW REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE DISPUTE RESOLUTION REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE EMPLOYMENT LAW REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE ENVIRONMENT AND CLIMATE CHANGE LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE FRANCHISE LAW REVIEW

THE GAMBLING LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE HEALTHCARE LAW REVIEW

THE INITIAL PUBLIC OFFERINGS REVIEW

THE INSOLVENCY REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE INTELLECTUAL PROPERTY AND ANTITRUST REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE INTERNATIONAL TRADE LAW REVIEW

THE INVESTMENT TREATY ARBITRATION REVIEW

THE INWARD INVESTMENT AND INTERNATIONAL TAXATION REVIEW

THE ISLAMIC FINANCE AND MARKETS LAW REVIEW

THE LENDING AND SECURED FINANCE REVIEW

THE LIFE SCIENCES LAW REVIEW

THE MERGER CONTROL REVIEW

THE MERGERS AND ACQUISITIONS REVIEW

THE MINING LAW REVIEW

THE OIL AND GAS LAW REVIEW

THE PATENT LITIGATION LAW REVIEW

THE PRIVACY, DATA PROTECTION AND CYBERSECURITY LAW REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE PRIVATE EQUITY REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE PUBLIC–PRIVATE PARTNERSHIP LAW REVIEW

THE REAL ESTATE LAW REVIEW

THE REAL ESTATE M&A AND PRIVATE EQUITY REVIEW

THE RESTRUCTURING REVIEW

THE SECURITIES LITIGATION REVIEW

THE SHAREHOLDER RIGHTS AND ACTIVISM REVIEW

THE SHIPPING LAW REVIEW

THE SPORTS LAW REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE TECHNOLOGY, MEDIA AND TELECOMMUNICATIONS REVIEW

THE THIRD PARTY LITIGATION FUNDING LAW REVIEW

THE TRADEMARKS LAW REVIEW

THE TRANSFER PRICING LAW REVIEW

THE TRANSPORT FINANCE LAW REVIEW

www.TheLawReviews.co.uk

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

A & E C EMILIANIDES, C KATSAROS & ASSOCIATES LLC

ANDERSON MŌRI & TOMOTSUNE

ARENDT & MEDERNACH

BAKER MCKENZIE – CIS, LIMITED

CORRS CHAMBERS WESTGARTH

DAB LAW FIRM

DEACONS

ENSAFRICA

HOGAN LOVELLS

LAW FIRM MIRO SENICA AND ATTORNEYS, LTD

MAYER BROWN

PESSOA ADVOGADOS

QUORUM STUDIO LEGALE E TRIBUTARIO ASSOCIATO

TRILEGAL

URÍA MENÉNDEZ

VAN OLMEN & WYNANT

WESSLAU SÖDERQVIST ADVOKATBYRÅ

CONTENTS

PREFACE

I qualified as an employment lawyer 30 years ago and have practised as an employment lawyer since the day I qualified. One of the benefits of reaching my 30th anniversary is being able to look back and see how trends have appeared over time and have shaped the advice needed by employers, and consequently the expectations of employment and human resources (HR) advisers and lawyers.

When I started, employment law was almost entirely a national subject. This was the case, even though, within the European Union, there was an employment framework derived from the European Union with some common obligations and rights throughout the Member States. Over the last 15 years, that position has changed as business has become increasingly international, with operations spanning many countries, and often with supply chains spanning yet more countries. As this process developed, employers structured themselves internationally, so that legal and HR teams, among others, are set up to be able to deal with a globally mobile workforce. Similarly, employers and their in-house teams are expected to be able to deal with disputes and potential disputes across many countries, and come up with an overall approach that delivers the right results across the board and not in one country at the expense of another. The most obvious example of this may be an attempt by an employer to enforce a post-termination restriction written under the laws of one country against an employee who is based in a second country, but who may want to compete with the employer in a third country. Employment lawyers need to be able to provide this advice, and HR professionals are increasingly expected to have an appreciation of employment law and practice in other countries.

This is why, when I was approached to be the editor of this book, I thought it was very timely and important. Employers and their advisers need to be able to keep up to speed with the significant employer-related developments occurring throughout the world. Added to this is the fact that employment law is a fast-moving area with significant developments occurring every year, in all the jurisdictions covered by this book – employment law does not stand still.

I am very grateful to the contributors for their time and effort in putting this book together. Like all the best products, it has been a real team effort. I am sure this book will prove very useful both this year and in subsequent years as we continue to cover the developments in this area.

Nicholas Robertson
Mayer Brown International LLP
London
February 2018

Chapter 1

AUSTRALIA

John Tuck and Anthony Forsyth[1]

I INTRODUCTION

Australian labour relations are governed primarily by the Fair Work Act 2009 (Cth) (the FW Act). This legislation establishes the Fair Work Commission (FWC),[2] Australia's national workplace relations tribunal. The FWC is an independent body with power to carry out various functions under the FW Act, including the resolution of a wide range of collective and individual employment disputes.

The federal system of workplace regulation under the FW Act covers most Australian private sector employers and employees; the public sector at the federal level and in the state of Victoria; and all businesses in the Australian Capital Territory and Northern Territory. Public sector employment in the other five states is covered by separate industrial legislation in each jurisdiction.

Australian labour laws have been constantly amended since the early 1990s, although the FW Act has been subject to only minor amendments since it came into effect on 1 July 2009. This legislative scheme provides significant support for collective bargaining as the basis for determining wages and employment conditions. Many Australian workers are covered by enterprise agreements made through this process, while others are covered by 'modern awards' that set wage rates and other terms of employment for each industry. The employment of award- or agreement-free employees is regulated by a combination of common law contracts of employment and 10 statutory minimum employment conditions set out in the FW Act (the National Employment Standards).

As well as enabling the FWC to assist parties to engage in collective bargaining, the FW Act empowers the FWC (and, in some instances, federal courts) to resolve individual claims relating to unfair dismissal, discrimination and other forms of adverse treatment (the general protections), workplace bullying, and disputes arising under the terms of an applicable award or enterprise agreement. These individual claims make up around two-thirds of the FWC's workload, a reversal of the position in 2002, when collective disputes between employers and unions predominated.[3]

Cases involving enforcement of minimum employment standards (e.g., underpayment claims), whether arising under an employment contract, award, agreement or legislation,

1 John Tuck is a partner and Anthony Forsyth is a consultant at Corrs Chambers Westgarth.

2 See: https://www.fwc.gov.au.

3 Justice Ross, FWC President, address to the International Perspectives on Dispute Resolution Conference, Melbourne, reported in *Workplace Express*, 3 November 2017.

must be brought in the relevant federal, state or territory court. A federal agency, the Fair Work Ombudsman (FWO),[4] investigates non-compliance with workplace laws and assists employees with enforcement issues.

A combination of federal, state and territory laws offer employees protection against employment discrimination and sexual harassment, while different statutes in each jurisdiction regulate occupational health and safety and workers' compensation.

This chapter focuses on the most common types of individual employment claims in the Australian context: unfair dismissal, general protections, discrimination or harassment and workplace bullying.

II PROCEDURE

i Unfair dismissal

An unfair dismissal claim is commenced by the dismissed worker lodging an application with the FWC under Section 394(1) of the FW Act. A filing fee (currently A$70.60) must be paid by the applicant unless the FWC is satisfied that this would cause serious hardship (Section 395). An application must be made within 21 days of the dismissal taking effect (Section 394(2)), unless the FWC grants an extension of time.

Most unfair dismissal claims are first dealt with through a telephone conciliation conference conducted by specialist conciliators. If a claim is not resolved at conciliation, it will be referred to a member of the FWC for an arbitration hearing at which oral submissions and evidence are presented by each party. Legal representation is subject to the granting of leave by the FWC (e.g., based on the complexity of the matter), and in many cases applicants are self-represented. Any FWC award of compensation or reinstatement that is not observed by the employer or respondent must be enforced in a federal court.

ii General protections

An employee must initiate a dismissal-based general protections claim in the FWC, where the FWC will attempt to settle the matter through informal processes (FW Act, Sections 365 and 370). If the claim is not resolved at this stage, it may proceed to an arbitration hearing in the FWC if both parties agree; alternatively, the employee may pursue the claim in a federal court (the Federal Circuit Court[5] or Federal Court of Australia).[6] General protections claims not involving dismissal may be initiated either in the FWC or in a federal court (Sections 372 and 539(2), Item 11).

4 See: https://www.fairwork.gov.au.

5 See: http://www.federalcircuitcourt.gov.au/wps/wcm/connect/fccweb/home.

6 See: http://www.fedcourt.gov.au.

iii Discrimination and harassment

The Australian Human Rights Commission (AHRC)[7] investigates and conciliates complaints about alleged discrimination under federal anti-discrimination statutes. Unresolved complaints must be pursued in a federal court. In addition, each state and territory has its own anti-discrimination agency or tribunal, or both.[8]

Where an employee considers he or she has been discriminated against or harassed on a ground that is covered by both federal and state or territory legislation, the employee may choose to bring a claim before the AHRC under the applicable federal law; or to the relevant state or territory tribunal. However, employees may not seek a remedy in more than one jurisdiction for the same claim.

iv Workplace bullying

An application for an order to stop bullying must be lodged with the FWC. The FWC has an online eligibility quiz to assist individuals to determine whether they are eligible to apply.[9] On receipt of an application, the FWC will inform the employer and the persons alleged to have engaged in the bullying behaviour.

The FWC adopts a case management model aimed at early resolution of workplace bullying claims with a view to repairing the ongoing relationship between all parties involved. The emphasis therefore is on conciliation, mediation and other informal approaches to dispute resolution (although bullying claims may be arbitrated where necessary).

III TYPES OF EMPLOYMENT DISPUTE

i Unfair dismissal

Part 3-2 of the FW Act outlines when an individual is protected from unfair dismissal,[10] what constitutes unfair dismissal, the remedies that may be awarded by the FWC and the processes for dealing with these claims. The FWC must be satisfied of four elements for an applicant to make out a claim of unfair dismissal (Section 385):

a the person has been dismissed;

b the dismissal was harsh, unjust or unreasonable (i.e., the sacking was not based on a valid reason relating to the employee's misconduct, incapacity or poor performance, or the employee was not accorded procedural fairness);

c the dismissal was not consistent with the Small Business Fair Dismissal Code (where applicable); and

d the dismissal was not a case of genuine redundancy (where applicable).

7 See: https://www.humanrights.gov.au.

8 For example, in the state of Victoria, the Victorian Equal Opportunity and Human Rights Commission (https://www.humanrightscommission.vic.gov.au) and Victorian Civil and Administrative Tribunal (https://www.vcat.vic.gov.au).

9 See: https://www.fwc.gov.au/content/rules-form/application-order-stop-bullying.

10 There are numerous exclusions from eligibility to bring an unfair dismissal claim (e.g., short-term casual employees and employees who have not completed the applicable qualifying period of six months' continuous service with the employer, or twelve months in a small business).

Following a finding that an employee has been unfairly dismissed, the FWC may order reinstatement or compensation (which is capped at the lesser of six months' pay and A$71,000).

ii General protections

Part 3-1 of the FW Act provides for a range of protections against discriminatory or adverse treatment of an employee. An employer must not take one or more forms of 'adverse action' against an employee (e.g., dismissal, disciplinary action, demotion, reduction in wages or conditions) (Sections 340(1) and 342), because of one of a number of prohibited grounds. These include an employee's exercise of various types of 'workplace rights' such as the employee's rights under an award, agreement or workplace law (Section 341), an employee's involvement (or non-involvement) in a trade union or industrial activity (Sections 346–347), or a discriminatory reason (e.g., an employee's race, colour, sex, sexual orientation, age, disability, etc.) (Sections 351–352).

Complaints under these provisions are known as general protections or adverse action claims. Where an employee succeeds in such a claim, the FWC may order uncapped compensation or reinstatement. If a federal court deals with a general protections claim, it can order reinstatement, compensation or the imposition of a civil penalty upon the employer (currently, the maximum penalties are A$12,600 for an individual and A$63,000 for a corporation) (Section 546).

iii Discrimination and harassment

In addition to the protections against discrimination under the FW Act (see above):

a the Racial Discrimination Act 1975 (Cth) proscribes discrimination on the grounds of race, colour or national or ethnic origin, and racial vilification;

b the Sex Discrimination Act 1984 (Cth) proscribes discrimination on the grounds of sex, sexual orientation, gender identity, intersex status, marital or relationship status, pregnancy or potential pregnancy, breastfeeding or family responsibilities. It also prohibits sexual harassment;

c the Disability Discrimination Act 1992 (Cth) precludes discrimination on the basis of a range of physical, intellectual and psychiatric disabilities, and proscribes the harassment of people with disabilities; and

d the Age Discrimination Act 2004 (Cth) prohibits discrimination for reason of age or age-related characteristics.

Each state and territory has its own anti-discrimination statute, prohibiting discrimination on the basis of a broader range of attributes than the above federal laws.[11]

Most workplace harassment claims relate to sexual harassment, which is typically defined to mean conduct of a sexual nature that could reasonably be expected to offend, humiliate or intimidate a person.[12]

11 Anti-Discrimination Act 1977 (NSW); Equal Opportunity Act 2010 (Vic); Anti-Discrimination Act 1991 (Qld); Equal Opportunity Act 1984 (WA); Equal Opportunity Act 1984 (SA); Anti-Discrimination Act 1998 (Tas); Discrimination Act 1991 (ACT); Anti-Discrimination Act (NT).

12 See, for example, Section 28A of the Sex Discrimination Act 1984 (Cth).

iv Workplace bullying

Bullying behaviour in the workplace may be addressed through workplace health and safety, workers' compensation or anti-discrimination legislation, criminal law or the tort of negligence. Primarily, however, an employee may bring a claim before the FWC seeking an order to stop bullying under Part 6-4B of the FW Act.

For purposes of these provisions, a worker is bullied if, while at work, an individual or a group of individuals repeatedly behaves unreasonably towards the worker (or towards a group of workers of which the worker is a member) and that behaviour creates a risk to health and safety. However, reasonable management action (e.g., legitimate performance management) does not constitute bullying (Section 789FD).

FWC orders in bullying cases (whether made as a result of conciliation, mediation or arbitration) are generally focused on preventing further bullying. Orders may therefore include:

a requiring the individual or group of individuals to stop the specified behaviour;
b regular monitoring of behaviour by an employer or principal;
c compliance with an employer's or principal's bullying policy;
d the provision of information, additional support and training to workers about acceptable workplace conduct; and
e review of the employer's or principal's anti-bullying policy (or implementation of such a policy where none exists).

The FWC has no power to award monetary compensation in bullying cases.

IV YEAR IN REVIEW

i Significant cases: unfair dismissal

Higgins v. Coles Supermarkets Pty Ltd T/A Coles [2017] FWC 6137: the FWC rejected an unfair dismissal claim brought by a supermarket employee who had sent sexually explicit images to his manager. The FWC found that although the images were sent by text using the employee's own mobile phone and outside the bricks-and-mortar environment of the store, the employee's actions breached the company's code of conduct. This decision adds to a growing line of authority confirming that social media and other transgressions occurring outside work hours or the workplace may form a legitimate basis for dismissal (where a sufficient connection to the employment can be shown).[13]

Farstad Shipping (Indian Pacific) Pty Ltd v. Rust; *Rust v. Farstad Shipping (Indian Pacific) Pty Ltd* [2017] FWCFB 4738: an FWC Full Bench overturned a finding of unfair dismissal relating to a ship's captain, sacked for breaching the company's zero-tolerance policy on alcohol consumption prior to duty. The dismissal arose after the captain tested positive for alcohol, having consumed 10 beers the day prior to the ship's scheduled departure from port. The Full Bench rejected the captain's claims that a work-related incident had triggered his resort to alcohol and that he was on anti-depressant medication because of a related incident some years earlier. Rather, it was found that the captain had also breached the drug and alcohol policy by failing to report his use of anti-depressants, providing a further basis for the dismissal.

13 See Louise Thornthwaite, 'Social Media, Unfair Dismissal and the Regulation of Employees' Conduct Outside Work' (2013) 26 *Australian Journal of Labour Law* 164.

Fitzgerald v. Woolworths Limited [2017] FWCFB 2797: a Full Bench of the FWC determined that the requirement to obtain permission to appear as a legal representative in an unfair dismissal case applies not only to advocacy at the hearing stage, but also where a party obtains legal assistance with preparation of submissions and other pre-hearing steps. The Full Bench ruled that the reference in Section 596 of the FW Act to representation 'in a matter' in the FWC means 'the whole of [the] justiciable controversy' brought before the FWC for adjudication. This outcome will have significant implications for the widespread use of 'shadow lawyers' by parties in many types of FWC proceedings.

ii Significant cases: general protections

Power v. BOC Pty Ltd and Others (No. 2) [2017] FCCA 2387: the Federal Circuit Court awarded an employee A$58,000 (including a civil penalty of A$20,000 and A$9,000 for hurt and humiliation) following her employer's decision to make her position redundant during her pregnancy. The Court found that by bringing forward the date on which the redundancy was to take effect, the employer had breached Section 84 of the FW Act (the employee's right to return to her position after maternity leave) and Section 340 (the taking of adverse action against her because she had exercised her workplace right to take maternity leave). The Court also determined that these breaches had occurred because senior managers within the company had acted with undue haste and without involving its HR department in the redundancy process.[14]

Hull and Another v. Hertel Modern Pty Ltd [2017] FCCA 2579: the Federal Circuit Court found that a sheet-metal worker on the Gorgon liquefied natural gas project was lawfully dismissed for reason of redundancy, and not (as he claimed) because he had exercised a workplace right to make a complaint in relation to his employment.[15] The employee had previously made the complaint, about racist treatment by another worker and a supervisor, and alleged that once he formalised the complaint he was included among 116 employees to be made redundant. However, the Court decided that the making of the complaint formed no part of the employer's decision to make the employee redundant, particularly given that one of the co-workers he had complained about was also listed for redundancy.

Fair Work Ombudsman v. Yenida Pty Ltd and Another [2017] FCCA 2299: in the course of finding that a hotel and its manager had breached the FW Act by underpaying two kitchen workers, the Federal Circuit Court determined that the respondents had taken these actions for reasons related to the employees' nationality and race in breach of Section 351. The underpayments totalled around A$26,000 over a four-year period. The Court accepted the employees' evidence that the hotel manager referred to them as 'family' because, in Malaysia and China, there is a culture of helping out family and on this basis they would not question working long hours for low (or no) pay. Underpayment and other forms of exploitation,

14 See also *Power v. BOC Ltd and Others* [2017] FCCA 1868; and *Mahajan v. Burgess Rawson and Associates Pty Ltd* [2017] FCCA 1560 (finding of unlawful adverse action taken by the employer when it dismissed an employee, on the final day before expiry of her probationary period, for taking time off work to manage morning sickness and related issues).

15 In several other decisions, this protection (in Section 341(1)(c)(ii) of the FW Act) has been interpreted quite broadly to enable successful general protections claims to be brought where adverse action has been taken against an employee for a making various types of employment-related complaints or inquiries: see, for example, *Walsh v. Greater Metropolitan Cemeteries Trust (No. 2)* (2014) 243 IR 468; *Shea v. TRUenergy Services Pty Ltd (No. 6)* (2014) 314 ALR 697.

often involving migrant workers, have been the subject of increasing scrutiny in Australia over the past three years.[16] This case signals a new focus on the part of the FWO to bring enforcement proceedings where there are race-based motivations for exploitation.

iii Significant cases: discrimination and sexual harassment

Garriock v. Football Federation Australia [2016] NSWCATAD 63: a professional footballer with the Australian women's national team lost a complaint of indirect discrimination on the ground of her status as a carer. The footballer sought reimbursement of the costs associated with having her mother accompany her on the team's tour of the United States in 2013, to care for her 11-month-old daughter. When the Football Federation refused to reimburse these costs, the footballer brought a claim alleging that she had been discriminated against on the basis of her 'responsibilities as a carer' under the Anti-Discrimination Act 1977 (NSW). However, the NSW Civil and Administrative Tribunal determined that indirect discrimination could not have occurred, because there was no requirement or condition (to meet the costs of alternative carer arrangements while on tour) that not only the complainant but also other employees had to comply with.

Green v. State of Queensland, Brooker and Keating [2017] QCAT 008: the Queensland Civil and Administrative Tribunal (the Tribunal) awarded around A$156,000 compensation to a cleaner who developed a psychological disorder following unlawful sexual harassment by his co-workers. They had played a prank on the cleaner, simulating the aftermath of a 'sex romp' between two school staff members in the staff room, which the cleaner was then required to clean up. Subsequently, the cleaner was informed of the prank and claimed he suffered an adverse reaction; this was contested by the respondents to his sexual harassment claim, who argued he had embellished his response to the prank. The Tribunal accepted that the cleaner was very shocked by the incident, which had been intended by his co-workers to embarrass and humiliate him. It was found that the two colleagues had engaged in sexual harassment, for which the state government as employer was vicariously liable. The high compensation award in this case is consistent with the increasing tendency of Australian courts and tribunals to ensure that sexual harassment victims are appropriately compensated for the harm they suffer (including hurt and humiliation).[17]

Hilditch v. AHG Services (NSW) trading as Lansvale Holden [2017] FCCA 1086: the Federal Circuit Court found that an employer did not engage in unlawful disability discrimination when it dismissed an injured employee but had not offered him redundancy or redeployment. The employee had sought to return to a different role following surgery, as he was unable to perform all his pre-injury duties. The Court applied earlier authority establishing that the requirement to make 'reasonable adjustments' under the Disability Discrimination Act 1992 (Cth) relates to an alteration or modification enabling a person

16 See, for example, Corrs Chambers Westgarth's coverage of the 7-Eleven franchise network underpayments scandal (http://www.corrs.com.au/publications/corrs-in-brief/stricter-laws-for-franchisors-responses-to-the-7-eleven-wage-scandal) and the federal government's response through enactment of the Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 (Cth) (http://www.corrs.com.au/publications/corrs-in-brief/parliament-passes-the-vulnerable-workers-bill).

17 See, for example, *Richardson v. Oracle Corp Australia Pty Ltd* (2014) 223 FCR 334; *Collins v. Smith (Human Rights)* [2015] VCAT 1992.

to do the work they were employed to do.[18] The employee's medical certificates indicated he could not fully return to his position as a fitter. The employer had therefore not breached the legislation when it did not accede to his requests to be given an office or driving role.

iv Significant cases: workplace bullying

Darren Lacey and Chris Kandelaars v. Murrays Australia Pty Limited; *Andrew Cullen* [2017] FWC 3136: despite finding that two employees' claims of bullying conduct were proven, the FWC determined not to issue stop-bullying orders because the employer had already taken steps to reduce the risk of further problems arising. The unreasonable behaviour engaged in by the manager of the two bus drivers included unjustified threats of disciplinary action, repeated correction of minor mistakes, and humiliation in front of colleagues. However, the FWC observed that its role is not to punish but to ensure that further workplace bullying is prevented, and in this case the employer's removal of the manager to another role sufficiently reduced the risk of ongoing bullying.

Application of Lynette Bayly [2017] FWC 1886: the FWC made a rare order preventing the dismissal of an executive director pending the determination of her application for an order to stop bullying. The order was granted because if the employee were to be dismissed, there would be no jurisdiction to deal with her bullying application.[19] The interim order made in this case required the employer not to investigate further, take disciplinary action against or dismiss the employee in respect of alleged misconduct and poor performance.

v FWC caseload and access to justice programmes

In 2016/2017, the FWC dealt with 14,135 unfair dismissal claims; 3,729 general protections claims involving dismissal; 937 other general protections claims; and 722 applications for orders to stop workplace bullying.[20] With the exception of general protections dismissal claims, which trended higher, and a lower number of unfair dismissal claims, overall the volume of claims in 2016/2017 was consistent with previous years.[21]

Since 2012, the FWC has implemented many initiatives to improve access to justice for users of its services, especially the approximately 40 per cent of applicants who are unrepresented when they lodge an unfair dismissal or general protections claim.[22]

In 2016/2017, the FWC established the Workplace Advice Clinic programme to facilitate the provision of free legal advice to unrepresented litigants in Melbourne, Sydney and Brisbane, working in partnership with community legal centres.[23] The FWC also

18 *Watts v. Australian Postal Corporation* [2014] FCA 370.

19 Applications for stop-bullying orders under Part 6-4B of the FW Act can only be entertained by the FWC where there is an ongoing employment relationship. If the employment has ended, there is no jurisdiction to make an order.

20 FWC, *2016–17 Annual Report: Access to Justice*, 2017, page 33.

21 Ibid., page 42.

22 Commissioner Johns, FWC, 'The virtual Commission – improving access to justice and efficiency in dispute resolution through technology', paper for the Australian Labour Law Association Conference, Melbourne, November 2016, page 3.

23 FWC, *2016–17 Annual Report: Access to Justice*, pages 24–25.

operates a pro bono programme, through which law firms provide free legal assistance to unrepresented employees and employers in cases involving jurisdictional objections to an unfair dismissal claim.[24]

V OUTLOOK AND CONCLUSIONS

Debate over workplace regulation in Australia is likely to intensify in the lead-up to the next federal election, which will be held by around mid 2019. The trade union movement is already campaigning for changes to the FW Act, mainly to improve what are perceived to be limitations in the legislation that have enabled employers to thwart union efforts to engage in collective bargaining – or to evade enterprise agreements through the creation of new employing entities.

Another major focus of this campaign is to ensure that workers engaged via platforms or apps in the growing 'gig economy' have access to minimum employment standards and other protections. In December 2017, the FWC handed down the first Australian decision addressing these issues, finding that an Uber driver was not an employee and therefore could not pursue an unfair dismissal claim when he was disconnected from the Uber app following poor passenger ratings.[25] More litigation of this nature can be expected, as gig economy companies maintain that they are legitimately engaging staff through independent contractor relationships.

Employers more broadly continue to raise concerns about having to pay 'go away money' to settle unmeritorious unfair dismissal claims, and about the imposition on businesses of defending general protections claims (which can take several years to work their way through the FWC and federal courts).

However, regardless of the outcome of the next election, it is unlikely that there will be any major changes to the current framework for the resolution of individual employment disputes. The FWC will continue to implement initiatives to improve access to justice, especially for unrepresented litigants, including exploring options for establishing administrative hubs in suburban centres that are closer to the parties involved in individual claims.[26]

24 Ibid., pages 26–28.

25 *Kaseris v. Raisier Pacific VOF* [2017] FWC 6610.

26 Justice Ross, FWC President, address to the International Perspectives on Dispute Resolution Conference, Melbourne, reported in *Workplace Express*, 3 November 2017.

Appendix 1

ABOUT THE AUTHORS

CORRS CHAMBERS WESTGARTH

Level 25
567 Collins Street
Melbourne VIC 3000
Australia
Tel: +61 3 9672 3000
Fax: +61 3 9672 3010
john.tuck@corrs.com.au
anthony.forsyth@corrs.com.au
www.corrs.com.au

JOHN TUCK

Corrs Chambers Westgarth

John Tuck is a partner and the practice group leader of Corrs' employment, labour and safety team. Recognised by his peers as a leader in both the employment and government areas, John has extensive experience in acting for government and corporates for over 20 years in the employment, industrial relations and equal opportunity area. He brings practical and strategic thinking to complex workplace issues and litigation, having acted in a number of large enterprise agreement negotiations and most difficult disputes.

John has been recognised as a 'Best Lawyer – Labour & Employment' by the AFR 'Best Lawyers' peer review (2014–2018); as a 'Best Lawyer – Government' by the AFR 'Best Lawyers' peer review (2013–2018); as a 'leading lawyer' for labour and employment law by *The Legal 500 – Asia Pacific* (2018); and as a leading lawyer for employment by *Chambers Asia-Pacific* (2012–2018).

ANTHONY FORSYTH

Corrs Chambers Westgarth

A consultant with Corrs' employment, labour and safety team, Professor Anthony Forsyth oversees the firm's thought leadership in workplace relations and workplace health and safety. Anthony publishes regular articles on new legislation, case law and policy; delivers seminars to clients and in-house; and also provides practical advice to corporate and public sector clients on employment and workplace relations issues.

Anthony is also a law professor in the graduate school of business and law at RMIT University, where he teaches labour law and legal research in the University's Juris Doctor programme. His research covers collective bargaining, union recognition, workplace dispute resolution, trade unions and labour hire.

Law
Business
Research

ISBN 978-1-912228-04-1