

ACTUS WORKPLACE LAWYERS

Insights into Current Workplace Relations Issues



8 November 2023

Welcome to the Spring edition of Actus Workplace Lawyers' *Insights into Current Workplace Relations Issues*. Please get in touch if you would like to discuss any of the issues covered in this edition or the workplace relations services or support that Actus Workplace Lawyers could provide to your business.

Proposed casual employment changes – how bad would they be for employers?

There has been a lot of debate in the media about the proposed casual employment changes in the Government's [Closing Loopholes Bill](#). Given the complexity of the changes, it is little surprise that many employers are confused about what they would mean in practice. Amongst other changes, the Bill would amend the definition of a "casual employee" and expand the rights of employees to convert to permanent employment. [Read more](#)

Drafting of casual employment provisions in enterprise agreements

Employers making new enterprise agreements would be wise to keep in mind the provisions of the Government's Closing Loopholes Bill when drafting casual employment provisions for an agreement. For example, the Bill includes, in effect, two different definitions of a "casual employee" – one that would apply to casuals employed prior to 1 July 2024 and one that would apply to casuals employed on or after 1 July 2024. If wording like "A casual employee has the meaning given by section 15A of the Fair Work Act" is included in an enterprise agreement, this could inadvertently extend the problematic new definition in the legislation to a large number of existing casuals. For any enterprise bargaining assistance, please contact Actus Workplace Lawyers.

High Court wage theft case

The High Court of Australia is considering a Constitutional challenge to the validity of the Victorian *Wage Theft Act 2020*. There are credible arguments that the legislation is invalid for employers and employees covered by the *Fair Work Act 2009* because the federal legislation comprehensively deals with wage underpayment matters for employers and employees covered by the federal legislation. [Read more](#)

High Court to hear BHP's public holiday special leave application

On 21 November, the High Court will hear BHP's application for special leave to appeal a problematic 28 March 2023 [decision](#) of the Full Court of the Federal Court. In its decision, the Federal Court held that employers must request, not just require, employees to work on a public holiday. A decision is likely to be handed down on 21 November on whether special leave is granted. If special leave is granted, the appeal will be heard by the High Court next year. [Read more](#)

Federal Court confirms broad coverage of the Miscellaneous Award

Justice Raper of the Federal Court of Australia has confirmed the broad coverage of the *Miscellaneous Award 2020 (Miscellaneous Award)*. In [Shergill v Singh \[2023\] FCA 1346](#), Raper J decided that a domestic worker (Ms Shergill) who carried out cooking, cleaning and gardening duties in the house of the Indian High Commissioner to Australia was an employee covered by the Miscellaneous Award. [Read more](#)

Employers need to be mindful that many of the positions they consider to be award-free may in fact be covered by a modern award. Particular care needs to be taken with positions that are not managerial or professional. Even if there is not another modern industry or occupational award that applies, the Miscellaneous Award could apply, depending upon the circumstances. Many underpayment claims pursued by the Fair Work Ombudsman, trade unions and plaintiff lawyers over recent years have related to employees who were being incorrectly treated as award-free by their employer.

Enterprise bargaining wage outcomes

The Fair Work Commission's latest fortnightly enterprise agreement [statistical report](#) (published on 6 November) shows that the average annualised wage increase (AAWI) in agreements lodged for approval between 23 September and 6 October 2023 was 3.5%. [Read more](#)

Should you wish to discuss any of the issues in this report or require any legal advice or assistance, please contact Stephen Smith, Principal of Actus Workplace Lawyers at stephen.smith@actuslawyers.com.au. If any other members of your staff would like to receive this regular report, please advise of the details through this link: <https://actuslawyers.com.au/contact-us>

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