More changes ahead? Productivity Commission to scrutinise Australia’s workplace relations framework

A ‘root and branch’ inquiry into Australia’s workplace relations framework has commenced.

Background

In December 2014, and in accordance with the Coalition’s policy prior to the 2013 Federal election, Treasurer Joe Hockey kicked off a broad inquiry by the Productivity Commission (PC) into the workplace relations framework.

The inquiry will examine the current operation of the workplace relations framework (including the Fair Work Act 2009 (Cth) (Act) and the Independent Contractors Act 2006 (Cth)) and identify future options to improve the framework ‘bearing in mind the need to ensure workers are protected and the need for business to be able to grow, prosper and employ’.¹

For those nervous about another round of employment law changes, Employment Minister Eric Abetz has stated that the Government will consider all of the recommendations put forward by the PC, and will not seek to legislate any of the recommendations prior to the 2016 election.²

The focus of the PC inquiry

In January 2015, the PC released five Issues Papers setting out the focus of the inquiry and inviting public submissions from interested stakeholders. The scope of the inquiry is broad. Key matters under the microscope include:

- Safety nets - including minimum wages, penalty rates, Modern Awards and the National Employment Standards.
- The enterprise bargaining framework - including the operation of the better off overall (BOOT) test, greater emphasis on productivity for approval of enterprise agreements, good faith bargaining obligations and the practical use and value of individual flexibility agreements.
- Processes for initiating and ending industrial action and the types of industrial action available for employers (currently limited to lockouts in response to employee action).
- The role of the Fair Work Commission and Fair Work Ombudsman: In particular, the experiences of employers, employees and organisations with the Fair Work Commission and Fair Work Ombudsmen and whether there is any need to change the roles and processes of these bodies.
- Individual arrangements and the regulation of alternative labour (such as independent contractors, labour hire and foreign workers).
- Employee protections, including unfair dismissal (and its impact on productivity), anti-bullying orders and general protections claims.
- Competition law: The operation of competition law and its relevance to industrial legislation and the issue of secondary boycotts.

Although the Issues Papers paint the picture of a broad inquiry, early signs from the media...
attention surrounding the PC inquiry are that the following issues will be a key focus for stakeholders:

1. The Safety Net - minimum wages and penalty rates

   - The PC is seeking submissions on the best process for setting the minimum wage and whether the minimum wage should vary by region.
   - Penalty rates will also be scrutinised. The PC notes in the Issues Papers that, although additional payment for overtime and shift work is not overly contentious, views are polarised on the need for weekend penalty rates. The PC has raised the prospect of penalty rates being calculated differently, replaced by time-off-in-lieu, or being determined by the market.
   - To date, the potential review of minimum wage and penalty rates has attracted controversy. By way of example, National Secretary of the Transport Workers’ Union Tony Sheldon wrote recently that “the government unleashes its attack dog the Productivity Commission to cut the minimum wage, scrap extra pay for Sunday and bank holiday pay and attack workplace rights”.

2. Independent contractors

   - Another key issue will be the inquiry’s potential impact on independent contractors. The PC is seeking submissions on whether the current industrial relations framework is a ‘barrier’ to independent contractors, and whether there should be a statutory definition of ‘independent contractor’.
   - Although it unclear how the PC will address this issue, there appears to be support for greater freedom for business to engage contractors. Recently, small Business Minister Bruce Billson stated that he will pursue more flexible rules for companies to negotiate and engage skilled workers as independent contractors.

3. Bullying and WHS laws

   - Although the inquiry’s terms of reference do not permit the PC to examine in detail specific workplace health and safety laws, the terms of reference do permit consideration of the general impact of the workplace relations system on workplace health and safety.
   - The PC has noted that significantly fewer than expected anti-bullying applications have been lodged, and that many stakeholders find the anti-bullying regime to be ‘confusing and complex’. Given that the PC partly attributes that confusion to an overlap with workplace health and safety laws, and has signalled potential ‘consolidation’ across the different employee protections, it may be that the PC will recommend a simplification of, or a reduced scope to, the anti-bullying regime.

Process from here

From here, the timeframes for the PC inquiry are as follows:

- Due date for public submissions 13 March 2015
- Release of draft report June/July 2015
- Public hearings August/September 2015
- Final report 30 November 2015

Employers wishing to participate in the PC inquiry can make written submissions or otherwise provide comments about workplace relations matters on the PC website.

While the PC inquiry is in its infancy, it is already becoming evident that because of the broad nature of the inquiry, there will likely be recommendations for future change to the FW Act. If, when and how such recommendations are actioned does, however, remain to be seen.

Hall & Wilcox can assist any interested employers in making submissions to the PC inquiry.

This article was written by Kerryn Tredwell, Partner, Jessica Fletcher, Special Counsel and David Burnt, Lawyer.

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General protections update: why the decision-maker is critical to defending a claim

General protections claims are on the increase. More and more businesses are facing these claims (also known as ‘adverse action’ or ‘GP’ claims) from former, and even existing, employees in a myriad of situations.

Recent years have delivered two High Court cases which provide guidance about what an employer will need to do to discharge the reverse onus it bears in GP claims. Once the adverse action is established (for example, that a disciplinary action or dismissal occurred), the employer has to prove that the action was not taken for a prohibited reason.

In the first of the High Court decisions, Board of Bendigo Regional Institute of TAFE v Barclay, an employee who was also a union official was suspended by his employer, the Bendigo Institute of TAFE, for circulating an email to union members alleging fraud by TAFE officers. The employee claimed the suspension was adverse action taken for unlawful reasons including that he was an officer of the union. The High Court ultimately accepted that the alleged unlawful reasons played no part in the decision and that the employee’s union position did not, of itself, grant him immunity from being disciplined for any actions he undertook wearing his union hat.

Last year, in CFMEU v BHP Coal Pty Ltd, the High Court again found in favour of an employer who had dismissed an employee who was a union member and had held up a ‘scab’ sign on a picket line during industrial action. The company dismissed the employee because his actions were intimidating and offensive to other employees and breached the company’s Code of Conduct. The employee claimed the dismissal was adverse action taken against him for prohibited reasons (his union membership and participation in industrial activities). Following Barclay, the High Court accepted that the evidence established that the decision-maker had not been motivated by prohibited reasons in dismissing the employee.

Guidance for employers

From those cases, we know that:

- The court will focus on the decision-maker’s reasons for taking the adverse action. This is a question of fact. The decision-maker’s evidence (and ultimately how that person performs in the witness box) will be critical to successfully defending a GP claim.

- If the court is satisfied that the decision-maker’s reasons for taking the adverse action did not include any unlawful consideration, the GP claim cannot succeed.

- Determining the reasons for the adverse action is not an objective test. The court cannot substitute its own view. It must make findings of fact about the true reason of the decision-maker. It will have to weigh up all of the available evidence (which should include the decision-maker’s testimony about why the action was taken).

- Just because the adverse action is connected in some way to union membership, participation in industrial activity or some other prohibited reason, does not automatically make the prohibited reason the reason for the adverse action. The connection may force the court to consider the true motivations of the decision-maker, but the connection is not enough of itself to prove the decision-maker took the action for the prohibited reason, particularly where the decision-maker’s evidence says otherwise.

- The majority held that it is not necessary to completely dissociate the adverse action from any industrial activity. (In contrast, the minority took the approach that the waving of the ‘scabs’ sign could not be divorced from the fact that it was done while participating in a union-organised protest).

- In Barclay, it was said that just because an employee’s union position and activities were inextricably entwined with the adverse action, an employee was not immune and protected from the adverse action. It was held that such an approach would destroy the balance between employers and employees which is central to the provisions.

- The trial judge had found that the reasons for the dismissal decision did not include the operator’s participation in industrial activity or his representing the union’s views, and that the decision-maker had not been motivated by those considerations. The majority held that the trial judge did not need to make any further inquiry; those findings alone should have led the trial judge to find that there had been no breach.

- The critical distinction was articulated by Gageler J (in the majority). The protection afforded:

  - is not protection against adverse action being taken by reason of engaging in an act or omission that has the character of a protected industrial activity;

  - rather, it is protection against adverse action being taken by reason of that act or omission having the character of a protected industrial activity.
In other words, action taken because the act or omission had the protected character will breach the Act.

**Other recent ‘adverse action’ cases**

In December last year, a Federal Court full bench overturned an order to reinstate a Victorian government solicitor who claimed he had suffered adverse action when he was dismissed while suffering depression.³

The Court accepted the government’s evidence that the true reason for the solicitor’s dismissal was related to his conduct and not his depressive condition. While the solicitor argued that his conduct had been a result of his depression (eg poor punctuality and failing to meet deadlines), the Court found that there was insufficient evidence linking the conduct to the depression. There was also contrary evidence that the solicitor’s excuses to his employer for the relevant misconduct had nothing to do with his depression.

The Court reasoned that even where there is a close connection between the reason that adverse action is taken (here, the misconduct) and a prohibited reason (his mental condition), it may be possible for an employer to prove that the prohibited reason was not a factor at play.

**No-one is immune**

A further illustration that exercising a ‘workplace right’ does not make an employee a protected species in the context of ‘adverse action’ is the recent case of Mendonca v Chan and Naylor (Parramatta) Pty Ltd & Anor.⁴

In this case, a client manager for a firm of accountants, Mr Mendonca, lodged a GP claim against his employer after being dismissed for serious misconduct.

Mr Mendonca had raised bullying complaints with his employer, the Fair Work Ombudsman and WorkCover New South Wales. He also made complaints to his employer that he had been underpaid his wages and annual leave entitlements. He claimed he was dismissed because he made these complaints, and that they constituted a ‘workplace right’.

The firm claimed the dismissal related to serious concerns about Mr Mendonca’s skills, diligence and work performance which had been discovered during a period when he was absent from work. The firm alleged that some of Mr Mendonca’s actions had the potential to expose its clients to additional tax liabilities, fines and penalties, and also put the reputation of the business at risk.

There was no dispute that Mr Mendonca had made the complaints to the Fair Work Ombudsman and WorkCover. Accordingly, the Judge accepted that Mr Mendonca had exercised a workplace right. There was also no dispute that his dismissal amounted to adverse action.

The firm bore the onus of proving that its reasons for dismissing Mr Mendonca did not include the complaints he had made and it produced evidence of its investigation into Mr Mendonca’s file management and advice to clients.

Mr Mendonca argued that to succeed in its defence his employer would have to prove not only that they thought he was guilty of serious misconduct, but that he was actually guilty of serious misconduct.

The Judge rejected this approach saying that the question to be answered is whether the adverse action was motivated by a prohibited reason (that is, because Mr Mendonca had exercised a workplace right), not whether the firm’s conclusion about his conduct was correct.

The Judge accepted that the firm’s decision to dismiss Mr Mendonca was not motivated by his exercising of his workplace rights and the claim was dismissed.

**Tips for avoiding liability**

The fact that an employee has exercised a workplace right or has a protected attribute will not make unlawful any adverse action taken against them. The employee can still be the subject of disciplinary action for conduct or performance issues as long as the conduct or performance of the employee is (and can be proven to be) separate to their workplace right or protected attribute.

The risks of GP claims arising out of dismissals are an unfortunate reality. To minimise exposure to such claims, employers need to ensure that any decision to dismiss an employee is defensible for reasons that do not include prohibited reasons.

Employers who are managing performance or conduct issues of an employee who has exercised a workplace right should consider the following tips:

- take appropriate steps to investigate or deal with the employee’s complaints separate to the performance or misconduct process;
- if practicable, quarantine the decision maker in the performance/misconduct process from other matters that gave rise to the workplace right;
- follow a process of procedural fairness to deal with the performance/misconduct issue;
A dangerous policy: HR policy lands employer in breach of contract

The spectre of workplace policies having legal force and binding employers has existed for some time. We have seen a series of cases where policies on topics ranging from redundancy to discrimination policies have been found to form part of an employment contract giving rise to contractual rights for the employee and legal obligations for the employer.

In a recent sex discrimination case, Romero v Farstad Shipping (Indian Pacific) Pty Ltd [2014] FWAFC 177, a Full Court of the Federal Court of Australia has, on appeal, held that a shipping company’s ‘Workplace Harassment & Discrimination’ policy (the policy) was contractually binding. The company’s failure to follow the investigation procedure in the policy to the letter has landed it in breach of contract and liable to pay damages.

Overview

Ms Romero was employed by Farstad Shipping as a second officer on the supply ship, Far Swan. After a falling out with the ship’s captain, Ms Romero sent an email to the company’s HR department raising concerns about the captain’s treatment of her aboard the ship. She claimed the Captain had been hostile and aggressive toward her and treated her as incompetent.

The email was not expressed as a complaint (formal or informal) and did not ask that any particular action to be taken, but rather left it to the company to decide how to deal with the issue.

The company chose to deal with Ms Romero’s email as a formal complaint pursuant to its Workplace Harassment & Discrimination policy and commenced an investigation. The investigator found that while there was a clash of personalities and communication styles, none of Ms Romero’s allegations against the captain about his treatment of her were substantiated.

Ms Romero lodged a complaint of sex discrimination against the company with the Australian Human Rights Commission on grounds that she had been bullied and vilified because she was female. The matter proceeded to the Federal Court where Ms Romero argued, in addition to sex discrimination, that the policy formed part of her employment contract and that the company had breached her contract by failing to investigate the matter in accordance with the policy.

Findings

At first instance, the Court dismissed the claim for sex discrimination, agreeing with the company that there was nothing more than a ‘personality clash’ between the Captain and Ms Romero and that the Captain had never made any ‘gender associated’ comments.

The Court also dismissed the breach of contract claim, finding that the policy was not incorporated into Ms Romero’s employment contract because the language used was aspirational and too vague to form binding contractual obligations. The Court held that even if the policy had been contractual, the company had not breached it.

Ms Romero successfully appealed the finding that there was no breach of contract. The appeal court held:

- the policy was incorporated into Ms Romero’s employment contract.

The employment contract required Ms Romero to observe the company’s policies at all times and the policy set out the process the company would follow when a discrimination complaint was made. Accordingly, the policy imposed mutual obligations.

The Court also noted that the policy was issued at the same time as the offer of employment, and that training was regularly conducted for employees on the policy and it was regularly reinforced.

Some parts of the policy were aspirational, and other parts directive.

- The company had not complied with the policy and so had breached Ms Romero’s employment contract. In conducting the investigation, the company failed to comply with the policy in a number of ways, including:
not giving Ms Romero any notice that a formal investigation was been conducted;

- dealing with the policy as a formal complaint and not considering the informal options available under the policy. (The Court noted that she had never intended that the matter become a formal investigation and said that a formal complaint should not be inferred by receipt of an email that made no reference to the policy);

- interviewing the captain before anyone spoke to Ms Romero to seek details;

- rolling performance issues raised by the Captain into the investigation into Ms Romero’s allegations about his behaviour, and in doing so, circumventing the processes for dealing with performance issues set out in the applicable enterprise agreement;

- not interviewing any witnesses. Crew members of the Far Swan who witnessed interactions between Ms Romero and the captain should have been interviewed;

- not properly documenting the investigation.

The appeal court referred the matter back to a single judge to determine damages.

**Message for employers**

Employers now face some mixed messages when it comes to workplace policies. For example, on the one hand, employers are constantly reminded of the importance of training employees on company policies if the company intends to rely on the policy when an employee does the wrong thing. On the other hand, in *Farstad*, the fact that training had been regularly conducted on the policy in question was one of the factors the appeal court pointed to in finding that the policy was contractually binding.

Most employers do not intend for workplace policies to be legally binding on the employer, even though they do want their employees to comply with the policies. To minimise the risk of a policy having contractual force and an employer being in breach, employers should:

- Ensure that employment contracts expressly state that HR policies do not form part of the employment contract and do not legally bind the company. (In *Farstad*, there was no indication that Ms Romero’s contract or the relevant policy contained any such statement leaving it open to the court to conclude that the policy had contractual force.) All HR policies should contain the same statement that they are not legally binding on the company.

- Simplify your HR policies. The less prescriptive and more flexible your policies and procedures, the less likely the company will be found to have breached them. For example, do not include specific time limits (eg ‘The company will respond within 48 hours.’) where a more general time limit will suffice (eg ‘The company will respond within a reasonable time.’).

- Don’t issue specific policies with the offer of employment. This might lead to an employee claiming the company made representations about how it would act in certain situations, and that the employee relied on those representations by accepting the offer of employment. Familiarisation with company policies can wait until induction.

**For the record... the new challenge of secret recordings in the work place**

‘Smart devices’ (phones, tablets and the like) populate almost every workplace and have increasing capacity to be used to record conversations. So what happens if an employee secretly records private workplace meetings and conversations using a smart device? Can they do it and, if they do, can those recordings be used in a subsequent workplace dispute?

These questions are more frequently arising for employers as the practice of making recordings occurs more often in workplaces, with varying outcomes.

In this briefing, we look at the general rules that apply to the recording of private conversations in the workplace and recent decisions of the Fair Work Commission which have examined the issue of secret recording.

**A kaleidoscope of rules and regulations**

Each Australian state and territory has its own set of rules and regulations that apply to covert recordings of private discussions. Most of these laws apply generally and are not specific to the employer-employee relationship (although there are exceptions, such as the Workplace Surveillance Act 2005 (NSW)). Nevertheless, the general rules apply to the workplace setting.

As an example, the Victorian legislation (the Surveillance Devices Act 1999 (Vic) (SD Act)), prohibits a person from using any device (including a smartphone) to record a private

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This article was written by Kerryn Tredwell, Partner.
conversation to which the person is not a party, unless the person has the consent (express or implied) of each of the parties to the conversation to record it. The maximum penalty for recording a private conversation without consent is two years' jail and a hefty fine.

Additionally, even if a private recording is lawfully made, the SD Act prohibits the communication or publication of that recording without the consent of each of the participants to the conversation (with limited exceptions).

The other Australian states and territories have legislative schemes broadly similar to that in Victoria. Although in some jurisdictions (for example, Western Australia), it is unlawful to record a conversation, even if a person is party to it, without the consent of all participants.

When considering the issue of secret recordings, it is important to identify which state or territory legislation applies to any given case.

**Lessons from the cases to date**

Cases involving secret recordings are becoming increasingly common in the Commission. Several decisions handed down in recent years illustrate this trend.

In Thompson v John Holland Group Pty Ltd (Thompson), the employee had been dismissed for secretly recording a meeting he had with two of his managers. He revealed the recording to a colleague who then informed a manager. An investigation into the employee’s conduct followed which resulted in the employee’s dismissal for making the recording. The employee lodged an unfair dismissal claim with the Commission.

In determining the claim, the Commission had to decide two issues:

- Was the secret recording of the meeting admissible as evidence in the employee’s unfair dismissal application?
- Was the employee’s dismissal unfair?

Ultimately, the answer to both questions was ‘no’.

The Commission’s answer to the first question was closely linked to the applicable surveillance legislation, which in this case was the Surveillance Devices Act 1998 (WA). The Commissioner held that it was likely that the secret recording was made in breach of that legislation. Even though the illegality of the recording did not automatically preclude it from being admitted as evidence (because the Commission not being bound by the ordinary rules of evidence), the Commission was not convinced that the recording should be allowed into the hearing.

On the second question, the Commission held that the employee’s decision to secretly record the meeting with his managers and then replay that recording to a colleague provided a valid reason for the employer to terminate his employment. The Commission described the secret recording of the meeting as “wrong and inexcusable” and considered that the employee’s conduct had destroyed the essential relationship of trust and confidence, emphasised by the fact that the colleague to whom the employee revealed the secret recording gave evidence that he no longer felt comfortable working with the employee.

The Thompson decision was reinforced in Thomas v Newland Food Company Pty Ltd (Thomas case). In Thomas, the employee was working at a Queensland meat processing plant. He had made three WorkCover claims in respect of various injuries suffered over the course of the five years he worked at the plant.

The employee began to secretly record meetings he had with his managers as they attempted to organise appropriate duties for him given his injuries. The employee was eventually dismissed after it was discovered that he had taken photos of alleged breaches of food safety standards at the plant with a view to using them against the employer unless he received a redundancy package.

The employee lodged an unfair dismissal claim. The Commission found:

- that there was no evidence that the employee intended to blackmail the employer with the photos of food safety breaches; and
- that the employee was not accorded procedural fairness in the manner of his dismissal.

It followed that the employee had been unfairly dismissed and in the ordinary course would be entitled to reinstatement. However, the Commission held that reinstatement would not be appropriate given that “there could hardly be an act which strikes at the heart of the employment relationship, such as to shatter any chance of re-establishing the trust and confidence necessary to maintain that relationship, than the secret recording by an employee of conversations he or she has with management”.

A third decision of the Commission which considered the dismissal of an employee for recording workplace meetings is Schwenke v Silcar Pty Ltd. The performance of a trades assistant became an issue not long after his initial engagement, culminating in a meeting attended by the employee and his managers in which he received a first and final warning to improve his performance.

A further meeting occurred two weeks later in which the employee suggested that he had made a voice recording of the first meeting. After that revelation, the employer summarily dismissed the employee. The employee subsequently brought an unfair dismissal claim against the employer.

The Commission characterised the reasons for the dismissal as being twofold:
Unlike the two cases considered above, the Commissioner in this case did not consider the relevant surveillance legislation to determine the lawfulness of the employee's secret recording. This was largely because the employee did not seek to introduce the recording as evidence during the hearing.

The Commission reiterated the message from the Thompson and Thomas cases: secret recordings are contrary to an employee’s duty of good faith and undermine the mutual trust and confidence that is essential to the employment relationship. The Commissioner here commented that unlike notes taken with a pen and paper during meetings, “secretly recorded discussions are objectionable because one party is being deceptive and purposefully misleading the other party.”

The Commission concluded that the employee’s dismissal was not unfair. Both the employee’s misconduct in recording the first disciplinary meeting without the knowledge or consent of his managers, and the various performance related issues identified by the employer, provided valid reasons for the employer’s decision to terminate the relationship. That finding was upheld on appeal.

Where to from here?

While the Commission has taken a dim view of employee conduct in making secret recordings, unfair dismissal cases always turn on their own facts. Now that the High Court has decided that there is no implied term of ‘mutual trust and confidence’ in employment contracts in Australia, it will be interesting to see whether the Commission continues to reach the same conclusion on the basis of an implied term of good faith alone.

Tips for employers

Here are some tips for managing the issue in the workplace:

- Employees should be asked to switch off their mobile phones and similar devices at the start of confidential workplace meetings, including disciplinary and grievance meetings. Employees should be asked to switch off their mobile phones and similar devices at the start of confidential workplace meetings, including disciplinary and grievance meetings.

- Employment policies should be reviewed and updated to deal with the conduct of employees making covert recordings. Policies should expressly prohibit the making of recordings in the workplace without consent of the parties to the conversation.

- Managers should be alert to the fact that their conversations may be recorded by colleagues and as such, when managing disciplinary issues, follow good practices and act in accordance with relevant policies and procedures.

- If employers become aware of secret recordings in their workplace, the issue should be addressed promptly and proportionately to the conduct having regard to all the circumstances of the case.

- Take advice before dismissing an employee for making a secret recording to ensure that all relevant legal issues are considered, including the applicable surveillance legislation.

This article was written by Jessica Fletcher, Special Counsel and Jonathan McCoy, Graduate Lawyer.

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1 Surveillance Devices Act 1999 (Vic) s 6(1).
6 Ibid at [65].
8 Commonwealth Bank of Australia v Barker [2014] HCA 32