IRSQ
Industrial Relations Society of Queensland

The IR Advocate

January - March 2017

Your Professional Association

President's Welcome

Welcome to another edition of the Advocate

We have kicked off 2017 with two amazing activities that have been significantly supported by both members and non-members across our industry.

We held our Advocacy for Workplace Relations Professionals in February and, as usual, it was very well supported and received. I have had many positive comments made to me when going about my work from those who attended or presented about the professional program and level of content and assessment. There is always a high demand for this course and we already have a wait list for the next one! Thank you to all who assisted, well done.

We recently presented our IRSQ Breakfast held at the Novotel - Cletus Brown the Director of Knowledge Solutions FWO was the guest speaker and his presentation was impressive. The interaction between the FWO and workers and employers is extraordinarily high, and as Cletus said that is attributed to the complexity of Award interpretation and other industrial matters. Listening to discussions regarding precarious and vulnerable employment issues always captures my attention. I think the tribute to the presentation however was that nearly every attendee stayed to the end of the event, I know that I hope to hear Cletus speak again.

We have some critically important changes to the landscape already, the Penalty Rates Decision and the changes to Appeals in the State jurisdiction. This is what keeps us interested and fresh of course, you simply cannot sit on your laurels in this field!

I hope to see you at a future event - look out for our upcoming Trivia night and of course the Patron's lunch in the middle of the year.

Please also note that we are rebuilding our website, please bear with us whilst that occurs.

Jo McConnell

Upcoming events

The IRSQ has an exciting array of events planned for the remainder of the year including networking, educational and social events. Keep an eye on our website for further details.

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Event Recap – Breakfast with Cletus Brown

The IRSQ Annual Breakfast Event has a long-standing tradition of kick-starting our guest speaker events each year.

This year's breakfast was held on 14 March 2017 at the Novotel Hotel Brisbane with guest speaker Cletus Brown (Director Knowledge Solutions) from the Fair Work Ombudsman (FWO) talking about interesting tales from 2016 and providing insights as to what to look out for in 2017.

The industrial coverage of the society's members was on show with over 80 attendees from across the field: government agencies, lawyers, employers, employees and their respective associations being present; not to mention a few academics for whom the event is always considered a very, very early start to their day! Nonetheless, the concise informative speech and opportunity to network was well worth the early rise.

Tales from 2016

The speech started with Cletus briefly outlining the role of the FWO "*in case anyone had been dragged along … by an IR practitioner*." This included some mind-boggling statistics:

- Last year the independent regulator's website received 15 million visits making it one of the top 10 most popular government websites visited in 2016, sitting alongside much larger agencies such as the ATO.
- Employing approximately 700 staff, the FWO handles half a million telephone calls per year, including more than 100,000 to its Small Business Helpline and 60,000 online queries.
- Last year the FWO completed more than 10,000 complaints – most were resolved through some form of early intervention strategy or alternative dispute resolution.
- 90% of disputes involving formal allegations of non-compliance were resolved without using compliance action or enforcement procedures, saving the public purse from costs of enforcement including procuring evidence of offences.

2016 was described as being yet another year of transformation for the FWO with compliance activities focussing on strategic enforcement, having started the transformation journey in 2012. Cletus stated that the FWO's compliance approach is now designed to enable it "*to seek a balance between proactive and reactive work ... encouraging parties to find their own solutions for workplace issues to keep the employment relationship intact.*" The FWO is of the belief that most employers want to do the right thing but find understanding their obligations difficult, in particular, for those running small businesses. Thus, it generally only commences litigation when an employer has disregard for their obligations or consistently fails to comply with such. This results in about 50 cases per year, which intentionally create much media attention as a warning to others.

The FWO's most notable work in 2016 was the infamous 7-Eleven case, with Cletus reporting that:

- The FWO Inquiry found that while the franchisor "*… ostensibly promot[ed] compliance, it did not adequately detect or address deliberate non-compliance and as a consequence, compounded it*", resulting in a large number of franchisees creating "*… false and misleading records to satisfy 7-Eleven's auditing and payroll regime*" while continuing to underpay their employees.
- Whilst 7-Eleven's head office was provided with several years of warnings, it "*… had consistently failed to look behind the documents*."
- Essentially, policies and procedures mean nothing unless they are put into practice with controls in place.
- Poor governance from head office had filtered down to the franchisees.
- To date, this has resulted in 7-Eleven repaying $78 million and one franchisee alone paying fines "*… upwards of $400,000, a record at the time.*"

The FWO is now investing significant time and resources into educating and helping those in the supply chain to ensure compliance with workplace laws, particularly those using labour hire arrangements. Cletus noted that some employers are ignorant to their responsibilities

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believing that once 'contracted out', personal responsibility no longer applies. He reminded those present that, as a result of accessorial civil liability provisions applying under the *Fair Work Act 2009*, all parties involved in all parts of the supply chain network must ensure compliance occurs. No longer can employers (whether a primary business, franchisee or subcontractor) legally or morally avoid their responsibilities to workers who are often low-skilled migrant workers. Sadly, according to Cletus, for some industries "*… non-compliance with workplace laws has become a cultural norm.*" FWO Inquiries into "*Baiada, 4 and 5 star Hotel chains and Woolworths all disclose findings regarding systemic non-compliance in labour supply chains.*" He further stressed that "*many will also look for the 'cheapest option' when looking to contract out services. But sometimes the lowest quote can have the highest cost!*" Buyer beware!

So what lies ahead for 2017?

Cletus drew the audience's attention to the *Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017* that was introduced into parliament last month noting that its purpose is to increase penalties for serious contraventions and record keeping failures, expand accessorial liability provisions to franchisor entities and hold companies accountable for contraventions of the Act (such as cashback schemes) in addition to "*… strengthening the FWO's evidence-gathering powers by allowing the FWO to compel a person to provide information or answer questions (with appropriate safeguards)*". Parliamentary debate on the Bill continues, with lobbyists exercising their democratic rights. Cletus stated that, although the FWO will not be intervening in this debate, as it is an independent regulator, it will watch on as an interested spectator. No doubt amendments will be made before the Bill is passed.

In addition he reported that:

- The FWO is currently reviewing the franchisor agreements at Domino's and Caltex, while finalising its investigations into Pizza Hut outlets and United Petroleum.
- The Migrant Worker Taskforce developed by the Federal Government last year aims to identify regulatory and compliance weakness to enable better protection of vulnerable workers. Its focus for 2017 will be on particular industries which are known for the exploitation of migrant workers and reviewing labour hire practices of companies that attempt this. This includes mistreatment of visa holders which has become a growing concern over the previous five years.
- There is also the upcoming Modern Award Review, which he hoped will result in award simplification so that advice can be provided with confidence; and the transition to the penalty rates in retail and hospitality.

All of these issues reflect additional workload for the FWO as it will need to assess the changes before updating information and providing tools to the public. If there is dispute over the meaning of such changes, Cletus said that consultation will be a key part of this process for the FWO as it seeks to understand the ramifications "on the ground". Part of its approach has been the development of a "hip, cool" online facility called 'Konnect'! We are told that the IR Nerds are using it already.

Special thanks to Cletus for travelling from Melbourne to share his insights with the Society and for taking some challenging questions. Further thanks to the IRSQ Organising Committee and Cameron Armstrong from Essential Experiences for their support in organising and running this successful event.

Ben French - Griffith University Lecturer

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Five Minutes with Giri Sivaraman

Giri Sivaraman is a Principal and the head of Maurice Blackburn's Queensland Employment Law Practice and is based in Brisbane.

How did you decide on your desired career path?

It sounds a bit nerdish, but I always wanted to be a lawyer. I enjoyed debating and public speaking at school. Once I was at university, I started to realise how practicing law provided so many opportunities to help the disenfranchised and oppressed. I was an activist of sorts, probably of the more conventional legal kind, including revitalising a Moribund free legal advice clinic for students, and volunteering as a refugee case worker for Amnesty International. My interest in industrial relations and labour law was sharpened shortly after I finished university, when I worked for an organisation that advocated for, and organised, working children in Karnataka, India.

Who are the people who have influenced your career decisions?

My parents were very supportive of me studying law. I was the first in the family to do so. I think for my father the fact that I went to university was particularly important as he was denied the chance due to systemic discrimination against Tamils in Sri Lanka (at the time he was trying). Archana Parasher was my lecturer in discrimination law at Macquarie University, and she had a profound impact on educating me about the nature of discrimination and the role of the law in combating (or supporting) it. When I commenced working at Maurice Blackburn, Anne Gooley (who is now a Deputy President at the FWC) was my mentor in the team. I was incredibly lucky to have Anne for advice on making the right career decisions. She gave great advice on making the right decisions in a law firm environment, and set an excellent example about ensuring work/life balance and avoiding burnout.

Who do you admire greatly and why?

There are so many. Trying to limit this list makes me feel guilty. But to name a few, I'll start with Josh Bornstein our national practice leader. Putting this into a publication probably makes me look sycophantic, but them's the breaks. What I most admire about Josh is his ability to be a courageous thought leader in industrial relations and broader labour law issues, whilst still running a very successful employee/union ER/IR practice. I admire my predecessor Terri Butler who remains one of the best IR lawyers I have ever worked with, and is now a formidable politician with excellent values. I admire Stephen Keim SC, who is an excellent barrister across a number of jurisdictions, including IR, but also uses his valuable time and reputation to promote human rights issues of great importance.

What do you consider to be the most important issues in industrial relations today?

The single biggest issue is the rampant exploitation and wage theft happening across numerous industries in Australia. It is clear that scandals such as 7-Eleven, Caltex, Baiada, Pizza Hut, and various agricultural industries, are just the tip of the iceberg. Particularly concerning is the level of exploitation of migrant labour in Australia. It's clear we need systemic change including education, greater resources for enforcement, a greater role for unions and cultural change in workplaces to address this issue.

What do you most enjoy about your current role?

I enjoy working with a dynamic team of lawyers who are committed to getting good outcomes for clients and improving the lives of employees. I also love constantly meeting new individual clients, hearing their stories, and working out how I can help them. I think I am very lucky that after 15 years of doing it, this still gives me a buzz.

When you started in your role, what did you set out to achieve and why?

When I became a principal I wanted to ensure the financial success of our practice. All of the good work we do needs a strong financial base to support it. I also wanted to ensure that we were involved in significant social justice projects that made a difference on a broad scale, such as our 7-Eleven pro-bono scheme, representing underpaid workers. It's important to me that we use our position of privilege and knowledge not just for financial gain but also for the betterment of others in the society we live in.

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Appointment of life Members

At the AGM in December 2016 the Society was delighted to appoint the following practitioners as Life Members in recognition of their work in industrial relations and their support of the IRSQ.

QIRC CMR Glenys Fisher

Glenys has been a member of the IRSQ for over 35 years and throughout that time served on the management committee (including in executive positions) for a number of years.

Glenys was the first women appointed to the QIRC and served as the IRSQ Patron in 1997.

Dale Himstedt

Dale is a longstanding member of the IRSQ and served on the management committee for over 12 years. During his time on the committee he held a variety of executive roles, was instrumental in organising many IRSQ events and also represented the Society on the national body (ALERA) committee.

Some say you don't think of IRSQ without thinking of Dale!

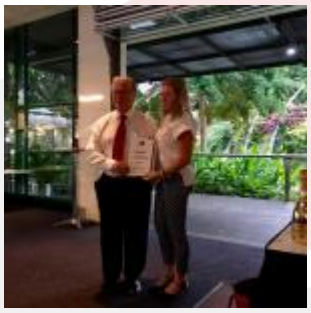
Peter Garske

Peter has been a member of the IRSQ for almost 30 years and served on the management committee for 15 years, in addition to representing on ALERA. He has had a long and illustrious career in IR and has been a significant contributor to debate and policy development at both state and federal level.

Robin Bechley

Robin was a founding member of the IRSQ and has been a member and supporter of the Society for over 40 years.

He is a former Patron of IRSQ and was a highly respected QIRC Commissioner for over 20 years.



Existing life members include Adrian Bloomfield, Jim Bonding, Kevin Connolly, Lionel Ledlie A.M., Norm Mansini A.M. and John Thompson.

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Advocacy Course a Success Again!

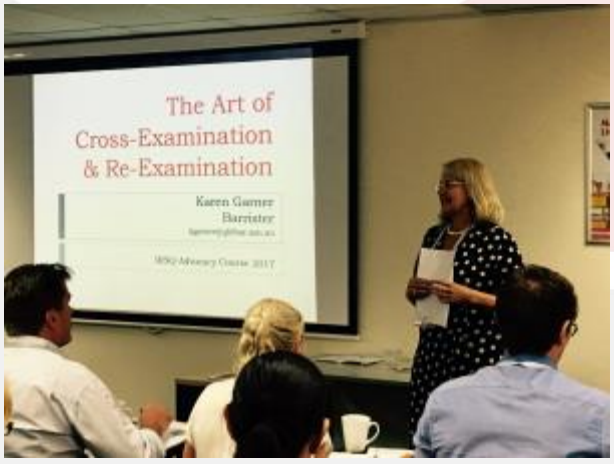
The IRSQ held its popular Advocacy for Workplace Relations Professional course in February 2017, and again it has proved itself as one of the best advocacy skills courses in Queensland.

The format followed was similar to past courses – a theory weekend on 11 and 12 February – with the Moots before the Fair Work Commission (FWC) and Queensland Industrial Relations Commission (QIRC) almost two weeks later on Friday, 24 February.

This year the Course welcomed 40 eager workplace relations professionals from Unions, employers, law firms and state government agencies. The course filled up fast with several practitioners already on the waiting list for next time….which could be towards the end of the year/early 2018. Stay tuned!

Presenters from the course included (*in order of session*):

- Justice Glenn Martin, IRSQ Patron, who discussed the '101' of being an advocate;
- Michael Thomas (Together) and Candice Jacobs (Office of Industrial Relations) who provided a practical overview of preparing for a Conference/Conciliation before the FWC and QIRC;
- Cara Spence, a IR employer association professional, who spoke to the actual Conference/Conciliation process;
- John Merrell, Barrister, delivered a paper on the Opening Address, Evidence in Chief and Closing Submissions when before a tribunal;
- Karen Garner, Barrister, provide valuable insight into proper Cross Examination and Re-Examination;
- Andrew Herbert, Barrister, followed Karen's session and discussed Draft Submissions and Pleadings;
- Deputy President Ingrid Asbury, FWC, who spoke on unfair dismissal matters before the FWC; and
- Deputy President Dan O'Connor, QIRC who presented on unfair dismissal matters before the QIRC.



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Both Deputy Presidents also provided attendees with some valuable and practical tips on being an advocate in the FWC and QIRC jurisdictions.

IRSQ sincerely thanks all of its presenters for their contribution to the 2017 Course. The continued support of professionals, such as those listed above, means that the IRSQ can deliver quality education opportunities to its members.

An addition to the support provided by Course presenters, this year's course introduced a new element – Mentors. Mentors generously gave their time on the Sunday of the Theory weekend, and, despite the air-conditioning breaking down (yes, it broke down mid-morning on what was the hottest day of the year to date!), remained available to assist the Moot teams with any questions they had about the Moot scenario.

The IRSQ extends its thanks to all Mentors *(in alphabetical order)*:

- Nate Burke, FWC Conciliator
- Mark Curran, Partner - Kaden Boriss
- Lydia Daly, Senior Associate - McCullough Robertson
- Rita Fitton and Kerriann Dear (co-Mentors), WWS and Visa Workers Employment Advisory Service
- Karen Garner, Barrister
- Candice Jacobs, Director, Public Sector Industrial Relations - Office of Industrial Relations | Queensland Treasury
- Charles Lentini, Principal Employment Relations Adviser - Queensland Hotels Association
- John Martin, Research and Policy Officer - Queensland Council of Unions
- Brendan Pearce, Solicitor - Colin Biggers & Paisley
- David Quinn, Partner - CRH Law

Several Mentors attended the Moots and said that they were impressed with how their teams went!

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And speaking of Moots, these were held on Friday 24th at the FWC and QIRC before sitting members of both Commissions. There were a lot of sweaty palms and nervous twitches as the teams prepared to present their cases in the Unfair Dismissal Case of IT Manager, Mr Terry Bytes.

However, while there were some questionable impersonations of witnesses Mr Bytes and the HR Manager, Donna Blame-Me in the witness stand, the advocates battled through their nerves and performed exceptionally well! The feedback from the Members overwhelmingly indicated that they too were impressed by the teams' performances, and they also provided some valuable feedback to the participants on some of the rules, nuances and protocols in presenting cases before the respective Commissions.

All in all, a successful afternoon was had by all and the buzz afterwards at the networking drinks was palpable - once they had done their jobs, the Moot participants were all super pumped! And a few nice beverages provided exactly the right remedy to unwind after all that adrenalin was expended.

A special thanks also goes to our sitting Members, without whose generous time and support this component of the program would not be possible:

- Deputy President Ingrid Asbury, FWC
- Commissioner Jennifer Hunt, FWC
- Commissioner Chris Simpson, FWC
- Deputy President Dan O'Connor, QIRC
- Deputy President Adrian Bloomfield, QIRC
- Deputy President The Hon. Leslie Kaufman, QIRC (and formerly FWC)
- Commissioner Glenys Fisher, QIRC

The IRSQ was proud to have presented this course once again and we look forward to adding this back into our regular calendar of events going forward.

Joanna Minchinton – Employment Relations Manager, QHA

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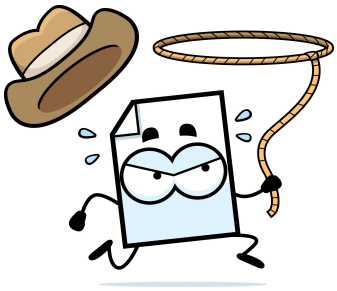
IR World Roundup



Employee's unfair dismissal appeal granted after no-show to work – Full Bench states that abandonment of employment clause in Modern Award is of no effect

An employer's reliance on an abandonment clause in a modern award during an unfair dismissal application has been rejected in an appeal to a Full Bench of the Fair Work Commission. The Full Bench found that the clause is of no effect, and that even if it had effect, the employee's termination was at the employer's initiative, and therefore was a dismissal for the purposes of the unfair dismissal provisions in the *Fair Work Act 2009* (**FW Act**).

The Appellant, Mr Bienias, had been employed by the Respondent Iplex Pipelines since 1983. The Appellant appeared to have an unblemished employment record until 2015, during which he received two written warnings. In January 2016, the Appellant failed to attend four consecutive rostered shifts. On 28 January the Appellant attended a meeting with management to discuss the absences and he was directed to call his manager Mr Holmes prior to any shift which he could not attend.

Due to further absences from work which were not properly notified to Mr Holmes and concerns about quality assurance information given by the Appellant, he was directed to attend a meeting on 10 May 2016. During the meeting, the Appellant was notified that Iplex would be issuing him with a final written warning as well as putting him on a performance improvement plan. The warning letter was subsequently prepared but never given to the Appellant, as the meeting was the last time that Mr Holmes saw or spoke with the Appellant.

The Appellant stated that he did attend work on 12 May but asked a colleague to fill in for him and left early, as he did not feel able to work his full shift. This was the last time that the Appellant presented for work at Iplex. The Appellant "*said that the following days he stayed at home in bed and was barely aware that the phone had rung or that he had to eat, take his medication or even care for his life, and that he was appalled and did not want to talk to anyone.*"

Mr Holmes called and left a message with the Appellant asking him to provide a medical certificate for his absence from work, however on 23 May, following several further missed shifts by the Appellant with no contact made by him, Iplex sent a letter to the Appellant asking him to urgently contact Mr Holmes. With no response to the letter, on 26 May Iplex contacted the police who conducted a welfare check on the Appellant. The police advised Iplex that they had successfully contacted the Appellant. On 30 May Iplex sent a letter by courier to the Appellant which outlined his absences from work and Iplex's attempts to contact him. It concluded that because of his lack of response, Iplex had determined that he had abandoned his employment, and that consequently his employed was terminated from 13 May. The letter also explained that the Appellant would receive pay in lieu of his five week notice period upon receipt of all company property.

The Appellant lodged his initial unfair dismissal application in June 2016. In the decision at first instance, Senior Deputy President Drake noted that an important issue was whether the Appellant had been dismissed by Iplex, or whether *"the termination of his employment was an event which he precipitated by virtue of his unexplained absences"*.

SDP Drake determined that the *Manufacturing Award 2010* covered the Appellant's employment with Iplex and as such she considered clause 21 of the Award which dealt with abandonment of employment. Iplex had submitted that the Appellant's absence from work (and his failure to contact his employer) fell within the application of clause 21, and therefore that the Appellant's termination of employment was not at the initiative of the employer. SDP Drake accepted this argument, as she interpreted clause 21 to mean that *"a failure to notify the employer, or obtain the employer's consent to an absence within 14 days of the employee's last attendance*

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at work means that the employee is regarded or judged as having abandoned their employment".

SDP Drake concluded that a termination under clause 21 was automatic, rather than needing to be confirmed by the employer - particularly because the clause provided a date on which the termination takes effect. SDP Drake had noted that this automatic termination of employment could create a problem where the employer might have wished the employment relationship not to immediately end, but she stated that despite her 'significant reservations' about this, she was unable to read the clause to apply as only operating to terminate the employment *after* the employer accepted the repudiation of the contract. The Appellant's initial application for unfair dismissal was dismissed by SDP Drake on the basis that the termination had not been at the employer's initiative.

The Full Bench on hearing the appeal considered several arguments raised by the Appellant.

The Appellant argued that SDP Drake incorrectly applied clause 21 of the Award by taking the view that it caused the automatic termination of employment. Additionally, it was also argued that the clause was contrary to section 136 of the FW Act and therefore has no effect.

The Full Bench agreed that clause 21 of the Award did not operate to automatically terminate employment in circumstances such as those the Appellant and Iplex had found themselves in. They stated that the clause was no more than a deeming provision which would deem an employee abandoned their employment if the relevant circumstances occurred - however the employer still had to take the final step of acting to terminate the employee's employment. In reaching this conclusion they referred to the judgement in *Mahony v White* [2016] FCAFC 160, which dealt with a somewhat similar scenario in which the Federal Court of Australia determined that a teacher's employment was not terminated by the doctrine of frustration but instead at the employer's initiative, when the teacher had been charged with child sex offences and could no longer work with children as per child protection legislation in NSW. The Full Bench also pointed out that Iplex's conduct reinforced this conclusion – they referred to correspondence sent to the Appellant where they stated that Iplex had 'determined' that he had abandoned his employment and that consequently his employment was terminated, and the paying of five weeks' pay in lieu of notice was more consistent with a termination at the employer's initiative.

Furthermore the Full Bench held that even if clause 21 operated to automatically terminate employment where the required circumstances occurred, they accepted the Appellant's argument that clause 21 was contrary to section 136 of the FW Act (that is, that it was not a permitted or required term of a modern award) and therefore has no effect. It was noted that a clause in a modern award which purported to terminate employment automatically, rather than at the initiative of the employer, was not ancillary, incidental or supplementary to the termination provisions in the FW Act, or any of the National Employment Standards provisions.

As a result, the appeal was granted by the Full Bench, and the Appellant's unfair dismissal application was remitted to Senior Deputy President O'Callaghan to be heard.

Mr Boguslaw Bienias v Iplex Pipelines Australia Pty Limited T/A Iplex Pipelines Australia [2017] FWCFB 38

Note: Following this decision, the Fair Work Commission will be reviewing the abandonment clauses across all modern awards, as part of the 4 year modern award review.

Employer ordered to make costly payout to former employee in sexual harassment claim – no harassment / discrimination policies or training provided to staff at the time of the assault

A hotel employer and one of its male employees has been ordered by the Queensland Civil and Administrative Tribunal to pay over $300,000 in compensation to a former female employee, after she was sexually assaulted by a male colleague in their accommodation within the hotel grounds.

The Applicant was sexually assaulted in December 2010 by the caretaker of the hotel in a unit that they both resided in at the hotel as part of their employment. The Applicant argued that the assault constituted unlawful sexual harassment as per the *Anti-Discrimination Act 1994* (Qld) (**ADA**) and that the hotel employer was vicariously liable for the caretaker's actions as his employer.

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The Applicant submitted that the sexual harassment contributed to her suffering from a depressive illness and Post-Traumatic Stress Disorder (**PTSD**), both of which prevented her from working again after the assault until 2015.

The hotel accepted that its employee's actions constituted sexual harassment within the meaning of the ADA, however, it did not accept that it was vicariously liable. It argued that the assault did not occur in the course of employment, on the basis that if the caretaker had not been called upon to carry out duties during 10pm and 6am (the hours he was on-call for) he was not performing services for employer, and the unit within the hotel was the caretaker's private residence.

Tribunal Member Fitzpatrick disagreed however, noting that:

- Being available to attend to matters during 10pm and 6am was still 'work', even if he would not end up being called upon on any particular night – the caretaker had to remain ready and able to carry out work, by remaining sober and close enough to the hotel to respond quickly.
- Whilst the unit was the caretaker's private residence, this did not exclude the fact that the unit was located in the hotel, and whilst the caretaker was on-call 'he would no doubt locate himself in the unit for comfort and convenience' – as such, it was held that the unit was the Caretaker's place of work when he made himself available for duties.

Importantly, Member Fitzpatrick rejected the hotel's argument that there was no action they could have taken to try to prevent the assault, determining that:

> *'at the very least one would expected a publicly listed company… to have an Anti-Discrimination Policy and an education program for its workers… if the [hotel] had taken steps to inform its workers of their legal obligations and to provide the education and training necessary to ensure compliance, then it may have avoided responsibility for the unlawful acts of its worker'.*

The total compensation awarded to the Applicant for which the caretaker and the hotel were liable to pay was $313,316.10. The Applicant had also sought as a remedy a direction for the hotel to conduct sexual harassment programs with employees and contractors, however Member Fitzpatrick declined, noting that the hotel '*has the advantage of legal advisers who can no doubt advise it, in relation to its responsibilities under the Act'.*

STU v JKL (Qld) Pty Ltd & Ors [2016] QCAT 505

Miner reinstated with order for $100,000 in backpay

Deputy President Asbury has ordered that Oaky Creek Coal reinstate a dismissed employee with additional orders of continuity of service and compensation in excess of $100,000, plus superannuation.

Mr Peter Watts was dismissed following a number of exchanges and confrontations with another employee of Oaky Creek. Mr Watts and the other employee had been involved in an ongoing conflict over a number of months. The Manager of both employees was aware of the ongoing conflict between the two employees, and had advised Mr Watts to have a "*robust discussion*" with him.

In August 2015, following a comment by the other employee, Mr Watts approached the other employee by standing in the door of his office and saying that he was ready to sort out the problem "*when you're f*cking ready".* The other employee abused Mr Watts, but Mr Watts walked away.

Later that same day, Mr Watts was in his car in the site carpark ready to leave. The other employee walked to Mr Watts' vehicle asking Mr Watts what his "*f*cking problem*" was. Mr Watts responded that he was happy to have a "chat" about it in town. Mr Watts drove away and headed home.

Mr Watts alleged that the other employee followed him home after this confrontation although accepted that the other employee's route home was the same as the route Mr Watts took. Mr Watts stated that when he was about to turn into his street he pulled over having noticed the other employee in his vehicle behind him. The spot at which Mr Watts pulled over was in close proximity to the other employee's home. The other employee continued driving, turning away from his own home and later contacted police and made a complaint to Oaky Creek regarding Mr Watts' behaviour.

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Oaky Creek investigated the complaint and facilitated a mediation between the two employees that resulted in an agreement between them. The other employee, within a short period of time, made a further complaint about Mr Watts, following which Mr Watts was dismissed.

Although the Deputy President accepted that Mr Watts' conduct left something to be desired it was concluded that there was no valid reason for Mr Watts' dismissal. The Deputy President considered that the conduct was not sufficiently serious so as to constitute a valid reason.

In reaching this conclusion the Deputy President took into account that Oaky Creek management were aware of the issues between the employees, that the Manager had advised Mr Watts to have a robust discussion with the other employee and that the conduct of the other employee was also inappropriate towards Mr Watts. The evidence was that the other employee was not truthful in his complaint or during the investigation and had lied. The Deputy President concluded that it was not reasonable for the employer to reach the conclusion that it did regarding Mr Watts' conduct on the evidence available.

The Deputy President also took into account that the employer had conducted a mediation between the employees following the complaint that had purportedly resolved the issues, that no further incidents had occurred in the time between mediation and when the other employee made the further complaint and that the employer did not take into account Mr Watts' honesty during the investigation or the other employee's dishonesty.

In considering reinstatement, the Deputy President took into account that Mr Watts was remorseful about his conduct, was willing to participate in further training and that there was not a sufficient basis for the Commission to conclude that the employer had lost trust and confidence in Mr Watts. It was also relevant that the other employee was no longer employed by the employer.

The Deputy President ordered that Mr Watts be reinstated with consequential orders for backpay and continuity of service. A 25% deduction from any backpay was ordered on the basis that Mr Watts was not blameless in the events leading to dismissal.

Mr Peter Watts v Oaks Creek Coal Pty Ltd [2016] FWC 9090

Full Bench confirms QLD NAPSAs relating to Apprentices & Trainees and OBO & Tools Order terminated on 1 January 2014

A Fair Work Commission Full Bench has confirmed a decision of Commissioner Paula Spencer that various State awards and orders previously thought to apply to apprentices and trainees in Queensland have terminated. The Full Bench and first instance decisions are complex.

In August 2016, Commissioner Spencer issued a preliminary decision in respect of an application for approval of an enterprise agreement made by All Trades Queensland Pty Limited. In that decision the Commissioner concluded that the relevant reference instrument for the purposes of the BOOT was the modern award and not a number of award-based transitional instruments (**ABTIs**) relied upon by All Trades.

In reaching this conclusion the Commissioner determined, amongst other things, that a number of State awards and orders, preserved by the transitional provisions, had sunsetted and ceased to exist.

The Full Bench granted permission to appeal on the basis that the appeal raised novel and complex issues that had potential implications for pay and conditions of trainees and apprentices generally in Queensland. The appeal was ultimately dismissed.

The Full Bench stated that the BOOT required that a comparison be undertaken against the relevant modern award, being a modern award that *covered* the employee, and that modern awards *cover* employees if expressed to do so.

Because of the operation of s.193 (the BOOT) and s.48 (when a modern award covers…), it was necessary to consider whether the Transitional Act altered this "clear" position i.e. displaced coverage of the modern award.

The Bench accepted that the Commissioner's decision was correct on two bases:

1) The operation of the transitional provisions did not displace the coverage of modern awards such that s.193 required that the BOOT be conducted against the relevant modern award; and

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2) The transitional instruments relied upon by All Trades had ceased to exist on 1 January 2014.

As to the first finding, the Bench found that Item 16 of Schedule 5 continued coverage of ABTI's but did not displace coverage of any modern award to an employee. Item 16(5) specified that modern awards shall not *apply* to an employee while an ABTI still *covered* the employee, but did not provide that the modern award shall not *cover* the employee.

The Full Bench did not agree that it was implicit in Item 16's terms that the modern award could not cover an employee where there was also coverage by an ABTI. The Bench confirmed that coverage is concerned with potential and not actual application of the industrial instrument.

Because the coverage of the modern award was not displaced by Item 16, the Full Bench said that the only way that the use of an ABTI (including NAPSAs) was authorised for the purposes of the BOOT is under Item 18 of Schedule 7.

Item 18 is titled "*Transitional provisions to apply the better off overall test after end of bridging period if award modernisation not yet completed*". The Full Bench noted that the award modernisation process was in fact completed by 1 January 2010. If this Item had any continued operation, which wasn't explicitly decided by the Full Bench, the Item nonetheless applied in respect of an "*unmodernised award covered employee*". For the purposes of the BOOT, any employee that is covered by a modern award has as a relevant comparator instrument, the modern award.

As to the second finding, the Full Bench considered that Schedule 3 of the Transitional Act dealt with the continuing *existence* of various industrial instruments. Item 20 of Schedule 3, the sunsetting clause, brings the existence of these instruments to "*an absolute end*" at the later of 1 January 2014 or a later date prescribed by the Regulations.

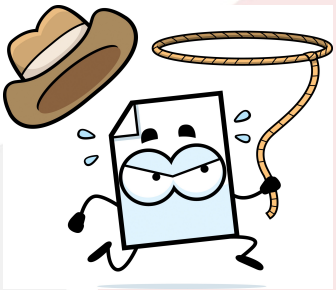
In determining whether a later date was prescribed by the Regulations such that the ABTIs in question continued in existence, the Full Bench said that Schedule 3 included interaction rules for transitional instruments that have continued existence because of the Schedule and FW Act instruments. Being interaction rules they concern *coverage* and *application* of various instruments. These rules do not alter the *existence* of the instruments.

The critical matter was Item 16 of Schedule 5 of the Transitional Act. The Full Bench noted that Item 16 specifically identifies, the other Items in the Schedules that were modified by it. The terms of Item 16 were only concerned with *coverage* of certain ABTIs. No statement in Item 16 modified the effect of the sunsetting clause, which bought the existence of the ABTIs (and related NAPSAs) to an absolute end.

The application has been referred back to Commissioner Spencer to determine whether or not to approve the enterprise agreement.

All Trades Queensland Pty Limited v CFMEU, CEPU and AMWU [2017] FWCFB 132

Sarah Tilby - Workplace Relations Advisor, AMA Queensland & Nate Burke – Conciliator, Fair Work Commission



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Notable Quotes

Unfortunately, [the nurse] provided a voluminous potpourri of the same prolix material she provided to the Commissioner at first instance, in her appeal and again in this costs application.

Fair Work Commission Full Bench in Ms Robin Hansen v Calvary Health Care Adelaide Limited [2016] FWCFB 8162 (1 December 2016)

I do not consider that the system provides a framework for cooperative and productive workplace relations and I do not consider that it promotes economic prosperity or social inclusion. Nor do I consider that it can be described as balanced.

Former Fair Work Commission Vice-President Graeme Watson on his shock resignation.

Enterprise bargaining has become a minefield for employers, employees and bargaining representatives…partly because of the arguably punctilious manner in which the Fair Work Commission is approaching its task of assessing enterprise agreements which are lodged for approval.

Innes Wilcox, Ai Group Chief Executive about proposed legislative amendments announced by the Employment Minister on 2 February 2017.

Now is the time for renewal at the ACTU, with a new generation of highly skilled, diverse and motivated leaders each of whom are capable of fulfilling a critical leadership role.

Dave Oliver, former-ACTU Secretary upon his resignation.

That these are the best reforms of which the Commission can conceive, within the framework government has forced upon them, speaks to the true policy bankruptcy at the heart of this inquiry.

ACTU submissions, Productivity Commission Inquiry into Human Services

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Unionism was a feature of the 20 Century, it will not be a feature of the 21st Century.

Peter Costello in his address to the H.R. Nicholls Society on 8 February 2017 titled "The Importance of Ideas".

Vaishi Raja, Industrial Officer/Lawyer - Independent Education Union (Qld and NT Branch) and Rohan Hilton, Industrial Officer – National Tertiary Education Union (QLD Division)

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Official Notices

Changing of the guard

The Society welcomes the following new members to the management committee – Megan Brooks (General Member), Karen Garner (General Member), Kate Flynn (General Member), Kris Birch (General Member), Daniel Pfrunder (Employer Representative), Manpreet Kharbarh (Student Member), Michael Thomas (Employee Representative); and thanks retiring committee members Faiyaz Devjee (Vice President – Employer), Thalia Edmonds (Vice President – Employee), Tony Stronge (Employer Representative) and Kerriann Dear (General Member).

New Members

We welcome the following new members – Emma Treherne of Adam Wilson, Claire McCurdy of the Fair Work Ombudsman, Paul Simmonds of Landbridge Group, Ashlee Miller of Clarke Kann Lawyers, Manpreet Kharbarr – Student, Brendon Pearce of Colin, Biggers & Paisley, David Quinn of CRH Law, Shahra McDonnell of the Department of Health, Andrew Stevens of Queensland Health, Patrisha Rowles of Metro South Hospital & Health Service, Sandra Creaner of Gold Coast Health, Nicholas Everson of Gold Coast Hospital & Health Service, Azadeh Faalivat of Griffith University, Shannon Fogarty of the Plumbing Union QLD / NT and Mark Brady, Ashley Lynch, Bridget O'Connor and Ethan Edwards of Livingstones.

If you have moved, been promoted or taken on a new challenge, email the Secretariat at irsq@irsq.asn.au for inclusion in the next edition.

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The views expressed in this publication do not necessarily reflect the individual views of the IRSQ Management Committee and do not represent the collective stance of the IRSQ Society as a whole, which aims to be impartial. Feedback, suggestions and improvements, including material for upcoming editions can be emailed to the Editor, Kristin Ramsey at kristin.ramsey@hyneslegal.com.au.

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