We've Come a Long, Long Way Together – 10 Years of the *Fair Work Act 2009*

By **Amber Roncoroni**
HLS Legal

This year marks the 10 year anniversary of the commencement of key parts of the Fair Work Act 2009 (Cth) (the Fair Work Act) including the unfair dismissal and general protections provisions. In this article we reflect on the Fair Work Act and what the key cases have taught us about the Fair Work Act.

The impact that the Fair Work Act has had on employment law in the last 10 years cannot be understated.

The Fair Work Act has governed employment law in Australia during a period of significant change to the Australian economy, politics and technology.

In these respects:

- The mining and construction sectors have expanded and contracted.
- The Labor Party, which introduced the Fair Work Act, was replaced by the Coalition at the Federal level in 2013.
- Use of social media has become prolific and its impact on work has grown. For instance, according to the 2018 Yellow Social Media Report, 93% of 18-29 year olds and 90% of 50 to 64 years olds in Australia maintain a Facebook profile.[1]
- The CFMEU and the MUA merged to create the CFMMEU super union.

With this in mind, it is an appropriate time to ask: What do we know about the Fair Work Act?

Since key parts of the Fair Work Act commenced on 1 July 2009, there have been approximately 80,000 decisions, including Fair Work Australia/Fair Work Commission decisions, that refer to the Fair Work Act. 19 of these decisions were issued by the High Court of Australia.

Some of these decisions provide guidance on the meaning of the Fair Work Act in respect of key day to day issues.

However, there remain important parts of the Fair Work Act which are untested and unclear.

Understanding these can assist with navigating the Fair Work Act moving forwards.

What we can say is fairly settled

- In respect of unfair dismissal, an employer will generally have a valid reason to dismiss an employee who has sent sexually explicit material or comments over social media to colleagues:

  In *Luke Colwell v Sydney International Container Terminals Pty Limited* [2018] FWC 174 an employee was terminated for sharing a pornographic video on a Facebook Messenger chat group which included a number of his colleagues.

  When finding that the employer had a valid reason to dismiss the employee, Commissioner McKenna acknowledged the growing number of cases regarding dismissal, social media use and out of hours' conduct.

  Commissioner McKenna held that the connection between the employee's conduct and his employment was satisfied as the employee was Facebook friends with his colleagues because of the employee's relationship with the employer.

  The decision reflects the general willingness of the Fair Work Commission to support employers in dismissing employees engaging in this form of conduct.

- Enterprise agreements are unique from legislation, regulations and contracts, meaning that a special approach is to be used when interpreting their terms:

  In *Toyota Motor Corporation Australia Limited v Marmara* [2014] FCAFC 84, the Full Court discussed what enterprise agreements are and principles should be used to interpret them.

  The Full Court considered this issue for the purposes of considering the significance of a "no extra claims" clause in an enterprise agreement.

  The issue was whether a clause purporting to prevent the parties from varying the enterprise agreement was effective when the Fair Work Act permitted the parties to vary the enterprise agreement.

  The Full Court found that enterprise agreements:

  - **are not** delegated legislation to be interpreted like a regulation as they are not "made" by the Fair Work Commission, rather they are made by employees, employers and sometimes unions; or
  - **are not** contracts as they are made between an employer and a majority of employees not one employer and one employee.

  The Full Court found that enterprise agreements are a "statutory artefact" of legislative character because the Fair Work Act empowers an employer and

the majority of employees to make enterprise agreements.

The Full Court indicated that the principles applicable to the interpretation of enterprise agreements are unique to enterprise agreements.

Having set out these findings, the Full Court held that the "no extra claims" clause did seek to prevent the parties from varying the enterprise agreement and the clause was contrary to the Fair Work Act and unenforceable.

- Rest and relaxation periods in an employee's roster remain non-paid time for the purposes of an employee's payment in lieu of notice pursuant to s117(2)(b) of the Fair Work Act:

  In *Short v CBI Constructors Pty Ltd* [2017] FCCA 2442, it was argued that fly-in-fly-out employees working on a roster which included non-working time should be paid as if they were at work when being paid in lieu of notice, that is, ignoring non-paid, non-working time in their roster.

  Relevantly, s 117(2)(b) of the Fair Work Act provides that payment in lieu of notice is to be calculated on the hours the employee would have worked had the employment continued until the end of the minimum period of notice.

  The Federal Circuit Court held that there is nothing in the language of s 117 of the Fair Work Act that requires an employee to be paid for non-working time, in particular where the employee works a roster which compresses working time into set periods.

  The Federal Circuit Court's decision makes it clear that rostered working hours impact the calculation of payment in lieu of notice for s 117(2)(b) of the Fair Work Act.

- Payment of accrued but untaken annual leave on termination of employment may be higher than the employee's base rate of pay if a modern award or enterprise agreement provides for payment of annual leave during employment which is higher than the base rate of pay.

  In *Centennial Northern Mining Services Pty Ltd v Construction, Forestry, Mining and Energy Union* [2015] FCAFC 100, the Full Court considered the difference in the language requiring payment of annual leave taken during employment in s 90(1) of the Fair Work Act and accrued and untaken annual leave on termination in s 90(2) of the Fair Work Act.

  The Full Court confirmed that s 90(2) of the Fair Work Act is expressed differently to s 90(1) of the Fair Work Act to ensure that where a modern award or enterprise agreement provides for annual leave to be paid at a rate which is higher than an employee's base rate of pay during employment that this is also the rate to be paid at termination for accrued but untaken annual leave.

  The Full Court indicated that the intention of s 90(2) of the Fair Work Act is to ensure that payments which would be payable when an employee takes annual leave during their employment, like annual leave loading, would also be paid to the

employee when paid their untaken leave.

- An employer will contravene the Fair Work Act if they take adverse action against an employee and the "substantial and operative" reason for this action was a prohibited reason:

  In *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, the High Court confirmed that an employer will contravene the Fair Work Act where the "substantial and operative factor" if the employer's decision to take the adverse action against an employee is a prohibited reason.

  The High Court confirmed that the question of whether an employer's decision to take adverse action against an employer was for a prohibited reason involves the assessment of the employer's (specifically, the decision maker's) reasons for taking the adverse action from a factual perspective.

  That is, the assessment is not an assessment of what an objective outsider would believe the employer's reasons to be or an assessment of whether there was an unconscious bias towards a prohibited reason.

  The High Court's decision establishes that credible and strong evidence that an employer's reasons for taking adverse action against an employee were not prohibited reasons is essential for an employer to successfully defend a general protections claim.

- Section 570 of the Fair Work Act, which limits the circumstances where costs can be awarded against a losing party in proceedings involving the Fair Work Act, can apply to claims outside the Fair Work Act. This can occur where a non-Act related claim is commenced at the same time as an Act related claim and the non-Act related claim is within the court's accrued jurisdiction:

  In *Melbourne Stadiums Ltd v Sautner* [2015] FCAFC 20, the Full Court held that the employee's claims under the Fair Work Act and common law breach of contract claims were matters within the same proceeding.

  Accordingly, s 570(1) of the Fair Work Act applied to the employee's claims in respect of the Fair Work Act and his breach of contract claims.

  Section 570(1) of the Fair Work Act provides that costs should only be awarded where a party instituted proceedings vexatiously or without reasonable cause or engaged in an unreasonable act or omission which caused the other party to incur costs.

  As section 570(1) of the Fair Work Act makes it more difficult for a party to obtain costs against the other party, employee claims which couple breach of contract and general protections claims have become commonplace.

- The meaning of "causal employees" for the purposes of s 86 of the Fair Work Act is the customary meaning in general law:

  In *WorkPac Pty Ltd v Skene* [2018] FCAFC 131, the Full Court held that the meaning of "casual employees" in s 86 of the Fair Work Act is its customary meaning in general law.

  The Full Court held that determining whether an employee is a casual employee requires consideration of the character of and indicia traditionally used to define casual employment, subject to any adjustment required by the Fair Work Act.

  The Full Court described the character of casual employment as the absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

  The Full Court's decision indicated that employers need to be mindful that:

  - merely designating an employee as a casual employee may not make the employee a casual employee for the purposes of the Fair Work Act; and
  - the essence of casual employment is the absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work.

- Directors, human resource professionals and accountants may be accessories to contraventions of the Fair Work Act pursuant to s 550 of the Fair Work Act. The knowledge requirements for s 550, which includes being "knowingly concerned" in a contravention, can result in these parties been found liable under s 550 of the Fair Work Act:

  In *FWO v Oz Staff Career Services Pty Ltd & Ors* [2016] *FCCA 105 and FWO v Oz Staff Career Services Pty Ltd & Ors (No.2)* [2016] FCCA 2594, the Federal Circuit Court held that a Human Resources Manager was liable as an accessory for contraventions of s 323 of the Fair Work Act and regulation 3.44 of the *Fair Work Regulations 2009* (Cth).

  The Federal Circuit Court ordered that the Human Resources Manager pay a penalty of $9,920 in respect of deductions that were made to employee's wages and for a failure to keep accurate records.

  In *EZY Accounting 123 Pty Ltd v Fair Work Ombudsman* [2018] FCAFC 134, the Full Court held that an accounting firm that was aware of and facilitated its client's systematic underpayment of its employees was an accessory to the employer's contravention.

  The Full Court found that it did not matter that the accounting firm did not intend to assist its client to contravene the applicable modern award.

Areas where clarity is still required

- Whether an employer can lawfully terminate an employee for comments of a political or religious nature which are made outside of work but which are contrary to the employer's mission or culture:

  In *Linfox Australia Pty Ltd v Fair Work Commission* [2013] FCAFC 157, the Full Court found no error in the Fair Work Commission Full Bench's finding that free speech may justify a finding of unfairness in an employer's decision to terminate an employee.

  The Commissioner at first instance held that the comments made by the employee were *"[W]ithin his right to free speech… even though many, including myself, would find much of the Facebook discourse which is in evidence to be distasteful"*. The decision of the Full Court suggests that an employer may unfairly dismiss an employee where the reason for the dismissal was the employee's use of social media to comment on religious or political matters.

On the other hand, in *Banerji v Bowles (acting Secretary, Dept of Immigration and Citizenship)* [2013] FCCA 1052, when considering the employee's, Ms Banerji, application for an injunction on the basis of threatened and actual adverse action because of political tweets, the Federal Circuit Court held that *"even if there be a constitutional right* [to free speech] *of the kind for which the Applicant contends, it does not provide a licence [allegedly] to breach a contract of employment."*

The issue was recently considered by the High Court in *Comcare v Banerji* [2019] HCA 23. The High Court held that the political tweets were not protected by a general right to free speech pursuant to the Constitution. The High Court stated that the question was whether the law used to sanction Ms Banerji (which was related to the public service) impermissibly limited political communication. Although the matter was unique in terms of the public sector aspect and focus on the Constitution, it has been considered a decision against "free speech" in the employment context.

In respect of religious comment, the area may receive the attention it needs as a result of rugby union player Israel Folau. Mr Folau was dismissed by Rugby Australia for posting content on social media stating that "hell awaits" "homosexuals" and others. Rugby Australia's position is that the content did not meet its inclusive standards whereas Mr Folau described the content as an expression of his devout Christian beliefs. Mr Folau filed a general protections claim in the Federal Circuit Court on 31 July 2019 (MLG2486/2019).

- When a shift worker will be entitled to the additional weeks' annual leave pursuant to s 87(3) of the Fair Work Act:

  In *O'Neill v Roy Hill Holdings Pty Ltd* [2015] FWC 2461, the Fair Work Commission held that the threshold that an employee must satisfy in order to "regularly" work on Sundays and public holidays for the purposes of s 87(3)(a)(iii) of the Fair Work Act is at least 34 Sundays and 6 public holidays per year of employment.

  The Fair Work Commission extracted the 34 Sundays and 6 public holidays threshold from cases which predated the Fair Work Act.

  While it is arguable that Parliament intended the 34 Sundays and 6 public holidays threshold to apply for consistency and certainty, the meaning of s 87(3) is yet to be confirmed.

- What is a "complaint" for the purposes of the general protections provisions of the Fair Work Act:

  One approach takes a narrow view on what is a "complaint". The narrow approach requires that the employee have a contractual right to make complaint.

  The other and broader approach captures most circumstances where an employee expresses concern about matters that could affect their employment.

  In *Walsh v Greater Metropolitan Cemeteries Trust (No. 2)* [2014] FCA 456 Bromberg J favoured the broader approach and held that an employee makes a complaint when they raise a matter or conduct which could reflect badly on them or could prejudice them in their employment.

  The impact of this broader approach was seen more recently in *Fatouros v Broadreach Services Pty Ltd* [2018] FCCA 769 where an email sent by an employee about another employee's performance was considered a complaint.

What does the future hold?

The Coalition government is unlikely to introduce significant changes to the Fair Work Act in the next three years. Only a handful of its election promises concerned industrial relations. One of its most significant proposals to date has been to limit the impact of the Skene decision by stopping "double dipping" by casual employees.

Regardless, it is undeniable that the Fair Work Act has and will continue to shape the employment law landscape moving forward.

HLS Legal provides comprehensive and current advice to employers in respect of the Fair Work Act, including, in respect of managing termination of employment, enterprise agreement disputes, annual leave and deductions from pay.

Endnotes

1 Yellow, *2018 Yellow Social Media Report* (2018), https://www.yellow.com.au/wp-content/uploads/2018/06/Yellow-Social-Media-Report-2018-Consumer.pdf.