






**FY21 in Focus
Employment Update
Australia**

Much of the focus in the world of employment last financial year was on the repercussions of lockdowns, restructuring, and remote work. There were however quite a number of important changes and decisions which employers may have missed. We set out in this Paper a calendar of key events, and also a checklist of tips for FY22.






 Issue	 Summary	 Recommended Action
JULY TO SEPTEMBER		
High Court overturns Federal Court majority in Mondelez leave decision¹	The High Court has confirmed the calculation of 10 days' personal/carer's leave for each year of service (per section 96 of the <i>Fair Work Act 2009</i> (Cth) (FW Act)). A day is a 'notional day' based on ordinary hours over a two-week period, rather than an employee's actual "working" day.	Review your leave policies to ensure they reflect calculations based on ordinary hours.
Paid Parental Leave Amendment (Flexibility Measures) Act and Paid Parental Leave	<p>The <i>Paid Parental Leave Amendment (Flexibility Measures) Act</i> and <i>Paid Parental Leave Amendment (Flexibility Measures) Rules</i> came into effect for children born or adopted after 1 July 2020.</p> <p>The changes introduced greater flexibility with taking paid parental leave (PPL), including the ability to split the 18-week PPL period into a 12-week PPL block and a six-week "flexible" PPL block.</p>	Update your parental leave policies and arrangements.
OCTOBER TO DECEMBER		
FW Act amended to improve unpaid parental leave for parents of stillborn babies	The FW Act was amended to improve access to unpaid parental leave entitlements for employees who experience traumatic events during or in anticipation of parental leave, including stillbirth and premature birth.	Review parental leave arrangements.
Variations to 97 Modern Awards	<p>The Fair Work Commission (FWC) varied 97 modern awards to clarify overtime rates of pay for casual employees. Common changes include clarifying how casual and overtime loadings interact, whether casuals are entitled to overtime, and the hours when overtime applies. These changes came into effect from the first full pay period after 20 November 2020.</p> <p>See the FWC's publication with links to the affected modern awards here.</p>	Review your arrangements for award-covered employees to ensure they are compliant with these variations.

¹ *Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union Known as the Australian Manufacturing Workers Union (AMWU)* [2020] HCA 29.





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<p>Adverse action claim involving allegations of bullying reiterates the need for clear reasons for employment termination</p>	<p>Though the case was overturned on appeal to the Full Federal Court (as the judge failed to have regard to the totality of the evidence and failed to give adequate reasons),² the lengthy litigation shows the risks of terminating an employee who has raised complaints without providing clearly articulated reasons.</p> <p>Prior to the appeal, the Federal Court awarded more than AUD \$5 million in compensation, damages and penalties to a senior employee who was terminated after he made seven bullying complaints.³ The employer was unable to discharge the onus that the complaints were the operative reason for the termination decision.</p> <p>The Federal Court judge imposed a penalty 'at the higher end of the scale' against the CEO decision maker, noting he twice rejected professional HR advice that it would be unfair to dismiss the employee on the basis of mere allegations.</p>	<p>Ensure you have in place an appropriate bullying policy and ensure that your managers comply with the policy and understand that potential consequences of breach.</p> <p>Also ensure that you have good and lawful reasons for terminating employees, and can support these reasons with evidence. Documenting warnings and following a fair process before termination will always assist employers respond to adverse action claims.</p>
<p>WHS poster causes sexual harassment</p>	<p>A spine safety campaign poster that included a female employee's image with a "Feel great - lubricate!" caption constituted sexual harassment.⁴ The Court emphasized that the employer's good intentions regarding the poster were irrelevant to the objective question of whether the conduct was of a sexual nature. The reference to lubrication in the poster objectively did have sexual connotations.</p> <p>Damages of AUD \$318,280 were awarded, but reduced to AUD \$100,000 from each respondent due to statutory caps.</p>	<p>Reinforce in your policies and anti-discrimination training that sexual harassment may arise even though the "harasser" may not intend to offend, humiliate or embarrass a person. It is important that employers and employees have careful regard to how their statements and behavior may be interpreted by others.</p>




² *TechnologyOne Limited v Roohizadegan* [2021] FCAFC 137.

³ *Roohizadegan v TechnologyOne Limited (No 2)* [2020] FCA 1407.

⁴ *Vitality Works Australia Pty Limited v Yelda; Sydney Water Corporation v Yelda* [2020] NSWCATAP 210. We note this was upheld on appeal: *Vitality Works Australia Pty Ltd v Yelda (No 2)* [2021] NSWCA 147.








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New whistleblowing protections do not apply retrospectively	The Federal Court has confirmed that the new whistleblowing protections in the <i>Corporations Act 2001</i> (Cth) do not apply to detrimental conduct occurring prior to the commencement date of 1 July 2019. ⁵	Regardless of this decision and depending on the nature of the complaint or disclosure, employees may have other protections against detriment e.g. under adverse action, work health and safety, or discrimination laws.
JANUARY TO MARCH		
Commencement of Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Act 2021	<p>The FW Act was amended in relation to casual employees. The changes came into effect on 26 March 2021.</p> <p>The amendments importantly introduced a definition of casual employment, the requirement to issue a Casual Employment Information Statement (link here) and a safeguard against double-dipping for misclassified employees seeking backpay of entitlements.</p> <p>See the FWC's explanation of the changes here.</p> <p>These final changes represent a somewhat aborted reform, as the original "omnibus" bill represented the most changes to our workplace relations laws since the introduction of the FW Act, also covering changes to enterprise agreement making and approval processes, increased penalties for underpayments and increased workplace flexibility provisions (see our original release here).</p>	Review your existing employment contracts for casual employees and on-boarding materials.
Extension of Schedule X - unpaid pandemic leave and annual leave flexibility for awards	In response to the coronavirus pandemic, the FWC inserted a temporary Schedule X into 99 modern awards allowing unpaid pandemic leave and annual leave at half pay. The scheme was extended until 31 December 2021 for some awards.	Use this list to assess whether the Schedule continues to apply to your industry.

⁵ *Alexiou v Australia and New Zealand Banking Group Limited* [2020] FCA 1777.








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APRIL TO JUNE		
Changes to superannuation	<p>In the 2020/21 budget, the Government announced the "Your Future, Your Super" reforms.</p> <p>From 1 November 2021, where employees do not choose a super fund, employers will have to check with the Australian Taxation Office if their employee has an existing super account, known as a 'stapled super fund,' to pay the employee's super contributions into (rather than making contributions straight into the employer's default fund).</p> <p>The Government also confirmed the planned increase in the superannuation contribution to 10%, which took effect from 1 July 2021.</p> <p>Finally, the government announced its intention to abolish the superannuation guarantee income threshold. Assuming the legislation introducing this change passes, this change is expected to take effect from 1 July 2022.</p> <p>Please read the full Baker McKenzie alert here.</p>	<p>Ensure your employment contracts, on-boarding and payroll are compliant with these changes to superannuation.</p> <p>You may also wish to check whether your salary packages are inclusive or exclusive of superannuation.</p>
Introduction of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021	<p>In March 2020, the Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces was publicly released.</p> <p>In response, on 24 June 2021 the federal government introduced the <i>Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021</i>. A key change proposed by the bill is to provide two days' paid compassionate leave in the event of a miscarriage.</p>	<p>Watch for developments.</p>
Fair Work Commission rules that refusal to get the flu vaccine constitutes a valid ground for dismissal	<p>On 20 April 2021, the FWC issued a decision affirming that an Early Learning Centre had not unfairly dismissed an employee for failing to</p>	<p>Despite these decisions, employers will only be able to justify mandatory vaccination where the employees are engaged in high risk environments.</p>





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	<p>follow a reasonable request to get the flu vaccine.⁶</p> <p>This follows similar decisions regarding aged care providers,⁷ and highlights the importance of governmental directives on vaccinations and high-risk environments when determining reasonableness of vaccination directions.</p>	<p>However, incentivizing employees to take the vaccine is permissible, providing that employers cater for employees who may not be able to take the vaccine for medical reasons.</p>
<p>Fair Work Commission finds delivery driver to be an employee</p>	<p>On 18 May 2021, the FWC issued a landmark decision⁸ holding that a delivery driver was considered an employee of Deliveroo, and therefore entitled to unfair dismissal protection.</p> <p>The FWC focused on the level of control Deliveroo had over Mr Franco. Relevantly, Deliveroo's system involved directing riders to undertake work or make themselves available for work at particular times. The fact that drivers were not exclusively working for Deliveroo did not mean that they could not be employees of Deliveroo given the context of a "modern, changing workplace impacted by our new digital world". In fact Mr Franco was also engaged with Uber Eats.</p>	<p>There is an increasing number of decisions where Courts or Tribunals have classified gig workers/independent contractors (e.g., delivery riders) as employees.</p> <p>The exercise (or right to exercise) control over the worker as to when and how the work is performed remains an important criteria which should be monitored by organisations seeking to engage contractors.</p>
<p>Fair Work Commission awards 2.5% minimum wage increase</p>	<p>On 17 June 2021, the FWC announced a 2.5% increase in the minimum wage to AUD \$20.33 an hour. The increase will apply to most awards from the first full pay period on or after 1 July 2021. Some other awards will be delayed due to the impact of the COVID-19 pandemic.</p>	<p>Ensure that you are compliant with this wage increase.</p>
<p>1 JULY 2021 - OTHER KEY COMMENCEMENTS</p>		
<p>Wage Theft Act 2020 (VIC)</p>	<p>The <i>Wage Theft Act 2020</i> (Vic) commenced on 1 July 2021.</p> <p>See our original release here.</p>	<p>Ensure compliance.</p>




⁶ *Ms Bou-Jamie Barber v. Goodstart Early Learning* [2021] FWC 2156.

⁷ *Jennifer Kimber v. Sapphire Coast Community Aged Care Ltd.* [2021] FWC 1818; *Maria Corazon Glover v. Ozcare* [2021] FWC 2989.

⁸ *Diego Franco v. Deliveroo Australia Pty Ltd. (U2020/7066)* [2021] FWC 2818.








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High income threshold	<p>From 1 July 2021 the high income threshold is AUD \$158,500.</p> <p>The threshold is an eligibility limit for protection from unfair dismissal under the FW Act.</p> <p>Employees with a guarantee of annual earnings must have an income above the threshold.</p>	<p>Review and ensure that you comply with your guarantees of annual earnings.</p> <p>Also ensure that you comply with unfair dismissal laws in relation to employees who are not over the high income threshold or are award covered. However affording procedural fairness and having valid reasons for termination in respect of all employees will assist you defend other claims which are not barred to high income earners.</p>
Fair Work Ombudsman priorities for 2021-22: Large Corporate Underpayments	<p>The Fair Work Ombudsman (FWO) compliance and enforcement priorities for the 2021-2022 year ahead include addressing large corporate underpayments.</p> <p>This initiative coincides with a growing list of large corporate employers self-disclosing significant underpayments of employee entitlements (going back several years) to the FWO.</p>	<p>Conduct an audit of your award coverage and compliance. Do not assume that because your employees are highly paid that they are not award covered. Keep accurate time records for all award covered employees.</p>
IMMIGRATION UPDATE		
Priority Migration Skilled Occupation List (PMSOL)	<p>The Australian Government's strict inbound and outbound travel ban on Australians and non-Australians continues to remain in place. Since the travel ban was implemented in March 2020, the Department of Home Affairs has introduced the Priority Migration Skilled Occupation List (PMSOL) after consultation with the National Skills Commission and external stakeholders.</p> <p>See our original release here.</p>	<p>Check whether any international employees fall on the PMSOL and are able to transfer to Australia.</p>
Priority processing	<p>The Department of Home Affairs will give priority processing for visa applications with an occupation on the PMSOL under the following visa programs:</p>	<p>Check whether any employees fall on the PMSOL and are able to be priority processed.</p>





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	<ul style="list-style-type: none"> • Temporary Skill Shortage (TSS) visa (Subclass 482) • Skilled Employer Sponsored Regional (Provisional) visa (Subclass 494) • Employer Nomination Scheme (ENS) visa (Subclass 186) • Regional Sponsored Migration Scheme (RSMS) visa (Subclass 187) 	
Travel exemption	<p>Individuals, who are sponsored in an occupation on the PMSOL are eligible to apply for a visa and travel exemption, however they are subject to the mandatory 14-day quarantine on arrival at their own expense.</p> <p>The list is in flux, so for further information please click here.</p> <p>Other travel exemption categories continue to remain in place under critical skills/sectors categories for eligible applicants.</p>	<p>Watch out for developments.</p>
Labour market testing	<p>The 1 October 2020 changes made to the labour market testing rules under the Subclass 482 Temporary Skill Shortage and Subclass 494 Skilled Employer Sponsored Regional visa schemes remain in place.</p> <p>The new changes now require a minimum of three advertisements for the nominated position. One of the job advertisements must be posted on the Department of Employment's recruitment website, Job Active. The two other job advertisements must be advertised on or in one or more professional recruitment websites, in the print media, on radio or on accredited sponsor website.</p> <p>See our original release here.</p>	<p>Ensure your recruiting procedures are compliant.</p>





12 Top Tips for FY21 (not related to COVID-19)



1. Ensure that your recruitment practices do not involve asking questions about sex, age, race or other protected grounds of discrimination. Also remember that under privacy laws, job applicants do have rights to seek access to records which you create during the interview process which identify them. This may include your opinions about a candidate. The employer records exemption will not apply to the collection of personal information from a job applicant, or for that matter (on current authority), an existing employee. An employer can only collect health related information without the consent of an employee in very limited circumstances. We are seeing a spike in privacy and discrimination claims at the recruitment stage.



2. Ensure your whistleblowing policy at least contains the mandatory provisions of ASIC Regulatory Guide 270 and your offices and senior managers have received training as to the nature and treatment of protected disclosures. Remember - a whistleblower does not need to tell you that he or she is a whistleblower, and may be protected even though his or her disclosure or complaint is not formal or in writing. Penalties for disclosing the identity of a whistleblower or causing detriment to a whistleblower are huge and the evidentiary onus is on the employer. We expect that claims under these new laws will increase in the coming year.



3. If you do not know whether any modern award applies to your workforce, or have assumed that because they are highly paid they are not covered by an award, get advice immediately. Even though an employee may be remunerated over and above the base rate under an award, if they regularly work long hours during which overtime would usually accrue, you may be underpaying them.



4. Employers should also not assume that you can simply set off high wages against award entitlements. You need to ensure that this is permitted by the award or, at the very least, you have a solid set off clause in your employment contracts. Due to changes introduced in February 2020 and taking effect from the first full pay period on or after 1 March 2020 certain awards which permitted annual salaries instead of overtime an allowances now require the employer to notify relevant employees as to how the salaries have been calculated in accordance with relevant award provisions. These include the *Clerks-Private Sector Award 2020*, the *Banking, Finance and Insurance Industry Award 2020* and the *Contract Call Centres Award 2020*.



5. Employers are reminded that by 27 September 2021 they must have assessed **all** casual employees employed before 27 March 2021 to determine whether they may be eligible for conversion to permanent (full-time or part-time) employment. Casual conversion must be offered to casual employees who were employed for at least 12 months and who, for at least the last 6 months, have worked regular hours on an ongoing basis that could be converted to full-time or part-time hours without significant adjustment. There may be "reasonable grounds" which can be relied upon not to offer such conversion. If a casual employee is not eligible for casual conversion (either due to reasonable grounds or because they don't meet the eligibility criteria, including for example where they have less than 12 months service), employers must issue a written notice to the casual employee explaining why the casual employee has not been offered conversion. In respect of casual employees employed on or after 27 March 2021, casual conversion must be assessed within 12 months of commencement. Employers should also review terms of engagement for "true" casual employees or those casuals who reject an offer of permanent



employment. Casual contracts should accurately reflect the new statutory definition of what constitutes a "casual employee" and provide for no firm advanced commitment of work. Employers must also ensure that Casual Employment Information Statements are issued as soon as possible to new employees and existing hires.



6. Employers need to maintain time records and manage working hours - especially where employees are award covered or are working remotely. We expect an increase in claims related to long working hours in the coming year - including both claims for overtime or work-related stress. It is very difficult for an employer to defend a claim relating to overtime or unreasonably long hours, where the employer has failed to maintain any time records. There is a rebuttable presumption in favour of the employee under the FW Act for overtime claims where no such records have been kept to by the employer. Lockdown has also meant that some employees have been working an uncontrolled set out of hours. In the long term this may backfire for employers who have failed to impose limitations and require employees to take proper breaks whilst working from home.



7. Make sure that any person who conducts internal investigations in your business which involves allegations of bullying, discrimination or harassment, or other conduct which may have caused a psychological injury, is appropriately trained to take a trauma informed approach. Employees are increasingly asserting that poorly conducted or unnecessarily prolonged investigations are exacerbating the stress caused by the original conduct about which they complained.



8. Ensure that your employment agreements or Human Resources policies contain clear descriptions of the nature of confidential information which you wish to protect in your business, not just a generic description. There is rarely a dispute about an employee's obligation not to disclose or abuse confidential information. The disputes are almost always about what information is confidential.



9. If you are running a restructuring program, you need to consult with employees on parental leave and also take into account they have a hard-wired entitlement to return to their position or (if it is redundant) the closest position in terms of status and pay which they are qualified and suited to perform. This means that you must wait until the end of the period before any termination to see if other positions arise.



10. Remember that there are tough restrictions on paying termination benefits to a person who is or was a director of your company or a related company in the last three years, unless you obtain the requisite approval from your shareholders. Termination benefits are broadly defined and include payments in lieu of notice and also settlement payments under a release agreement. The restriction will apply even if the employee is entitled to the benefit under a contract or employment or incentive plan. There are limited exemptions to this restriction, and the key exemptions are also subject to a salary cap which applies to the total value of all termination benefits. There are serious consequences if these provisions are breached.



11. If you are dismissing an employee who you believe has committed a crime, do not use the threat of reporting the matter to the police as a bargaining chip. Failing to report certain criminal conduct to the police may constitute a serious offence, and using it as leverage in termination negotiations could certainly land you in hot water.



12. Next time an employee resigns from employment to join a competitor, consider not releasing them from their employment immediately but using the notice period to require the employee to disclose and transition all key contacts, business opportunities and threats. You also have a right to require the employee to tell you if they have discussed with the competitor poaching any of your clients or employees, or disclosed to the competitor any sensitive business information. Whilst the person remains your employee, they cannot take any action to damage your business and must answer truthfully any questions relating to their employment.





This is especially important if your employment contracts do not contain valid post-employment restrictions. Where such restrictions do not exist, an ex-employee is free to join your competitor and poach business, clients and employees, provided that the ex-employee does not use your confidential information in doing so.





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