

The **ALERA ALERT**

Welcome

to the very first edition of the newsletter of the Australian Labour Employment Relations Association! The purpose of this newsletter is to inform and entertain readers who specialise in the area of employment relations, or who have a particular interest in this field. The following articles are a collaboration of various societies' newsletters and feature pieces from around the country. Much of the content in these societies' newsletters has been collected and reproduced in the ALERA Alert for the benefit of a broad readership. We hope you enjoy this edition!

Joanna Minchinton - ALERA President

What is ALERA?

The Australian Labour and Employment Relations Association Incorporated (ALERA) was formally the Industrial Relations Society of Australia (IRSA). ALERA was formed as an independent, non-partisan association which encourages discussion and debate on a wide range of issues affecting employee relationships and was the first organisation of its type to be formed in Australia.

The Association welcomes members involved in, studying or interested in industrial, labour relations or employment relations. ALERA's objective is to organise and foster discussion, research, education and publication within the field of industrial and workplace relations. ALERA is governed by an Executive Committee made up of representatives from the affiliated States and Territory bodies.

The Association aims to bring together representatives of trade unions, employers, Government, the legal profession and academics. At the National level this is achieved through the administration of the [Journal of Industrial Relations](#) and participation in the [Annual Kingsley Laffer Lecture](#) and a biannual [National Conference](#). Participation enables a free exchange of opinions and ideas. ALERA is also affiliate with the [International Labour and Employment Relations Association \(ILERA\)](#).

ALERA National Conference

We encourage our readers to register for the 2014 ALERA National Conference to be held at the Sofitel Hotel at the Gold Coast. For further details regarding the Conference [visit the website](#). Those wishing to [register](#) should do so today, as registrations are selling quickly! Sponsorship packages are still available for those wanting to support this good cause.



2014 Workplace Relations Lecture Series

The 2014 Workplace Relations Lecture Series features presentations on a range of workplace relations topics by local and international experts. Lectures are taking place around Australia throughout the year.

The next upcoming lecture is a collaboration between the Fair Work Commission, the University of Western Australia, and the Industrial Relations Society of Western Australia (IRSWA).

Russell Lansbury, Emeritus Professor of Industrial Relations at the University of Sydney Business School will discuss how employee communications and engagement can be better integrated with employment relations and enterprise bargaining to achieve productive outcomes for organisations and the economy.

The lecture will take place at the University of Western Australia Business School on Wednesday, 13 August 2014 from 6.15 to 7.30 pm. See the [event page](#) for more information. If you would like to attend, please register on the IRSWA's website.

In addition, mock hearings will be at the [Fair Work Commission in Perth](#) on Tuesday, 12 August 2014 from 5.30 to 7.30 pm. See the [event page](#) for more information and to register. Mock hearings have already taken place in Sydney, Melbourne, Brisbane and Canberra during the first half of 2014. You can watch recordings of a number of our mock hearings via the [FWC YouTube channel](#).

A Message from the FWC President Iain Ross

The Promoting Productive Enterprise Agreements Project

On 8 May 2014, the Fair Work Commission's launched a new phase of its change program *Future Directions* which features 30 initiatives that will be delivered over the next two years. The Commission has commenced work on a Future Directions research initiative that will identify and publish enterprise agreement clauses that enhance productivity and innovation.

The research is being undertaken in response to the Fair Work Act Review Panel's recommendation that institutions created under the Fair Work Act 2009 extend their role to actively encourage more productive workplaces, including through promoting best practice productivity enhancing provisions in agreements, in its report 'Towards more productive and equitable workplaces - an evaluation of the Fair Work legislation'.

The Commission is inviting employers, employees and their representatives to submit provisions in their agreements that they believe enhance productivity or innovation. A selection of submitted clauses, including findings from interviews with participants, will be part of a report to be published by the Fair Work Commission this year. The aim of the research is to provide a public resource for all Australian workplaces seeking to include productivity or innovation clauses in their own enterprise agreements.

It is an important project and one which we believe could greatly benefit Australian workplaces in this increasingly competitive economic climate. Further information is available from the research team at research@fwc.gov.au, or call (03) 8661 7024. Details can also be found on the Commission's website at www.fwc.gov.au/creating-fair-workplaces/research.

About the Project

The Fair Work Commission has begun work on a significant research project to identify and publish enterprise agreement clauses that enhance productivity and innovation. A selection of these clauses, including findings from interviews with participants, will be part of a report to be published by the Fair Work Commission this year. The report will provide Australian businesses with a resource to help them develop best practice provisions for enhancing productivity in their workplaces.

Submitting Clauses for Inclusion

The Commission invites all employers, employees and their representatives to submit clauses (whether made under the Fair Work Act 2009 or state legislation) that they believe are productivity enhancing or innovative to be considered for inclusion in the research. Participants in this research will be helping to promote productivity which is integral to Australia's future economic prosperity.

Submitting a clause will also provide an opportunity to showcase productivity and innovation achievements in the workplace. However, submissions can be made confidential on request. In either case, a clause will not be considered if any of the bargaining representatives for the agreement oppose its inclusion.

In the 2012-13 financial year, 53.5 per cent of approved enterprise agreements included a clause regarding productivity. A recent example of clauses identified as productivity enhancing are communication and consultative provisions in agreements implemented for the Newcastle Coal Infrastructure Group projects (Workplace Express, 'Hunter project arrangement "an exemplary model": Tribunal,' 3 December 2013). However, productive or innovative provisions will vary between industries and between individual workplaces.

Whether a clause is productivity enhancing or innovative will be for submitting parties to determine. The research will not involve any form of external audit or assessment of the workplaces to which submitted clauses apply. Participants' financial or other confidential information is not required. Participants will be asked to discuss their submission with Commission staff.

Please note that nominations closed on 8 August 2014

More information is available at the website www.fwc.gov.au/creating-fairworkplaces/research or by contacting the Commission's research staff at research@fwc.gov.au or on (03) 8661 7024.



Justice IJK Ross, President

Five Minutes With... Nigel Hadgkiss



Picture Source: www.fwbc.gov.au

Nigel Hadgkiss is the Director of Fair Work Building & Construction. Prior to joining the Victorian Government, Nigel was Executive Director, Office of the Director of Public Prosecutions (ODPP), NSW.

Who are the people who have influenced your career decisions?

Having joined the Hong Kong police force at the young age of 19, I was fortunate enough to work for experienced officers who took me under their wing. Lifelong friendships developed from this early period of my career and remain to this day despite those responsible now being scattered around the world. Most of my career has been spent in the Australian Federal Police where I was privileged to work for Adrien Whiddett who became the Deputy Commissioner and later the General Manager of Operations of the National Crime Authority.

To this day I am still beholding to him for his wisdom. In more recent times, since becoming involved in the building and construction industry, I have been fortunate enough to have worked under The Hon John Lloyd PSM. While running the Building Industry Taskforce from 2002 onwards, I reported to John when he was Deputy Secretary of the Department of Employment, Education and Workplace Relations. He was Commissioner when I was Deputy of the Australian Building and Construction Commission from 2005 onwards. I now have John as Chair of my Advisory Board. His experience, knowledge and leadership are admirable traits.

All of these people have greatly influenced my career decisions and had a significant effect on my life.

Who do you admire greatly?

Ernest Hemingway once said "As you get older it is harder to have heroes, but it is sort of necessary". So in that vein, I must say that I have always taken great inspiration from Winston Churchill throughout my

career. In both the office and the frontline, Churchill was a true statesman and leader who inspired many through his dogged determination and humility. He is remembered not just for his tremendous political and military achievements but for his ability to instil confidence and boost the morale of an entire nation.

What do you consider to be the future of industrial relations?

Firstly, I cannot emphasise enough that a shared commitment to improving industrial relations by all political figures is needed to create change in Australia. In terms of Australia's building and construction industry, it is interesting to look to an international perspective to understand the scope and possibility for change in our own country.

Take the United Kingdom for example, where the turbulent period of aggression between the Thatcher government and trade unions has evolved into what could be seen as an era of new realism and sophisticated partnerships between unions, employers and government. British trade unions now operate on the premise that increased performance and productivity means improved work conditions for workers and union members.

Confrontation and industrial action are avoided in place of negotiation and bargaining to resolve disputes. This model of cooperation and dependence can provide great inspiration for looking to the future here in Australia. What is needed for a bright and sustainable future for Australian industrial relations is a shared vision for optimal productivity and first-rate working conditions from all stakeholders involved.

What has been your most satisfying career achievement to date?

A particular career highlight for me was when I presented seminars at Oxford University and at the Inner Temple Hall of the Inner Temple Inn of Court in London, fifteen years ago. Additionally, working on three Royal Commissions in Australia and assisting a Canadian Royal Commission have been rewarding aspects of my career. It would be extremely satisfying to eventually leave the nation's building and construction industry in a better shape than what it was when I began in 2002.

What do you hope to achieve in your current role?

Since I started at the end of last year, there has been a significant shift in the agency's plans and priorities. As Director, my vision is ambitious: "That all Australian building and construction workplaces are productive and harmonious." I emphasise the 'all'. To my mind, that includes unions, workers and employers, because they all have a critical role to play in achieving that end goal of productive and harmonious worksites. Furthermore, the FWBC mission is simple: "To ensure

that the Rule of Law prevails in the Australian building and construction industry.” I plan to uphold the law on construction sites, regardless of who breaks it; be they employer, worker or union.

What advice would you give to graduates entering the field of industrial relations?

No matter what field you go into it is important that you never stop learning. There are constantly new developments in any field and it is important to be able to adapt to a changing environment. You also need to be willing to compromise with others but you should never compromise your own integrity.

International Achiever

Gusel Schneider is an internationally qualified lawyer who has worked in law firms in Russia and Australia. She was admitted to legal practice in Russia in 2003 and worked for almost six years with international law firms located in Moscow. In 2008 she relocated to Brisbane to undertake a Master of Laws degree at the Queensland University of Technology.



Picture source: Sydney Law School, Juris Doctor Guide 2015

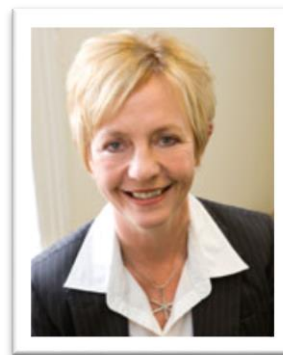
After graduation in 2009, Gusel worked as Litigation Assistant in the Professional Indemnity group of a Brisbane law firm for over two years until she decided to undertake further studies to become admitted as a lawyer in Australia. In 2012 Gusel commenced the Juris Doctor program at the University of Sydney. She recently completed this program and will become admitted to legal practice in New South Wales and Queensland in August 2014.

Gusel received the Wigram Allen Scholarship for the Juris Doctor awarded by the University of Sydney on the basis of academic merit and personal attributes (leadership, experience and creativity). During her studies, Gusel worked as a contractor for King & Wood Mallesons.

She has also prepared case summaries for the International Law in Domestic Courts online service published by Oxford University Press. In her spare time, Gusel volunteers for Dress for Success Brisbane, a non-for-profit organisation which promotes the economic independence of disadvantaged women and men by providing professional attire, and the career development tools to help them thrive.

Gusel is currently seeking work within the legal field. If you would like to contact her for further information, please email gusel.schneider@hotmail.com.

The Journal of Industrial Relations



The Journal of Industrial Relations is edited by Marian Baird (pictured) and Bradon Ellem (both at the University of Sydney, Australia). It is an ISI-ranked, peer-reviewed international journal administered by the Australian Labour and Employment Relations Association (ALERA). The editors invite scholarship

from a range of disciplinary perspectives, examining any aspect of employment relations.

Contributions exploring the traditional concerns of industrial relations as well as studies addressing the intersection of workplace, family and community are welcome. The Journal includes rigorous qualitative and multi-method analyses, including theoretically-informed case studies and international and comparative papers.

Marian Baird will be speaking at the ALERA National Conference. She is Professor of Employment Relations and Director of the [Women♀Work Research Group](#) in the University of Sydney Business School. Marian is one of Australia's leading researchers in the fields of women, work and family. She has received a

number of Australian Research Council and federal and state government grants to study maternity and parental leave, flexibility for working parents, women and the global financial crisis, mature age workers and low paid workers, gender equitable organisational change and work and family in regional Australia. She is widely published in Australia and internationally.

Picture source: The University of Sydney Business School <http://sydney.edu.au/business/staff/marianb>

The Sky's the Limit!

Whipper Snapper Distillery



What makes two young Aussie blokes from the shores of WA think they can take on the biggest names in the whiskey business? Some say it's risky. They say, there's a time for playing it safe and then there's a time for... whisky business!

"We may be young Whipper Snappers, but this is our obsession and we were meant to share this recipe".

The [Whipper Snapper](#) journey started where most great Australian stories do, built on camaraderie. An Australian and a US pilot shared two great loves in WWII – their love of bombers and whiskey. The war ended and they were separated by oceans and time but their recipe lived on.

Fifty years after the recipe reached Australian shores, veteran Vic continued to distil his whiskey and moonshine in his back shed in Scarborough, Western Australia. By a stroke of luck, Vic's neighbour was a young man by the name of Alasdair ('Al') Malloch, who helped him write his memoirs, but more importantly, shared his love of whiskey.

The shed became their escape and Vic passed on his recipe to his new comrade, Al, and his mate Jimmy. Al and Jimmy made their way to Colorado, tracking down a relative of Vic's fellow WWII pilot. Al found Coop, who shared his love of whiskey and had refined the same recipe from WWII over time.

Coop's life was whiskey and he had recently sold his acclaimed distillery to settle down and retire – until he heard about a story shared in a small shed across the world in Scarborough. Al and Jimmy took their love of whiskey across the world to Scotland, where Frank, a man who had been distilling for more than 50 years, helped them refine their recipe.

Revered for his legendary status at Springbank, Bushmills and Bruichlanddich Distilleries, Frank added the rock star touch the recipe required. So, with the determination of two young Aussie men, and a recipe refined from one side of the world to the other, Whipper Snapper was born.

Whipper Snapper whiskey brings together hundreds of years of distilling experience, to bring a taste that has stood the test of time, with great Australian ingredients. Every bottle distilled is a tribute to Vic, his bomber and all the servicemen who loved the recipe – and now to all of those who will love Whipper Snapper whiskey for years to come.

Whipper Snapper Who's Who

Tommy Cooper, Chief Whiskey Officer. After founding an award winning Colorado Gold whiskey recipe, Coop has spent 50 years refining his veteran recipe to now deliver a premium Aussie taste that belongs to Whipper Snapper

Alasdair Malloch, Chief Manager of Operations. Founder of the Whipper Snapper obsession, Al leads the business and sales operations and is obsessed with converting all drinkers to whisky lovers one at a time (*pictured below on left*). Email Al [here](#).

James McKeown, Chief Distillery Officer, Guardian of the Whipper Snapper recipe. Jimmy's engineering background set him up to be a master technician and meticulous distilling craftsman to ensure quality is maintained in every bottle that leaves our workshop (*pictured below on right*).

Frank McHardy, Chief Whiskey Advisor. Our Single Malt Magician, Frank combines his experience at Springbank & Bushmills over 50 years to refine our single malt recipe and process that is dedicated to maturing in our unique Aussie climate.



Retirement of Commissioner Barbara Deegan



Commissioner Barbara Deegan was appointed as a Commissioner of the Australian Industrial Relations Commission in January 1996. For the majority of her appointment, she has been the resident Member of the Commission in Canberra, and in recent years has also held a dual appointment to the Tasmanian Industrial Commission.

On 31 July 2014, Commissioner Deegan retired from her statutory appointment as a Commissioner of the Fair Work Commission. Commissioner Deegan has been the Patron of ALERA ACT for a number of years, and has made an invaluable contribution to industrial relations in Canberra over the last two decades.

ALERA ACT wishes Commissioner Deegan all the best with her future endeavours. ALERA ACT hosted a dinner on Thursday 7 August 2014 at the Commonwealth Club in Yarralumla to celebrate the contribution that Commissioner Deegan has made to industrial relations in Canberra.

Workplace Express circulated an article on 7 August 2014 regarding Commissioner Deegan's retirement. *Workplace Express* published that it understands that Deputy President John Kovacic, who is now Melbourne-based but was appointed while DEEWR's Deputy Secretary of Workplace Relations in Canberra, is one of the senior members who will cover Canberra.



Events on the **Western Front**

The Industrial Relations Society of WA was active in the month of June scheduling two very different events that proved to be both popular and successful amongst members.

Advocacy Master class with Ian Neil SC – Skills in Witness Examination

On the 4th of June 2014, the IRSWA held the Advocacy Master Class on Witness Evidence presented by Ian Neil SC (another in our series of CPD events). Ian has a wide practice, with a depth of experience in the law of employment, labour law, and commissions and inquiries. He practices before courts, tribunals and inquiries throughout Australia, as well as appearing in mediations and arbitrations in London and Hong Kong. Ian was invited back by popular demand following a similar Master Class event he conducted last year.

Ian's relaxed and informative manner provided valuable insights and practical tips into the often complex field of industrial advocacy. He covered topics including preparation, investigation, interviewing witnesses and presenting a solid case to tribunals and courts.

Ian's interactive style saw volunteers (selected from the IRSWA Committee) act as witnesses as Ian demonstrated useful examination techniques to uncover evidence and guide witnesses through what can be a very stressful process.



This event was well received by members and very generously sponsored (for a second year by Clayton Utz, which topped the evening by serving delicious canapés and refreshments and providing the opportunity for members to speak with Ian personally, and meet other industrial advocates. Clayton Utz continues to closely support the IRSWA.

MEET the WAIRC Commissioners

The second event was a “Meet the WAIRC Commissioners” night held on 24 June 2014. This event provided an opportunity for members to informally meet members of the State Commission and other key Commission Staff.

It also provided the opportunity for the WAIRC to showcase their finely refurbished hearing and conference rooms with the latest state of the art equipment.



Chief Commissioner Tony Beech welcomed and individually introduced other State Commissioners and the Registrar and CEO who spoke briefly on what their particular roles involved, what industries they were responsible for and how they had progressed into their current positions.



The Chief Commissioner also spoke about the various services on offer and the inner workings of how the Commission operates to deliver the high standards and quality services available.

For members, whether they had never been to the Commission or had presented cases before, enjoyed a rare opportunity to meet and speak informally with the State Commissioners over refreshments and it proved to be another successful and well attended event.

This event was organised in conjunction with the WAIRC and a big thankyou to Chief Commissioner Tony Beech for facilitating this event and his and the Commission’s long standing and ongoing generous support of the IRSWA.

Advocacy Course

The Industrial Relations Society of WA hosted the inaugural ALERA Industrial Advocacy Program in Perth from 28 – 30 March 2014. The course was delivered by former Senior Deputy President Brian Lacy and renowned industrial barrister Chris O’Grady of the Melbourne Bar together with current members of the Fair Work Commission in Western Australia.

The first day of the course focused on the theory of advocacy in general and specifically before the Commission.

Topics covered included: Key Features, Structure and Function of the Fair Work Commission; Practice and Procedure in the Fair Work Commission; Appearances; Opening and Closing Submissions; Rules of Evidence; Examination and Cross Examination and Intervention and Adjournments. Participants also received a file of resource materials which no doubt will serve as a valuable reference tool moving forward.

The next two days of the course were spent at the Fair Work Commission in skill workshops (mock hearings). Participants ‘appeared’ before the Bench in a variety of common applications including: Unfair Dismissal, Application to Stop Industrial Action, Approval of an Enterprise Agreement, General Protections Application. The Tribunal members handed down decisions in each ‘application’ and provided constructive feedback on the participants advocacy skills. The mock hearings provided an excellent opportunity for advocates of all levels to develop and improve their advocacy skills in real life scenarios.

At the end of the course Deputy President McCarthy presented participants with their certificates and Tribunal Members and Commission staff joined the participants for drinks and canapés. The IRSWA thanks the Fair Work Commission for its support of the program and the UWA Business School for hosting the theory session.

ALERA is currently determining where the course will be presented in 2015. If you are interested in attending the ALERA Industrial Advocacy Program in your State or Territory please register your interest at info@alera.asn.au

Take it or Leave it – Can an Employer pay Employees an “all in” rate covering annual leave entitlements?

By Corrs Chambers Westgarth: Tracy Caspersz and James Hulmes

In this article, Corrs examines the Fair Work Commission (**FWC**) Full Bench decision in *Canavan Building Pty Ltd* [2014] FWCFB 3202 (29 May 2014) (**Canavan**).

This decision, by a specially-convened five member Full Bench (Ross J, Hatcher VP, Acton SDP, Cargill C and Wilson C), resolved conflicting lines of authority about whether an enterprise agreement can provide for the pre-payment of annual leave.

In *Canavan*, the FWC Full Bench refused to approve an enterprise agreement that contained a clause purporting to permit the payment of an annual leave entitlement prior to the period of leave itself, on the grounds that such a provision was inconsistent with the National Employment Standards (**NES**) under Part 2-2 of the Fair Work Act 2009 (**FW Act**).

ANNUAL LEAVE PROVISIONS

Section 186(2)(c) of the FW Act provides that the FWC, prior to approving a proposed enterprise agreement, must satisfy itself that the terms of the agreement do not exclude any provision of the NES. Relevantly, the NES provides at section 87(1) that an employee is entitled to four weeks of “paid annual leave” for each year of service.

Section 55 provides that an enterprise agreement may include a term that is ancillary or supplementary to the operation of a NES entitlement, but only to the extent that the term is not detrimental to the employee when compared with the NES. Notes to that section provide examples, including that:

- a. an ancillary term would include a term under which an employee may take twice the statutory minimum amount of leave at half the rate of pay; and
- b. a supplementary term would include a term that permits the employee to take more than the NES minimum amount of leave, or to take annual leave at a higher than normal rate.

Section 89(1) states that an employer must pay an employee at the employee’s base rate of pay for the duration of any annual leave period. Sections 92-94 set out rules in relation the cashing out of annual leave.

Finally, section 12 defines “paid annual leave” to mean “paid annual leave to which a national system employee is entitled under section 87”.

THE ENTERPRISE AGREEMENT

In this case, the employer applied to the FWC for approval of the *Canavan Building Pty Ltd Enterprise Agreement 2013* (**Agreement**). The Agreement purported to provide that payment relating to periods of annual leave would be incorporated as a loading into the employees’ hourly rate of pay. This meant that payments for a period of annual leave would be made as a component of the employees’ ordinary pay, in advance of the period of leave itself.

This arrangement was described at clause 41 of the Enterprise Agreement, which provided (in part) that:

“... payment for annual leave is made progressively in advance and is incorporated into the wage rate prescribed by clause 35 of this agreement ...”.

The Agreement also incorporated a number of other entitlements into the hourly rate, including the base award rate of pay, redundancy, personal leave and overtime entitlements. This meant that the employees would receive a single hourly rate which incorporated all entitlements arising under the Building and Construction General On-Site Award.

CONFLICTING LINES OF AUTHORITY

As indicated above, prior to the decision of the Full Bench in *Canavan*, the authorities had conflicted concerning the ability of an enterprise agreement to provide for payment of annual leave entitlements in advance of the actual taking of annual leave.

In *Mr Irving Warren; Hull-Moody Finishes Pty Ltd; Mr Romano Sidotti* [2011] FWAFB 6709 (**Hull-Moody Finishes**), a Full Bench of Fair Work Australia considered a similar clause.^[1]

The majority in that case (Watson VP and Hamberger DP) noted that the only difference between the payment of leave under that clause and payment under the NES was the timing of the payments.^[2] In each case, the employee was entitled to receive payment for the period of leave, and an authorised period of absence from work. The majority noted that, in its view, nothing in the NES required that a payment for annual leave be made at any particular time.^[3]

In a dissenting decision in *Hull-Moody Finishes*, Commissioner Cambridge emphasised the importance of the context in which the annual leave entitlement appeared, i.e. as part of a “safety net” of national legislative minimum entitlements providing basic benefits to employees.^[4] Placing due weight on the “beneficial, protective” context of the provision, he found that the relevant annual leave clause defeated the “fundamental notion” of unpaid leave, as:

“[t]he redirection of the payment into an hourly rate creates such disconnection with the period of absence from work so as to effectively make the period of absence a period of unpaid leave.”^[5]

Justice Gray of the Federal Court of Australia adopted a similar approach to Commissioner Cambridge in *Construction, Forestry, Mining and Energy Union v Jeld-Wen Glass Australia Pty Ltd* (2012) 213 FCR 549 (**Jeld-Wen Glass**). In that case, a preserved Australian Workplace Agreement sought to permit an employee to receive an extra 1.5 hours’ pay each week in lieu of paid personal leave under section 97 of the FW Act. Relevantly, Gray J noted that the entitlement to payment for a period of personal leave under section 97 arose at the time that the leave was taken. This meant that an employer could not separate the entitlement to payment for the leave from the period of leave itself.^[6]

The conflict between the reasoning in these two decisions subsequently led to a number of inconsistent FWC decisions at first instance.^[7]

DECISION IN CANAVAN

The Full Bench in *Canavan* found that the relevant clause in that case conflicted with the NES in at least two key respects.

First, section 90(1) of the FW Act requires that payment for annual leave be made at the base rate of pay as it applies at the time that the leave is taken. However, the Agreement provided for specified pay increases at regular time intervals. The effect of this was that the Agreement, if approved, would permit payment for annual leave at one rate of pay, whereas leave may be taken at a later time when a higher rate would apply. This would contravene section 90(1).^[8]

Secondly, the Full Bench considered that the consistent use throughout the FW Act of the words “paid annual leave”, rather than merely “annual leave”, indicates that the former phrase must be read as a composite expression, in which “payment for the leave is inextricably linked to the leave itself”.^[9]

On the ordinary understanding of that phrase as a composite expression, the Full Bench held that “paid annual leave” meant annual leave provided together with pay.^[10] In doing so, it followed the reasoning of Gray J in *Jen-Weld Glass*.

The Full Bench indicated, further, that the scheme of pre-payment of annual leave in the Agreement amounted to cashing out of annual leave in a manner inconsistent with section 93 of the FW Act.^[11]

THE CONSEQUENCES

The decision in *Canavan* provides certainty to those who may have considered seeking the inclusion in an enterprise agreement of a clause permitting the

payment of an annual leave entitlement prior to the period of leave itself. Following *Canavan*, it is clear that an enterprise agreement containing a provision of this kind would not be approved by the FWC.

Although not expressly decided, the Full Bench indicated that a similar clause seeking to allow pre-payment of personal/carer’s leave entitlements would also not be approved for reasons similar to those pertaining to the annual leave provision – i.e. inconsistency with the relevant NES provisions.^[12]

[1] See <http://www.corrs.com.au/publications/corrs-in-brief/loaded-hourly-rates-including-annual-leave-payments-allowed-in-enterprise-agreements/>.

[2] [2011] FWAFFB 6709 at [41].

[3] [2011] FWAFFB 6709 at [41].

[4] [2011] FWAFFB 6709 at [52].

[5] [2011] FWAFFB 6709 at [55].

[6] (2012) 213 FCR 549 at [19].

[7] For example, *BM & KA Group as trustee for BM & KA Group Unit Trust* [2013] FWC 3654; *Robjohn Enterprises Pty Ltd* [2013] FW8A 6685.

[8] [2014] FWCFCB 3202 at [38].

[9] [2014] FWCFCB 3202 at [41]-[42].

[10] [2014] FWCFCB 3202 at [42].

[11] [2014] FWCFCB 3202 at [56].

[12] [2014] FWCFCB 3202 at [57].

Flexible Work Practices – Sharaze Pentland

IRSSA Committee Member

Flexible work practices can deliver more productive and efficient workplaces, as well as improve employee morale. Businesses are increasingly appreciating how flexible work arrangements can benefit their performance through improved staff motivation and productivity. A growing number of industrial instruments provide a basis for flexible working arrangements.

Flexible work practices can take many forms. They include:

- part-time work;
- job sharing;
- working from home;
- working from another location;
- compressed working hours;
- flexible leave options; and
- Flexible start and finish times.

Even if an employee is unable to access a legislated entitlement to flexible work practices (for example, because of eligibility requirements), it is possible for employers to provide such arrangements by way of policy and contractually.

Many older workers care for elderly parents, children or grandchildren which means that employers will need to consider offering more flexible conditions to retain their workers. This is particularly the case given the recently announced increases to the pension age.

Leave Entitlements

There are a range of leave entitlements aimed at improving work and family balance to assist employees in meeting their caring responsibilities.

There are a range of leave entitlements aimed at improving work and family balance to assist employees in meeting their caring responsibilities.

Parental Leave - An eligible employee is entitled to unpaid parental leave for a period of up to 12 months. There is also a right to request an additional 12 months unpaid leave, with approval from the employer. The Commonwealth Government also provides 18 weeks of paid parental leave for an eligible employee.

Personal/Carers Leave - This leave, when accrued (and sometimes in advance of accrual) can be taken by an employee when they are sick, or to care for a family member or dependant who is sick or requires care due to an to an unexpected emergency. The basic entitlement is 10 days per annum and untaken leave accrues from year to year.

Annual Leave - There is now frequently more flexibility around annual leave for employees. Such leave may be taken for any period agreed between the employer and employee, including single days - or even hours, rather than in blocks of a week or longer.

Flexitime

Flexitime enables workers to work an agreed number of hours spread over a set period of time. This allows a worker to accrue hours in order to have a rostered day off during that period. This could be done on a fortnightly or monthly basis, or as agreed with the employer. Rostered days could also be accumulated, if the applicable instrument or policy allows.

Compressed Working Hours

Compressed working hours allow employees to work longer hours each working day in order to work less days over a set period of time. A common example is where a worker works a 4-day week by working longer hours on the four days and does not work the fifth day.

Part-Time Work

Part-time work gives job protection, regular hours and access to the same benefits as full-time employment albeit relative to number of hours worked. Part-time arrangements permit many workers to better manage

their work and caring responsibilities. Part-time working arrangements allow employers to retain valued and skilled workers, arrange work to coincide with peak or slow times, extended hours of operation and minimise staff turnover or reduce absenteeism.

Job Sharing

Job sharing lets two or more workers share one full-time job - or even a fraction of a full time equivalent job. It's a practical way of attracting and retaining workers, including those with caring responsibilities, who do not wish to or are unable to work full-time. It can bring a wider range of skills to the one position, offers wider recruitment options and provides opportunities for the employees sharing a job to support and learn from each other. Additionally, job-sharing can reduce turnover in positions that are demanding or monotonous and can allow businesses to extend hours of operation without incurring overtime costs.

Seasonal Work

Some workers, including those with caring responsibilities, don't wish to or are unable to work for parts of the year. However, they may be available to work during school holidays, over the Christmas period or during peak business operations. Businesses using workers for seasonal work can plan for busy periods and attract and retain workers who otherwise might not be available.

Working from Home

Home-based work is another way that employers can retain valued employees who may otherwise leave the company. It can increase productivity because it reduces commuting time and because there are fewer interruptions to work. Home-based work may be permanent or it may be used as and when needed to help workers manage their work and caring responsibilities. Clearly, employers need to be keenly aware of occupational health and safety issues when contemplating working from home arrangements.

Purchased Leave

Employers can offer their workers the opportunity to 'purchase' additional leave by a corresponding reduction in weekly pay throughout the year. For workers without caring responsibilities, purchased leave provides more leisure time to pursue interests or travel. For those with caring responsibilities, the extra time away from work could be used in conjunction with respite care to provide a well-earned break for the carer or it could enable family members to share caring responsibilities.

News from the IRSV

This year has already been a very exciting year for functions and events with the IRSV. Following a very successful 'Meet the Commission' event to kick off the year, our new Industrial Revelations networking event held at the Fair Trader Café (next to the FWC), which is free to attend for IRSV members, has proven to be a great way for industrial relations professionals and enthusiasts to engage and share ideas in an informal environment. Future events coming up in 2014 include:

- Women in Industrial Relations Interest Group function
- Student function
- Speaker breakfast
- Industrial Revelations networking events

For details on upcoming events, please see the IRSV website and don't forget to follow the IRSV LinkedIn group for ongoing updates.

We look forward to seeing you at an event soon!

2013 Student Essay Competition

The winners of the Student Essay Competition were announced at the "Meet the Tribunal" function earlier this year. This competition now stands out as an important competition for students who have prepared a scholarly research paper across the broad areas of industrial relations, human resources and labour law. The winners of both the undergraduate and postgraduate level competitions are awarded a prize of \$500.

The members of the IRSV Executive Committee are keen to ensure that the essay competition remains an important annual activity of the Victorian society, and to encourage entrants from as many institutions as possible from the State of Victoria.

The 2013 postgraduate winner was Bryden Dalitz, currently undertaking study at the University of Melbourne. His paper considered some of the present arguments concerning the implied "term" of mutual trust and confidence. This, of course, is a matter of considerable interest and debate with the issue presently before the High Court in *Commonwealth Bank v Barker*.

The undergraduate essay competition winner was Sean Mulcahy, whose paper considered social and industrial relations issues associated with the regulation of wages for aboriginal stockmen. The difference in the subject matter of the winners' papers reflects the broad areas of research that may be considered in a prize of this nature.

The Committee hopes that all academic members of the Society will recognize the importance of the prize, and its value in encouraging students to undertake different types of research. A flyer concerning the 2014 competition will be sent to academic members of the Victorian Society shortly reminding them of the competition, which generally calls for entries to be submitted before a date in November. Stay tuned!

Beware the looming HRM trap and the impact for IR

by Dr Keith Townsend



Science fiction novels often present a robot driven society as either a utopia or dystopia. No cleaning, no messy work, no dangerous work – or alternatively humanity being suppressed by intelligent machines. Like many things, the reality is likely to be some where in between. But until such an unlikely time as when we live in a fully automated society, humans will have

jobs. And as long as humans have jobs there will be employers and employees – and that beast that lives in the middle – the line manager.

When industrialisation began craft workers were shifted in to factories where employers could standardise things like work time, work effort, and product quality. But the employer could not do this alone. The role of the manager – the supervisor became critically important to the success of organisations and the experiences of employees. Research performed by North American labour historians suggest that throughout the early 1900s most strikes were the result of either wages, or – abusive supervisors. In simple terms, organisations have roughly the same three groups of people: owners; their representatives – the managers; and employees. All organisations arrive at their own variation on how those three groups are arranged. The late 1980s and early 1990s was a period of de-layering. Many organisations sought flatter structures with senior management closer to the 'shop-floor' in the attempt to be more agile, responsive or any manner of business-driven cliché. This coincided with the rise of the modern HR phenomenon.

For more than twenty years now, HR departments and managers in organisations have fought for relevance. The underlying notion, driven out of North America which exists within a very different industrial context from Australia's, is that HR can implement policies and

processes which will lead to higher levels of cooperation and performance – hence, higher profits and competitiveness. This all sounds well and good, provided employees are treated fairly, have safe workplaces, and are able to share in the rewards. Whether this has occurred though is fiercely debated and lies at the heart of many things we do in the HR/IR realm.

Following this period of delayering and centralisation of people management (HR and IR) activities to the HR department, more recently there has been a devolution of the HR function to front-line managers. In many organisations HR departments are disappearing or shrinking (certainly losing people who have IR skills) and organisations are reliant upon external consultants to fill the knowledge and practice void. So commonly, HR responsibilities are being pushed back to the front-line manager, and if we remember it is the front-line manager (operating under a range of different guises - the supervisor, the foreman, the team leader) who was, in a different era, central to most strikes.

So where is the looming HR trap and what does it mean for IR? If organisations have been de-layered with a corresponding centralised HR/IR function, and then more recently these HR/IR responsibilities have been decentralised back to the front-line manager with a reduced presence in the HR/IR departments in workplaces. How does this level of manager learn his or her managerial responsibilities? Many organisations continue to have promotion systems based on their employees' length of tenure or operational performance. Front-line managers throughout the country are being placed in to roles with reduced operational responsibilities and increased managerial responsibilities without adequate training for this new role. HR departments have a reputation for being unresponsive to the immediate issues faced by line managers. Some problems need to be solved now – not once the HR officer returns from lunch, holidays or when the consultants have been contacted to provide advice.

What does this mean for IR? We can anticipate that the looming HR trap is a trough in the level of HR/IR skills held within organisations and a growing reliance on external consultants. When this phenomenon is coupled with the increasing devolution of HR/IR responsibilities to poorly prepared front-line managers, there is likely to be an increased level of industrial unrest. Sure, legislation might play a role to ensure that this unrest is unlikely to manifest in hostile strikes, but it is likely to appear in increased levels of absenteeism, psycho-social health concerns, grievances, turnover, and overall poor performance. Some organisations are already feeling this pain. Now is the time that good consultants with both HR and IR skills can do very well providing a balanced and extensive service to de-layered, poorly skilled organisations.

* Dr Keith Townsend is Associate Professor in the Department of Employment Relations and Human Resources at Griffith University. He has been a long-time employee and union member as well as a practicing manager. Dr Townsend welcomes any discussions with practitioners on their workplace experience at k.townsend@griffith.edu.au.

Notable Quotes

The proposition that the description of the delay as “several days” is a significant error of fact is preposterous. The proposition elevates the “fine tooth comb” approach to an appeal to new levels. The expression “several days” is not even a verbal slip. It is an accurate short hand description of the delay which is specified by the identification of the relevant days earlier in the decision of Deputy President Gostencnik... we are not satisfied that the [decision of Deputy President Gostencnik](#) reflects any significant errors of fact, significant or otherwise, or any error of law. Permission to appeal is refused...

Senior Deputy President Watson, Deputy President Gooley and Commissioner Bissett in [Ozsoy \[2014\] FWCFB 2149](#).

Reinstatement is the primary remedy and I can see no reason why it is inappropriate in this case. There was no issue raised about the Applicant's record or capacity to carry out the duties of Master in the future. There was no difficulty raised by Mr Brown or Captain Noronha about the Applicant's ability to become part of the ferry crew again. I am satisfied that the Applicant has “learnt his lesson”.

Deputy President Lawrence in [Christopher Toms v Harbour City Ferries Pty Ltd \(U2013/13687\)](#).

Of their nature, warnings are designed not only to put an employee on notice of conduct or behaviour the employer considers to be contrary to the employment contract, but also to give the employee opportunities to remedy the conduct or behaviour, all the while understanding (because of a sequence of warnings) that matters may escalate once three warnings have been given to a position where the employer is entitled to terminate employment.

Mortimer J in [Dafallah v Fair Work Commission \[2014\] FCA 328 \(4 April 2014\)](#).

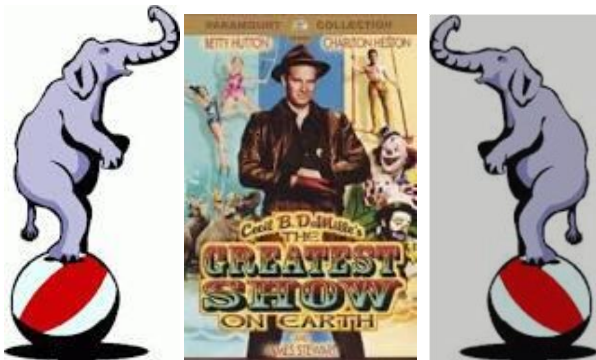
I do not consider that there is a sound basis to classify the relationship between him and the Department as one of employer and employee, principal and independent contractor, a volunteer in the undertaking of the Department or the performance of work for the Department in any other capacity.

Serious Satire

Fake It Till You Unmake It

By Cara Spence, QIRC Committee Member

Roll up roll up
 To witness the greatest showman on earth
 You'll marvel at his bravado
 You'll wonder at his gall
 You'll be bedazzled
 By the smoke and mirrors
 He can tap dance on thin ice
 He can leap through hoopla hoops
 He can traverse taut tightropes
 He can tell fantastic tales
 Of career achievements
 And quals galore
 He's a man of many monikers
 And varied dates of birth
 There's nothing he can't do
 With a little poetic licence
 And a lot of *confidence*
 But don't look behind the curtain
 Or you might just notice
 That the great and powerful bizwhiz
 Is only parading
 Masquerading at Myer
 For vast sums of money
 Yet lacking in credit and credibility
 Indeed he's incredible
 He's stupendous
 He's mysterious
 He's delirious
 To think he'd remain cloaked
 The truth about this workplace Houdini
 Has come to light
 It's a recruitment ruse
 Sure to amuse
 But his greatest trick
 Yet to be pulled
 Will surely be
 Convincing the world
 That Andrew Flanaganshenanigans
 Didn't exist.



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