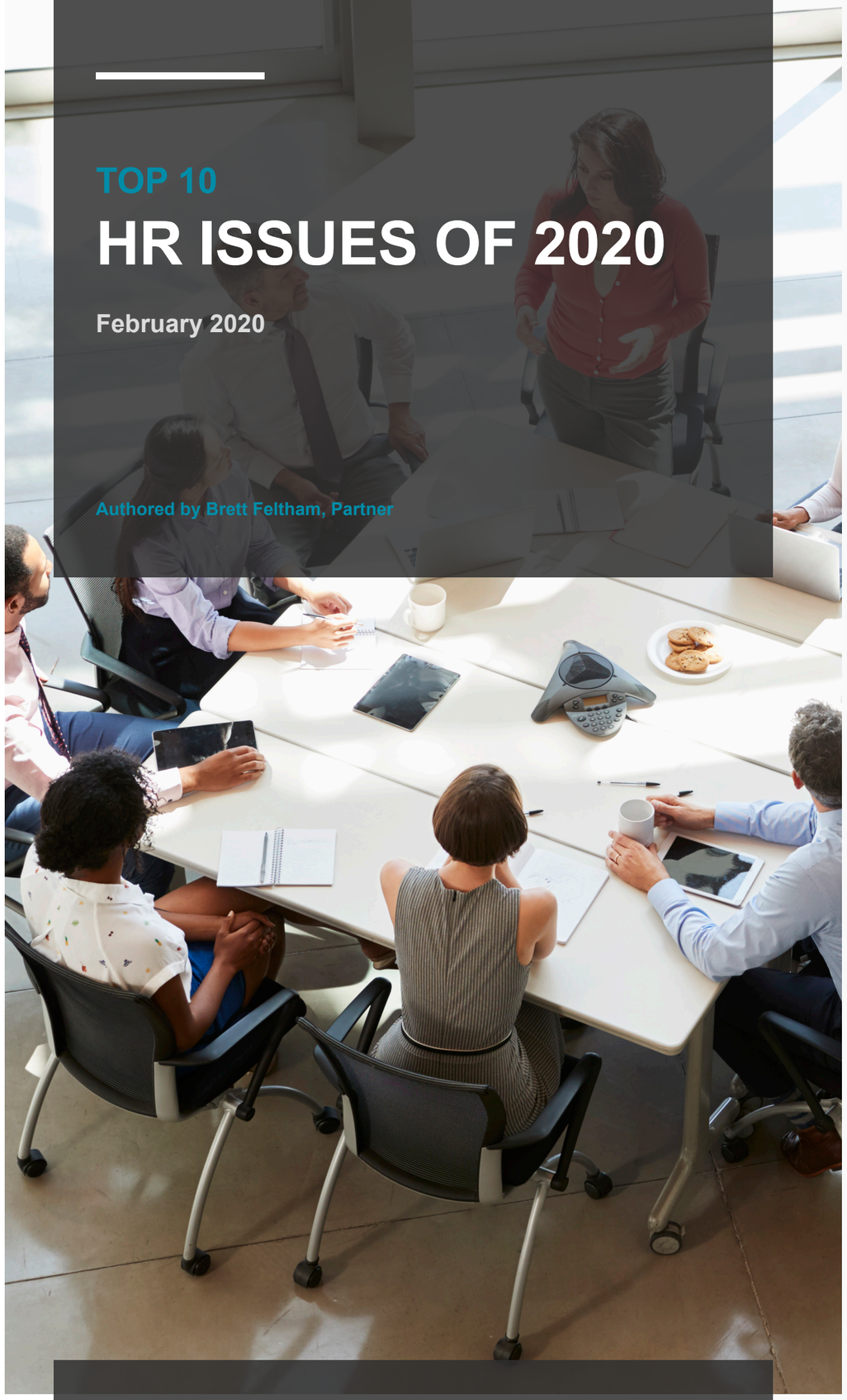

TOP 10
HR ISSUES OF 2020

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gadens

1 | EMPLOYEE (MIS)CLASSIFICATION

Momentum has been building in the last two years with respect to compliance with minimum employment entitlements. The Fair Work Ombudsman, government and media have devoted substantial attention to outing and prosecuting those employers who do not meet their minimum obligations. The focus on HR compliance is not expected to slow in 2020. One of the particular areas of focus is in relation to employee classification.

Part-time employees

For part-time employees, employers need to ensure that they have a regular pattern of work (where required by the relevant industrial instrument). Part-time employees cannot be used as "de facto" casual employees, with a roster that varies from week to week but without the benefit of a casual loading. Failing to agree on, and in practice provide, a regular pattern of work could expose an employer to significant overtime payments.

See our recent article on the risks that can arise with part-time employees: **Are your part-timers really part-timers? Another reason it's time for a compliance check!.**

Casual employees

There are also significant risks in relation to casual employees. In the 2018 case of WorkPac v Skene, the Federal Court was required to determine the definition of casual employment. The Court said that the essence of casual employment is the absence of a firm advance commitment as to the duration of the employee's employment or the days (or hours) the employee will work. So in that case, despite the fact that Mr Skene's employment contract stated that the employment relationship was casual, the Court found that he was not a casual employee for the purposes of the *Fair Work Act 2009* (Cth) and he was entitled to the same benefits as a permanent employee (such as annual leave). For a more detailed analysis of the case, see: **Keeping it casual? Think again!.**

In response the Federal government introduced new regulations which allow employers, in certain circumstances, to offset the casual loading paid to an employee against entitlements that may otherwise be owed to the employee if they are found in the future to be a permanent employee. If relied upon correctly, the regulations may prevent casual employees from 'double dipping' and claiming permanent entitlements in addition to their casual loadings. See our summary of the regulations: **No second bite at the cherry for casual employees seeking leave entitlements: Government introduces new regulations to tackle "double dipping".**

There is much more to come in this space however. The CFMMEU is running a self-funded class action against WorkPac pursuing at least $12 million in unpaid annual leave entitlements for "misclassified" casuals. A separate class action is seeking recovery of up to $84 million for an estimated 7,000 to 10,000 on-hire WorkPac casuals. Lastly, a further test case, WorkPac v Rossato, was heard by the Federal Court last year but is awaiting judgement.

The Gadens Employment Advisory team can assist employers in relation to all of these issues, please get in touch if you have any queries.

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2 | UNDERPAYMENTS AND #WAGETHEFT

Last year saw an ever growing list of companies and name brands being investigated by the Fair Work Ombudsman or self-reporting wage underpayments – commonly referred to as "wage theft". It should be clear to employers that the Fair Work Ombudsman has increased its investigative and prosecution activity, requiring strict compliance, so that self-reporting by employers will not result in an amnesty but most likely enforceable undertakings.

There have unfortunately been many recent examples. Following an investigation by the Fair Work Ombudsman, MAdE Establishment Group (the restaurant group headed by George Calombaris) agreed to pay over $7.8 million in wages and superannuation contributions to more than 524 employees for the period from 2011, plus a $200,000 fine. These underpayments are believed to have arisen from an initial misclassification of employees under the relevant modern award and then the flow on effects of unpaid overtime payments. In the last few days it has been announced that most of the MAdE Establishment Group has now been placed into voluntary administration.

Late last year Woolworths self-reported that it had underpaid some of its employees over the last 9 years, with compensation levels estimated to be between $200 and $300 million. It is understood that these underpayments were identified by Woolworths in the course of its negotiation of a new enterprise agreement. Coles has just announced a total of $20 million in underpayments for its salaried team members across its supermarkets and liquor businesses.

While each example will be fact specific, there does appear to be some general causes behind non-compliance – employers not properly understanding their modern award and enterprise agreement classifications, obligations and entitlements, increasingly complex payroll arrangements, poor payroll processes, time recording and record keeping, and a lack of checking and auditing.

While clearly there can be a significant financial impact and reputational damage arising from non-compliance and underpayments, directors and managers need to be aware of their own potential exposure through accessorial liability.

In addition to various State inquiries, a Senate committee into wage theft has been established and the Federal government has strongly signalled that employers should expect to see legislative change and criminal offences to be introduced in this area.

3 | ANNUALISED WAGE ARRANGEMENTS

The Fair Work Commission has determined that revised annualised wage provisions will be inserted into a number of modern awards, including the Clerks – Private Sector Award 2010 and Manufacturing and Associated Industries and Occupations Award 2010, to mostly take effect from 1 March 2020.

While many employers already pay an all-inclusive annualised rate of pay to their award covered employees, with the intention being to compensate an employee for all award related entitlements, many of those employers fail to comply with all of their compliance and record keeping obligations.

Employers that wish to utilise an annualised wage arrangement under a modern award will be required to notify employees of how the annualised wage has been calculated (including assumptions in relation to the likely amount of overtime hours and hours attracting penalty rates), keep additional records, and conduct annual audits. Not all modern awards have been amended, and those amendments vary between the awards. Some awards allow for such an arrangement to be imposed by an employer, while other awards require the agreement of an employee in order to do so.

See our detailed analysis: **Annualised wage arrangements – changes commence 1 March 2020** and our recent update: **Annualised wage arrangements: Have you considered all of your options?.**

4 | RESPONSES TO NATURAL DISASTERS AND PANDEMICS

Unfortunately of late many Australian businesses have had to deal with the implications of major natural disasters, from unprecedented bushfires to now flooding to both fire affected and new areas. In that context employers need to be aware of the many challenges that their employees may be facing. Employers will need to consider a range of issues from where workplaces have been directly affected and safety issues which may arise from employees working at or travelling to that site, through to what steps to take where employees are unable to perform their roles for a period of time from a downturn in the business, and what leave and other support should be provided to employees who have been personally affected by the fires. Employers should also be aware of their obligations under the *Fair Work Act 2009* (Cth) to provide unpaid community service leave to employees who are engaged in voluntary emergency management activities such as rural firefighting services.

Employers will also need to consider what steps they may need to take if we continue to see the number of coronavirus cases increase around the world, and particularly in Australia. While employers with employees who travel to, or are based in, China and more heavily affected areas will already be taking specific safety steps, employers will need to consider more generally what their response will be where an employee has travelled to an area or is in physical contact with someone who has recently travelled to an area which is affected and/or attends work with potential respiratory symptoms. There is also expected to be increasing shortages of products and components which are sourced from those areas, which may in turn affect the ability of Australian businesses to continue current levels of production and to lead to pressure on current workforce levels.

5 | WHISTLEBLOWING REFORMS

New whistleblowing laws were introduced in 2019, with those laws largely taking effect from 1 July 2019. In addition, all public companies (excluding charities and non-for profits) and large proprietary companies were required to implement a new whistleblowing policy from 1 January 2020.

These new laws are complex and include significant changes from the previous regime. In simple terms, an eligible whistleblower (which includes a current or former officer, employee or contractor, or their relative, dependant or spouse) may make a protected disclosure to an eligible recipient (which includes an officer or senior manager of the entity) or regulator, where they have reasonable grounds to suspect that their information concerns misconduct or an improper state of affairs or circumstances. In those circumstances the whistleblower, who may remain anonymous, will be entitled to various strengthened protections.

For HR practitioners, it is important to understand that only some "personal work-related grievances", which includes interpersonal conflict between the discloser and an employee and decisions affecting the employment or engagement of someone, will amount to protected whistleblowing disclosures. The distinction is critical in the context of any investigation being undertaken, and any subsequent action being taken in relation to the whistleblower. Please see our comprehensive guide to those laws: **New whistleblowing laws – are you ready?**

For more information on policy requirements, see our update: **New whistleblower laws: ASIC consults on whistleblower policy requirements**, and the **finalised guidance** produced by ASIC.

6 | MODERN SLAVERY REPORTING

The United Nations estimates that over 40 million people around the world, and 4,300 people in Australia, are victims of some form of modern slavery. While many Australian organisations may see modern slavery as being far removed from their own operations, when overseas based product supply chains are taken into account modern slavery becomes a very relevant issue.

The *Modern Slavery Act 2018* (Cth) came into force on 1 January 2019. The legislation requires entities based, or operating, in Australia, which have an annual consolidated revenue of more than $100 million, to report annually on the risks of modern slavery in their operations and supply chains, and actions taken to address those risks. The first reporting period under the legislation will be an organisation's first financial year starting on or after 1 January 2019, which means that most Australian companies will need to first report by 31 December 2020.

While NSW previously passed its own modern slavery legislation (with a lower threshold for reporting), as a result of concerns having been raised about its compatibility with the Federal legislation, the NSW legislation has yet to commence operation and may not ultimately come into effect: **Modern slavery reporting: NSW legislation update.**

Although many smaller organisations may not have direct reporting obligations, if they form part of the supply chain for larger organisations then they should expect to have to provide this type of information "up the chain".

See our previous articles for a comprehensive overview of the legislation and the steps that organisations should be taking to meet their obligations: **Modern slavery and what businesses need to know** and **Update on Australia's modern slavery reporting requirements.** The Federal government has also published **useful guidance** for reporting entities.

7 | NATIONAL INQUIRY INTO SEXUAL HARASSMENT IN AUSTRALIAN WORKPLACES

The Australian Human Rights Commission commenced a National Inquiry into Sexual Harassment in Australian Workplaces with nationwide consultations in 2018 and 2019. The focus of the inquiry is on the nature and prevalence of sexual harassment, the drivers of this harassment, and appropriate measures to address sexual harassment in Australian workplaces. With the focus on systemic issues, the inquiry did not involve investigating or making findings about individual allegations of sexual harassment. For a more detailed analysis of the inquiry and issues arising in the context of #MeToo, see our article: **#MeToo and sexual harrassment in Australian workplaces.**

While originally its report was expected to be finalised in late 2019, the report is now expected to be released by the Australian Human Rights Commission in the first half of 2020. The results of the inquiry are expected to lead to greater guidance for employers, potentially through legislative reform.

8 | INDUSTRIAL MANSLAUGHTER LAWS

Industrial manslaughter laws have been in place in the ACT and Queensland for some time. Despite that, the first prosecution in Queensland, involving the death of an employee killed by a reversing forklift, has only recently been commenced and the ACT laws have not been used to date.

In late 2019 Victoria passed new industrial manslaughter laws, which are expected to commence operation by 1 July 2020. Under those laws an organisation who is found to have negligently caused a workplace death may face a penalty of up to $16.5 million, while individuals will face fines of up to $1.65 million and up to 20 years imprisonment may be imposed. See our detailed analysis of those new laws: **Victoria to introduce offence of Industrial Manslaughter: What does it mean for employers?.**

Some other States are expected to follow Victoria's lead, but the NSW government has rejected the case for introducing industrial manslaughter laws, saying that it will instead be focusing on targeting "risky work practices" and increasing potential penalties for work health and safety breaches generally.

9 | RELIGIOUS DISCRIMINATION BILL

Largely as a result of the publicity surrounding the Israel Folau dispute (which was subsequently settled), the Federal government released a first exposure draft of the Religious Discrimination Bill in August 2019. After much controversy and consultation, a revised draft of the Bill was released in December 2019. It remains to be seen if the Bill will become law.

The revised draft Bill, if passed, would allow a broad range of defined religious organisations, such as religious charities, hospitals, aged care facilities and accommodation providers, to preference the employment of those who share their faith and to take a person's faith into account when making employment decisions.

The revised draft Bill also provides that if a large business imposes a condition relating to the standards of dress, appearance or behaviour on its employees, and that condition would restrict or prevent an employee from making statements of belief in their private capacity (such as via social media), the business is required to prove that compliance with the condition is necessary to avoid unjustifiable financial hardship to the business. If the business is unable to demonstrate that the condition is necessary to avoid that hardship, the condition is not reasonable and will amount to unlawful discrimination. These provisions only apply to an employer with revenue of at least $50 million in the current or previous financial year, and do not cover the Commonwealth, state or territory public sector. One of the practical effects of this provision may be to prevent large businesses from regulating the use of social media by their employees outside of work.

10 | OTHER LEGISLATIVE CHANGES

It is likely that there will be a raft of other legislative workplace relations changes introduced in 2020. Some of those potential changes have already been flagged by the Federal government, such as the potential reintroduction of the Ensuring Integrity Bill designed to provide the Federal Court with additional powers to disqualify officials and cancel the registration of registered organisations, but which was voted down in the Senate last year.

The Federal government has also released discussion papers and invited submissions in relation to a variety of workplace relations issues, including whether the existing penalty framework in the *Fair Work Act 2009* (Cth) is sufficient and whether criminal offences should be introduced for exploitive workplace conduct. Further discussion papers are to follow.

In 2019, the Victorian government introduced a labour hire licensing scheme, joining Queensland and South Australia, in regulating this area. The *Labour Hire Licensing Act 2018* (Vic) imposes an obligation on all 'labour hire providers' to be licensed. The Act makes it an offence for a labour hire provider to operate without a licence, or for a host to engage the services of a labour hire provider who is not licensed. The maximum penalty for a body corporate who infringes these laws is approximately $507,000. The Federal government has indicated that it may also look to regulate labour hire arrangements particularly in the high-risk sectors of cleaning, horticulture, meat processing and security.