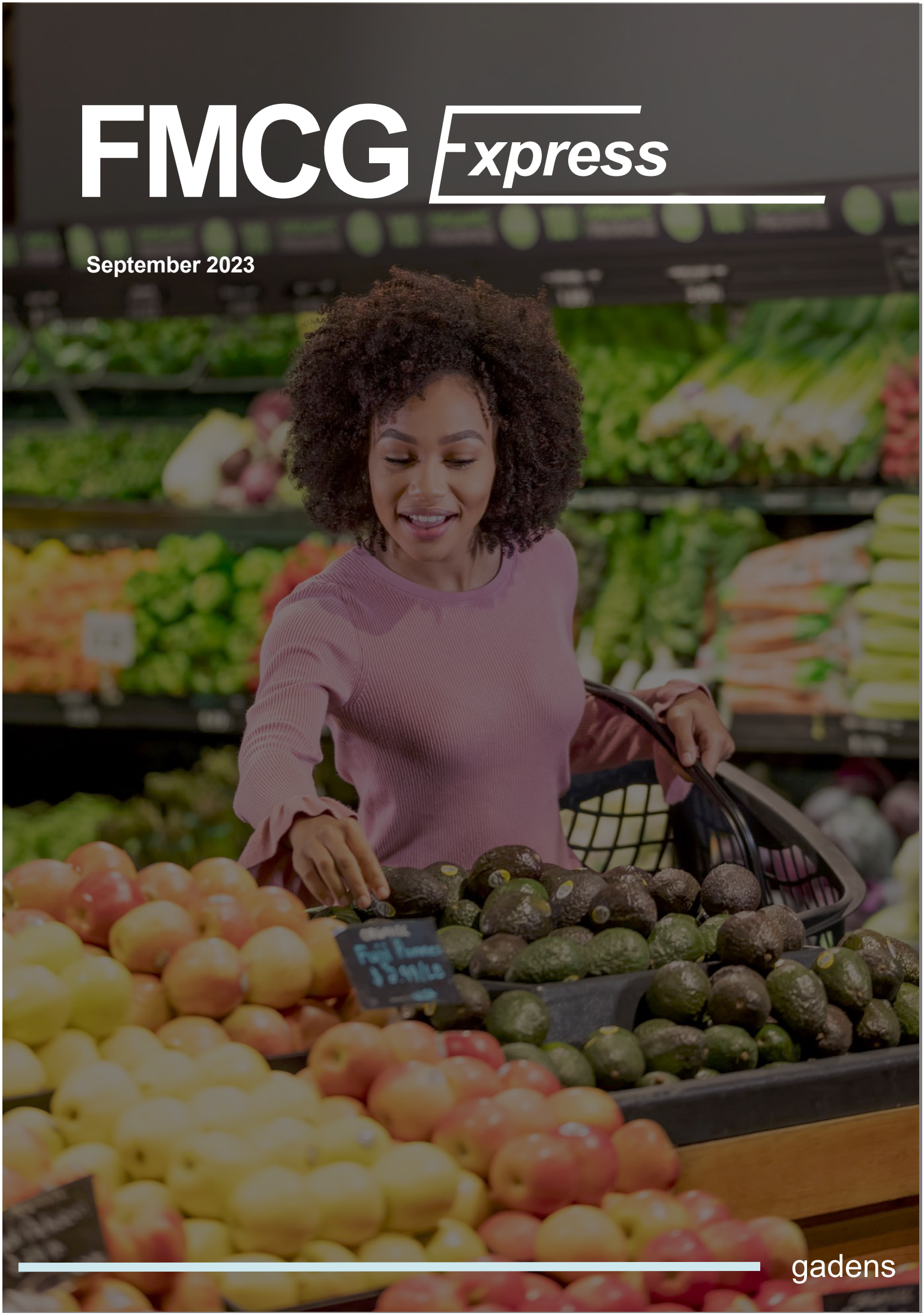
FMCG Express

September 2023



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Welcome to the eighth edition of FMCG *Express*

This is our second and final issue for 2023. Our consumer, retail and hospitality sector clients are busier than ever, and we are grateful for the opportunity to support them through a turbulent economic period with increasing legislative and compliance obstacles to navigate.

I found David Smith and his team's article on the practicalities of the implementation of changes required pursuant to the amendments to the unfair contract terms (UCT) regime particularly helpful. If you have not received a link to our client presentation on these UCT regime changes, please reach out. The positive feedback has been extraordinary. The UCT regime changes have relevance to a huge slew of our clients, and our reviews of their templates have necessitated many clients making changes and putting in place new systems.

Siobhan Mulcahy and her team continue to provide us with commercially-targeted, timely and efficient legal advice across all aspects of employment law. In this edition there is focus on obligations regarding psychosocial safety and hazards, the Retail Award and general legislative updates. Unemployment rates in many parts of Australia continue to remain at record lows which can make the attraction and retention of staff (particularly casual staff) challenging.

Finally, we take a look at recent ACCC enforcement activity and consider one of the current buzzwords 'greenwashing' and what risks our clients need to be aware of.

We hope you enjoy this edition of FMCG *Express*. Please let me know if you have any questions or feedback or would like us to cover any topics.

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Unfair contract terms – Navigating the new regime

By David Smith, Partner, Eve Lillas, Senior Associate and Stephanie D'Amelio, Lawyer

From 9 November 2023, the stakes are rising regarding non-compliance with the unfair contract terms (UCT) regime under the *Australian Consumer Law* (ACL) and the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act). Under the new UCT regime:

- **more contracts will be captured due to changes to the definition of a 'small business contract' and further guidance on what constitutes a 'standard form contract';**
- **terms contained in standard form contracts will be unlawful if they are considered 'unfair', rather than merely void if they are considered 'unfair', which was the position under the old regime; and**
- **significant civil penalties of up to $50 million (in some cases even more) will apply for breaches of the UCT regime.**

For more information on the reforms to the UCT regime see our previous article here.

Businesses must act now to prepare for these changes, including by reviewing their contract templates to which the UCT regime may apply.

We provide some practical steps a business can take to help navigate the UCT regime.

Reducing the risk of a contract being considered a standard form contract

The threshold question as to whether the UCT regime applies is whether the contract is a 'standard form contract'.

If a party to a legal proceeding alleges that a contract is a standard form contract, it is presumed to be a standard form contract unless another party proves otherwise.

There is no definitive definition of a standard form contract, but a court must take certain considerations into account under the legislation.

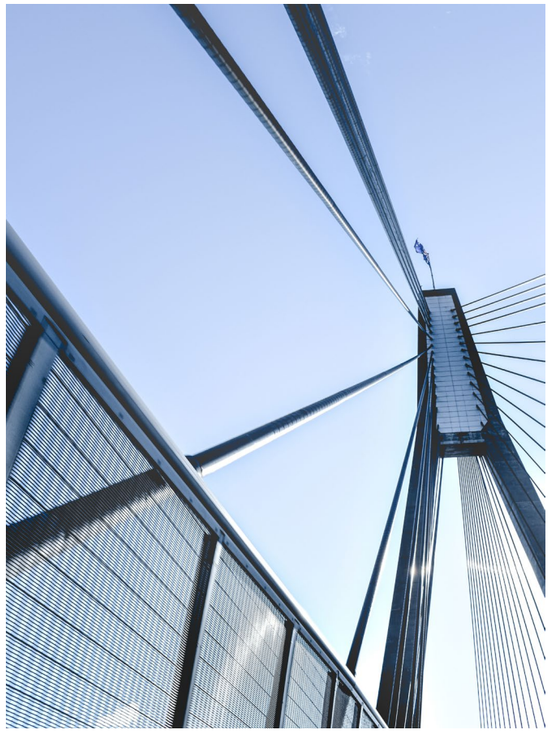
Standard form contracts are often contracts provided on a 'take it or leave it basis' and may include contracts prepared by one party with most of the bargaining power, with little or no opportunity for the counter-party to negotiate the terms.

To help reduce the risk that a contract is considered a standard form contract, businesses may consider taking the following steps:

1. Use the counter-party's draft contract, and negotiate amendments to that contract. However, this option may not be suitable for all counter-parties (for example they may not have the knowledge or resources to prepare a draft contract) and the contract may require a high degree of review and negotiation.
2. Use your own template contract and provide the counter-party with an effective opportunity to negotiate material changes. In doing this, a business could consider:
    - asking the counter-party what key points and special requirements it may wish to address in the contract, and amending the draft to reflect those points and requirements;
    - inviting the counter-party in writing to suggest amendments to the contract, and then considering any such amendments in good faith;
    - ensuring any request for tender (**RFT**) process expressly includes an opportunity for tenderers to provide proposed amendments to any draft contract included in the RFT, that will be considered in good faith;
    - recommending that the counter-party obtains independent legal advice on the contract;
    - offering to pay a material contribution to the counter-party's costs of obtaining independent legal advice on the contract (preferably this should be a sum that will realistically assist the counter-party to obtain the required advice); and
    - actually accepting compromised positions proposed by the counter-party, by giving ground on material points.

The business should keep records to show that the above steps have been taken.

If your business holds most of the bargaining power, you will need to do more than just pay lip service to the above points. If you implement any of them you will need to implement them in good faith, which may mean shifting the risk position under the contract to a 'balanced' rather than a 'one-sided' position. This may be hard to swallow from a commercial viewpoint, but it might be necessary in order to manage this legal risk.



How to identify small business contracts

The UCT regime only applies to a standard form contract that is either a 'consumer contract' or a 'small business contract'.

A consumer contract is essentially a contract for the supply of goods or services (or an interest in land) to an individual for personal, domestic or household use or consumption.

From 9 November 2023, a contract will be considered a small business contract if at least one contracting party is a business that:

a. employs fewer than 100 people; or

b. had a turnover for the previous income year below $10 million.

Note that the UCT regime will apply if either your business or the counter-party fits the above criteria.

If the ASIC Act applies, the contract must also have an upfront price no greater than $5 million.

An important practical issue is how you can determine whether a counter-party's characteristics will make your contract a 'small business contract'. Here are some tips to consider:

1. When counting employees, the legislation requires that you only count a casual employee if employed on a regular and systematic basis and that you count a part-time employee as an appropriate fraction of a full-time equivalent.
2. Don't make assumptions about the number of employees or turnover of the counter-party, particularly when dealing with a company within a large corporate group. The relevant considerations are the number of employees and the turnover of the counter-party, not of any group of companies of which the counter-party is part.
3. Ask the counter-party to confirm in writing its employee headcount and turnover. Consider building a brief questionnaire into your standard contracting process for new contracts, variations or renewals to ask for this information.
4. Ask the counter-party to provide written evidence to support its answers to the above (for example, extracts from its personnel/payroll records and from its financial accounts).
5. Conduct your own due diligence on the counter-party using relevant information (if any) in the public domain.
6. Keep records that the above steps have been taken and of any information obtained about the counter-party.
7. Have the counter-party warrant in the contract, if applicable, that it employs at least 100 people and had a turnover for the previous income year of at least $10 million.
8. If in doubt, assume the contract is a 'small business contract'.

Some of the above steps may seem onerous, but they may be unavoidable if you want to be reasonably confident about whether a contract is a 'small business contract'.

Renewing and varying agreements

The new UCT regime will apply to relevant standard form contracts that are entered into or renewed, or to terms that are varied in relevant standard form contracts, from 9 November 2023. Otherwise, existing relevant standard form contracts that continue past this date without renewal or variation will be subject to previous regimes.

Given this, if your business is to vary or renew an existing standard form contract from 9 November 2023, consider taking the following steps:

1. If the contract is to be varied,
    - determine whether the UCT regime applies (namely, is the contract a consumer contract or small business contract); and
    - if the UCT regime does apply, either decide not to vary the contract if the variation is not vital or ensure that the varied or added terms are balanced and not 'unfair'.
2. If the contract is to be renewed:
    - determine whether the UCT regime applies (namely, is the contract a consumer contract or small business contract); and
    - if the UCT regime does apply:
        - take steps to reduce the risk that the renewed contract will be a standard form contract, for example by inviting the counter-party to suggest amendments and then considering any proposed amendments in good faith (see discussion above); or
        - put forward an amended version of the contract that is balanced and not 'unfair'.

Beware – if you have a current contract that will automatically renew on or after 9 November 2023, the renewed contract may be subject to the UCT regime so you should consider the above.

One template contract or two?

A question many businesses are considering in relation to their template agreements is: from 9 November, should we have two versions of our agreements (one 'balanced' agreement to use where the UCT regime applies, and one less favourable to the counter-party to use where the UCT regime does not apply)?

Many of our clients are taking the view that for simplicity and to avoid the risk of error, they will have just one version of most or all of their template agreements. The detriment of this approach is that when it uses the revised templates (with 'unfair' clauses removed) the business may take on more risk than it otherwise might have, in those instances where the UCT regime does not apply.

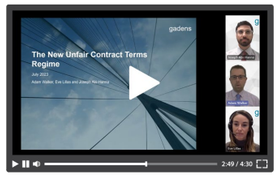
If your business goes down the path of having two versions of a template agreement it will need to put in place rigorous internal procedures to ensure it uses the 'balanced' version where the UCT regime applies. If in doubt, we recommend using the 'balanced' version.

Please contact us if you would like assistance to implement any of the above and prepare for the introduction of the UCT reforms.

Click the links below to access additional Gadens UCT resources:

Our top 10 unfair contract terms

The new Unfair Contract Terms Regime presentation



The commencement date for the amendments to the unfair contract terms regime has been amended to 9 November following a change in the date previously communicated by the Australian Competition and Consumer Commission.

Privacy Act reforms in sight for employees, individuals and small businesses

By Antoine Pace, Partner and Clare Smith, Associate

As well as the recent spate of data breaches exposing volumes of customer personal information, most of our readers will be aware that reforms to the *Privacy Act 1988* (Cth) (Privacy Act) are on the horizon.

The recommendations set out in the Attorney General's recent report on the proposed amendments to the Privacy Act (Report) are extensive and, if implemented, will have a significant and far-reaching effect on how businesses who are regulated under the Privacy Act (APP entities) may collect, use and disclose personal information. This article looks at a few of these reforms, namely the changes to the employee record exemption, individuals' rights over their personal information, and the small business exemption.

You can read more about the proposed changes to the employee record exemption here and individuals' rights here.

Curbing the employee record exemption

International observers often comment on one peculiar aspect of how the handling of personal information is regulated in Australia – the fact that employers are not required to treat the personal information relating to their own employees with the same care as information relating to strangers. In Australia, an APP entity acting in its capacity as the employer (or as a former employer) of an individual is currently exempt from complying with the Privacy Act in relation to acts or practices directly related to the employment relationship. The exemption covers any record of personal information relating to the employment of an employee, including the conditions of employment[2].

Before you rub your eyes and say to yourself that you're dreaming, we can assure you it's true. However, we expect that this exemption will be curbed substantially as part of the coming Privacy Act reforms, to increase transparency around employers' collection and use of employee personal information[3]. This common-sense reform will give employees the same level of protection for their personal information as their employers are required to give to customers.

Employers can get ahead of the game by reviewing the employee personal information that they hold, appointing a privacy officer, updating their internal employment processes to harmonise the information handling aspects with their general privacy practices, updating the data breach response plan to include employee personal information, and deleting unnecessarily retained employee personal information.

The world won't end if this sensible reform comes into force. It's just a matter of being prepared.

New individual rights

The Report also proposed six rights for individuals whose personal information is collected, used or disclosed. These are the right to:

1. know what information is held about them and what is being done with it;[4]
2. challenge whether the APP entity's handling of their personal information complies with the Privacy Act;[5]
3. require that personal information being held about them is deleted;[6]
4. require that personal information being held about them is relevant, accurate, up-to-date and not misleading;[7]
5. require that internet search results about them is de-indexed;[8] and
6. take direct action where they have suffered loss or damage due to a privacy interference.[9]

The aim of these rights is to give individuals greater power over the use and handling of their personal information. It is important to empower individuals in this way, to help them control what information is kept about them, and to help them make a claim directly, if their personal information is breached in any way.

Removing the small business exemption

Businesses with an annual turnover of less than $3 million are currently exempt from complying with the Privacy Act (unless an exception applies).

We support changes to the exemption, and possibly even a phased removal, as this will bring Australia's privacy landscape into line with other jurisdictions and enhance the protection of individuals' personal information. However, the cost and impact of complete removal is likely to be significant, and there are also the questions as to timing: how much time should small businesses be given to uplift their privacy compliance, and what assistance should be provided to assist them with such compliance?

Despite the above issues, and even if the exemption remains in a more limited way (for instance, by lowering the upper threshold to, say $1 million or $2 million), it is likely that biometric information (such as fingerprint or facial recognition) will be carved out of the small business exemption and that small business will be required to obtain express consent from individuals if they wish to trade in personal information.[10] This measure would balance public concern regarding businesses engaging in data-brokering and trading in personal information with what is considered to be the onerous impact of Privacy Act compliance.

There will be more to come in this series of articles. Stay up-to-date with the evolving privacy landscape and how the reforms may impact you and your customers here.

1. Australian Government, Attorney General's Department, 'Privacy Act Review Report' (16 February 2022).
2. Privacy Act 1988 (Cth) s 7B(3).
3. Above 1, proposal 7.1(a).
4. Above 1, proposal 18.1.
5. Above 1, proposal 18.2.
6. Above 1, proposal 18.3.
7. Above 1, proposal 18.4.
8. Above 1, proposal 18.5.
9. Above 1, proposal 26.1.
10. Above 1, proposal 6.2.

ACCC enforcement activity – Misleading and deceptive conduct online

By Breanna Davies, Partner and Raymond Huang, Lawyer

For the second year in a row, manipulative or deceptive advertising and marketing online is one of the top priorities of the Australian Competition and Consumer Commission (ACCC).[1]

Now more than ever, retailers need to be reviewing all the digital representations they are making to consumers to minimise their chances of contravening the *Australian Consumer Law* (ACL).

Where these reviews are ignored, the ACCC's ongoing enforcement activity makes it clear that serious consequences for businesses are very much in play. The below cases are just a few of many examples where significant penalties have been imposed.

Outcome of recent enforcement activity by the ACCC

Facebook Israel and Onavo Inc (subsidiaries of Meta) – Digital advertising

In Federal Court proceedings brought by the ACCC and concluded this July 2023, two Meta subsidiaries were found to have contravened the ACL for using misleading promotional material about an app called Onavo Protect. This app was free to use and offered a virtual private network service to secure and encrypt a user's app and web traffic.[2]

Part of the app's marketing involved statements about security and data protection, which appeared across the app's website, Apple App Store and Google Play Store app descriptions, Facebook ads and within the app itself. For example, these representations would include statements such as 'protect personal information' or 'keep it secret'.

At the same time, however, the app would collect and share anonymised internet and app activity with Meta for commercial benefit.

Without making the proper disclosures to Australian consumers about how their data would be used, the online marketing material (across various digital mediums) of the two Meta subsidiaries ultimately gave rise to a total penalty of $20 million for misleading the public.

Dell Australia – Pricing

The ACCC's Federal Court proceedings against Dell Australia Pty Ltd (**Dell**) saw pricing representations made on Dell's website also declared (by consent) as false or misleading in June this year.[3]

In that case, Dell failed to recognise that an incorrect price was being struck through when the website was displaying discounted prices for monitors being purchased as an add-on to a computer. Consumers would therefore see themselves receiving discounts that were larger than the one they were in fact receiving.

Dell has already been ordered to adopt a consumer redress regime, appoint a qualified compliance professional to review its internal compliance program and to issue corrective notices to affected consumers.

On top of that, the Federal Court has now also ordered Dell to pay a penalty of $10 million, following the recent conclusion of the case's penalty hearing.[4]

Moving forward, Dell will be expected to have a far more robust system of internal compliance reviews, especially relating to the pricing representations it makes through its website.

Booktopia – Terms of Business

In March 2023, one of Australia's largest online booksellers was declared by the Federal Court to have made misleading statements via the Terms of Business on its website.[5]

Those terms (which were repeated by customer service staff) required customers to give Booktopia notice for damage, fault or error within two business days to be entitled to refunds. Of course, this meant customers were presented with less rights than they were in fact entitled to under Australian Consumer Law.

For these misleading representations, Booktopia was ordered to pay a penalty of $6 million.

In the Federal Court's judgment, reference was made specifically to Booktopia's lack of consumer law compliance policies, staff compliance training, customer service staff scripts or legal advice in drafting their website's terms of business.

What can happen if you don't comply?

As the above may show, the consequences that contravening retailers have faced are varied and naturally depend on the nature of the breach.

For example, the ACCC may issue an infringement notice for alleged false or misleading conduct by corporations for as much as an $18,780 penalty per notice.[6]

Where Federal Court proceedings are brought (for more serious contraventions) penalties for corporations can reach as high as the greater of $50 million or triple the value derived from the breach. If the latter cannot be determined, the value will be 30% of turnover during the contravention period instead.[7]

Additional burdens are also being imposed by the Court or being agreed to under court-enforceable undertakings given to the ACCC. This includes issuing corrective notices to customers, establishing and maintaining consumer law compliance programs, and appointing qualified compliance professionals.

What do retailers need to know?

The cases above are just a small sample of the ACCC's ongoing enforcement activity against the representations being made by retailers online.

We are seeing action being brought for a range of areas, from prices and product descriptions to star ratings and consumer guarantees.

As this trend continues, businesses that neglect proper disclosures and regular reviews of their websites, apps and online marketing material for compliance with the ACL risk incurring significant monetary and non-monetary consequences.

Please contact us should you require any advice or assistance with your online consumer law compliance.

1. https://www.accc.gov.au/media-release/compliance-and-enforcement-priorities-for-2022-23 and https://www.accc.gov.au/about-us/accc-priorities/compliance-and-enforcement-policy-and-priorities
2. https://www.accc.gov.au/media-release/20m-penalty-for-meta-companies-for-conduct-liable-to-mislead-consumers-about-use-of-their-data
3. https://www.accc.gov.au/media-release/dell-australia-declared-to-have-misled-consumers-about-the-prices-of-computer-monitors
4. https://www.accc.gov.au/media-release/10m-penalty-for-dell-australia-for-misleading-representations-about-discount-prices-of-computer-monitors
5. https://www.accc.gov.au/media-release/booktopia-to-pay-6m-for-misleading-statements-about-consumer-guarantee-rights
6. https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties
7. https://www.accc.gov.au/business/compliance-and-enforcement/fines-and-penalties

Guidance by the ACCC on avoiding greenwashing

By Susan Goodman, Partner, James Macdonald, Special Counsel and Ahmed El-Jaam, Lawyer

The environmental impact of products is an increasingly relevant factor for Australian consumers. The knock-on effect is that it is becoming more and more important for businesses to market their products in a way that highlights their environmental friendliness.

It can be difficult for businesses to work out what is an acceptable marketing practice and what could be said to over-represent, exaggerate, mislead or falsify the environmental impact of a product. Where businesses get it wrong, they risk being accused of 'greenwashing' and falling foul of the *Australian Consumer Law* (**ACL**), which applies to all forms of marketing and representations made in relation to consumer goods or services.

Mindful of the difficulties businesses face on this front, the Australian Competition and Consumer Commission (**ACCC**) has published draft guiding principles to help businesses provide clear and reliable information to consumers about the environmental performance of their businesses and to ensure their compliance with the ACL.

Draft guidelines

The eight draft guiding principles published by the ACCC are headlined below:

1. Make accurate and truthful claims

Even if a claim is factually correct it could be misleading if the overall impression created (including through the inclusion of visual elements) overstates the level or scientific acceptance of the claim. Scientific studies can be conditional or inconclusive. Representing such studies as being more widely accepted or having stronger merit than is the case could be misleading.

You should also avoid exaggerating the environmental benefit of a product or service (for example, making a general statement that a product is recyclable where certain parts of it are not could be misleading).

Environmental claims should only be made about the meaningful impact of a product. If your product is required to meet certain standards, you should not use the fact that it does to try to create an impression that your product is especially environmentally conscious.

Only make representations about future environmental plans or initiatives if you genuinely intend on following through with them and meeting any announced targets or goals.

2. Have evidence to back up your claims

It is important that you have a reasonable basis for any environmental claims you make.

Independent and scientific evidence is usually the most credible.

If you rely on claims made by suppliers or other third parties, it is important that you verify those claims.

It can be difficult for consumers to verify claims. Businesses are encouraged to provide customers with sufficiently detailed information to enable them to verify any environmental claims. This can be done by including a link or QR code with any marketing material.

Don't leave out or hide important information

Consumers should be given all the relevant information they need to make an informed decision about a product. This means that information should not be placed where it is unlikely to be found.

It is important to be mindful of a product's complete lifecycle when making environmental claims. Where claims are based on only certain parts of the lifecycle (without specifying that to be the case) there is a real risk that they could be seen as false or misleading.

3. Explain any conditions or qualifications on your claims

Some environmental claims may only be true under specific conditions or after taking certain steps.

Where this is the case, it is important that:

- enough information is given to the consumer to allow them to understand what they need to do to realise these environmental claims; and
- it is possible for the consumer to take the required steps (for example, if the relevant technology to recycle the product does not exist in Australia but does elsewhere, it should not be advertised as being 100% recyclable).

4. Avoid broad and unqualified claims

Unqualified and ambiguous sweeping statements have the potential to mislead consumers.

Without proper qualification or clarification, terms like 'sustainable', 'environmentally friendly', 'green' and 'eco-friendly' can convey sweeping benefits that can mean different things to different consumers.

Phrases such as 'carbon neutral', 'climate neutral', or 'net-zero' can also be problematic because a lot of consumers do not truly understand what they mean.

When making claims concerning product emissions it is good practice to:

- use established Australian or internationally recognised methodologies to assess the level of greenhouse gas emissions;
- account for all types of greenhouse gas emissions; and
- ensure that the information is clear and easy to understand.

5. Use clear and easy-to-understand language

Most consumers don't have specialist scientific or relevant industry knowledge. It is best to avoid technical terms or jargon.

6. Visual elements should not give the wrong impression

Visual elements are a useful tool when conveying information to a consumer, but they should be used with care.

Visual elements or symbols (e.g. pictures of dolphins or using the colour green) may be interpreted as meaning that a product has particular environmental benefits.

Certification labels or trust marks are also regularly used to show that a product has certain environmental characteristics or has been certified by a third party as meeting particular environmental standards. If you apply such labels or marks, you should make sure that:

- your product or service meets the criteria associated with that label or trust mark;
- the extent to which the mark or label is applicable to product is clearly explained; and
- the details of the certification scheme or criteria for the mark are available to consumers.

Ultimately, you need to consider the overall impression created by any packaging or marketing material and ensure that holistically it accurately represents the environmental characteristics of the product.

7. Be direct and open about your sustainability transition

More and more businesses are now transitioning towards more sustainable business practices and making public claims to this effect.

You should avoid making claims about:

- steps that have been achieved as part of any sustainability transition if this isn't the case; or
- aspirational plans or initiatives you intend to put in place if you do not have a clear and actionable plan and are not genuinely committed to achieving the publicised goals.

What does this mean for businesses operating in Australia?

Consumers are more and more aware of the environmental characteristics of the products and services they purchase. It is no surprise that businesses have had to shift their marketing to highlight the environmental characteristics of their products.

Of particular concern to the ACCC appears to be that, in responding to that change in consumer sentiment, some businesses are either inadvertently or deliberately making exaggerated, misleading or false claims about the environmental characteristics of their products or services.

In a recent greenwashing internet sweep conducted by the ACCC, it found that 57% of businesses reviewed were making potentially misleading environmental claims.

The ACCC has, therefore, made it a priority to crack down on such practices. These draft guidelines form a part of that broader initiative by the ACCC.

Although only in draft at this stage, the guidlines provide valuable insight as to:

- how the ACCC intends to approach the issue of greenwashing under the ACL; and
- the measures you should take to avoid falling foul of the ACL when it comes to advertising the environment benefits of your products or services, it will be important to bear the principles outlined above in mind.

The ACCC draft guidelines can be accessed here.
Consultation is now open and closes on 15 September.

Protecting worker entitlements – Recent changes to the Fair Work Act

By Siobhan Mulcahy, Partner, Sarah Saliba, Senior Associate and Lauren Chappill, Lawyer

On 22 June 2023, the second tranche of *Fair Work Act 2009* (Cth) (FW Act) amendments were passed by the government, contained in the *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth).

The following key changes were made to the FW Act:

Change	Date of change
Unpaid parental leave scheme	1 July 2023
Workplace determinations	1 July 2023
Protection for migrant workers	1 July 2023
Employee authorised deductions	30 December 2023
National Employment Standards - Superannuation contributions	1 January 2024

Unpaid parental leave scheme

On 1 July 2023, changes to the unpaid parental leave scheme took effect and only apply to parents of children born on or after 1 July 2023. The changes allow employees who are taking unpaid parental leave to take up to 100 days (an increase from 30 days) of their leave entitlement flexibly during a 24 month leave period.

Changes also remove some barriers to access to unpaid parental leave for parents who share parental responsibility as follows:

- both parents will be able to take unpaid parental leave at the same time. This includes taking unpaid parental leave as a single continuous period, flexibly up to 100 days or as a combination of both;
- employee couples will be able to take more than eight weeks of unpaid parental leave at the same time;
- pregnant employees will be able to access flexible unpaid parental leave in the six weeks before their expected birth date; and
- parents can request an extension to their period of unpaid parental leave, despite the amount of leave the other parent has taken.

The changes to the unpaid parental leave scheme seek to reflect similar changes that were recently made to the paid parental leave scheme through the *Paid Parental Leave Amendment (Improvements for Families and Gender Equality) Act 2023* (Cth).

Workplace determinations

If bargaining representatives for a proposed enterprise agreement cannot agree on the terms and conditions of employment, in certain circumstances under the FW Act, the Fair Work Commission may determine terms and conditions of employment (otherwise known as a workplace determination).

When the Fair Work Commission makes a workplace determination covering an employee, the previous enterprise agreement will no longer apply to the employee. The amendment which took effect from 1 July 2023 includes an express interaction rule for workplace determinations and enterprise agreements.

Protection for migrant workers

This change took effect on 1 July 2023 and provides for a new provision that outlines how the FW Act and the *Migration Act 1958* (Cth) (**Migration Act**) interact with each other in circumstances where there has been a breach of the Migration Act.

The new provision provides protection for migrant workers ensuring that the validity of a contract of employment or contract for services are not impacted in circumstances where they may have breached a provision of the Migration Act. The implication of this change is that even if a temporary migrant worker has breached their visa conditions or no longer has work rights in Australia, they can still seek to recover unpaid wages or make claims under the FW Act, including for unfair dismissal or adverse action.

National Employment Standards – Superannuation contributions

From 1 January 2024, the National Employment Standards (**NES**) within the FW Act will include an obligation on employers to make superannuation contributions for the benefit of employees so as to avoid the superannuation guarantee charge. This will allow for unpaid or underpaid superannuation contributions to be enforced through the FW Act by employees, employee organisations (i.e. unions) or the Fair Work Ombudsman.

The Australian Tax Office will continue to be responsible for ensuring compliance with employer obligations under superannuation guarantee laws.

Employee authorised deductions

From 30 December 2023, employees will be able to make a single authorisation for salary deductions that are either recurring, or for amounts that vary from time to time. As currently required, deductions must be principally for the employee's benefit and in writing. These authorisations can also be withdrawn by the employee in writing at any time. The intention of this change is to reduce the administrative burden on employees and employers as currently, a new written authorisation is required between the employer and employee if the deduction amount changes.

Implications for employers

In light of these new amendments, employers should:

- review their current parental leave policies (both paid and unpaid); and/or
- review any policies and/or documents in relation to employee deductions.

Please contact us should you require any advice or assistance with any of the recommendations above.

No change to the Retail Award despite application by Woolworths Group

By Siobhan Mulcahy, Partner, Emma Moran, Special Counsel, and Jessica Smith, Lawyer

Fair Work Commission clarifies Retail Award coverage

A Full Bench of the Fair Work Commission (**Commission**) recently held that employees working in Woolworths' customer fulfilment centres (**CFCs**) and eStores are covered by the *General Retail Industry Award 2020* (**Retail Award**), not the *Road Transport and Distribution Award 2020* (**Road Transport Award**) or the *Storage Services and Wholesale Award 2020* (**Storage Services Award**). The decision provides clarity on a number of relevant expressions in the Retail Award and should be considered in detail by all employers operating in the online retail sector.

Variations sought to award coverage

The question before the Commission was which modern award applies to employees working at Woolworths' CFCs and eStores. Woolworths' position was that employees were covered by the Retail Award and this had been used as the relevant reference instrument when the Commission had previously approved two enterprise agreements applying to such staff.

However, in the event the Commission held the Retail Award did not apply, Woolworths sought to include in the Retail Award's coverage clause reference to 'employees working in an online supermarket sales fulfilment facility', meaning a 'facility operated by or for a supermarket to fill orders for retail sales placed by a customer online'. It also sought to replace each classification's reference to employees performing functions 'at a retail establishment' with 'in the general retail industry'

Business model in question

Woolworths' CFCs are set up in a similar format to a traditional supermarket, except they are not open to the public. Goods are delivered to CFCs by road from Woolworths' distribution centres or third-party storage facilities. Once delivered they are not stored in bulk at the CFC but are placed in relevant sections of the CFC to be picked and packed for online orders. Delivery is then carried out by third-party road transport/logistics businesses.

EStores are similar to CFCs save that they also contain a computer-operated 'Order Storage Retrieval System' that automates the picking and packing process to some extent.

Woolworths did not lead any evidence from any other supermarket retailer and while Coles lodged a supporting submission, it did not provide detailed evidence about its operations.

Retail Award applies

The Commission held that employees working at eStores and CFCs are covered by the Retail Award, finding that

> ***"'retail' means the sale of commodities to household or ultimate consumers, usually in small quantities (opposed to wholesale)"*** and noting that ***"there is no requirement in the concept of a retail sale that the customer be physically present to effect the sale or receive the relevant goods."***

The Commission also observed that the definition of general retail industry operates subject to exclusions, including warehousing and distribution. It held that the purpose of the CFCs and eStores is not to store goods once delivered, but to immediately disaggregate those goods for the purpose of meeting online orders, meaning the Retail Award was the appropriate award and not the Storage Services Award.

It also rejected submissions made by the Transport Workers' Union that the Road Transport Award was applicable because Woolworths 'contracts for and facilitates the delivery of goods from its CFCs and eStores to its online customers, charges its customers for delivery, supplies the trucks by which the deliveries are made through a subleasing arrangement, and appears to publicly characterise the delivery drivers as its own drivers...' The Commission found that it was the relevant contractors and not Woolworths that were operating a road transport business.

Satisfied that Woolworths operates in the general retail industry, the Commission then considered whether employees working in eStores and CFCs could be classified under the Retail Award and in particular whether employees could be considered to be performing functions at a 'retail establishment'. The Commission found that a 'retail establishment is simply a place of business at which retailing - that is, the sale of goods to consumers or end users - is conducted' and is an expression often used in contradistinction to 'wholesale establishment'. It also held that the ordinary meaning does not require retail sales to be conducted in person. On this basis, the Commission was satisfied that CFCs and eStores are 'retail establishments' and that employees can be classified under the Retail Award.

Once it was determined that the Retail Award was the applicable award, the Commission held that there was no need to vary the award to clarify coverage. The Commission noted that Woolworths only advanced evidence relating to their own operations for the purpose of the application. Accordingly, the Commission was not satisfied that an award variation with industry-wide implications was appropriate. Further, the Commission was not satisfied that Woolworths had addressed the future automation and 'uberisation' of online shopping in its evidence and submissions.

The Commission was also concerned that including reference to the 'general retail industry' in the classifications, without reference to a 'retail establishment', would remove any requirement for employees to work at a 'bricks and mortar' retail establishment and might extend coverage to employees working in entirely online e-commerce businesses and employees working entirely from home, with results that were indeterminable on the material before it.

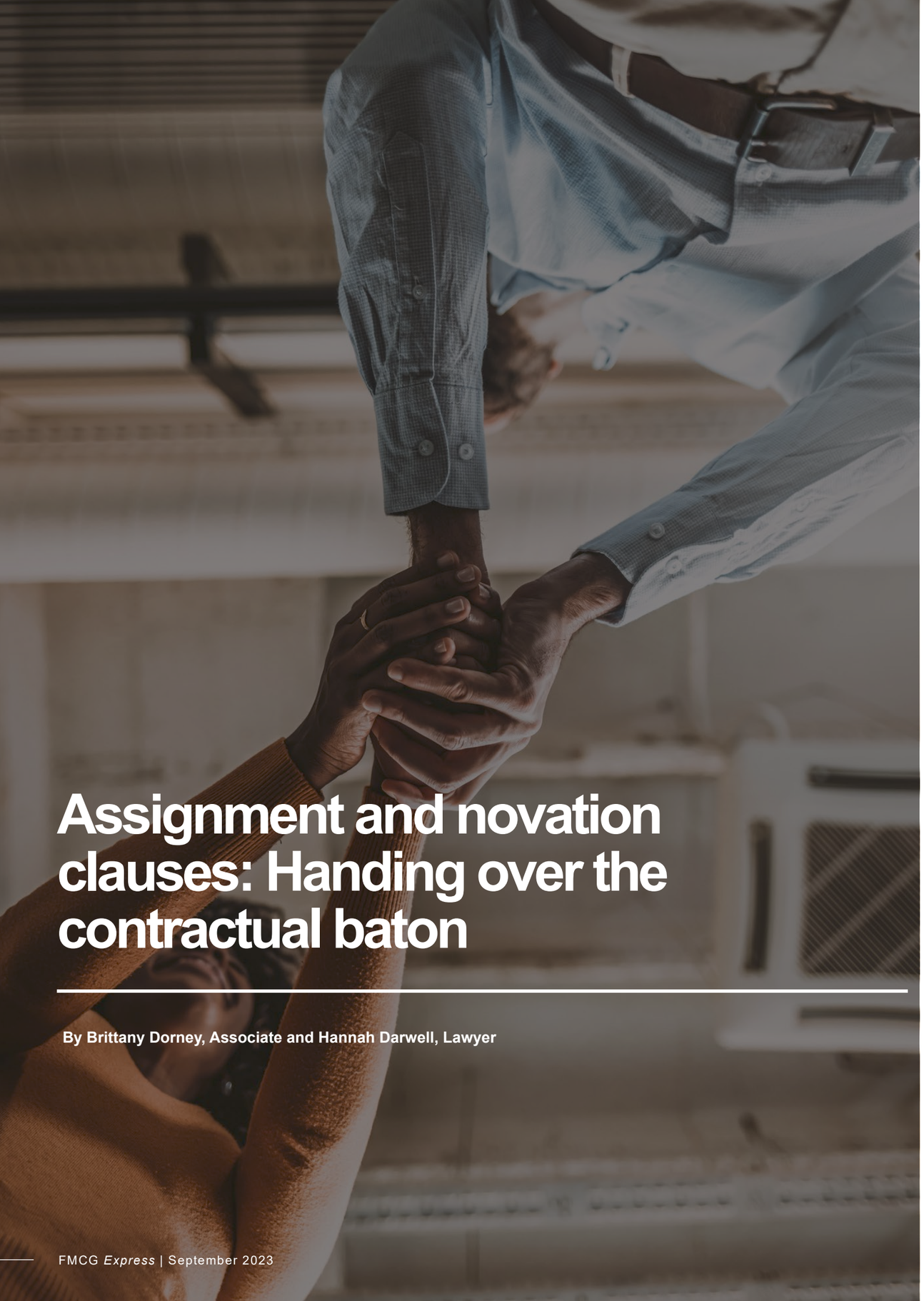
Where to next?

This decision provides significant clarity on the scope of the Retail Award's coverage and classification provisions. All employers operating in the online retail industry will need to consider the impact of the decision in close detail. It raises particularly complex questions for employers carrying out a mix of retailing, wholesaling, warehousing and/or road transport from the one location.

For those employers with enterprise agreements, award coverage will need to be carefully considered when applying the better off overall test for future enterprise agreements. This is an area ripe for disputation.

Gadens is well placed to assist with advice and assistance on all award coverage and interpretation issues.

Application by Woolworths Group Limited [2023] FWCFB 139



Assignment and novation clauses: Handing over the contractual baton

By Brittany Dorney, Associate and Hannah Darwell, Lawyer

It is not uncommon in commercial dealings for one party to seek to transfer their rights and/or obligations under an existing contract to a third party. This is achieved by way of assignment or novation. Typical scenarios where this may occur include a business restructure or a business sale.

This article explores the differences between an assignment and novation in the context of commercial contracts (as opposed to interests in land) and provides key takeaways points.

Assignment

The common law recognises the general right of a party (**Assignor**) to assign their contractual rights to a third party (**Assignee**) without the consent of the other parties to the contract.

It is commonplace for parties to exclude or limit this common law right by virtue of the inclusion of specific clauses. For example, a clause may be drafted so as to permit assignments to related bodies corporate without consent, or alternatively the clause may prohibit any transfer of rights without the consent of the other contracting party.

The effect of an assignment is that the Assignee becomes entitled to the benefit under the contract, including the ability to bring legal proceedings. However, the obligations under the original contract stay with the Assignor. Accordingly, the Assignor remains liable for any unperformed obligations under the original contract.

For example, if Company A and Company B are parties to a supply contract, Company A may assign the benefit of its accounts receivable under the supply contract to Company C, and Company C may rely on the assignment to collect such accounts payable by Company B to Company A.

Novation

The common law provides that obligations under a contract may only be novated with the consent of the original and incoming contracting parties.

A novation may transfer both the rights and obligations under a contract from one contracting party (**Transferor**) to a third party (**Transferee**).

The effect of a novation is that the rights and obligations under the original contract are extinguished and replaced with a new contract with equivalent rights and obligations. Accordingly, the original contract is terminated and unenforceable. Before consenting to a novation, the original contracting party should undertake due diligence on the incoming party and ensure that the performance of any unfulfilled obligations is adequately dealt with, and also that the original contracting party is not giving up any rights to make claims (whether such claims are known or unknown) in connection with the contract that has now been terminated.

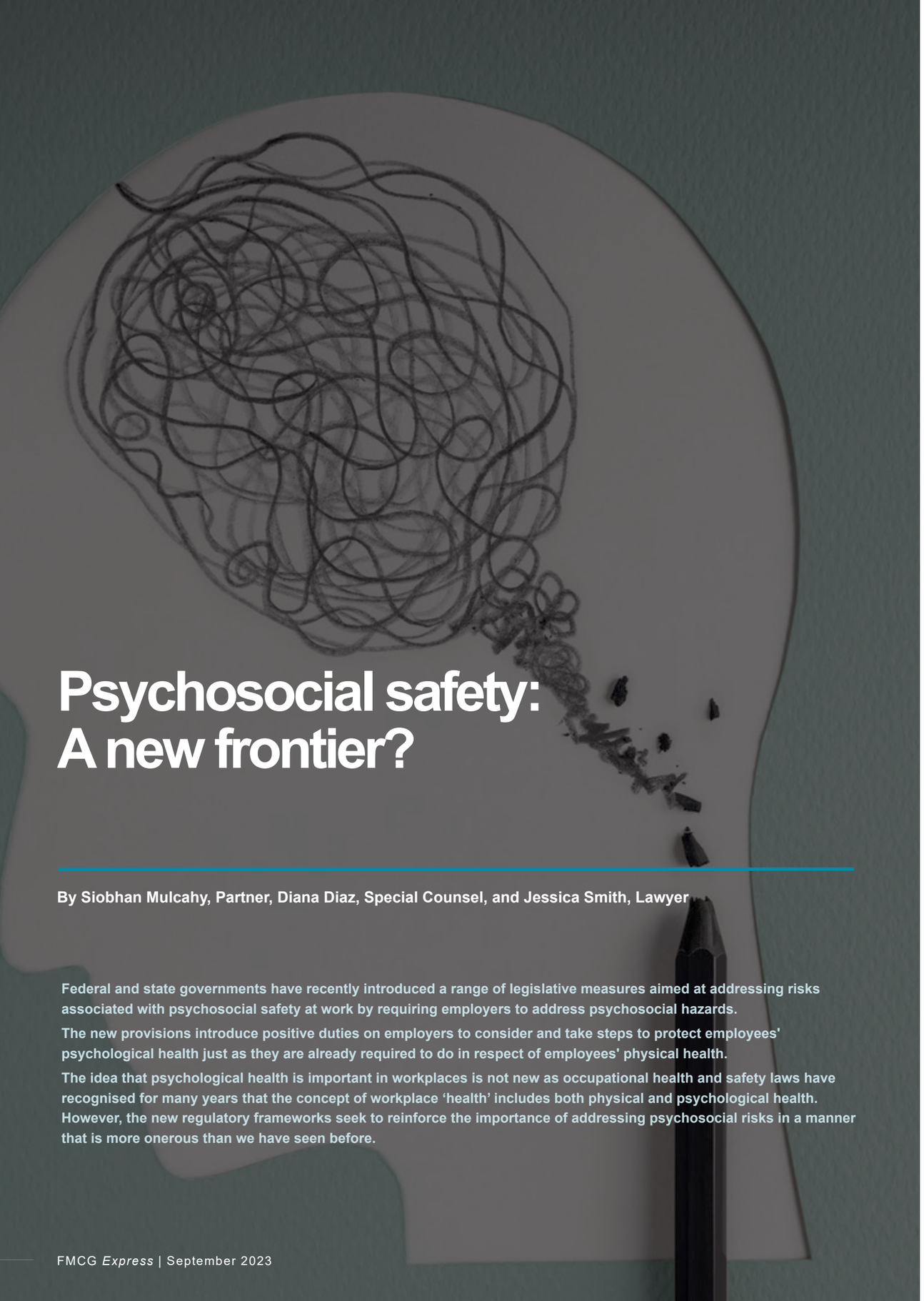
Conversely, the Transferor under a deed of novation may seek to ensure they are released from all obligations and liabilities in respect of the contract to be novated.

In addition to the above, to effect a novation consideration must be provided under the new contract (unless the new contract is in the form of a deed).

For example, if Company A and Company B are parties to a services contract and Company C acquires Company A's business assets, Company B and Company C may enter into a deed of novation to continue the provision of services following the acquisition on the same terms as the original services contract.

Key takeaways

1. **Understanding the concepts:** an assignment transfers certain rights or benefits under a contract from one contracting party to a third party. A novation on the other hand, transfers the rights and obligations under a contract from one contracting party to a third party.
2. **Consequences:** following an assignment the Assignor remains liable for unperformed obligations under the original contract, whereas a novation terminates the original contract.
3. **Consent and approval:** consider whether the contract alters the common law positions in respect to requirements for prior consent or approval.
4. **Liability and release:** the Transferor under a deed of novation may need to ensure that they are released from the obligations and liabilities under the contract being novated.
5. **Restrictions and prohibitions:** contracts that are based on sensitive factors such as confidentiality or specialised skills may prohibit or restrict assignment or novation completely.



Psychosocial safety: A new frontier?

By Siobhan Mulcahy, Partner, Diana Diaz, Special Counsel, and Jessica Smith, Lawyer

Federal and state governments have recently introduced a range of legislative measures aimed at addressing risks associated with psychosocial safety at work by requiring employers to address psychosocial hazards.

The new provisions introduce positive duties on employers to consider and take steps to protect employees' psychological health just as they are already required to do in respect of employees' physical health.

The idea that psychological health is important in workplaces is not new as occupational health and safety laws have recognised for many years that the concept of workplace 'health' includes both physical and psychological health. However, the new regulatory frameworks seek to reinforce the importance of addressing psychosocial risks in a manner that is more onerous than we have seen before.

The state of play

Given that occupational health and safety is regulated by each state and territory, it should come as no surprise that the implementation of the new laws has not been consistent throughout the country.

The laws implemented to date in New South Wales, Queensland, Western Australia and Tasmania differ slightly between jurisdictions. However, in general, they require persons who conduct a business or an undertaking (**PCBUs**) to identify and manage psychosocial risks that impact their workforce, including by implementing control measures that seek to eliminate psychosocial hazards in the workplace as far as reasonably practicable. The regulations generally acknowledge that elimination is not always possible and, in that circumstance, the obligation on a PCBU is to minimise the risk as far as reasonably practicable.

Victoria has released draft regulations which look to introduce similar duties; however the proposed new obligations would go further to require employers to address certain psychosocial hazards (aggression or violence, bullying, exposure to traumatic content or events, high job demands and sexual harassment) with a written prevention plan which identifies the risk associated with the hazard, the measures used to control the risk and an implementation plan for the proposed control measures.

In addition, the proposed new Victorian regulations would seek to enforce a bi-annual reporting scheme for employers with more than 50 employees in respect of reportable psychosocial complaints (complaints in relation to aggression or violence, bullying and sexual harassment) received by the employer during the reporting period. Victorian employers with more than 50 employees would be required to produce that report to the state regulator, WorkSafe Victoria.

South Australia and the Australian Capital Territory are yet to adopt any official instrument to address psychosocial hazards specifically.

Ultimately, regardless of your geographical location and given the national operation of many businesses within the FMCG sector, employers will be unable to avoid managing risks associated psychosocial hazards and should consider how they can comply with their obligations across state and territory borders.

What are psychosocial hazards?

Psychosocial hazards are factors that present within the workplace that have the potential to cause psychosocial harm to an employee's mental health and wellbeing. These hazards can arise from the design or management of work, the working environment, plant at a workplace or workplace interactions and behaviours.

When an employee is subjected to frequent or prolonged interactions with these hazards, it can cause a stress response which leads to psychological harm. Psychological harm or injuries from psychosocial hazards include conditions such as anxiety, depression, post-traumatic stress disorder and sleep disorders.

Examples of commonly presenting psychosocial hazards include:

- Job demands.
- Low job control.
- Poor support.
- Lack of role clarity.
- Poor organisational change management.
- Inadequate reward and recognition.
- Poor organisational justice.
- Traumatic events or material.
- Poor physical environment.
- Remote or isolate work.
- Violence.
- Conflict or poor workplace relationships and interactions.

What about psychosocial risks?

Psychosocial risks are the likelihood that a psychosocial hazard will cause harm to a person's mental health and wellbeing. Risk is unique to an organisation and the respective risk will be impacted by multiple workforce characteristics. Although employers are unlikely to be able to eliminate risk completely in a workplace, the goal of the new regulations is to prompt employers to proactively consider and take steps to mitigate and manage the risks that present.

This process involves identifying the hazards that are present within the workplace and understanding the psychological harm that the hazard could cause to the psychosocial safety of the employee. Once identified, it is up to the employer to determine how they will seek to control the risk of harm, whether that be elimination or reduction of the hazard. Employers have an obligation to regularly review the control measures that are undertaken to ensure effectiveness.

In practice – some industry examples

Although the concept of psychosocial safety may seem new, an employer's duty to manage workplace risks, including psychological risks, is not. And that means employers now have an opportunity to use existing OH&S systems and concepts which have traditionally been applied to identify and manage physical risks, to manage their new duties with respect to psychosocial safety.

Let's consider an industry-specific example

It is not controversial that workers in retail and hospitality businesses may be exposed to psychosocial hazards based on interactions with customers.

In a previous FMCG *Express* article linked here we explored the positive duty that applies to Victorian employers to take reasonable and proportionate measures to eliminate workplace sexual harassment, discrimination and victimisation as far as possible and how that played out in an investigation into Bakers Delight which was carried out by the Victorian Equal Opportunity and Human Rights Commission. One of the reasons why Bakers Delight was investigated was a recognition that retail is a high-risk industry for sexual harassment due to the large number of vulnerable workers such as young workers, casuals and workers who are new to Australia and who may fear losing their job if they make a complaint or may not understand their workplace rights.

New psychosocial safety laws merely add an extra layer to these obligations which are aimed at targeting similar workplace risks.

Risk is not a once size fits all concept, and employers need to determine how severe the presenting risk is on the basis of a multitude of factors. Using this example to identify the risk, employers should firstly consider the roles and/or groups of employees who may be impacted. It is likely that the risk of psychosocial hazards associated with customer interactions will be high for front of house staff who directly engage with customers in their service role, whilst the risk for the operations team managing back of house functions will be comparatively lower.

Risks should also be considered based on the duration and frequency in which employees are exposed to adverse behaviour from customers. For example, are employees consistently rostered on shifts where they are exposed to intoxicated patrons or on shifts where they are frequently manning the front of house alone?

Employers should also consider the factors that may increase the likelihood that the employee will be at risk of harm. Such factors can be age, inexperience and literacy of the employee. The consumer, hospitality and retail sectors often rely on a heavily casualised workforce and employees may be reluctant to speak up in fear of jeopardising their employment.

Reasonably practicable control measures that a business might implement in these situations include:

- enforcing a strict no tolerance policy for patrons who demonstrate violence or harassment;
- not rostering junior employees alone on early morning or evening close shifts; and/or
- ensuring the business has suitable policies and procedures that can be accessed by the employees if impacted by psychosocial risks, and that they are trained on those policies.

In the lead up to the Christmas period, employees in these sectors will likely be exposed to increased job demands as retailers brace for business shopping seasons, hospitality workers face copious Christmas party bookings and warehouse staff see greater shipments of stock arriving. The likelihood is that shifts will get busier, new inexperienced staff will be hired, more products will need to be shipped and employees will be exposed to higher volumes of customers.

Whilst the demands placed on employees due to this busy time period likely cannot be reduced, employers should undertake their own risk assessments and implement reasonably practical control measures to reduce the risk that psychological harm may arise. Some examples may include:

- ensuring enough staff are rostered on shifts to support work demands;
- diversifying employee skills so that employees can help in other areas of the business during busy periods;
- considering the design of the workplace to eliminate demanding tasks or jobs, such as locating the storeroom next to the loading dock, so deliveries do not require double handling;
- making sure staff receive adequate breaks between shifts when rostering to foster rest and rejuvenation;
- providing adequate training, support and supervision to new employees during their induction period;
- providing adequate recognition and reward for staff going the extra mile during the busy period – consider bonuses for staff and incentives and rewards; and
- employing security or rostering more senior staff who are trained to deal with incidents such as shoplifting or abusive patrons to support junior staff.

Compliance is important

OH&S regulators are ready to investigate and potentially prosecute employers that are not complying with their existing and new duties to manage psychosocial risks in the work environment. Even in Victoria where the draft regulations are yet to be finalised, WorkSafe has taken steps to ensure employers are addressing psychosocial hazards based on existing duties.

The Gadens Workplace Advisory and Disputes team is ready to advise employers on the new regulations and can provide tailored guidance on compliance.

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