

Sladen **eliminates**  
Legal **risk**

# Employment Essentials

Sladen Legal's quarterly newsletter

Edition 1: Spring 2015



[sladen.com.au](http://sladen.com.au)

# Welcome

**Welcome to the first edition of Employment Essentials, SladenLegal's Employment, Industrial Relations and OHS newsletter.**

Each quarter, we will be covering topical issues in HR and bringing you the latest updates in employment law.

In this first edition, we discuss a case which could herald the end of the open bar at work functions, new rights to cash out annual leave, legislative updates and answers to your commonly asked questions.

## Fast Facts



- As of 20 September 2015, we have a new Minister presiding over workplace relations, Senator Michaelia Cash from Western Australia. Senator Cash was an employment lawyer prior to entering the Senate. We look forward to seeing if this change results in any progress with the government's fairly stalled reform agenda.
- According to the latest Safe Work Australia's notifiable fatalities monthly report, there were 11 work-related deaths reported to safety regulators in May. The total number of work-related deaths from 1 January to 31 May 2015 stands at 73 - almost half of those have involved vehicles.



We regularly publish "**Snippets**" which contain important updates.

The most recent ones are published in this edition, and can also be accessed on our website.

To receive Sladen Snippets in your inbox, email us at

[EmploymentEssentials@sladen.com.au](mailto:EmploymentEssentials@sladen.com.au)



- The Operation AUSTRANS blitz caught 190 heavy vehicle drivers who were impaired or tested positive to drugs or alcohol (up from 172 last year). The blitz intercepted 323 individuals driving heavy vehicles without a licence, identified 3271 work diary breaches, detected 1518 improperly restrained loads and found speed-tampering devices on 145 trucks. However, mobile phone and other distraction offences, speeding offences and dangerous goods and OHS offences identified were (in some instances significantly) lower than in 2014.

- A national employer received a record fine of \$363,000 over the death of a non-employee – the Federal Court penalising the employer for its conduct both before and after the incident.

- Premium rates have reduced across most jurisdictions for 2015/16, including an Australian low in Queensland (now an average of 1.2 per cent of payroll), followed closely by a state-low in Victoria (now an average of 1.272 per cent of payroll).



# Your Questions Answered

We answer the commonly asked question,

“When does an award cover an employee?”

It is certainly not always clear when an award covers an employee/ employer and determining what (if any) award applies is important because awards prescribe minimum entitlements (including minimum wage rates) that apply to employees covered by that award.

Awards cover certain industries or occupations and will apply to employers and employees who perform work covered by the award.

To work out whether an award covers a particular employee, you need to consult the coverage clause (usually clause 4) and job classifications (usually in the pay clause or in a schedule) contained in the award.

An award will only apply to employers and employees who perform work covered by the award.

It is important to note that a business can be covered by more than one award depending on the jobs the employees do, so it is not advisable to only consult the industry award covering your business.

In fact, some modern awards cover both an industry and specific occupations, such as the *Graphic Arts, Printing and Publishing Award 2010*. This means that an employee may not necessarily be employed in the ‘graphic arts, printing and publishing industry’ but is still covered by the award because of their ‘occupation’.

Of course, not all employees are covered by awards (but many are). Examples of those employees who will not usually be covered by an award are:

- senior managers;
- some classes of professional employees (such as accountants);
- “high income employees” (those employees with a guaranteed income which exceeds the high income threshold, currently \$136,700 – note that certain requirements have to be met before an employee is considered a “high income employee”).

An employee is not “award-free” simply because you pay rates that are in excess of the award.



**Do you have a question you would like answered?**

**Email us and we’ll select one to answer in the next edition of Employment Essentials.**

[EmploymentEssentials@sladen.com.au](mailto:EmploymentEssentials@sladen.com.au)

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And of course, there are exceptions to the general rules above:

- the *Miscellaneous Award 2010*, which defines coverage by a series of exclusions. If none of the exclusions apply and the employee falls within one of the classifications set out in the award, the employee will be covered by this award. This is a far more difficult exercise than determining award coverage by occupation or industry; and
- if your business has an enterprise agreement or other registered agreement which covers the employee then an award will not apply to that employee.

## Tips

- Determine whether the work performed by your employees is covered by a modern award.
- Review the classifications within an award and ensure that you are paying your employees correctly.
- Keep up-to-date with changes to the modern awards, including annual wage reviews (note that the Fair Work Commission is currently reviewing all modern awards and changes are intermittently being made to awards).
- Ensure your contracts of employment and any policies comply with applicable awards.
- if you are not sure whether an award covers or applies to an employee, seek advice.



# Workplace Wrap-Up

## Is it the end of the open bar?



**Open bar policies at work functions could spell disaster for employers with a recent decision of the Fair Work Commission serving as a glaring reminder of the need for employers to ensure alcohol is served responsibly.**

An employee who sexually harassed colleagues and verbally abused his superiors at a work Christmas party was found to have been unfairly dismissed and his employer partly to blame for his behaviour by serving unlimited alcohol.

The team leader became quickly intoxicated whilst attending the firm's Christmas party. He told a company director and a senior project manager to "f\*\*k off," repeatedly asked a colleague for her number and said to another colleague "who the f\*\*k are you? What do you even do here?"

When the party came to an end, a number of employees including the team leader moved on to the venue's public bar where he described one of his colleagues as a "stuck up bitch" and without permission kissed another on the mouth.

Whilst waiting for a taxi, he told a female colleague that he was on a "mission" to find out the colour of her underwear.

The employee was dismissed for sexual harassment when he returned to work in January.

Considering whether the dismissal was harsh, unjust or unreasonable, Vice-President Hatcher said that only the incidents that took place at the Christmas party could be considered, as those which occurred after the function had officially ended were not in connection with the employee's employment.

"Employees were informed in advance that, in substance, [the employer's] standards of conduct would apply at the function, but there was no suggestion of any expectation that those standards would apply to behaviour outside the temporal and physical boundaries of the function," he said.

Vice-President Hatcher said that the employee's aggressive behaviour at the Christmas party would have warranted a valid reason for dismissal had it been included in the letter of termination and been communicated to the team leader.

The service of unlimited alcohol at the Christmas party was found to be an "exacerbating factor." Employees were able to freely help themselves to alcohol and despite being visibly intoxicated, the

employee was never refused a drink or prevented from accessing alcohol.

Vice-President Hatcher found that it was "contradictory and self-defeating for an employer to require compliance with its usual standards of behaviour at a function but at the same time to allow the service of free alcohol at the function."

**In light of this decision, employers will need to rethink the manner in which alcohol is served at functions if they wish to be in a position to insist on standards of conduct.**

Steps should be taken to control the service of alcohol and managerial supervision of functions should be considered. In addition, employers should have a well-communicated policy on drugs and alcohol in the workplace.

This case serves as a reminder that employers need to carefully consider what conduct warrants dismissal and ensure employees are afforded procedural fairness in respect of allegations prior to dismissal.





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## New rights to cash out annual leave

Anyone who runs a business knows that excessive annual leave accruals can be a significant issue.

Many employers will soon be able to direct employees covered by a modern award to take annual leave in order to reduce 'excessive' accruals, following a ruling by the Full Bench of the Fair Work Commission (Commission).

The decision was made as part of the Commission's first four-yearly review of modern awards and will also allow employees to cash out up to two weeks per year so long as no less than 4 weeks of accrued annual leave remains.

The proposed changes, aimed at addressing 'common issues' across awards, will provide many employers with greater flexibility in managing their leave liability and give employees more incentive to take their annual leave.

### Excessive annual leave

The model term devised by the Commission will give many employers a right to direct an employee to take annual leave where the employee has accrued "excessive" annual leave.

**"Excessive" annual leave has been defined as 8 weeks for non-shift workers and 10 weeks for shift workers.**



However, before a direction can be made, the parties must (amongst

other things) genuinely try to agree on steps to reduce or eliminate the accrual. If an agreement cannot be reached, an employer can direct an employee to take leave, subject to the following restrictions:

- the direction cannot result in the employee's remaining entitlement being less than 6 weeks;
- the direction cannot be for a period of leave of less than one week;
- the employee must be given at least 8 weeks' notice (no more than 12 months' notice can be given); and
- there is no conflict with any existing leave agreements.

### Cashing out annual leave

Prior to the Full Bench's ruling, employees covered by modern awards were only able to cash out their annual leave if the award expressly provided for such a right (and generally speaking, very few did).

The model term devised by the Commission will allow employees to cash out a portion of their annual leave subject to a number of safeguards:

- only a maximum of two weeks' paid annual leave per year can be cashed out;
- any agreement to cash out annual leave must meet specific requirements relating to record keeping;
- if the employee is under the age of 18, the agreement must be signed by a parent or guardian; and
- notes are included at the end of the model term that draw attention to the general protections provisions in Part 3-1 of the *Fair Work Act 2009* against undue employer influence and misrepresentation of employee's workplace rights.

**Whilst a date is yet to be set for the implementation of any changes to modern awards, employers should familiarise themselves with the changes to annual leave provisions in any applicable modern awards, and review their leave policies and procedures to take advantage of these impending changes.**

## Legislative Updates

### "Double Dipping" laws tabled

The federal government has tabled its controversial *Fairer Paid Parental Leave Bill 2015* (Bill) in parliament, which seeks to stop parents from "double dipping" into government and employer-funded parental leave schemes from 1 July next year. Under the proposed laws, parents with employer schemes which provide less than the government scheme will only be eligible to receive a "top up" payment.

The Bill also removes the requirement for employers to act as "paymasters" administering the government scheme (a move the government has unsuccessfully sought to introduce twice before). The Bill was referred to a senate committee (which recommended, amongst other things, that the government conduct a comprehensive consultation process including on definitions of primary carer pay/leave and how different types of payments will interact with the new scheme). However, with both Labor and the Greens opposing the changes, the prospects of this Bill passing seem to be slim.

## Heavy Vehicle Laws: Brief Update

New “chain of responsibility” provisions have been added to Western Australia’s road safety laws, requiring all parties involved in the transport of goods by road to take all reasonable steps to prevent safety breaches under its own version of the Heavy Vehicle National Law (HVNL).



WA is the only Australian jurisdiction which is not a signatory to the inter-governmental agreement that established the HVNL.

Laws have been passed that extend the automatic commencement of any unproclaimed provisions of the *Heavy Vehicle National Law Act 2012* (HVNL Act) to 1 July 2018. Amongst other things, this means that the national registration scheme for heavy vehicles (due to commence on 1 July this year) has been postponed.

The Queensland government has also introduced a bill that amends the HVNL to facilitate the introduction of electronic fatigue diaries and which increases some penalties.

In South Australia, variations have been made to HVNL revising, amongst other things, fees for inspections and fines for offences such as failing to comply with a notice.

The fatigue provisions of the HVNL have commenced in Tasmania.

In Victoria, amendments have been made to the *Road Safety Act 1986* to apply the fatigue-management provisions of Victoria’s HVNL to light buses (in the same way as this applies to heavy buses).

## Commonwealth Work Health and Safety Regulations amended

The introduction of the *Work Health and Safety Amendment Regulations 2015* has resulted in around 100 amendments being made to the Commonwealth jurisdiction’s mirror *Work Health and Safety Regulations 2011* (Regulations). Most of the amendments are technical in nature. However, two corrections involve substantive changes in the operation of the Regulations by:

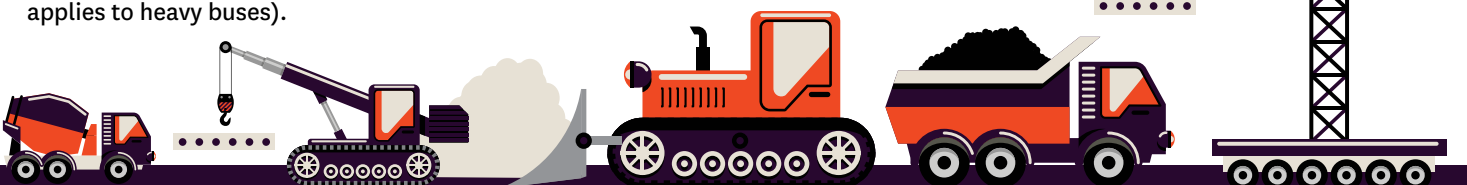
- removing the requirement to hold a high-risk work licence to operate a plant for the purpose of loading or unloading plant from a vehicle or equipment used to move the plant within the workplace; and
- disapplying certain requirements relating to asbestos registers and management plans in relation to domestic premises used for residential purposes.

## Industrial Manslaughter laws proposed

South Australia is revisiting the industrial manslaughter debate after the Greens introduced the *Work Health and Safety (Industrial Manslaughter) Amendment Bill 2015* into parliament. The laws (if passed) provide for company officers who recklessly cause the death of a person to be jailed for up to 20 years. Previous attempts to introduce such laws in South Australia have failed.

## Workers’ Compensation Changes in South Australia

While there have been a number of proposed changes to workers’ compensation laws across Australia, by far the biggest news in this space is the commencement of the *Return to Work Act 2014* (RTW Act) in South Australia. The RTW Act replaces the *Workers Rehabilitation and Compensation Act 1986*. Amongst other things, the RTW Act requires employers to actively help injured workers return to work as soon as possible and restores common law access for seriously injured workers. The new South Australian Employment Tribunal (SAET) (which replaces the Workers Compensation Tribunal) has also commenced (other employment-related jurisdictions are likely to be transferred to the SAET in the future).





## [VCAT orders \\$20,000 compensation for the “shock” arising from a production worker’s discriminatory dismissal](#)

The Victorian Civil and Administrative Tribunal (VCAT) has found that a confectionary company directly discriminated against a 63 year-old production worker when it dismissed him because of a disability and has ordered the company to pay him \$20,000 compensation for the shock caused by the dismissal.

The worker had been employed by the company for almost 30 years and had previously suffered chronic “tennis elbow” (which had arisen as a result of his employment but had fully resolved at the time of dismissal). Relying upon a medical report that warned the company the condition could flare up if he maintained his regular duties, the company terminated the employee’s employment effective immediately.

However, VCAT member Anna Dea found that the company discriminated against the employee when it failed to consider, or give the employee an opportunity to propose, adjustments that might have enabled him to continue working. Dea stated that it was “an extremely disrespectful way to treat such a long-standing employee and not what the community would regard as fair.”

She ordered the company pay the worker \$20,000 for the “shock, disappointment, upset and distress” that resulted as a consequence of the decision to terminate the worker’s employment. Dea also warned that the worker’s claims for economic losses (i.e. lost wages and entitlements) of around \$260,000 was consistent with an appropriate award under the *Equal Opportunity Act 2010* (Vic) and reflected what the worker would have received if had continued to work until his planned retirement at age 65.

An employer must take into account and comply with their obligations variously arising under workers’ compensation laws, anti-discrimination laws, workplace health and safety laws, the *Fair Work Act 2009* (Cth) and any industrial instruments, employment contracts, policies and procedures. We recommend that you seek legal advice before making any decision to terminate an ill or injured worker.

**Terminating the employment of an ill or injured worker is a legal minefield for employers and requires careful navigation.**



## [Head Contractors must have a “Fitness for Work” Policy by 16 October 2015](#)

The Workplace Relations Management Plan (WRMP) requirements under the *Building Code 2013* (Code) have been amended to include a requirement that principal contractors have a fitness for work policy to manage alcohol and other drugs in the workplace.

Amongst other things, the policy must include:

- detection methods;
- substances tested;
- a requirement for frequent and periodic random testing of the workforce; and
- an outline of how workers affected by drugs and alcohol will be counselled, assisted and disciplined.

Head contractors working on certain Commonwealth-funded projects have until 16 October 2015 to put in place a compliant policy.

If affected by the Code, we recommend that you review your current fitness for work policy to ensure compliance with the new requirements or implement a compliant policy before the deadline.

In any event, for businesses in high-risk industries liked the construction, manufacturing and transport industries (where hazards such as the use of heavy machinery or vehicles, mobile equipment, congested sites and working from heights exist) we recommend that you put in place appropriate (and regularly review your) drug and alcohol policies.



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## Minimum Pay Rates for Truck Drivers

The Road Safety Remuneration Tribunal (RSRT) has issued a draft road safety remuneration order (draft Order) and statement on minimum payments for contractor drivers.

Specifically, the draft Order contains minimum pay rates for drivers distributing goods for supermarket chains and for drivers in all long distance operations in the private transport industry (as those terms are defined by the relevant modern award). These minimum rates are based on research commissioned by KPMG (which has been highly criticised by employer groups, who have said the rates are much higher than current industry standards).

Amongst other things, the draft Order is set to impose requirements on an employer/hirer and a participant in the supply chain to ensure their contracts are consistent with the order.

The RSRT has published a [draft payments calculator on their website](#).

This draft Order has been published for the consideration of interested parties and has not been made (yet).

## New financial year – new employment pay rates and thresholds

The national minimum wage and high income thresholds have increased as set out below.

### **1. Minimum wage**

The Fair Work Commission's (Commission) annual wage review resulted in a 2.5% increase to the weekly minimum wage. From 1 July 2015, the minimum wage increased to \$656.90 per week (or \$17.29 per hour). All modern award minimum rates of pay also increased by 2.5%.

### **2. High income threshold**

An employee who is not covered by a modern award or enterprise agreement can only have an unfair dismissal claim heard by the Commission if his or her annual income does not exceed the high income threshold. For the 2014/15 financial year, this threshold amount was \$133,000 per year.

From 1 July 2015, the high income threshold for the 2015/16 financial year has increased to \$136,700 (excluding compulsory superannuation) per year.

The compensation cap for an unfair dismissal claim (currently 26 weeks' pay) has also increased from \$66,500 to \$68,350 in line with the change to the high income threshold.

## **Did you know ...**

As well as offering the usual full service, Sladen Legal offer a “general employment advice” facility which essentially operates like a help line allowing clients to phone or email the team and obtain high level advice

# in real time

as it is needed.



## Big payout the result of an employer's failure to make reasonable adjustments



In a recent case in the Federal Circuit Court a corrective services employer was ordered to pay a former probation and parole officer who suffered from Crohn's Disease the sum of \$180,000 plus interest as a result of its discriminatory treatment of her (when it decided that the employee should be medically retired

unless she was found fit to return to her original job).

The Court found that the employee's supervisors failed to consider the inherent requirements of the employee's position and that reasonable adjustments could have been made to enable the employee to return to her original position.

This case highlights the obligations on employers under the *Disability Discrimination Act 1992* (Cth) to carefully consider medical advice in relation to an employee's disability, consider what the inherent requirements of the employee's position are, and whether any reasonable adjustments can be made, taking into account medical advice, to enable the employee to return to their position.

## Safe Work Health and Safety Statistics

Safe Work Australia has released key statistics on work-related injuries, diseases and fatalities. While the report shows a downward trend in both worker fatalities and in the rates of serious injury over the period 2003 to 2013, the total number of serious workers' compensation claims (117,815 in 2012-13) and worker fatalities (196 in 2013) are significant. The report also highlights that:

- the agriculture, forestry and fishing industry remains a poor safety performer recording both the highest serious injury rates and workplace fatalities (followed closely by the transport, postal and warehousing industry);
- most work-related fatalities occur as a result of vehicle incidents;
- labourers account for the greatest number of serious injury claims.

[Access the full report](#)

## Budget – Increased fines for breaching workplace laws

Penalty units (i.e. fines) for breaching federal laws have risen from \$170.00 to \$180.00 (per unit) as of 31 July 2015.

The maximum penalty for a breach of the *Fair Work Act 2009* is:

- 300 penalty units for a corporation; and
- 60 penalty units for an individual.

This means that corporations and individuals now face fines of up to \$54,000 and \$10,800 respectively.

The government has also announced that it intends to introduce ongoing indexation of penalty units based on the Consumer Price Index (to occur on 1 July every three years).

“go the extra mile,  
it’s never crowded”

author unknown

Many of you will know [Joanna Bandara \(Jo\)](#) by her former name Joanna Shields – Jo changed her name following her marriage earlier this year to Srinath.

If Jo’s not at the office, you’ll find her running about the hockey field (and the Casey Cannons Hockey Club keeps her pretty busy too in her role as Vice-President – Women’s Unit) or hiking somewhere with friends in rural Victoria (or sometimes further afield). She has a passion for travel and isn’t happy unless she is planning her next adventure – and while this year has been a full one with a road trip to Western Australia and a honeymoon to Sri Lanka (where her husband is from) - she isn’t quite settled on where the next one should be and is happy to take suggestions!

Jo’s professional life started a little differently – after finishing a science degree – Jo moved to London and started working for an energy company where she pursued her interest in environmental management.

She later transitioned into a role as an assistant project manager at a construction company. This piqued an interest for Jo in OHS and upon her return to Australia she started working in an employment, industrial relations and OHS team and completed her Master of Laws (juris doctor).

Jo is an associate in the employment, IR and OHS practice area. She understands the need to work closely with her clients and takes a practical approach to the law, providing advice that is both comprehensive and straightforward. Jo works with employers across a range of industries.

She is experienced in advising on employment and IR issues including employee entitlements, termination of employment, breach of contract claims, work health and safety obligations, enterprise-agreement making and industrial disputes.



**Joanna Bandara**

Associate



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## Key contacts

At Sladen Legal our team of experienced employment and safety lawyers will assist you to navigate the complexities of these areas of the law.

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