



# THE 17<sup>TH</sup> ANNUAL EMPLOYMENT LAW CONFERENCE

How Closing Loophole Reforms Have Redefined 'Casual' Employees

Flexible Work and the Right to Disconnect: What Is Reasonable In 2024

What It Now Means to be an 'Employee' or 'Employer'

Underpayments and Wage Theft: Criminal Minds or Innocent Criminals?

Navigating the Three D's in Recruitment: Diversity, Disability and Discrimination

Employment Contracts and Awards: What's New and What Needs Changing?

Employment Contracts: Navigating End-of-Term Challenges from Day One

Preventing Sexual Harassment in the Workplace

Strategic Adjustments: Addressing Mental Health and Injuries

Preparing for the Increased Presence of Unions in the Workplace

Managing Underperformance, Warnings and Dismissal

The When, How (and by Who) of Conducting HR Investigations

A Two-day Conference  
**Thursday 1 & Friday 2 August 2024**

Imperial Hotel (formerly Palazzo Versace), Gold Coast

## Feedback from last year's conference:

- Unlike other employment law conferences which provide a somewhat superficial overview of topic areas, this conference always provides high quality speakers and papers which demonstrate excellent knowledge and subject matter expertise.
- The range of topics were relevant, interesting and the presenters were obviously very knowledgeable in their field of expertise. I have come away with so many thoughts, actions and reflections.
- I believe the topics and variety of presentations/presenters, were able to add value to many industries. The topics were well planned and covered enough content to ensure the conference was both informative, extremely relevant and fresh. I would recommend the conference to others.
- Love this conference every year. I always leave with a sheet of notes of 'to dos' - very practical and well put together.



**The Professional Development Specialists**

# DAY 1 - THURSDAY 1 AUGUST 2024

## MORNING THEME: RECENT WORKPLACE REFORMS

9.00 - 9.15am

Introduction and welcome

9.15 - 10.00am

### Session 1: Return to Form? How the Closing Loophole Reforms have Redefined 'Casual' Employees

In 2020, the Rossato decision clarified that when it comes to determining whether an employee is in fact casual, the Courts will look at the real substance of the relationship rather than its form. While that decision ended years of legal uncertainty, it was not to last. In response to that decision, the government has changed the way in which casual employees are to be defined yet again following the Closing the Loophole reform package introduced in late 2023. To help HR professionals get across these changes and understand what they mean for their organisation, this session explores:

- The legal changes under Closing the Loophole legislation, including the new definition of casual employee and the new employee choice pathway to permanent employment
- The test to be applied when considering the application of the test to individual workplaces (and what to look out for) and specific issues which may arise in practice
- Practical guidance to assist workplaces determine whether their employees are genuinely casual
- Tips for what to look for when reviewing and amending employment agreement templates

*Speaker: Nick Ruskin, Partner, K&L Gates, Melbourne, Vic.*

10.00 - 10.10am Panel Comments and Questions

10.10 - 10.55am

### Session 2: Flexible Work and the Right to Disconnect: What is Reasonable in 2024 (and what does the FWC say?)

Over the last 12 months, there have been significant changes made to the law as it relates to flexible work arrangements. Under these changes, flexible work arrangements now go to the Commission if there is a dispute. For employers, these changes, understandably, raise many questions. In what circumstances is the FWC considering it reasonable to have flexible arrangements? What types of arrangements are considered reasonable? What does WFH even look like in 2024? And, how do the new 'right to disconnect' laws fit in? To help employers get across these recent changes and consider what changes are required in their own workplace, this session explores:

- The reforms and provide an overview of the options available and entitlements of employees for flexible work arrangements
- The new powers of the FWC to review decisions to refuse requests for flexible working arrangements, right of appeal and steps workplaces should be taking in light of this
- Aspects of the reforms causing the most issues in workplaces and how to manage the cohort of employees who haven't returned to the workplace
- The applicable timeframes, what is a valid request, what may now constitute reasonable business grounds, how to now assess, the practicalities of alternative arrangements and how do these changes fit into your business model
- How these issues have played out in recent FWC decisions including Gregory v Maxia
- How a right to disconnect may operate in practice within the proposed model, the different perspectives for and against and its potential impact (for better or worse) on different types of employees across industries and the organisational hierarchy

*Speaker: Tamara Lutvey, Partner, Ashurst, Brisbane, Qld*

10.55 - 11.05am Panel Comments and Questions

11.05 - 11.30am Networking Break and Morning Tea

# DAY 1 - THURSDAY 1 AUGUST 2024

**11.30am - 12.15pm**

## **Session 3: What's in a Name? What it Now Means to be an 'Employee' or 'Employer'**

Recent reforms have introduced statutory definitions for 'employee' and 'employer' into the Fair Work Act, reversing the impact of recent High Court decisions. Under the changes, proper consideration of the real substance, practical reality and true nature of the relationship is required to determine the nature of the employment relationship. But what does this actually mean in practice? And what role does HR play in this process? To breakdown these changes, this session explores:

- The changes to definition of employee and employer and its application to independent contractors, non-workers etc
- What is required by the new multi-factor test - what does proper consideration require and how to prove this
- The impact of these reforms on individual workplaces, including capacity to set conditions for independent contractors
- The broader impact of the changes by workshopping recent Federal Court decisions including *Chioto v Silk Contract Logistics* [2023] FCA 1047 - how would this case have been different if heard now?

*Speaker: Stephen Marriott, Special Counsel, Ai Group Workplace Lawyers, Sydney, NSW*

**12.15 - 12.25pm** Panel Comments and Questions

**12.25 - 1.10pm**

## **Session 4: Underpayments and Wage Theft: Criminal Minds or Innocent Criminals?**

Underpayments of wages and superannuation continue to be an ongoing issue in many workplaces. Recent reforms have introduced significant changes to the penalties for underpayments as well as the new criminal offense of wage theft. This session explores the changes to the law regulating underpayments and wage theft and what this means for workplaces. It covers:

- The new maximum penalties for underpayments and the new threshold for serious contraventions
- A deep dive into the new offence of wage theft, what evidence may prove intentional conduct and trigger criminal consequences and the role of cooperation agreements
- Steps workplaces are expected or should have in place to identify and respond to underpayments
- What should happen when an underpayment is identified - what are the options to remedy, dealing with communications to employees, unions and self-reporting to Fair Work Ombudsman

*Speaker: Wendy Fauvel, Partner, Herbert Smith Freehills, Brisbane, Qld*

**1.10 - 1.20pm** Panel Comments and Questions

**1.20 - 2.15pm** Luncheon

# DAY 1 - THURSDAY 1 AUGUST 2024

## AFTERNOON THEME: HIRING EMPLOYEES

2.15 - 3.00pm

### Session 5: Navigating the Three Ds in Recruitment: Diversity, Disability and Discrimination

Increasingly organisations are competing for talent and giving out messages about a culture which values diversity and inclusion. But in reality, how far are organisations walking the talk and ensuring their recruitment practices and workplace procedures are compliant with the anti-discrimination laws?

This session provides a practical guide to avoiding complaints of discrimination, including:

- The multi-layered anti-discrimination framework and its application to employment
- The difference between direct and indirect discrimination and the test for crossing the line
- Can job advertisements specify particular characteristics for applicants?
- Affirmative action and discrimination distinguished
- Is there an obligation to disclose age, disability or medical information when applying for a job?
- Tips for subverting unconscious bias in recruitment
- Are electronic questionnaires and algorithms used in recruitment discriminatory?
- What can you ask or not ask in interviews?
- The impact of recommendations from the Disability Royal Commission, and other proposed reforms to discrimination laws
- Cases and examples including *Chalker v Murrays Australia Pty Ltd* [2017] NSWCATAD 112; *Fair Work Ombudsman v Yenida Pty Ltd & Anor* [2018] FCCA 1342; *ABCC v Corestaff WA Pty Ltd* [2020] FCA 893; *Galstaun v Adept Underpinner Pty Ltd* [2021] NSWCATAD 75

*Speaker: Sara McRostie, Special Counsel, MinterEllison, Brisbane, Qld*

3.00 - 3.10pm Panel Comments and Questions

3.10 - 3.55pm

### Session 6: Employment Contracts and Awards: What's New and What Needs Changing?

Recent changes to the Fair Work Act mean that the incorrect interpretation and application of an award may now result in a prosecution. Now more than ever it is important to not only keep on top of each of developments in each of the modern awards but also ensure their provisions are correctly interpreted and applied (and that evidence of this is retained!) To assist employers with this monumental task, this session explores:

- The key aspects of recent changes to key awards
- A practical step-by-step guide to interpreting the awards including recent judicial commentary about key terms
- How the contract and award fit together, how you can get flexibility under the award and tips for preparing contracts that supplement award entitlements
- Areas which are likely to change in the foreseeable future as a result of the reforms, policies of the Fair Work Commission and Ombudsman and judicial trends

*Speaker: Chris Molnar, Partner, Kennedys, Melbourne, Vic*

3.55 - 4.05pm Panel Comments and Questions

4.05 - 4.25pm Networking Break and Afternoon Tea

4.25 - 5.10pm

### Session 7: Employment Contracts: Navigating End-of-Term Challenges from Day One

An employment contract is vital to the relationship between the employer and the employee. This session examines the problems and pitfalls in drafting employment contracts and the key issues that need to be addressed in your agreement to mitigate risks and ensure a smooth transition when the employment relationship ends. It covers:

- Creation of IP during employment - Who does the IP belong to?
- What you can and can't do with restraint clauses
- What factors influence reasonableness when constructing restraint clauses?
- Non-solicitation clauses - the right and wrong way of doing
- Protecting an employer's goodwill - how far will courts go?
- Confidential information and departing employees - extent of employer's rights

*Speaker: Tom Brett, Partner, Gilbert + Tobin, Sydney, NSW*

5.10 - 5.20pm Panel Comments and Questions

# DAY 2 - FRIDAY 2 AUGUST 2024

## MORNING THEME: CONTEMPORARY CHALLENGES IN THE WORKPLACE

9.00 - 9.05am

Introduction and welcome

9.05

### Session 8: Preventing Sexual Harassment in the Workplace: The Practicalities of Compliance

Under the Fair Work Act, workplace sexual harassment is now prohibited, and a person or company can be liable for sexual harassment conducted by an employee or agent unless they can prove they took all reasonable steps to prevent the sexual harassment. But what does this mean in a legal sense? And what steps does the regulator expect workplaces to have taken to comply with their legal obligations This session shall take a practical approach to assist individual workplaces understand their new obligations and what steps they need to take to discharge them under the recent legislative changes. In particular, this session explores:

- The obligations of the employer when it comes to preventing sexual harassment and what evidence do you need to discharge reverse onus under protection legislation
- Practical case studies highlighting what measures have met the reasonable steps standard (and what may fall short)
- The role workplace culture plays in workplace sexual and tips for creating the right culture
- Practical tips for how to be proactive in the workplace and demonstrate compliance with positive duty, including tips for HR to manage complaints against managers or senior executives and ongoing relationships in the workplace

Speaker: *Claire Bratney, Special Counsel, Corrs Chambers Westgarth, Brisbane, Qld*

9.50 - 10.00am Panel Comments and Questions

10.00 - 10.45am

### Session 9: Strategic Adjustments: Addressing Mental Health and Injuries in the Modern Workplace

One of the more challenging aspects of the role for HR professionals is managing the ill and injured in the workplace. With mental health diagnoses on the rise, this area of practice is set to become more complex. This session shall explore the key issues HR professionals need to navigate when managing the ill and injured in the workplace, with a focus on those who are experiencing mental health challenges. It covers:

- The practicalities of performance reviews, supervision and managing ill or injured employees using de-identified examples
- Obligations of the employer and options for supporting employees - what is reasonable or appropriate e.g. flexible working, remote work and return to work mandate issues
- The issues arising from long term absentee employees - how to get them back to work
- Navigating the delicate balance and when and how it may be appropriate to consider termination

Speaker: *Elizabeth Devine, Principal, Devine Law at Work, Sydney, NSW*

10.45 - 10.55am Panel Comments and Questions

10.55 - 11.15am Networking Break and Morning Tea

11.15 - 12.00pm

### Session 10: Back With Force: Preparing for the Increased Presence of Unions in the Workplace

It is clear from the legislative agenda of the Federal Government that unions are back at the centre of the industrial relations system and back with force. While the Closing the Loophole reforms have beefed up the rights of unions and union representatives, it is less clear what this return to collectivism means for individual workplaces. How will it impact practices and procedures and what steps need to be taken to prepare? This session shall look at the impact of the union-based reforms from the perspective of an individual workplace and look at:

- The union protections framework and where it will sit from an enforcement perspective
- The rights workplace delegates and union representatives now have from these recent reforms (e.g. right of entry, union delegate rights etc)
- Steps employers can take to comply (what must they do vs what not to do) and practical steps employers can consider to mitigate risk
- How these reforms have played (or could play out) in cases including Qantas baggage handlers' case

Speaker: *Ben Dudley, Partner, Seyfarth Shaw, Sydney, NSW*

12.00pm - 12.10pm Panel Comments and Questions

12.10 - 1.10pm Lunch

# DAY 2 - FRIDAY 2 AUGUST 2024

## AFTERNOON THEME: MISCONDUCT AND UNDERPERFORMANCE

### 1.10 - 1.55pm

#### Session 11: Going, Going, Gone: A Practical Guide to Managing Underperformance, Warnings and Dismissal

Managing underperforming employees is stressful for HR professionals, employees and employers alike. While some of this stress is sadly unavoidable, ensuring that your workplace has robust and compliant policies, practices and procedures in place will go a long way to alleviate as much of that stress as possible. To help guide HR professionals through this process, this session explores:

- What is poor performance, how this measured and communicated and examples of valid reason for dismissal and circumstances in which to seek specialist legal advice
- When a dismissal will be unfair in light of recent cases, including *Weston v Coal & Allied Mining Services Pty Ltd* [2023] FWC 93, *Yen Yap v Club Assist* [2022] FCWA 520
- Steps workplaces can take to ensure the employee was afforded procedural fairness including what might be required to show they have had reasonable opportunity to improve performance
- What a good performance management process looks like and what may happen when an employee is unfairly dismissed or wrongfully terminated
- How to manage the performance of employee-like workers in light of recent reforms

*Speaker: Jennifer Wyborn, Partner, Clayton Utz, Canberra, ACT*

### 1.55 - 2.05pm Panel Comments and Questions

### 2.05 - 2.50pm

#### Session 12: The When, How (and by Whom) of Conducting HR Investigations into Workplace Behaviour

When a complaint is made by an employee within an organisation, it is up to HR to get to the bottom of the complaint. Knowing when you need to conduct an investigation is one thing. Knowing how to go about it is a whole other ballgame. This session explores:

- When it is now required to conduct a workplace investigation in light of recent amendments and where the legal obligations now lie
- When it might otherwise be beneficial for a workplace to conduct an investigation
- How to use the findings to address issues or improve workplace culture
- The types of investigations that can be run, the pros and cons of each, how to run them, who they each involve and tips when engaging external third parties
- Key issues which can arise during or from an investigation - dealing with sensitive and/or privileged information, managing reporting and disclosure notifications

*Speaker: Melissa Scadden, Managing Partner, Justitia, Melbourne, Vic.*

### 2.50 - 3.00pm Panel Comments and Questions

### 3.00pm Conference Close

# GENERAL INFORMATION

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## Conference Registration Fee

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The registration fee includes attendance at the conference and conference papers. Refreshment breaks and lunches are included for face to face attendees.

## Conference Papers

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TEN does not provide printed copies of the conference papers or Powerpoints. Access to the papers & Powerpoints will be available online to all delegates in the lead-up to the conference (as they become available).

## CPD

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**Lawyers (except WA):** 11 CPD units/points (substantive law)

**Lawyers WA:** 6 CPD points (substantive law) – being the maximum allowable per conference by the LPBWA. TEN is an accredited provider.

## CPD Certificate

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All delegates attending the conference will receive a CPD Certificate confirming attendance.

## The Conference Venue

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**Imperial Hotel, Gold Coast** (formerly Palazzo Versace)

Sea World Drive, Main Beach

Hotel Reservations:

Phone: (07) 5509 8000

Email: [reservations@theimperialgc.com.au](mailto:reservations@theimperialgc.com.au)

Website: 5 Star Luxury Hotel in Gold Coast ffl Imperial Hotel ([theimperialgc.com.au](http://theimperialgc.com.au))

## Delegate Rate at the Conference Venue

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Lagoon King - \$350 per night including breakfast for one

Please use the accommodation link below fto secure your booking at this rate:

17th Annual Employment Law Conference

<https://reservations.travelclick.com/106826?groupID=4088108>

## Travelling to the Conference Venue

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Delegates are advised to make their own travel arrangements.

## Conference Dress

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Smart casual attire is suitable (note: the temperature in the conference rooms can vary depending on where you are sitting. Short sleeves are generally OK, but it is advisable that you bring a jacket/long sleeved top just in case you need it).

# TERMS AND CONDITIONS

1. In these terms,
  - a. "TEN" means Television Education Network Pty Ltd
  - b. "you" means the person who has registered to attend or the person or persons who attend[s] the conference (if different from the person registered)
  - c. "conference" means the live face to face or live or recorded online educational event or which you have registered (by whatever name called and includes conferences, masterclasses, webinars and webinar series).
  - d. "live conference" means a conference other than a recorded conference.
  - e. "recorded conference" means a recording of a presentation or a series of presentations which you can view at a time of your choosing
  - f. "online" in relation to a conference means a conference you attend by viewing the conference over the Internet
  - g. "face to face" in relation to a conference means a conference held in an external venue where you view the conference in the conference room

## General – all conferences

2. TEN may change the program for a live conference as described in the brochure you have downloaded or in the TEN website without notice to you in any manner and at any time.
3. The information and opinions of presenters at the conference are not necessarily those of TEN and are in the nature of general information and not professional advice and you rely on these at their own risk. TEN is not responsible for the accuracy of the information or the correctness of the opinions offered by presenters at the conference.
4. TEN is not responsible for any financial or other losses incurred by you or for injury or damage to persons or property which occur at or in connection with the conference.

## Conversion of face to face conferences to live online conferences

5. If the conference is being held face to face or face to face AND online, TEN reserves the right to convert the conference on no less than 24 hours' notice to a solely online conference or to cancel the conference or to postpone the conference to a later date if TEN determines that it is unable to hold the conference face to face on the date/s advertised for any one or more of the following reasons:
  - a. State or national border closures
  - b. Restrictions on movement of persons imposed on persons by any responsible authority in Australia
  - c. The inability or refusal of one or more presenters or TEN team members to attend the conference to present
  - d. In its opinion, it is unsafe to hold the conference face to face for any reason.
6. If TEN converts the conference from face to face only or to face to face and online to online only or postpones the conference or cancels the conference, TEN will not be responsible for any loss or damage you suffer as a result including any travel costs relating to the conference.
7. If TEN converts the conference from face to face to online or postpones the conference and as a result you are not able to attend you will be entitled to a full refund of registration fee paid or a credit equal to that fee to use for a future purchase of a TEN product.

## Copyright

8. The copyright in materials prepared by presenters at a conference and made available to you by TEN is and remains the property of each presenter.
9. You are entitled to use those materials for private study and research only.
10. The copyright in the live stream and in any recording of a conference offered online is the property of TEN.
11. You are entitled to watch a conference for private study and research only.

## Conference cancellation by TEN – all conferences

12. TEN reserves the right to cancel a conference for any reason.
13. If TEN cancels the conference, you will be entitled either to a refund of the registration fee you have paid or to a credit equal to that fee which you can use to purchase another TEN product within 12 months of the first day of the cancelled conference.

## Cancellation by You – all conferences

14. Refunds for registration cancellation by you other than under Clause 6(b):
  - a. If notice of cancellation is actually received by TEN more than 10 days before the first day on which the conference is to be held, 85% of the registration fee you have paid
  - b. Otherwise, no refund.

## Governing Law – all conferences

15. The agreement between TEN and you is governed by the laws in force in the State of Victoria and the courts and tribunals of that State have sole jurisdiction to determine disputes arising in relation to it.



