



# THE 15<sup>TH</sup> ANNUAL EMPLOYMENT LAW CONFERENCE

Flexible Working Arrangements and the Employment Relationship

The Final Word on Independent Contractors

The Precarious Boundary between Work and Play

Personal Information Use and Abuse in the Spotlight

Rethinking Workplace Dispute Management

Long Term Injured Workers and Return to Work

Effective Management of Underperforming Staff

Getting on the Front Foot with General Protection Claims

Reducing the Risks in Redundancy and Restructuring

What to do when the Regulator Comes Knocking

Avoiding the Blame Game in Sexual Harassment Claims

Managing the Me(ntl) Health You Can't See

A Two-day Conference

**Thursday 11 & Friday 12 August 2022**

Palazzo Versace, Gold Coast

## Feedback from last year's conference:

“Overall the content and presenters were of a consistent high quality and topical.”

“Always a good range of topics and engaging presenters.”

“Overall, it was a great conference and I was able to learn a lot and it will better assist me in my job.”

“Excellent content that was applicable to my everyday work. Generally, speakers were of an extremely high standard. Loved the opportunity to ask questions.”

“I like the practical examples and war stories from very experienced practitioners.”



Leaders in online CPD for Lawyers & Accountants

# DAY 1 - THURSDAY 11 AUGUST 2022

## MORNING THEME: STRUCTURING AND MANAGING THE EMPLOYMENT RELATIONSHIP

9.00 - 9.10am

### Introduction and welcome

9.10 - 9.55am

#### Session 1: The Precarious Boundary between Work and Play

The melding between home and office as places of work has added to the growing complexity of when work begins and ends, and the boundaries of behaviour in personal and working life. As 9-5 becomes increasingly irrelevant, this session will explore some of the key legal challenges and risks arising from work, play, social and sexual interactions, including:

- What is an employer's potential liability for the non-work conduct of its employees?
- How far can an employer seek to regulate the private life of an employee?
- Has the position changed as a result of increased work from home arrangements?
- Should any boundaries be placed on employees meeting offsite? Is there a distinction whether it is work or after-work activities?
- When do outside work friendships and relationships between colleagues' matter? When is disclosure required and what prudent steps does an employer need to take?
- Is a "bonk ban" a valid or legal option?
- Social media policies and other methods of restricting employee activity and opinions – what is permissible and appropriate?
- Cases and examples

*Speaker: Samantha Betzien, Partner, Allens, Brisbane*

9.55 - 10.05am Panel Comments and Questions

10.05 - 10.50am

#### Session 2: The Final Word on Independent Contractors? The High Court Decisions and the Road Ahead

The long-standing issue of independent contractor v employee characterisation has recently been the subject of two High Court decisions, which have turned the previous thinking on its head. But is this now the definitive position? This session will examine the ongoing debate and decisions and what employers need to be doing to clarify the nature of their arrangements, including:

- Is the previous "multi-factorial" approach no longer applicable?
- Why the contractual terms are now front and centre
- Is labelling the relationship in the contract enough to tip the balance?
- Will later conduct under the contract make any difference?
- What will the approach be in the absence of a written agreement or invalid contract?
- Key tips for contract negotiations and drafting
- A detailed analysis of *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2022] HCA 1 and *ZG Operations Australia Pty Ltd v Jamsek* [2022] HCA 2

*Speaker: Stephen Woodbury, Partner, Ashurst, Sydney*

10.50 - 11.00am Panel Comments and Questions

11.00 - 11.25am Networking Break and Morning Tea

# DAY 1 - THURSDAY 11 AUGUST 2022

11.25am - 12.10pm

## Session 3: Personal Information Use and Abuse in the Spotlight

Organisations hold a wealth of information about their employees, but when it comes to the need to disclose such information there is often a lot of confusion about what can and can't be shared. This session will clarify privacy obligations and provide guidance on what to do when information is requested both internally and externally, including:

- An overview of the privacy framework
- What information is an organisation able to collect from an employee or potential employee?
- How is personal information required to be stored?
- Understanding the difference between access, use and disclosure
- In what circumstances can you disclose employee personal information and to whom?
- Is consent required before disclosure?
- Application of exemptions to privacy obligations, with a focus on the public health exemption
- An examination of the use of personal information in investigations, reporting and litigation
- What to do when a third party seeks information about your employee
- Tips for responding to subpoenas
- Does your organisation's privacy policy meet the legal requirements?
- Privacy issues arising from the pandemic – medical disclosures and vaccinations

Speaker: Leah Mooney, Director, KPMG, Brisbane

12.10 - 12.25pm Panel Comments and Questions

12.25 - 1.05pm

## Session 4: Bending Over Backwards: Flexible Working Arrangements and the Employment Relationship

The changes to working life brought about by the pandemic have been nothing short of revolutionary. However, they have created a state of affairs where the centrality and importance of the office or other workplace has been diminished in some instances, with associated problems for staff management, development and collegiality. This session will provide a guide to employers of their rights, responsibilities and options when it comes to agreeing to flexible working arrangements within the employment relationship, including:

- When is an employee required to attend a workplace?
- If a job can be done remotely, is it reasonable to require an employee to work from the organisation's office?
- What are the options when an employer and employee disagree on the availability of work from home arrangements?
- Have employment contracts been permanently varied through allowing work from home?
- Strategies for managing staff with heightened risk issues or anxiety returning to the office
- Tips for managing the emerging issues of overtime
- What should be in employment contracts for employees working from home?
- Law reform and overseas experiences of home and hybrid working arrangements, including the "right to disconnect" laws
- Relevant cases

Speaker: Lucy Adams, Senior Associate, Seyfarth Shaw Australia, Melbourne

1.05 - 1.15pm Panel Comments and Questions

1.15 - 2.15pm Luncheon

# DAY 1 - THURSDAY 11 AUGUST 2022

## AFTERNOON THEME: PERFORMANCE, BEHAVIOUR AND MANAGEMENT

2.15 - 3.00pm

### Session 5: Shoot First Talk Later? Rethinking Workplace Dispute Management

Disputes between workers can often start as minor disagreements or be attributed to incompatible personalities but have the potential to escalate into claims of bullying or discriminatory treatment. This session will explore the benefits of early intervention strategies in workplace disputes and other available actions and remedies before the situation ends up in a compensation claim or legal dispute, including:

- One size doesn't fit all – dispute resolution theory and generational expectations
- Dealing with aggressive, intimidatory and threatening behaviour
- Strategies for keeping disputes in-house and offline
- Using the staff code of conduct to outline expectation and processes
- Mediation and other resolution strategies – when to call in independent experts
- Managerial training in dispute recognition and management
- When is disciplinary action justifiable?
- Options when all else fails - legal and other ramifications
- Limiting the fall-out within the team
- The benefits of nipping disputes in the bud at an early stage

*Speaker: Denise O'Reilly, Director, O'Reilly Workplace Law, Gold Coast*

3.00 - 3.10pm Panel Comments and Questions

3.10 - 3.55pm

### Session 6: Too Hot to Handle? Long Term Injured Workers and Return to Work

Long term injured workers provide a real management challenge to employers and can significantly impact productivity and workplace morale. As claims continue to rise presenting employers with difficult choices, this session will explore why long-term injured workers need careful management and the strategies available to achieve an acceptable outcome, including:

- The protections for an injured worker
- What obligations does an employer have to assist a worker to return to their original role?
- How has covid-19 impacted the rights of injured workers?
- When are alternative duties a reasonable option?
- What enquiries and consultation must be made before terminating employment?
- Tips for avoiding claims of disability discrimination and unfair dismissal
- What will the impact of the National Return to Work Strategy 2020-2030 (Safe Work Australia) be?
- Relevant cases

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

3.55 - 4.05pm Panel Comments and Questions

4.05 - 4.25pm Networking Break and Afternoon Tea

4.25 - 5.10pm

### Session 7: Effective Management of Underperforming Staff

Performance management is possibly one of the most challenging aspects of a HR professional's role. Emotions often run hot, legal risks are high, and difficult but necessary conversations are sometimes avoided. Failure to get the process right can lead to significant issues down the track. This session will provide guidance to HR professionals for establishing a well-designed performance management process, including:

- Best practice performance management – key essentials for an optimum process
- Guidance for appropriate communications with the employee
- Establishing ways to evaluate individual performance and manage performance issues
- How have the elements of performance management changed as a result of work from home?
- Understanding the legal risks if handled poorly
- Lessons from recent cases

*Speaker: Mark Howard, Partner, HWL Ebsworth Lawyers, Melbourne*

5.10 - 5.20pm Panel Comments and Questions

# DAY 2 - FRIDAY 12 AUGUST 2022

## MORNING THEME: REGULATION AND COMPLIANCE

9.00 – 9.05am

Introduction and welcome

9.05 - 9.50am

### Session 8: Getting on the Front Foot with General Protection Claims

General protection claims based in adverse action continue to be attractive to disgruntled employees due to their accessibility, reverse onus of proof and broad scope. This session will examine recent cases and provide guidance on how employers can minimise the risks of an adverse action claims, including:

- Revisiting the key elements of when an employee can bring a general protection claim
- Why might an employee choose to bring a general protection claim instead of another possible claim such as unfair dismissal or discrimination?
- Analysing cases for examples of how employees and unions are using adverse action to challenge performance management, disciplinary action and workplace disputes
- What constitutes an adverse action by an employer?
- What must the employer show to support their position that the adverse action was not for a prohibited reason?
- Strategies for heading off claims – transparency, efficiency, process and proper reasoning
- The benefits of early intervention and communication
- Recent cases including *Alam v National Australia Bank Limited* [2021] FCAFC 178; *Crossing v Anglicare NSW and ACT* [2021] FCA 112

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

9.50 - 10.00am Panel Comments and Questions

10.00 - 10.45am

### Session 9: Reducing the Risks in Redundancy and Restructuring

Current economic circumstances have resulted in organisations looking critically at their workforce and having to make hard decisions. A constant dilemma is avoiding claims and challenges that a redundancy is an unfair dismissal in disguise or otherwise fails to meet the criteria. This session takes a detailed view of the redundancy law and process and provides guidance to HR practitioners on how to successfully move through the process, including:

- What are the legal risks in going down the redundancy path?
- What to look for in the award or agreement
- What is a “genuine redundancy”?
- Is an employer required to restructure business to preserve jobs?
- When is redeployment reasonable?
- What are the consultation obligations?
- Strategies for communication with stakeholders during redundancy and restructuring processes
- Lessons from recent cases

*Speaker: Jamie Wells, Partner, Mills Oakley, Brisbane*

10.45 - 10.55am Panel Comments and Questions

10.55 - 11.15am Networking Break and Morning Tea

# DAY 2 - FRIDAY 12 AUGUST 2022

11.15 - 12.00pm

## Session 10: Fair Work Ombudsman: What to do When the Regulator Comes Knocking

The office of the Fair Work Ombudsman has in recent times been on the front foot and increasing its pursuit and prosecution of organisations who have failed to comply with their legal obligations. This session provides best practice guidance to organisations on what to do when the regulator comes knocking, including:

- FWO Priorities and focus going forward
- Best practice responses to communications, directives and requests
- Attitude to upfront self-reporting and disclosures by organisations
- Enforcement processes and agreed arrangements
- When penalties are the only option
- A view from the coalface of organisations behaving both well and badly
- Tips for proactive compliance activities and audit tools

*Speaker: Jamie Robinson, Special Counsel, K&L Gates, Brisbane*

12.00pm - 12.10pm Panel Comments and Questions

12.10 - 1.10pm Lunch

## AFTERNOON THEME: CONTEMPORARY CHALLENGES

1.10 - 1.55pm

## Session 11: Avoiding the Blame Game in Sexual Harassment Claims

The shift in attitude and responses to claims of sexual harassment has been meteoric in recent times, with employers sometimes at risk of taking action without proper consideration or investigation. This session provides HR practitioners with practical and sound advice for fair handling of complaints of sexual harassment from the outset and achieving the best available outcomes for the organisation, including:

- Defining and identifying sexual harassment
- What obligations do employers have to prevent and deal with sexual harassment?
- What are the first steps on receiving a complaint of sexual harassment?
- Should employers act on office gossip or third-party information in the absence of a complaint from an alleged victim?
- Avoiding knee-jerk reactions
- Key investigation steps and according fairness
- Managing the relevant parties during investigation
- Does the strategy change if the alleged harasser is a senior executive?
- Implementing crisis and communication strategies to minimise reputational damage
- Whose decision? Outcomes and fall-out
- Recent cases and their lessons for the future

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

1.55 - 2.05pm Panel Comments and Questions

# DAY 2 - FRIDAY 12 AUGUST 2022

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**2.05 - 2.50pm**

## **Session 12: Managing the Me(ntl Health) You Can't See**

In recent times mental health has overtaken physical health in its impact both on the workplace and in the community generally. The increasing focus on mental health has resulted in developments in recognition, treatment and ongoing management in the workplace. This session will explore the practical challenges that organisations and HR professionals are facing in managing employees with mental health concerns, including:

- Understanding and identifying mental health in individuals and the impact on their working life
- WHS obligations for mental health – what do the Codes of Practice require of employers?
- When does disability discrimination arise in the treatment of employees with a mental health condition?
- What reasonable adjustments need to be made for employees? When do these adjustments fall outside the realm of “reasonableness”?
- Balancing the impact on the workplace and fellow employees with the rights of an individual?
- When is termination of employment the appropriate option?
- How covid-19 has impacted mental health in the workplace
- The report and recommendations of the Disability Royal Commission and where to from here?
- Changing the mindset, embracing diversity and finding opportunities for employing people with mental health challenges
- Resources and support for both employers and employees

*Speaker: Danny King, Principal, Danny King Legal, Sydney*

**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 lunch on both conference days are included for those attending the conference in person.

TEN will be live streaming the conference. Delegates have the option of attending the conference in person or attending it online.

All delegates will receive recordings of all sessions regardless of registration type.

## Conference Papers

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

## CPD

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

**WA Lawyers:** 6 CPD points (substantive law). WA practitioners can claim 6 CPD points being the maximum allowable by the LPBWA per event. TEN is an accredited QA 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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### Palazzo Versace Gold Coast

Sea World Drive, Main Beach

The Palazzo Versace is located in Main Beach in the heart of the Gold Coast, Queensland.

## Conference Delegate Rate at Palazzo Versace

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We have negotiated a special conference delegate rate with Palazzo Versace:

<b>Superior Room (for single or twin share)</b> (this room rate includes a buffet breakfast for 1 person)	<b>\$345 (GSTinc)</b>
<b>Superior Room (twin share)</b> (this room rate includes a buffet breakfast for 2 persons)	<b>\$387 (GSTinc)</b>

This rate is strictly subject to availability. **Delegates are advised to make their own accommodation arrangements directly with Palazzo Versace.**

### Hotel Reservations:

Online Reservation Link: <https://reservations.travelclick.com/106826?groupID=3280936>

Group Access Code: **2132208** [you will need to enter this code when booking online via the above link]

Phone: 1800 098 000 [toll free] Phone: (07) 5509 8000 Fax: (07) 5509 8074

Website: [www.palazzoversace.com.au](http://www.palazzoversace.com.au)

## 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/summer tops 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. "Plan" means the COVID-Safe Plan for the conference described below.
  - d. "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).
  - e. "live conference" means a conference other than a recorded conference.
  - f. "recorded conference" means a recording of a presentation or a series of presentations which you can view at a time of your choosing
  - g. "online" in relation to a conference means a conference you attend by viewing the conference over the Internet
  - h. "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.

## COVID SAFE PLAN – FACE TO FACE CONFERENCES

### What happens if you are diagnosed with COVID-19 or you are otherwise unwell?

5. If the conference is held face to face, TEN will conduct the conference in accordance with a COVID Safe Plan. You agree to comply with that Plan at the conference. If you fail to comply with the Plan, you agree to leave the conference immediately at the request of a TEN staff member or venue staff member. If you leave under these circumstances, you will not be entitled to a refund of any part of the registration fee. TEN will not be responsible for any travel or accommodation costs or fees incurred by you in relation to the conference or as a result of you leaving the conference early.
6. The COVID safe plan will prevent your attendance at a face to face conference if you are diagnosed with COVID-19 prior to or during the conference and the infection has not been cleared by two negative PCR tests, if you have a fever (ie raised temperature) at the time of registration or if you have a respiratory illness (including a cold or cough) at the start of or during the conference. In these circumstances:
  - a. You will be entitled to attend the live online version of the conference and/or recorded online version if that is offered; or
  - b. If not, you will be entitled to a full refund of the registration fee paid or a credit equal to that fee to use for a future purchase of a TEN product.

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

7. 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.
8. 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.
9. 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

10. 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.
11. You are entitled to use those materials for private study and research only.
12. The copyright in the live stream and in any recording of a conference offered online is the property of TEN.
13. You are entitled to watch a conference for private study and research only.

## Conference cancellation by TEN – all conferences

14. TEN reserves the right to cancel a conference for any reason.
15. 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

16. 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

17. 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.

