



THE 7TH ANNUAL MELBOURNE EMPLOYMENT LAW CONFERENCE

The “Casual Conundrum”: What Does the Future Hold?

Strategies for Managing Long-Term Injured Workers

Executive Employment Contracts

The Trouble with Adverse Action Claims

Restructuring Employment in a Challenging Economy

Obligations for Mental Health Management

Effective Performance Management Strategies

Where to Draw the Line on Employee Behaviour and Opinion

Procedural Fairness and Misconduct Investigations

Sexual Harassment and the Workplace

Insights and Observations from the Fair Work Ombudsman

Underpayments: Paying the Price

A Two-day Conference

Thursday 10 & Friday 11 March 2022

Grand Hyatt

Melbourne

Feedback from last year's conference:

- “Covered all the relevant employment topics that are an issue in these post-covid climate. Very helpful and reflective of the current employment issues we are seeing on the front end. Thank you.”
- “Excellent speakers, great content, all very relevant for the timing of the matters presented.”
- “Good speakers, the program ran to time and was really well organised and put together.”
- “Overall the content and presenters were of a consistent high quality and topical.”



Leaders in online CPD for Lawyers & Accountants

DAY 1 - THURSDAY 10 MARCH 2022

MORNING THEME: MANAGING EMPLOYEE RIGHTS AND ENTITLEMENTS

9.00 - 9.10am

Introduction and welcome

Day 1 Chair: Moira Rayner, Principal, Moira Rayner & Associates, Melbourne

9.10 - 9.55am

Session 1: The “Casual Conundrum”: What Does the Future Hold?

The focus on the definition and entitlements of casual workers is reaching a crescendo with the High Court now determining the issues and the Federal Government legislating the relationship. This session will examine where the law now sits in relation to casuals, and what employers need to consider when determining how to structure their labour force, including:

- An update on the key cases: Workpac Pty Ltd v Skene, Workpac Pty Ltd v Rossato and the High Court appeal
- Recent legislative amendments and proposed reforms and what they mean for organisations
- When is it appropriate to employ a casual worker?
- Key attributes of casual employment including the “regular and systemic” test
- Weighing up the pros and cons of casual v part-time employment
- Drafting and reviewing contracts for casuals
- Strategies for auditing a casual workforce - is the classification appropriate?
- How to manage a request for conversion to part-time employee

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

9.55 - 10.05am Panel Comments and Questions

10.05 - 10.50am

Session 2: Watching the Clock: Strategies for Managing Long-Term Injured Workers

The absence of an injured worker can significantly impact the workplace and provide management challenges to the organisation. This session will examine the rights and obligations of employers to long-term injured workers as well as advice for risk minimisation strategies, including:

- How the Fair Work Act governs the management of sick leave and what is required of employers
- What happens when an employee remains unfit for work when sick leave runs out?
- Assessing the inherent requirements of the job and reasonable adjustments
- The impact of a worker's compensation claim on the ability to manage employees
- When is termination available?
- Avoiding claims of discrimination and unfair dismissal
- Transition back to work and flexible working requests
- Strategies for minimising risk:
 - Pre-employment screening and medical checks
 - Assessments of capacity during the employment relationship
 - Should you utilise an Absence/Long Term Sickness Policy?
- Lessons from recent cases

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

10.50 - 11.00am Panel Comments and Questions

11.00 - 11.25am Networking Break and Afternoon Tea

DAY 1 - THURSDAY 10 MARCH 2022

11.25am - 12.10pm

Session 3: Bullet Proofing Executive Employment Contracts

The employment of key people is critical for any organisation. The contract needs to be a robust and carefully considered document that comprehensively and clearly sets out the relationship between the parties and what will happen in unexpected situations. This session will provide a practical guide to the key elements of an executive employment contract, including:

- Describing duties, responsibilities and authority
- Structuring remuneration and benefits and aligning them to desired outcomes, including:
 - Incentives
 - Bonuses
 - Options
- Essential business protection clauses including:
 - Confidentiality
 - Reputation
 - Disclosure and conflicts of interest
 - Exclusivity
- Statutory requirements and obligations including those in the Corporations Act
- Preparing for change or unexpected situations:
 - Termination, redeployment and redundancy
 - Garden leave
 - Restraint of trade
- What should be in the body of the contract and what should be attached or incorporated by reference?
- A guide to implied terms and their effectiveness

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

12.10 - 12.20pm Panel Comments and Questions

12.20 - 1.05pm

Session 4: The Trouble with Adverse Action Claims

It could cynically be said that adverse action claims have been a great opportunity for difficult employees to hit back at their employer in the face of being disciplined or managed. However, employers need to take such claims very seriously as the potential costs of such claims can be significant. This session will examine how to respond to an adverse action claim and what direction the courts are heading in deciding these claims, including:

- What is adverse action and why is it unlawful? Legislation, cases and examples
- Who can make an adverse action claim? Categories of claimant and time limits
- General protections and workplace rights in the context of adverse action claims - what needs to be proved? *PIA Mortgage Services Pty Ltd v King [2020] FCAFC 15*
- Responding to and defending an adverse action claim - a guide for employers
- Potential outcomes of a claim and impact on an employer
- Individual and corporate liability for adverse action
- Recent cases, including *Roohizadegan v TechnologyOne Limited (No 2) [2020] FCA 1407* and *Cummins South Pacific Pty Ltd v Keenan [2020] FCAFC 204*

Speaker: *Martin Alden, Partner, Cornwalls, Melbourne*

1.05 - 1.15pm Panel Comments and Questions

1.15 - 2.15pm Luncheon

DAY 1 - THURSDAY 10 MARCH 2022

AFTERNOON THEME: MANAGING WORKPLACES IN CHALLENGING TIMES

2.15 - 3.00pm

Session 5: "A Sign of the Times: Restructuring Employment in a Challenging Economy"

The onset of difficult economic circumstances has meant that organisations are looking carefully and critically at their ongoing viability, operations and labour costs and assessing what the future holds. As a result, HR professionals need to be at the ready to contribute to and implement some of the hard decisions. This session will provide a guide to what options organisations have to review, negotiate and restructure their workforces to meet new challenges, including:

- Getting a seat at the decision-making table and advising on effective strategies for change
- Assessing your organisation's IR and employment landscape and anticipating options and impacts
- Reviewing awards and negotiating contracts and agreements to meet organisational needs
- The benefits of employee/worker buy-in and consultation
- A guide to standing down employees
- Ending employment and redundancy - tips and traps
- Tips for effective communication and relationships with staff, unions and stakeholders through a restructuring or rationalisation process
- Recent cases and examples

Speaker: Lindy Richardson, Partner, Maddocks, Melbourne

3.00 - 3.10pm Panel Comments and Questions

3.10 - 3.55pm

Session 6: Are You OK? Obligations for Mental Health Management

Providing a safe workplace includes safety to mental as well as physical health. Recent events have left employees facing uncertainty and experiencing stress as they come to grips with unprecedented impacts to their personal and professional lives. This session provides a guide to employers on managing mental health in the workplace, including:

- The statutory and common law duties of employers
- How covid and its consequences have impacted mental health
- Distinguishing between pre-existing mental illness and onset or exacerbation - are the employer's obligation the same?
- Recognising the needs of staff and balancing them with the needs of the employer
- Accommodating mental health issues - what are reasonable adjustments and how far is the employer required to provide them?
- Pro-active strategies for minimising stress and promoting mental health in the workplace
- Resources and support, including employee assistance programs

Speaker: Belinda Winter, Partner, Cooper Grace Ward Lawyers, Brisbane

3.55 - 4.05pm Panel Comments and Questions

4.05 - 4.25pm Networking Break and Afternoon Tea

DAY 1 - THURSDAY 10 MARCH 2022

4.25 - 5.10pm

Session 7: A Carrot or a Stick? Effective Performance Management Strategies

Under-performing employees can significantly impact their organisation's productivity, cohesion and morale. Successful performance management needs to be timely and structured, and conducted appropriately to achieve the desired outcome. This session will explore strategies for effectively managing under-performers, including:

- Establishing performance expectations through:
 - Contractual obligations
 - Position description
 - Performance plan
- Setting up a performance management framework - policies, plans and KPI's
- Lawful v unlawful grounds for managing performance
- The hard conversations: strategies for addressing under-performance
- Practical tips for performance management of employees working from home
- How to avoid allegations of bullying and discrimination
- Establishing effective monitoring and feedback processes
- What to do when all else fails? Options for separation

Speaker: Alison Baker, Partner, Hall & Wilcox, Melbourne

5.10 - 5.20pm Panel Comments and Questions

DAY 2 - FRIDAY 11 MARCH 2022

MORNING THEME: DISCIPLINE AND BEHAVIOUR MANAGEMENT

Day 2 Chair: Natalie Blok, Barrister, Victorian Bar, Melbourne

9.00 - 9.45am

Session 8: Conduct Unbecoming: Where to Draw the Line on Employee Behaviour and Opinion

The line between private life and professional life has become increasingly blurred, particularly as remote working sees a further step away from the collegiate atmosphere of the organisation. How far can an employee express him or herself without breaching their employment obligations? This session will examine the way formerly “private” behaviour and opinion is being increasingly viewed through the employment lens and what the rights of the employer are, including:

- Where does private life end and professional life begin? How far can an employer seek to regulate an employee’s private life?
- Is there a right to free speech and freedom of expression? The lessons of *Comcare v Banerji* [2019] HCA 23 and *James Cook University v Ridd* [2020] FCAFC 123 and the appeal to the High Court
- Can and should the employment contract regulate what an employee does outside of work?
- Staff Codes of Conduct and associated policies as a tool for behaviour guidance - are they effective?
- Restrictions on employees and social media - how far can you go? Practical tips for management and enforcement
- Consenting relationships in the workplace - what rights and duties does the employer have?
- Guidance for employers in proactively identifying and managing conflicts of interest and associated issues in personal office relationships.

Speaker: Charles Power, Partner, Holding Redlich, Melbourne

9.45 - 9.55am Panel Comments and Questions

9.55 - 10.40am

Session 9: Procedural Fairness and Misconduct Investigations

Although the theory of procedural fairness is well known, putting it into practice can sometimes be mismanaged, particular when the circumstances of an alleged misconduct appear clear-cut. This session will provide a guide to ensuring procedural fairness in employee misconduct management, including:

- What does procedural fairness require?
- What is an employer’s duty to provide procedural fairness and when does it apply?
- Key steps in managing allegations of misconduct
- Affording procedural fairness in the course of:
 - Allegations
 - Investigations
 - Counselling
 - Warnings
 - Termination
- Record-keeping and other essentials to support misconduct investigation and disciplinary action
- Reviewing disciplinary policies and processes for procedural fairness
- Recent cases, including: *Bartlett v Ingleburn Bus Services Pty Ltd t/a Interline Bus Services* [2020] FWCFB 6429; *Dr Shaodi You v Commonwealth Scientific and Industrial Research Organisation t/a CSIRO* [2020] FWC 6852

Speaker: Erin Hawthorne, Partner, Seyfarth Shaw Australia, Melbourne

10.40 - 10.50am Panel Comments and Questions

10.50 - 11.10am Networking Break and Morning Tea

DAY 2 - FRIDAY 11 MARCH 2022

11.10 - 11.55am

Session 10: Sexual Harassment and the Workplace

There is nothing more likely to send an organisation into a spin than an allegation of sexual harassment. The fall-out can extend far beyond the parties to affect other staff, corporate reputation, stakeholders and the community at large. Given the impact, why are claims of sexual harassment escalating? This session examines what mistakes employers are making and how to prevent and manage claims effectively, including:

- The link between the cultural environment of the office and bad behaviour
- Is the organisation's sexual harassment/complaint policy and procedure fit for purpose? A guide to key contents
- Five immediate steps to take when a complaint is made
- Duties to the alleged victim
- Strategies for dealing with an alleged harasser in the higher echelons of the organisation
- Investigation essentials including:
 - Independence
 - Authority
 - Scope
 - Record keeping
 - Confidentiality
 - Recommendations
- When to call law enforcement authorities
- Crisis and communication strategies
- An examination of some high-profile cases and their impact,
- The AHRC's report of the National Inquiry into Sexual Harassment in Australian Workplaces, recommendations and government response
- Strategies for ongoing management of workplace behaviour

Speaker: *Skye Rose, Principal, Moores, Melbourne*

11.55am - 12.05pm Panel Comments and Questions

12.05 - 1.05pm Lunch

AFTERNOON THEME: REGULATION AND COMPLIANCE

1.05 - 1.50pm

Session 11: Getting on the Front Foot: Effective Engagement with the Regulator

There is nothing like an unexpected communication from the Fair Work Ombudsman to cause waves of panic in an organisation. But it doesn't have to be that way, as experience indicates that self-disclosure and contrition can bring about vastly better consequences for all parties and stakeholders. This session will look at how to effectively engage with the regulator, including:

- An examination of the FWO's powers of investigation
- Allocating responsibility for the FWO relationships within your organisation
- The benefits of good record-keeping and a culture of openness when things go wrong
- The benefits of fessing up to discovered errors and if, when and how to approach the FWO
- Best practice processes for receiving and managing a communication or investigation from the regulator
- Key do's and don'ts
- Defences including privilege - should they be used or is transparency a better option?
- What should the Board be told and to what extent should they be involved in discussions and outcomes?
- Managing fallout with staff, stakeholders and the community - turning a problem into a win
- Tips for recovering from an investigation and restoring employee and regulator confidence

Speaker: *Kristen Lopes, Partner, Colin Biggers & Paisley Lawyers, Sydney*

1.50 - 2.00pm Panel Comments and Questions

DAY 2 - FRIDAY 11 MARCH 2022

2.00 - 2.45pm

Session 12: Paying the Price: Underpayments in the Spotlight

Underpayment of employees has become the increasing focus of the Fair Work Ombudsman, with more corporates outing themselves and repaying millions to their workers. This session will look at why underpayments happen and what organisations should be doing to ensure compliance, including:

- How the Fair Work Act and State legislation regulate underpayments, including proposed reforms
- Consequences of failure to comply with the law - not just financial
- How far does the complexity of the award system contribute to underpayment?
- Strategies for keeping up to date with payment obligations and avoiding underpayment claims
- Key steps for managing underpayment claims and investigations, including:
 - Does self-reporting minimise the fall-out?
 - Powers of the FWO in investigation
 - What documents and information can the FWO request?
 - Are any office-holders personally liable for underpayment?
 - Managing the public relations and workplace implications of an investigation and prosecution
- Recent cases and examples including *Arundell & Ors v Macquarie Bank Ltd* [2020] FCCA 2720

Speaker: Stephen Woodbury, Partner, Ashurst, Sydney

2.45 - 2.55pm Panel Comments and Questions

2.55pm Conference Close

GENERAL INFORMATION

Conference Registration Fee

The registration fee includes attendance at the conference, conference papers, refreshment breaks and lunch on both conference days.

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

TEN will 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

Lawyers (except WA): 10 CPD units (substantive law)

WA Lawyers: 6 CPD points (substantive law). (WA practitioners can claim a maximum of 6 CPD points for attending a conference). TEN is an accredited QA provider.

CPD Certificate

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

The Conference Venue

Grand Hyatt Melbourne

123 Collins Street
Melbourne

Phone: (03) 9657 1234

Web: <https://www.hyatt.com/en-US/hotel/australia/grand-hyatt-melbourne/melbo>

COVID-19 Vaccination Requirement

At this point in time it is a condition of entry to hotel that you must be fully vaccinated and produce proof of vaccination. This applies to the conference rooms as well as guest accommodation.

Travelling to the Conference Venue

Delegates are advised to make their own travel arrangements.

Conference Dress

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.

