

2021 US Labor & Employment Webinar Week  
**Insights and Compliance Strategies for a New World**

February 1 – 4, 2021



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## Australia Update

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# Presenter

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# Underpayments and 'wage theft'

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- Key focus area for the Fair Work Ombudsman (**FWO**)
- Increased investigations, prosecutions and self-disclosed instances
- Ensure current and former employees receive all applicable pay rates and entitlements in accordance with:
  - the *Fair Work Act 2009* (Cth) (**FW Act**);
  - modern awards; and
  - enterprise agreements
- Maintain accurate and timely record-keeping
- Back pay/underpayment claims exposure (6 years)
- FWO action and sanctions for breach:
  - Enforceable and published undertakings to back pay employees
  - Current maximum penalty for breach of the civil remedy provisions under the FW Act:
    - \$66,600 for a corporation and \$13,320 for an individual;
    - For serious contraventions - \$666,000 for a corporation and \$133,200 for an individual.
  - Importance of payroll audits and reconciliations

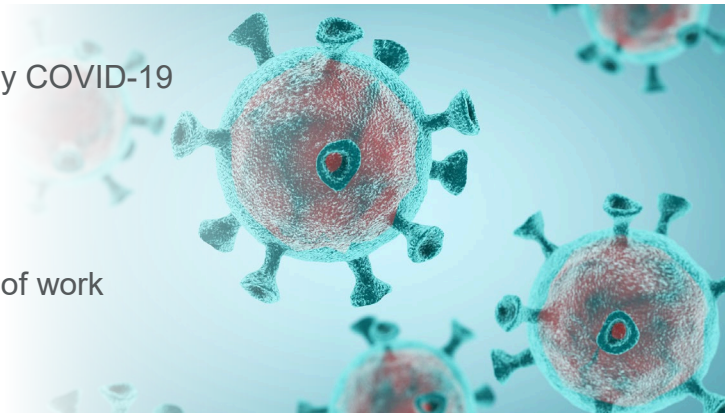


# COVID-19 related issues

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- **JobKeeper:**

- Temporary wage subsidy scheme for businesses significantly affected by COVID-19
- Extended until 28 March 2021
- Qualifying employers and legacy employers
- JobKeeper enabling directions:
  - Stand down an employee – including by reducing their hours or days of work
  - Change an employee's usual duties
  - Change an employee's location of work
  - Direction must be reasonable
  - *CEPU & Anor v Qantas Airways Ltd* [2020] FCAFC 205: Full Federal Court of Australia confirmed that an employee who has been stood down under the FW Act cannot take paid sick and carer's leave or compassionate leave. Decision may be appealed to the High Court of Australia.



- **Modern awards:**

- Temporary changes to modern awards to allow flexibility
- Up to 2 weeks unpaid 'pandemic leave'; agreement to take annual leave at 'half-pay'
- Emergency provisions extended until 29 March 2021

# COVID-19 related issues

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- **Vaccinations:**

- Likely to commence from late February 2021
- Not mandatory but strongly encouraged
- Employers have a statutory duty to provide a safe workplace and working conditions that do not expose workers to hazards
- Whether lawful and reasonable direction
- Recommendations from the Department of Health for at risk workers:
  - Vaccination policy
  - Current staff vaccination records
  - Information about relevant vaccine-preventable diseases
  - Policy for managing vaccine refusal
- Vaccination issues:
  - Power to direct employees?
  - Employee refusal



# General protections developments

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- **Disability discrimination:**

- Section 351 of the FW Act prohibits adverse action being taken against employees, or prospective employees in relation to their disability
- Employer to build an inherent requirement defence

- **A “complaint” or “inquiry”:**

- Section 340 of the FW Act prohibits adverse action being taken against persons in relation to their workplace rights. Workplace rights include making a complaint or inquiry in relation to employment.
- *PIA Mortgage Services Pty Ltd v King* [2020] FCAFC 15: The Full Federal Court held that a complaint must be underpinned by a source of 'entitlement or right' (such as a contract of employment, industrial instrument or legislation) and the complaint must be made genuinely and in good faith.

# WHS reforms – Western Australia

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- **Key amendments:**

- *Work Health and Safety Bill 2019* - passed parliament November 2020
- Expected to come into effect in the second half of 2021 as the supporting regulations need to be finalised
- Primary duty of care to ensure, so far as is reasonably practicable, the health and safety of workers and others who may be affected by the carrying out of work
- Increased penalties - up to \$3.5 million for failure to comply with health and safety duty for body corporates

- **Industrial manslaughter:**

- Failure to comply with health and safety duty that causes death or serious harm
- Industrial manslaughter will be a criminal offence
  - The maximum penalty for an individual is imprisonment for 20 years and a fine of \$5 million
  - Body corporates will face a fine of \$10 million



# Business Immigration Developments

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- COVID-19 travel restrictions and exemptions
  - Travel exemption required for non-citizens/permanent residents:
    - Entry in the national interest
    - Critical or specialist medical services
    - **Critical skills/sector** – medical technology, critical infrastructure, telecommunications, engineering and mining, supply chain logistics, aged care, agriculture, primary industry, food production, maritime, financial technology, large scale manufacturing, film and media
    - Occupations listed on **Priority Migration Skilled Occupation List (PMSOL)** e.g. medical practitioner, registered nurse, construction project manager, mechanical engineer, chief executive, managing director, software engineer, developer programmer
    - Compassionate and compelling reasons
  - Limited/capped flights; negative COVID-19 test required for entry from 22 Jan 2021
- Additional **Labour Market Testing** requirements introduced September 2020 for Employer-sponsored TSS (482) and Regional (494) visa nominations
- 2021: Streamlining of Business Innovation and Investment Visa Program (BIIP); Skilled Migration Occupations Lists review delayed until (earliest) March 2021

# 2021: Major reforms to *Fair Work Act 2009* (Cth)

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- *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* tabled to parliament December 2020
- **Casual employment:**
  - Statutory definition of 'casual employee' – no firm advance commitment at time of employment offer
  - Clarify casual employment post *WorkPac Pty Ltd v Skene* [2018] FCAFC 131 and *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84
  - Casual loading offset to prevent 'double dipping'
  - Statutory right to casual conversion after 12 months' employment
- **Criminal offence for dishonest and systematic wage underpayments**
  - 4 years imprisonment and/or \$1.1 million for an individual
  - \$5.5 million for corporations
  - Repatriation orders for unpaid entitlements (7 years)
  - Reform of Federal Circuit Court 'small claims' procedure to facilitate recovery of unpaid entitlements – increased jurisdiction from \$20,000 to \$50,000

# 2021: Major reforms to *Fair Work Act 2009* (Cth)

- **Enterprise agreements:**

- Greater flexibility in agreement making; 21 day approval deadline
- Better Off Overall Test (BOOT) – regard only to patterns or kinds of work actually performed or reasonably foreseeable; significant weight to employer and employee views; approval where BOOT not passed

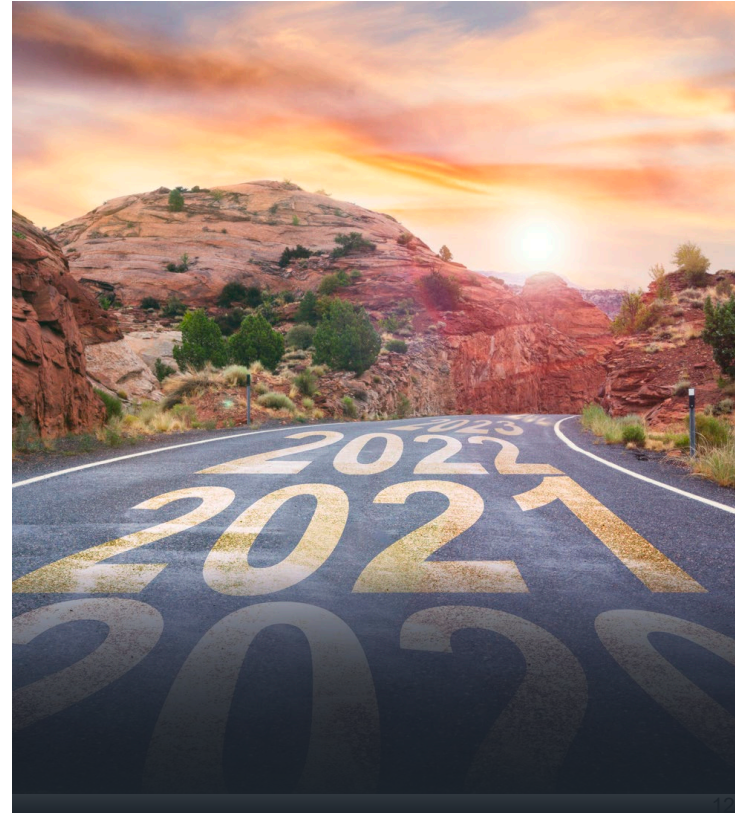
- **Part time flexibilities in modern awards**



# On the horizon: sexual harassment reform

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- Sex Discrimination Commissioner's *Sexual Harassment National Inquiry Report*, March 2020 – revealed 'widespread and pervasive' sexual harassment at work.
- Recent high profile cases
- Legislative reform likely – creation of a new positive duty on employers to eliminate workplace sexual harassment



Questions? Please let me know.

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