WORKPLACE WATCH – 22ND EDITION: 26 MAY 2025

In this fortnight's edition of the KHQ Workplace Watch, we cover:

- the Federal Government appoints a new Minister for Employment and Workplace Relations;
- the latest developments in health and safety, including Safe Work releasing a new WHS data profile covering the nursing, care and support workforce, and a recent prosecution concerning a workplace fatality;
- recent updates in the Fair Work Commission, including the annual wage review and a number of noteworthy decisions concerning drug and alcohol policies, meaning of 'serious misconduct', single-day absences for long service leave and a particularly contentious 'same job same pay' order; and
- new decisions from the courts regarding portable long service leave and the accrual of annual and personal leave for fly-in, fly-out workers.

POST ELECTION UPDATES

New Minister for Employment and Workplace Relations

Following the election, the Albanese Government has unveiled its new Cabinet.

The Hon Amanda Rishworth MP has been appointed as the new Minister for Employment and Workplace Relations (previous Minister for Social Services). Ms Rishworth MP replaces Senator the Hon Murray Watt, who has been appointed as the new Minister for the Environment and Water.

Senator The Hon Michaelia Cash continues to be the shadow minister.

A statement from the Hon Amanda Rishworth MP regarding her appointment can be found here.

SAFETY & REGULATORY UPDATES

WHS profile of nursing, care and support workforce

Safe Work Australia has published a Work Health and Safety data profile covering the nursing, care and support workforce using its National Dataset for Compensation-based Statistics alongside ABS Census data. The profile provides a number of insights including that:

- *"The frequency rate of claims due to 'being assaulted by a person or persons' is approximately 6.5 times higher compared to all other occupations and has increased over the last 10 years.*
- *Mental health claims among these workers have almost doubled over the last 10 years. Anxiety/stress disorder, reactions to stressors and post-traumatic stress disorder were the most common, together accounting for 8 out of 10 mental health condition claims."*

Safe Work Australia's media release can be found here and the WHS profile can be found here.

NT Supreme Court rejects appeal in workplace fatality case

The NT Supreme Court has dismissed an appeal from *Kalidonis NT Pty Ltd* (**Kalidonis**), in which it sought to quash two convictions for breaches of section 32 of the *Work Health and Safety (National Uniform Legislation) Act 2011* (NT) (**WHS Act**). Kalidonis was initially charged with industrial manslaughter in 2022 after a worker was struck and killed by towing chains while working on barge landing upgrades in March 2020. Kalidonis was sentenced to a total fine of $550,000 by the Local Court for its two breaches of the WHS Act.

In dismissing the appeal, Brownhill J said:

> *[196] The Local Court found that a reasonably practicable measure Kalidonis could have taken was to lock or tag out the Caterpillar excavator so all workers knew they could not 'touch, operate or tow' it. Kalidonis argued, essentially, that this measure was not reasonably practicable when the Caterpillar excavator was, on Mr Kalidonis' instructions, to be pushed down to the barge ramp.*
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> *[197] If the Caterpillar excavator had been 'tagged' with a 'tag' that clearly and prominently stated that towing it with chain was strictly prohibited, that would have clearly communicated to all workers, including the deceased and Mr Brian, that fact, thereby addressing the risk that a worker or workers would attempt to tow it with chain.*
>
> *(…)*
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> *[199] Kalidonis argued that these measures would not have made any difference to the risks because the deceased had already ignored direct instructions on three prior occasions. That submission simply emphasises the considerable deficiencies in Kalidonis' responses to the deceased's conduct, which did nothing to deter him from continuing to engage in this highly risky conduct in the workplace, thereby endangering himself and other workers.*

Brownhill J's decision in *Kalidonis NT Pty Ltd v Work Health Authority* [2025] NTSC 28 can be found here.

FAIR WORK COMMISSION UPDATES

Updates in Annual Wage Review Major Case

The re-elected Federal Government filed submissions in the Annual Wage Review proceedings, calling for an *"economically sustainable real wage increase."*

The Expert Panel held a consultation hearing on 21 May 2025.

Copies of submission and the transcript of the consultation hearing are available on the Major Case page here.

Full Bench rejects appeal regarding breach of drug and alcohol policy

An employee consumed a glass of wine approximately 30 minutes prior to his shift and was subsequently involved in an incident. The drug and alcohol test which ensued identified that the employee's BAC was 0.025 and 0.017 when the confirmatory test was conducted.

At first instance the Deputy President found that the employee had breached the Drug and Alcohol Policy, which required a 0.00 BAC. This provided a valid reason for dismissal, however reasons including inadequate training on the D&A Policy and the employee not being aware that the D&A Policy had recently reduced the allowable 0.00 BAC rendered the dismissal harsh and unreasonable.

The Full Bench refused permission to appeal, saying:

> *"[12] We consider that the Deputy President applied orthodox principles in assessing whether Mr Hancock was unfairly dismissed and determining that he should be reinstated, with 50 percent backpay and an order maintaining his continuity of service. This is not a case where the legal principles applied by the Deputy*

> *President appear disharmonious when compared with other recent decisions dealing with similar matters. Indeed, the Deputy President referred to and applied well-established principles articulated by Full Benches of the Commission in Sydney Trains v Hilder [2020] FWCFB 1373 and Sydney Trains v Goodsell [2024] FWCFB 401. There is not a diversity of decisions at first instance so that guidance from an appellate bench is required. The circumstances of this case are fact specific. The appeal does not raise issues of general importance or general application. Nor is the Deputy President's decision at first instance counter intuitive, and it does not manifest an injustice.*
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> *[13] A number of the arguments advanced by Hutchison on appeal were not argued before the Deputy President below, including that the seriousness of Mr Hancock's conduct was increased by reason of the fact that: (a) Mr Hancock ought to have known about the changes made to the Drug and Alcohol Policy in March 2023; and (b) Mr Hancock's initial BAC reading of 0.025 was a breach of the version of Hutchison's Drug and Alcohol Policy that was in force prior to the amendments in March 2023.*
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> *[14] Further, we do not consider that any of Hutchison's grounds of appeal disclose a sufficiently arguable case of appealable error to justify it being granted permission to appeal. (…)*"

(footnotes omitted)

The Full Bench's decision in *Sydney International Container Terminals Pty Ltd v Craig Hancock* [2025] FWCFB 106 is available here.

FWC rules that bullying does not necessarily mean 'serious misconduct'

The Full Bench of the Fair Work Commission has upheld an appeal from an ambulance worker after he was disciplined by Ambulance Victoria for engaging in bullying towards his coworkers, which was classed as serious misconduct. During the appeal, the worker claimed that the initial decision by Commissioner Connolly made an error of law in finding that *"bullying conduct is necessarily serious misconduct."*

The Full Bench (Vice President Asbury, Deputy President Colman and Deputy President O'Neill) agreed, saying:

> *"[25] That Mr Frost had engaged in bullying was not in contest because he did not dispute Mr Lacy's finding that this had occurred. But Mr Frost did dispute that his conduct amounted to serious misconduct. We do not accept the suggestion of AV that the Commissioner concluded at [120] that the conduct posed a serious risk and was inconsistent with the continuation of the employment relationship; as we have said, on our reading, the Commissioner regarded such 'distinctions' as irrelevant. But to the extent that the Commissioner made an assessment of the seriousness of the conduct, his conclusion that the conduct was serious misconduct was infected by his erroneous belief that bullying amounts to serious misconduct.*
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> *[26] For conduct to amount to bullying under the FW Act, it is sufficient that a person has behaved unreasonably at work on two occasions towards another, and that this has caused a risk to health and safety. That such conduct has occurred does not of itself say anything about the seriousness of that conduct. Plainly, the gravity of conduct that can fall within the definition of bullying in the FW Act can be charted on a wide spectrum. Some such conduct is very serious. Some is not. For example, there will be cases where a person has behaved unreasonably, but marginally so, and the risk to safety is one that is peculiar to the personal circumstances of the complainant and could not have been known to the first person. Such a case would come nowhere near amounting to misconduct, let alone serious misconduct, nor would there be any fair basis to condemn the person for marginal unreasonableness, or to label the person a 'bully', with all moral opprobrium that is associated with that word in contemporary society. Simply put, cases of bullying may range across a spectrum of seriousness. The FW Act implicitly recognises this possibility because the Commission retains a discretion as to whether to make any order in respect of bullying that it has found to occur, even if it apprehends a risk of further bullying in the future."*

The appeal was allowed, and the matter was remitted to Commissioner Connolly for redetermination in accordance with the appeal.

The Full Bench's decision in *Mark Frost v Ambulance Victoria* [2025] FWCFB 94 can be found here.

FWC hands down single-day long service leave ruling

Commissioner Sloane arbitrated a dispute concerning the meaning of the *Long Service Leave Act 1955* (NSW) (**LSL Act**). The issue concerned how a single day of long service leave should be calculated under the LSL Act.

Commissioner Sloane said:

> *"[50] Coles' submissions concentrated on the use of the words "week" or "weekly" in the definitions of "ordinary pay" and "ordinary remuneration". But they did not grapple with the effect of the definitions themselves. That resulted in Coles putting a position to this effect: If an employee who takes a single day of long service leave does not have a fixed number of normal weekly hours, they will be entitled to be paid for that leave an amount based on the average hours they have worked on each working day over the relevant period. However, if the employee has fixed normal weekly hours, they will receive payment of one-seventh of their weekly wage. Unless that employee works seven days a week, that payment will be less than the amount they would receive for the average hours they work each day.*
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> *[51] There is no rational basis for that difference in outcome. Such a result would not be consistent with the language and purpose of all of the provisions of the LSL Act.*
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> *(…)*
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> *[58] For the reasons outlined above, I do not accept that paying employees one-seventh of a week's wages is a "legally compliant way of implementing the LSL Act". As to the balance of the submissions, I accept that Coles has a legitimate interest in seeking to have a single, accurate system to manage long service leave across its operations. However, such a consideration does not inform the proper construction of the LSL Act or provide a basis for non-compliance with it."*

(footnotes omitted)

Commissioner Sloan's decision in *United Workers Union v Coles Group Supply Chain Pty Ltd* [2025] FWC 1370 can be found here.

'Same Job Same Pay' orders made despite impact on labour hire providers and their workers

The FWC has made 'same job same pay' orders in relation to the labour hire workers supplied to Bulga Coal Management Pty Ltd at the Bulga Open Cut Mine near Singleton in New South Wales.

Deputy President Tony Saunders acknowledged some of the arguments advanced by the labour hire providers that the order would be unfair and unreasonable in the circumstances – for instance:

> *"[95] In addition to the unfairness associated with increased leave liabilities, Skilled and WorkPac face a situation where they do not have the right under the labour hire supply contracts entered into with Bulga to unilaterally increase the amount they will be paid by Bulga if regulated labour hire arrangement orders are made and they are required under those supply contracts to supply labour to the Mine. Skilled and WorkPac can request an amendment to the rates to be paid by Bulga on the basis that regulated labour hire arrangement orders have been made, but Bulga is not obliged under the terms of the supply contracts to agree to any such request. This could potentially lead to the termination of the supply contracts between Bulga and the relevant WorkPac and Skilled entities. This uncertainty, together with the possibility of being required to supply labour to the Mine at a price which is below the wages which must be paid by Skilled or WorkPac to the relevant employees, gives rise to some unfairness and unreasonableness to Skilled and WorkPac."*

However, the Deputy President was nevertheless not satisfied that it would not be fair and reasonable to make the orders:

> *"[101] My broad value judgment is that I am not satisfied that it is not fair and reasonable in all the circumstances to make regulated labour hire arrangement orders with respect to employees of Skilled and WorkPac who work at the Mine. I have reached this position after having regard to all the circumstances, including the evidence before the Commission and the submissions made by each of Skilled, WorkPac and the MEU. My assessment, after balancing the various interests affected by an order in each case, is that the unfairness created by labour hire production operators at the Mine doing the same job as direct employees of Bulga, yet being paid significantly less than the direct employees, outweighs those considerations which support a conclusion that it is not fair and reasonable in all the circumstances to make the orders sought."*

The decision Applications by the *Mining and Energy Union re Bulga Open Cut Mine* [2025] FWC 1273 can be found here.

COURT DECISIONS

Full Federal Court allows appeal regarding black coal portable long service leave

The majority of the Full Federal Court upheld an appeal by Orica in part, finding that the shotfirers it engaged were only "eligible employees" for the purposes of the *Coal Mining Industry (Long Service Leave) Administration Act 1992* (Cth) for part of the period determined by the Federal Court at first instance.

The majority (Collier and Snaden JJ) said:

> *"40 In order that an employee might qualify for coverage under the BCMI Award as a "coal mining employee" or as an "eligible employee" under the Administration Act (ignoring, momentarily, sub-paras (c) and (d) of the statutory definition), he or she must be "employed in the black coal mining industry". Whether an employee is so employed turns upon the application of cll 4.2 and 4.3 of the BCMI Award. The first of those provisions identifies the suite of activities that are within the award's conception of "the black coal mining industry". The latter identifies activities that are not within that conception. Those excluded activities are, in the case of cl 4.3(g), identified partly by reference to the character of an employee's employer.*
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> *41 Employees who are engaged in "the supply of shotfiring or other explosive services"—as Orica's shotfirers plainly are and were—are not employed in the black coal mining industry (for the purposes of either the BCMI Award or the Administration Act) unless their employer is "otherwise engaged" therein. That, as his Honour with respect correctly observed (albeit in a different context), turns upon whether or not their employer engages, via the efforts of others—that is to say, of employees who are not engaged in the supply of shotfiring or other explosive services—in activities of the kinds that are listed in cl 4.2 (and that are not listed in cl 4.3).*
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> *42 Thus, employees engaged in the supply of shotfiring services will qualify as "coal mining employees" under the BCMI Award and as "eligible employee[s]" under the Administration Act if they are engaged by employers whose other exertions (or sufficient of them) are directed toward activities that are apt to be recognised under cl 4.2 as components of the black coal mining industry. That might include, for example, shotfiring employees who are engaged directly by a business that owns and operates a black coal mine. By operation of cl 4.3(g), though, shotfiring employees who are engaged by a business whose other activities (if any) are wholly external to the award conception of the "black coal mining industry" will not qualify as "coal mining employees" for the purposes of the BCMI Award, nor as "eligible employees" for the purposes of the Administration Act."*

The Full Federal Court's decision in *Orica Australia Pty Ltd v Coal Mining Industry (Long Service Leave Funding) Corporation* [2025] FCAFC 65 can be found here.

Federal Court hands down FIFO leave decision

Simpec's employees working at the Iron Bridge Project worked on a fly-in fly-out basis, with 21 days on and 7 days off. Simpec calculated employee leave entitlements on the basis that 114 ordinary hours were worked during each swing. Hours in excess of ordinary hours during the on-swing were paid at overtime rates. Simpec's position was that the off-swing week as taken as "unpaid authorised leave" and did not count towards the accrual of annual leave and personal leave.

The relevant union, being the ETU, claimed that under the applicable enterprise agreement employees were entitled to accrue annual and personal leave based on 152 ordinary hours of work for each swing, even though they did not work 152 ordinary hours in that period. It argued that the FIFO roster compressed four weeks of ordinary hours into 3 weeks during the on-swing period.

Justice Colvin dismissed the union's application, saying:

> *"85 The difficulty for the Union is that the EA does not permit the allocation of 152 ordinary hours in the 21 days on-swing. There is the further issue that would arise concerning overtime calculations because, in effect, it seeks to have the same hours counted both as ordinary hours and overtime hours.*
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> *86 By the express terms of cl 12, full-time employees were not entitled to any payment for the days they were rostered off where those days were to be treated as unpaid authorised leave. So much followed from the language of cl 12. Otherwise, the requirements under the EA (a) to work an average of 38 ordinary hours per week; (b) to work no more than 8 ordinary hours per day; and (c) to work those ordinary hours in the specified window, were entitlements that remained in place and had to be met by any roster imposed under cl 12.*
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> *87 Consequently, by the end of a year, full-time employees working the 21 days on-swing, 7 days off-swing roster would not accrue a year's leave entitlements under the NES provisions because they would not have completed a period of employment of 12 months. Every fourth week of their continuous service would not be counted under the NES provisions because the unpaid authorised leave in respect of ordinary hours that was allowed by cl 12 would not count towards the accrual of annual leave and personal leave. Those employees were employed for an average of 38 ordinary hours per week. However, the ordinary hours in the off-swing week were taken as unpaid authorised leave and when it came to determining their NES annual leave and personal leave entitlements those hours did not count.*
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> *88 The off-setting benefit for the employees was that in order for the system of works to comply with the EA they were paid for many more hours at overtime rates than if they had worked the ordinary hours under the EA without the invocation by SIMPEC of cl 12 to establish the 21 days on-swing, 7 days off-swing system of works.*
>
> *89 In a sense, the consequence of the roster is that there were less paid ordinary hours than were contemplated for a full-time employee and the accrual of three-quarters of the leave entitlements of a person who was paid for all those ordinary hours. However, that part of the Union's case fails to allow for the operation of cl 12 and the fact that the leave entitlements were sourced in the NES, not the EA. The system of works did not result in less ordinary hours. Rather, the system of works meant that 38 ordinary hours of each four week swing were required to be taken as unpaid authorised leave. This was a course expressly authorised by the EA. Its consequence for the operation of the NES leave provisions was a statutory outcome."*

Colvin J's decision in *Communications Electrical Electronic Energy Information Postal Plumbing and Allied Services Union of Australia v Simpec Pty Ltd (Liability)* [2025] FCA 470 can be found here.

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