WORKPLACE REVIEW

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EDITORIAL – *General Editor: Neil Napper* 75

ARTICLES

Two Fat Gentlemen – *Bryan Belling*

One was a protectionist, the other a free trader, at a time when that was a decisive demarcation in Australian politics, yet circumstances conspired to ensure the effective "alignment" of Charles Kingston and George Reid in the establishment of Australia's conciliation and arbitration system in the early years of Federation. Australia was then a world leader in radical, experimental, and progressive law-making, notably in the areas of women's enfranchisement and right to stand for legislative office. The introduction of compulsory conciliation and arbitration was at one with this milieu, institutionalising – legally and structurally – Australia's union movement, and paving the way for Australian workers gaining one of the highest standards of living for working people in the world. ... 78

Can Negative Deviance Spur Creativity with Positive Organisational Outcomes? – *David Nikolas Brodsky*

This article portrays a snapshot of the current state of research around workplace creativity through the lens of deviant behaviour. Effective utilisation of worker ingenuity might best begin with earnest contemplation of several key issues: individuals' intentions (positive or negative) when approaching teamwork, team dynamics which occur during complex problem-solving, and the challenge of continued support for creative processes among discordant team members. This article advises the heeding of these issues to help guide practitioners (and indeed, managers) to achieve two objectives. One objective is to maintain staff members' engagement in creative productivity. This objective naturally flows to another – to minimise or replace any loss in business resources caused by deviance. The relevant scholarship thus far has not asked the right questions for long enough to hone our knowledge in this nuanced yet important sphere, within which we nevertheless may have to operate blindly. 81

Future-proofing the Workplace: How COVID-19 Changed the Employment Landscape Forever – *Darren Gardner*

COVID-19 has fast-tracked legislative and societal change, led to technological advancement and employer innovation, and challenged employee resilience. It has forced employers and employees to rethink traditional workplace arrangements, and proven it is possible to quickly adapt to more flexible, non-traditional, ways of work. These changes have, overall, positively influenced attitudes to flexible work. The proven possibility of engaging productive labour remotely, also potentially presents some future challenges to traditional labour market supply, pay and conditions modalities. The lifting of government restrictions, the return to new smaller-shared or hubbed-remote workplaces – will alter employee and union expectations of safe work arrangements. A greater reliance on technologically augmented work arrangements also poses unique risks in reasonably ensuring safe, resilient and reliable labour services. Greater due diligence will be needed

to better future proof the workplace from future pandemic risks and novel risks bound to arise working in a "new normal". 85

The Inconsistencies of Industrial Manslaughter Laws in the Northern Territory and Australian Capital Territory – *Wazeem Kadir*

In recent years, there has been an effort by multiple parties (unions, governments and others) to have enacted industrial manslaughter offences in the work health and safety laws. The general purpose of enacting such an offence was to inflict harsher punishment on employers and their officers responsible for unlawfully causing the death of a worker in the workplace. This article examines industrial manslaughter offences enacted in the Northern Territory and Australian Capital Territory. There are some fundamental inconsistencies between the industrial manslaughter offences in both jurisdictions, that possibly abrogate the concept of harmonisation. While minor inconsistencies have always existed in WHS offences in each of the States' and Territories' laws, inconsistencies in "industrial manslaughter" offences are unacceptable. This article does not aim to provide definite solutions, but to highlight the need for consistency among jurisdictions, especially where the offence is as serious as manslaughter. 94

Employment Law and Law Firms – *Rick Manuel*

Like any employer, law firms have obligations under the laws regulating employment to those who work for them – solicitors as well as support staff. Firms have to be especially cognizant of the National Employment Standards in the *Fair Work Act 2009* (Cth), but also attentive to relevant industrial instruments and contracts of employment. Particular issues for law firms to consider include the terms of engagement of solicitors, restraint of trade clauses, and how to deal with complaints of discrimination/harassment. Rick Manuel considers the employment obligations of law firms and the penalties they could face for contravening them, and suggests a range of practical measures firms should take to adhere to their obligations, including having appropriately drafted employment contracts, conducting regular compliance audits, and providing staff with written information and detailed inductions as to their rights and training in relevant policies. 99

INTERVIEW

Abiding Faiths: Judge Gerard Phillips – *Craig Ryan* 106

CASE NOTES

The Great Barrier Rift – *Xavier Boffa*

Since the Full Federal Court's decision in James Cook University v Ridd, some uncertainty remains regarding the impact of "academic" and "intellectual" freedom upon the interpretation of enterprise agreements within the higher education sector. Xavier Boffa surveys the differing approaches towards these concepts adopted by Judge Vasta in the Federal Circuit Court, the Federal Court majority on appeal, and Justice Rangiah in dissent. The author notes that the High Court may soon have an opportunity to provide further clarity to these conflicting approaches. Regardless, the Ridd case is a reminder to employees of the potential consequences of failing to comply with lawful and reasonable directions from their employers. 114

What's in a Day? – *El Leverington*

The word "day" appears 465 times in the Fair Work Act 2009 (Cth), including 139 times in its plural form. After several years of uncertainty around the true meaning of a day, the High Court of Australia has at last settled the question – at least in respect of

its operation in Subdiv A of Div 7 of Pt 2-2 of the Fair Work Act, which prescribes the National Employment Standards' entitlement to paid personal/carer's leave. Four of five Justices, including Kiefel CJ, decided in favour of Mondelez Australia Pty Ltd, finding with the assistance of extrinsic materials that in this context a "day" is a notional day and the 10-day entitlement is intended to bring equity between different classes of worker, irrespective of the spread of working hours. The three decisions – Kiefel CJ, Nettle and Gordon JJ (plurality), Gageler and Edelman JJ (separately) – comprise a masterclass in statutory interpretation. 118

Arbitrary Exercise of a Discretion Kicked Out of the Park – *Lachlan Robison* 122

BOOK REVIEWS

"Letters to Lily Vale": The Life and Letters of Ernest William Latchford MC, MBE 1916 to 1919 France, Persia and Russia, by Mark Latchford – *Reviewed by Jennifer Giles* 125

Sir Frederick Jordan: Fire under the Frost, by Keith Mason – *Reviewed by Malcolm Kerr OAM* 127

IFMRO to IFHRO to IFHIMA: An Historical Overview 1949–2019, by Professor Phyllis J Watson AM – *Reviewed by Craig Ryan* 129

THE LAST WORD … 133

DIARY 137

INDEX 139