HOLMANWEBB LAWYERS

Health Law Alert

April 2018

Mandatory Data Breach Notification has Commenced! Do you have a Data Breach Response Plan?

By Alison Choy Flannigan, Partner and Rui Chi, Solicitor

Mandatory data breach notification under the *Privacy Act 1988 (Cth)*, applies to the Commonwealth public sector and the private sector including organisations which hold health information and provide a health service (which is broadly defined). The mandatory breach notification requirements commenced on 22 February 2018.

By now you should have developed a data breach response plan and provided relevant training to your Board, management and staff.

The Office of the Australian Information Commissioner published in February 2018 a Guide to Managing Data Breaches in accordance with the *Privacy Act 1988* (Cth), a copy of which is available at: https://www.oaic.gov.au/agencies-and-organisations/guides/data-breach-preparation-and-response

The Guide provides some useful information, including how to prepare a data breach response plan and four key steps to respond to data breaches, namely:

- **Step 1: Contain** the data breach to prevent any further compromise of personal information.
- **Step 2: Assess** the data breach by gathering the facts and evaluating the risks, including potential harm to affected individuals and, where possible, taking action to remediate any risk of harm.
- **Step 3: Notify** individuals and the Commissioner if required. If the breach is an 'eligible data breach' under the Notification Data Breach scheme, it may be mandatory for the entity to notify.
- **Step 4: Review** the incident and consider what actions can be taken to prevent future breaches.

For further information, please refer to our previous article in our May 2017 Health Law Bulletin at: http://www.holmanwebb.com.au/blog/mandatory-data-breach-notification-to-commence-privacy-amendment-notifiable-data-breaches-act-2017-cth

Corporate Governance Update for Not-for-profit Health and Aged care Providers

By Alison Choy Flannigan, Partner

On 12 February 2018, the NSW Government released the report of former NSW Supreme Court Judge Patricia Bergin, SC into the fundraising activities of RSL NSW, RSL Welfare and Benevolent Institution and RSL LifeCare.

A copy of the report is available at: https://www.finance.nsw.gov.au/inquiry-under-charitable-fundraising-act-1991/

All not-for-profit health and aged care providers who are registered as a charity with the Australian Charities and Not-for-profits Commission must ensure that they comply with the ACNC Governance Standards available at: http://www.acnc.gov.au/ACNC/Manage/Governance/ACNC/Edu/GovStds_overview.aspx

Not all charities realise that fundraising is more than 'rattling the tin'. Charitable fundraising can involve raising funds through your website, through raffles or special events organised by the organisation with volunteers and residents.

If a charity has a charitable fundraising authority, then it must also comply with the relevant State/Territory charitable fundraising authority conditions. For example, in New South Wales there are special requirements for Constitutions, dispute resolution, the financial accounts and auditing. Refer to: http://www.fairtrading.nsw.gov.au/ftw/Cooperatives_and_associations/Charitable_fundraising/Fundraising_controls.page

A Charitable Fundraising and Donations Policy and Charity Pack for staff and volunteers which complies with legal requirements is a recommended compliance tool.

Holman Webb conducted a corporate and clinical governance review and assisted with the development of charitable fundraising policies on behalf of RSL LifeCare as part of its continuous improvement strategy in response to the Bergin Inquiry. Our recommendations for our Stage 1 Report were included in the Bergin Inquiry Report.

Voluntary Assisted Dying Laws Passed in Victoria

By Alison Choy Flannigan, Partner and Sarah Spear, Associate

On 22 November 2017, the Victorian Government became the first State in Australia to pass voluntary assisted dying legislation which is due to commence in 2019.

Under the *Voluntary Assisted Dying Act 2017* (Vic) (**Act**), "voluntary assisted dying" is defined as the administration of a voluntary assisted dying substance and includes steps reasonably related to such administration.[1]

Who will be eligible?

A person is eligible for access to voluntary assisted dying if the person is[2]:

- aged 18 years or more; and
- an Australian citizen or permanent resident and ordinarily resident in Victoria and at the time of making a first request, has been ordinarily resident in Victoria for at least 12 months; and
- has decision-making capacity (as defined) in relation to voluntary assisted dying; and
- diagnosed with a disease, illness or medical condition that is:
    - incurable; and
    - is advanced, progressive and will cause death; and
    - is expected to cause death within weeks or months, not exceeding six months; and
    - is causing suffering to the person that cannot be relieved in a manner that the person considers tolerable.

However, a person is not eligible for access to voluntary assisted dying only because that person is diagnosed with a mental illness within the meaning of *Mental Health Act 2014 (Vic)*.[3]

When may a person access voluntary assisted dying?

A registered medical practitioner, known as a 'co-ordinating medical practitioner' under the Act, must assess whether a person meets the eligibility criteria for assisted dying.

A person may access voluntary assisted dying if:

(a) the person has made a first request; and

(b) the person has been assessed as eligible for access to voluntary assisted dying by:

(i) the co-ordinating medical practitioner for the person; and

[1] *Voluntary Assisted Dying Act 2017 (Vic)* s 9.
[2] Ibid s 9.
[3] Ibid, section 9(2).

(ii) a consulting medical practitioner for the person; and

(c) the person has made a written declaration; and

(d) the person has made a final request to the co-ordinating medical practitioner; and

(e) the person has appointed a contact person (to monitor the voluntary assisted dying substance); and

(f) the co-ordinating medical practitioner has certified in a final review form that the request and assessment process has been completed as required by this Act; and

(g) the person is the subject of a voluntary assisted dying permit.

Voluntary assisted dying must not be initiated by a registered health practitioner in the course of providing services to the person but a registered health practitioner may provide information about voluntary assisted dying to a person at that persons' request.[4]

A co-ordinating medical practitioner must hold a fellowship with a specialist medical college or be a vocationally registered general practitioner and must have completed approved assessment training.[5]

A registered health practitioner who has a conscientious objection to voluntary assisted dying has the right to refuse to do any of the following:

(a) to provide information about voluntary assisted dying;

(b) to participate in the request and assessment process;

(c) to apply for a voluntary assisted dying permit;

(d) to supply, prescribe or administer a voluntary assisted dying substance;

(e) to be present at the time of administration of a voluntary assisted dying substance;

(f) to dispense a prescription for a voluntary assisted dying substance.[6]

Generally, the person must administer the drug themselves, but there are provisions which allow the co-ordinating medical practitioner to apply for a 'practitioner administration permit' if the person is physically incapable of self-administration[7].

The legislation will come into operation on a day to be proclaimed, or on 19 June 2019 if not proclaimed earlier.[8]

[4] Ibid, s 8
[5] Ibid ss 10, 17
[6] Ibid s 7
[7] Ibid s 48(3)(a)
[8] Ibid s 2

Private Health Insurance Reform – How will it affect you?

By Alison Choy Flannigan, Partner

The Australian Government announced on 13 October 2017 a wide ranging package of reforms to make private health insurance simpler and more affordable for Australians.

These include:

- requiring insurers to categorise products as gold/silver/bronze/basic, and use standardised definitions for treatments to make it clear what is and isn't covered in their policies;
- upgrading the www.privatehealth.gov.au website to make it easier to compare insurance products, and allowing insurers to provide personalised information to consumers on their product every year;
- boosting the powers of the Private Health Insurance Ombudsman and increasing its resources to ensure consumer complaints are resolved clearly and quickly;
- reducing the benefits paid for implanted medical devices under an agreement with the Medical Technology Association of Australia;
- requiring insurers to allow people with hospital insurance that does not offer full cover for mental health treatment to upgrade their cover and access mental health services without a waiting period on a once-off basis;
- allowing insurers to discount hospital insurance premiums for 18 to 29 year olds by up to 10 per cent, with the discount phasing out after people turn 40;
- allowing insurers to expand hospital insurance to offer travel and accommodation benefits for people in regional and rural areas that need to travel for treatment;
- increasing the maximum excess consumers can choose under their health insurance policies for the first time since 2001;
- preventing insurers from offering benefits for a range of natural therapies, such as Bowen therapy or Rolfing; and
- continuing to support private hospitals, including transferring administration of the second tier default benefit, which provides a safety net for consumers attending non-contracted hospitals, to the Department of Health.

An exposure draft is due at the end of May 2018, with the legislation proposed to be passed in June 2018, so watch this space.

What Approved Providers can and cannot charge under the Aged Care Act – *Regis Aged Care Pty Limited v Secretary, Department of Health [2018] FCA 177; Regis Aged Care Pty Limited v Secretary, Department of Health (No 2) [2018] FCA 454*

By Alison Choy Flannigan, Partner

The Federal Court handed down a decision in *Regis Aged Care Pty Limited v Secretary, Department of Health [2018]* on 2 March 2018, confirming that the *Aged Care Act 1997 (Cth)* (**Act**) disallows approved providers from levying an "Asset Replacement Charge" on aged care residents.

In *Regis Aged Care Pty Limited v Secretary of Health* [2018] FCA 454 (6 April 2018) the Federal Court made the following declaration:

> *"The Asset Replacement Charge, provided for by cl 7 of the Regis Residential Care and Accommodation Agreement (in the form set out at Tab A to the Amended Agreed Statement of Facts filed on 10 October 2017), is a charge prohibited by s. 56-1(e) of the Aged Care Act 1997 (Cth)."*

The decision is a reminder to aged care providers to ensure that they adhere to legal requirements in charging fees to residents.

Facts

Regis imposed upon certain (but not all) individuals who received care in the aged care facilities it operates an "asset replacement charge" to "fund reinstatements of fixtures, fittings and infrastructure, rebuilding and construction of, or at, Regis's residential care facilities." Regis sought a direction that the charges were lawful.

A term requiring payment of the asset replacement charge was part of the written residential care agreement between the resident and Regis.

The Department issued notices to Regis under section 9-2 of the Act and the proceedings were commenced as a consequence of the failure of the parties to reach an agreed position.

Legislation

The Act and the *Aged Care (Transitional Provisions) Act 1997* (the **Transitional Provisions Act**) provide a scheme of fees that aged care providers (receiving subsidies under the Act) can charge to residents. Relevant provisions are found in Division 52C (Residents fees) and Division 56 (What are the general responsibilities relating to user rights?) of the Act and Division 58 (What are the responsibilities relating to resident fees?) and Division 57 (What are the responsibilities relating to accommodation bonds?) of the Transitional Provisions Act.

These provisions require that fees charged for, or in connection with, residential care, or for care and services specified in the *Quality of Care Principles 2014* (the **Principles**) cannot exceed the maximum calculated under Division 52C of the Act and Division 58 of the Transitional Provisions Act.

Fees charged for 'other care or services' must be agreed with the resident beforehand and the provider must give the resident an itemised account of the other care or services.

Providers are not permitted to charge fees above the maximum amount worked out under the Act and Transitional Provisions Act for services or activities that are part of the normal operation of an aged care home, or are required to be delivered as part of a provider's responsibilities. In some circumstances providers may charge additional fees for 'other care or services' only where the resident receives a direct benefit or has the capacity to take up or make use of the services.

This differs from extra service fees that are charged for rooms within aged care homes (either individual rooms or across the home) that have been granted extra service status by the Department. Extra service fees are for higher standards of food, accommodation and hotel-type services but not for care.

The decision

Mortimer, J of the Federal Court held that the asset replacement charge (**ARC**) was inconsistent with the scheme established by the Act and its associated regulatory instruments and is prohibited by section 56-1 of the Act.

The Court relevantly referred to Division 52C and section 56-1(e) of the Act. Mortimer J held at para 118 that the prohibition against a fee of the kind levied by Regis through the ARC can be located in section 56-1(e) of the Act.

Division 52C sets out the maximum resident fees that can be charged to residents. Resident fees are fees charged to a care recipient for, or in connection with, residential care provided to the care recipient through a residential care service.

Section 56-1(e) sets out the responsibilities of an approved provider in relation to a care recipient to whom the approved provider provides, or is to provide, residential care, including "*to charge no more for any other care or services than an amount agreed beforehand with the care recipient, and to give the care recipient an itemised account of the other care or services".*

The Court at para 124 considered that the phrase "to charge no more than" is a language of prohibition: an approved provider is prohibited from charging more than what is stipulated.

The Court held at para 125, that the text and structure of Division 55, read with the rest of the legislative scheme, discloses an intention that only the fees and charges that approved providers may impose on care recipients are those fees and charges made in return for the provision of care and services to the person who pays the fees and charges.

In return for subsidies (and the use of accommodation payments and contributions, and access to grants), approved providers are to fulfil their responsibilities. Subject to the restrictions outlined, they are not precluded from charging additional sums of money for aged care they provided. *What they are precluded from doing is charging recipients of care any fees which are unrelated to the care and services provided to those individuals.*

What types of services cannot attract additional fees?

The Commonwealth Department of Health has released an information paper available at:

https://agedcare.health.gov.au/programs/residential-care/charging-fees-for-additional-care-and-services-in-residential-aged-care-including-capital-refurbishment-type-fees

The paper states that approved providers cannot charge additional fees for:

- items listed in Schedule 1 of the Principles (some exceptions apply for items in Part 3); or
- other services or activities that would form part of the general operation of the aged care home; or
- services that are required to be delivered as part of a provider's responsibilities.

Examples of 'other care and services' for which charging of additional fees to residents is not permitted include, but are not limited to:

- maintenance inside and outside the aged care home;

- any repairs or replacements necessary because of normal wear and tear;
- general refurbishment of the resident's room after they have left the aged care home;
- services or activities that would form part of the general operation of the aged care home, or are required in order to deliver residential care to the individual;
- employment of administration staff where the staff member is primarily undertaking activities related to the general operation of the aged care home; and
- capital costs, asset management or replacement.

Obtaining agreement for additional services and fees

The provider must obtain agreement from residents before delivering any care or services for which additional fees are chargeable.

Key points

Accordingly, the key points taken from the case are as follows:

- for care and services that an approved provider is required to provide to residents under the Act, they are prohibited from charging more than what is stipulated in the Act; and
- for other care and services, an approved provider may only impose a fee if the fee has been agreed beforehand and is related to the care and services provided to that resident and the provider must give an itemised account of the other care or services.

What do you do if your Employees Don't turn up for Work? - *Boguslaw Bienias v Iplex Pipelines Australia Pty Ltd [2017] FWCFB 38*

By Robin Young, Partner

The Full Bench of the Fair Work Commission (**FWC**) ruled in January 2017 that the abandonment of employment clauses in six modern awards are not terms which are permitted or required to be included in modern awards under the *Fair Work Act 2009 (Cth)* (**Act**) and must be removed.

The Full Bench's decision was handed down as part of the FWC's four yearly review of modern awards. This occurred after the Bench was asked by the President of the FWC last year to review the clauses in the wake of the Full Bench's decision in *Boguslaw Bienias v Iplex Pipelines Australia Pty Ltd [2017] FWCFB 38* (**Iplex**) that the abandonment of employment clause in the Manufacturing Award has no effect if it is read as effecting an automatic termination of employment.

In Iplex, an employee had been dismissed for allegedly abandoning his employment when he failed to show up to work for a fortnight without the consent of his employer. At first instance, Senior Deputy President O'Callaghan held that the employee's actions in failing to attend for work for 14 days meant that he was presumed, according to the Manufacturing Award, to have abandoned his employment. This meant that the employer's actions in subsequently writing to the employee to confirm the termination of employment was no more than an acknowledgement of his abandonment of employment.

However, on appeal, the Full Bench held that the fact an employee may be deemed to have abandoned their employment because they have been absent without their employer's knowledge or consent for a specified period of time under a modern award clause, does not bring the employee's employment to an automatic end. Rather, the employer must take the additional step of terminating the employment, otherwise the employment will continue. The Full Bench in Iplex also held that if the abandonment of employment clause in the Manufacturing Award is interpreted as effecting an automatic termination of employment, it is of no effect.

Following its review of the abandonment of employment clauses in the six modern awards as part of the four yearly review, the Full Bench agreed with the approach taken in Iplex, ruling that these clauses are not permitted or required to be included in modern awards and must be removed. In doing so the Full Bench held that all these clauses seek to achieve is to "establish a minimal process by which an employer may proceed to dismiss an employee in response to an absence from work without consent."

However, the Full Bench stated that there would be utility in the above modern awards including a provision which identifies the procedures to be followed in the event that there is an extended and unexplained absence from duty on the part of an employee (for example, the steps the employer might take to consult with the employee regarding their whereabouts before taking any action against them). Interested parties have accordingly now been given an opportunity to present proposals for such a replacement clause.

Lessons for employers

Clauses that deem when an employee has abandoned employment are not uncommon in industrial instruments and have been considered by the FWC and its predecessors in a number of earlier decisions. However, the Full Bench's recent decision as part of the four yearly review of modern awards has confirmed the FWC's view as to how such clauses should be interpreted.

In essence, the decision confirms that when abandonment of employment occurs as contemplated by an applicable award or agreement (i.e. an employee is deemed to have abandoned their employment in accordance with an award or agreement provision), the employment will not automatically come to an end. Rather, the employer will have to take some further action to bring about the termination of the

employment. This means that it is not the deeming of the unauthorised absence as an abandonment which causes the employment to terminate, but rather the act of the employer.

The obvious risk of the above is the potential exposure of employers to an unfair dismissal claim arising out of the termination due to the employee's abandonment. For this reason, employers should take all reasonable steps in attempting to contact the absent employee to ascertain their whereabouts before proceeding to terminate their employment on the basis of abandonment, and when in doubt, seek advice.

Awards

A number of our partners have been named in Best Lawyers, International for 2018 including the following members of our health and aged care team:

- Alison Choy Flannigan - Health & aged care law
- John Van de Poll – Insurance Law
- Caroline Knight – Occupational Health and Safety Law

Holman Webb has been named as finalists for the Australasian Law Awards 2018 for Law Firm of the Year (1-100 lawyers) and Insurance Specialist Firm of the Year. Chairman, John Wakefield and CEO, Greg Malakou have also been named finalists for Australasian Arbitrator of the Year, and Law Firm Leader of the Year (≤200 lawyers), respectively.

These awards define excellence in the legal profession, recognising leading firms and in-house teams for their outstanding achievements over the past 12 months.

Unfair dismissal update – casual and labour hire employees

By *Ethan Brawn, Senior Associate*

The Fair Work Commission (**FWC**) has handed down a number of recent decisions which may provide increased access to unfair dismissal claims by employees engaged on a casual basis, particularly those employees engaged in the labour hire industry.

Part 3-2 of the *Fair Work Act (Cth) 2009* (the **Act**) provides the legislative framework for claims for unfair dismissal. An employee will need to have accrued six months continuous service (12 months for a small business) before they can bring an unfair dismissal claim. The period of service as a casual employee does not count towards the period of employment unless:

- the employment as a casual employee was on a regular and systematic basis; and
- during the period of service as a casual employee, the employee had a reasonable expectation of continuing employment by the employer on a regular and systematic basis.

The following is an outline of some recent decisions which illustrate how the FWC is approaching these issues.

Recent decisions

Robert Smith v Goldfields People Hire Pty Ltd ATF Goldfields People Hire Trust T/A GPH Recruitment [2017] FWC 6730

The worker was engaged by a labour hire company to work as a truck driver for his miner client. His role was defined as a casual under a contract of employment. He worked on a 3 week roster cycle, in which he worked 4 days on, 3 nights on, 3 days off, 3 days on, 4 nights on, 4 days off and performed these duties for approximately 10 months.

Due to a change in staffing requirements from the host employer, his services were no longer required and his employment was terminated. Subsequently he brought a claim for unfair dismissal and the employer made a jurisdictional objection. It alleged that Smith had no reasonable expectation of ongoing employment, and that he was merely performing a task that came to an end (meaning he was not terminated on the initiative of the employer).

A Casual Employment Declaration signed by the employee, stated:

"I understand the conditions of working for a labour hire company and that the length of my assignments will depend on my level of performance and competency, my classification and the requirements of the clients of GPH recruitment. I understand and accept that with any assignment, there can be no expectation of permanent employment."

However, the FWC found that "the fact that he [the Applicant] knew and accepted his status as a casual employee does not, of itself, mean he could never hold an expectation of continuing employment by Goldfields [the Respondent]." Importantly, it found that "an expectation of continuing employment is not the same as an expectation of permanent employment." As there had been no other factors (such as issues with performance, or an indication of a change in the requirements of the host employer that would affect

the employee) the FWC found that the employee did have a reasonable expectation of continuing employment.

The FWC further found that the employee's contract of employment was clearly for multiple tasks and that there was no evidence that the terms of the employment were limited to a specified task.

Mandy Morrow v MedHealth Pty Limited T/A MedHealth [2017] FWC 3120

Ms Morrow was employed as one of around 30 casual employees who performed 'overflow' typist work from home. Tasks to be completed by typists were uploaded to an online virtual queue called 'Report Manager' by the employer. The amount of work uploaded to Report Manager each day was not predictable. The employee was not required to log into Report Manager at set times and there was no minimum level of work that the employee was required to complete. The employee could therefore choose which tasks, and the level of tasks she completed. As a result, the fortnightly pay of the employee was variable. The employer subsequently failed to allocate work to the employee. The employee applied to the FWC alleging that she had been unfairly dismissed by the employer.

The employer contended that the above work arrangement meant the employee was not employed on a regular and systematic basis, and that as the level of work uploaded was variable, and the level of work which the employee was required to complete was discretionary, that the employee did not have a reasonable expectation of continuing employment. In support of her application the employee relied on the fact that her timesheets showed that she worked a reasonably consistent schedule earning approximately $600.00 per week, clause 7 of her contract referred to notification of working hours, the requirement to be on a roster; and an email from the employer seeking further commitments from typists for increased workload.

The FWC found that following the decision of *Yaraka Holdings Pty Ltd v Ante Giljevic (2006) 149 IR 339* (**Yaraka**) it is a workers 'engagement' that must be regular and systematic, not the hours worked. Further, the term 'regular' should be interpreted liberally such that it means only 'frequent' or 'often', not 'uniform' or 'constant'. "Systematic" was defined as to "not require the worker to be able to foresee or predict when his or her services may be required" but merely that there be a sufficient pattern of engagement that occurs as a consequence of "an ongoing reliance upon the worker's services as an incident of the business by which he or she is engaged" (Yaraka). On this definition, the FWC found that the employee was employed by the employer on a systematic and regular basis. With respect to whether the worker had a reasonable expectation of continuing employment, the FWC found that a clear long standing pattern could be established such that the employee would have a reasonable expectation of ongoing employment.

Rebecca Barnes v Plantagenet Bakery [2017] FWC 3762

The employee commenced employment with the employer on a part time basis in April 2016. On 29 August 2016, the employee's employment status was changed to casual and continued as such until her dismissal on 3 February 2017. The employee applied to the FWC alleging unfair dismissal. The employer alleged that as a casual employee, the employee was not entitled to this protection.

With respect to whether there was an expectation of ongoing regular and systematic employment, the FWC found that there was no evidence to support this proposition. To the contrary, an expectation of ongoing employment could be established on the basis that the employee had made enquiries as to her hours/roster at the time of her dismissal indicating she expected her employment with the employer to continue in the same systematic and regular fashion as it had previously.

Manisha Kumar v Australia Personnel Global Pty Ltd [2017] FWC 5661

The employer was a labour hire company that employed the employee, Ms Kumar, on a casual basis. The employee was lent on hire to a chicken processor as a casual labourer where she worked approximately 37.5 hours per week. Due to attendance and punctuality issues, the host employer lost trust and

confidence in Ms Kumar and directed the employer to no longer allocate her to work at its site. This ultimately resulted in her termination.

In the FWC, the employer submitted that the employee was not entitled to bring her application on the basis that she did not have a reasonable expectation of ongoing employment. However it was found that owing to the employee's work history with the employer, the requirement that she inform either the employer and/or the host employer if she was unable to attend work, and the lack of evidence to suggest that the employee anticipated a change in her employment arrangements led to a reasonable expectation of continuing employment being held by the employee. As such, the employee was protected from unfair dismissal under the Act.

When examining the question of unfair dismissal, the FWC made a number of comments with respect to unfair dismissal relevant to labour hire companies. In particular the FWC noted that following the decisions of *Kool v Adecco Industrial Pty Ltd T/A Adecco* [2016] FWC 925 and *Pettifer v MODEC Management Services Pty Ltd* [2016] FWCFB 5243 the employer, as a labour hire company, could not solely rely upon its contractual relationship with the host employer to defeat the rights of a dismissed worker. The FWC found that the employer had failed to investigate the complaints of the host employer, or to provide warning to the employee with respect to her behaviour; therefore its termination of the worker was unfair.

Considerations for employers

The FWC's approach to these cases suggests that it will interpret the application of the unfair dismissal jurisdiction broadly in relation to casual employees. Key points for consideration include:

- even if a contract for casual employment makes clear that there is no expectation of permanent employment this does not necessarily protect an employer from a finding that a casual employee is entitled to protection from unfair dismissal.

- in establishing that an employee holds a reasonable expectation of continuing employment, the FWC may find in their favour even though limited evidence is put forward in support of the proposition.

- businesses should give casual employees similar due process as they would with permanent staff. In the context of labour hire, consider redeployment prior to termination.

- employment contracts which purport to employ an employee under a casual engagement should make clear that the employee's employment is casual with no ongoing expectation of continued future engagement. This will provide some level of protection but will not be determinative.

- in relation to labour hire, the employer should clearly spell out what tasks the employee is being assigned to perform, and make it clear in their employment contract that their continued employment is contingent on the labour requirements of the host and the host's willingness to accept the employee's labour.

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