IR POLICY AND GOVERNANCE UPDATE

INTRODUCTION

In this week's final Update for the year, we look at the Australian economy moving at a snail's pace, current unemployment figures, the RBA's last decision for the year, we remind members of the VMA HR/IR Helpdesk hours across the festive season, some issues around Apprentice employment contracts, we look at potential issues when hiring overseas domiciled workers, a recent redundancy related decision of interest, a stop bullying decision of the Fair Work Commission, and some employment related regulatory issues coming up in the new year.

STATE OF AUSTRALIAN ECONOMY

National accounts data released by the Australian Bureau of Statistics (ABS) last week evidences the Australian economy grew by only 0.3% in the September quarter of 2024, and 0.8% over the past 12 months. This result was materially short of market expectations with the annual rate of growth now at its lowest point since the COVID impacted December quarter of 2020.

From the Reserve Banks perspective, part of the recent decline in headline inflation is expected to be temporary, and headline inflation is expected to increase again as cost-of-living relief unwinds. Underlying inflation, which is a better guide to inflation momentum, is easing more slowly. The labour market remains tight and total demand for goods and services still exceeds supply. But the gap between demand and supply is narrowing and inflation is coming down slowly.

Currently, the economy continues to be underpinned by public sector expenditure, with government consumption and public investment both contributing to growth in the September quarter. The strong rise in government spending offset declines in building and private sector inventory investment. This dynamic provides further evidence of the two-speed economy emerging in Australia, where the public sector is expanding rapidly while the private sector struggles to achieve comparable gains. Without a shift in the current state, achieving stronger and more sustainable economic growth will remain difficult to achieve.

VMA HR HELPDESK – FESTIVE SEASON OPERATING HOURS

A heads up for members that our HR Helpdesk Advisory service (1800 835 167) will be operating on reduced hours during the Christmas/New Year period as follows.

Monday December 23	9am - 3pm
Tuesday December 24	9am - 12 noon
Wednesday December 25 (Christmas Day)	**CLOSED**
Thursday December 26 (Boxing Day)	**CLOSED**
Friday December 27	9am - 12 noon
Monday December 30	9am - 12 noon
Tuesday December 31	9am - 12 noon
Wednesday January 1 (New Year's Day)	**CLOSED**

Normal operating hours will resume from Thursday, 2 January 2025. If members have any urgent matters during that time please reach out via email hrhelp@visualmediaassociation.org.au and the Advisory team will get back to you as soon as possible.

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RBA INTEREST RATE DECISION

In its final decision for 2024, last week the Board of the RBA determined to hold the cash rate at 4.35% ahead of Christmas and New Year's.

In a statement, the RBA Board said "While underlying inflation is still high, other recent data on economic activity have been mixed, but on balance softer than expected in November." Further they said that "Taking account of recent data, the board's assessment is that monetary policy remains restrictive and is working as anticipated. Some of the upside risks to inflation appear to have eased, and while the level of aggregate demand still appears to be above the economy's supply capacity, that gap continues to close."

With inflation now getting closer to the target for the RBA, signs are pointing towards a potential rate cut on the horizon, however when exactly that occurs in 2025 remains to be seen.

UNEMPLOYMENT FIGURES

According to the latest data from the ABS, Australia's unemployment rate dropped to 3.9% in November, a decrease of 0.2 percentage points. The decline was driven by an increase of 36,000 people finding employment and a decrease of 27,000 in the number of unemployed.

APPRENTICESHIP EMPLOYMENT CONTRACTS

Members are likely to be hiring apprentices in the early part of 2025. Members should ensure that employment contracts for apprentices are well drafted to avoid unnecessary risks and that employment practices take account of the relevant requirements and exemptions within the Fair Work Act.

The drafting of employment contracts for apprentices raise some unique issues. Such contracts have traditionally been characterised as contracts for a specific period of time. However, contracts need to be drafted in a manner that considers the fact that apprenticeships are typically competency-based and often completed in a shorter period of time than four years. Failure to appropriately draft related contracts can result in risks, particularly when the employment relationship comes to an end at the completion of the apprenticeship period or earlier.

A further point to keep in mind is that if an apprentice is not going to be employed upon completion of the apprenticeship, the employment should come to an end on the last day of the apprenticeship. Once the employee has been engaged beyond the term of the apprenticeship, the employer is exposed to claims that the relevant exemptions under the unfair dismissal and redundancy laws no longer apply.

Additionally, prior to or upon commencement, members need to ensure they provide a new apprentice with a copy of the Fixed Term Contract Information Statement and the Fair Work Information Statement.

ISSUES WHEN HIRING OFFSHORE WORKERS

A recent decision of the Fair Work Commission has evidenced how Australian businesses that engage offshore 'contractors' can make incorrect assumptions over the employment status of those workers.

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In this case, the Philippines based applicant was engaged under a contract from July 2022 and was terminated in March 2024. The applicant lodged an unfair dismissal claim and named the company as the employer. In response, the company argued that the applicant was not 'dismissed' within the meaning of s 386 of the Fair Work Act 2009 because she was not an employee. The company argued the applicant was engaged as an independent contractor and the work was performed under a contract for services. The company sought to rely upon the written contract between the parties which described the relationship as one of independent contractor.

The contract was titled "independent Contractor's Agreement' and described the relationship as one of independent contractor, with the standard clauses that contract did not create an employment relationship, and that the company will not be liable for any other benefits or remuneration other than what was specified and that the firm was not liable for taxes, worker's compensation, unemployment insurance, employer's liability, social security or other entitlements.

However, based on the clause by clause assessment of the contractual terms and the reality of the relationship, the Commission found the relationship was an employment relationship, not one of principal and independent contractor. As such, the applicant was allowed to pursue her unfair dismissal claim. In coming to that finding, the Commissions reasoning for finding the applicant to be an employee covered a range of factors including the following:

- The applicant received daily instructions and was supervised in performing the work. Further, she was required to perform duties within directed timeframes. This suggested a level of control being exercised over the work being performed that was consistent with employment.

- Further, the contract required the work to be performed by the applicant with no option to delegate the work to others.

- The applicant was not conducting her own business, rather she was undertaking work within another's business rather than as part of an independent business being conducted by the applicant. Further, the applicant's use of a PBX phone account identified her as calling from the firm's office and the use of the firm's signature block on her emails suggested the work was being performed in the Respondents business.

- The applicant was not providing expertise or specialist services and was paid on an hourly basis for a 40 hour week.

- The arrangement was ongoing unless terminated in accordance with the terms of the contract, which suggested an employment relationship.

What makes this decision particularly interesting is how an international employment arrangement can be drawn into the Australian workplace system. Regardless of the geographic location, if your business is an Australian national system employer bound by the Fair Work Act, and the individual is

deemed to be an employee, the same rights and obligations may apply to that employee as to other employees located in Australia.

Key takeaways
If your business engages overseas-based contractors or employees, it is important to carefully assess whether their contracts and working arrangements appropriately reflect the nature of the relationship. Factors such as control, supervision, and payment structure should align with the terms of the contract to avoid misclassification risks, and a finding that a contractor is in fact an employee.

If it appears the relationship is potentially one of employment rather than independent contractor, businesses should consider mitigating associated risks by having a third party in that country be the legal employer so as to handle all aspects of the employment relationship in line with local labour laws. This is often referred to as an "Employer of Record" model.

Additionally, by having foreign domiciled workers, there is a potential risk that a business will be considered to be carrying on a business through a permanent establishment in the relevant foreign country. This could potentially expose an Australian business to tax in the foreign country on some of its business profits.

REDUNDANCY DURING A FLEXIBLE WORK ARRANGEMENT
In a recent decision, the Fair Work Commission considered whether a redundancy was genuine after an employee was made redundant during a flexible work arrangement.

Due to changes in operational requirements of the business, the employer in this case undertook a restructure of its operations which resulted in the redundancy of an employee's position. The employee was working remotely from Japan under an agreed flexible working arrangement, although their position was ordinarily based in Australia. Although the employee did not dispute the operational reasons for the redundancy, he claimed the dismissal was unfair as it had occurred during his flexible work arrangement.

The Commission rejected the employee's argument stating that employees are 'never immune from being made redundant', The Commission stated that employees can be made redundant while on workers compensation, parental leave, sick leave and or during a flexible working arrangement, due the potential for operational issues arising at any time. Given the appropriate processes were followed, and that there was no redeployment or suitable alternative position to be considered, the Commission ruled the redundancy was genuine and dismissed the claim.

STOP BULLYING ORDER GRANTED
In another recent decision of interest, the Fair Work Commission determined it should grant a 'stop bullying' order against a company General Manager who was on stress leave at the time.

In this case, the General Manager engaged in bullying behaviour against the Chief Financial Officer of the company. Such conduct and behaviour of the General Manager included:

- undermining the CFO's authority;
- sending hostile emails;
- imposing impossible deadlines; and

- trying to reduce the CFO's role to debt collection despite the task being assigned to another employee.

While absent on stress leave, the General Manager continued to bully the CFO.

The CFO claimed the 'relentless bullying and harassment' had led to the CFO suffering from severe anxiety, sleep issues and 'immense mental pressure.' During the hearing, the CFO's director advised the Commission that he was 'torn between retaining a key employee' whilst also maintaining the CFO, who had been employed for more than seven years.

The Commission found the General Manager's actions amounted to bullying, including unreasonable management decisions that posed ongoing health risks to the CFO. The Commission also noted that the General Manager's behaviour persisted, even whilst he was on leave. As a result, the Commission directed the General Manager not to communicate directly with the CFO if he returned to work, and to act professionally. In addition, the Company was ordered to implement a comprehensive anti-bullying policy and provide training to all employees.

Furthermore, as the General Manager did not attend the Commission hearing, claiming he was recovering from "stress and anxiety" within the workplace, the Commission referred the matter to the Australian Federal Police due to the Manager's failure to attend!

WAGE THEFT LEGISLATION

In 2025, new wage theft laws will come into effect starting in January. Under these laws, employers who intentionally underpay their employees may face criminal charges. An employer will commit an offence if:

- They are required to pay an amount to an employee under the Fair Work Act or an industrial instrument (such as an enterprise agreement); and
- They intentionally engage in conduct resulting in failure to pay these amounts to or for the employee on or before the due date.

The intention of a body corporate will be established by:

- proving the board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- proving a senior manager intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
- proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with wage and entitlements legislation laws; or
- proving that the body corporate failed to create and maintain a corporate culture that required compliance with wage and entitlements laws (unless it can prove it exercised due diligence to prevent the conduct, or the authorisation or permission).

For a person to be guilty as an accessory:

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1. the person's conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
2. the offence must have been committed by the other person; and
3. the person must have intended that:
   (a) his or her conduct would aid, abet, counsel or procure the commission of the offence; or
   (b) his or her conduct would aid, abet, counsel or procure the commission of the offence and was reckless about the commission of the offence.

The Fair Work Ombudsman will continue to investigate wage theft issues. However, the prosecution of alleged offences will be handled by the Director of Public Prosecutions or the Australian Federal Police. If found guilty, companies and individuals may face significant fines and even imprisonment, with cases assessed based on the criminal standard of 'beyond reasonable doubt.'

There are practical steps boards and senior management can take to mitigate the risk of wage theft, including:

- ensuring their organisation pays all statutory employment entitlements.
- if necessary, auditing their organisation for wage compliance.
- seeking advice if you are unsure about obligations, award coverage or classifications.
- training boards and senior management about the importance of paying employee wages and other statutory entitlements.
- creating and maintaining a corporate culture that requires compliance with wage and entitlements laws.
- exercising due diligence to prevent the conduct, or the authorisation or permission of non-compliance with wage and entitlements laws.

CONTACT

Any Industrial Relations Member who has a related query should contact the HR Hotline on 1800 835 167 or contact Charles Watson, GM – IR, Policy and Governance via email: charles@visualmediaassociation.org.au