Year In Review & Year In Preview

• **Benjamin Niciak** – *Case Study: Israel Folau’s Unlawful Termination Application*

• **Andrew Olivares** – *Workpac, Mondelez & Wage Theft*
Israel Folau Sacked by Rugby Australia

In April 2019, Israel Folau posted a range of homophobic comments to his Instagram and Twitter accounts.

On 17 May 2019, Folau’s 4-year employment contract with Rugby Australia was terminated early, ending his career with the Waratahs and the Wallabies.
Arguments before the Tribunal

Folau’s arguments before the Tribunal were that:

• 1. the words in his Instagram and Twitter posts reflected his religious views;

• 2. the words were not his direct words, as he was quoting scripture; and

• 3. the degree of seriousness of his conduct should be mitigated in light of his commitment to his religion.
Coverage of Unlawful Termination Provisions

• Who is covered by unlawful termination laws under s 772 of the Fair Work Act 2009 (Cth)?

• In most cases employees **not** covered by the national workplace system will be covered by unlawful termination laws. These types of employees include:
  o state government employees; and,
  o local government.
Application of Unlawful Termination Provisions

• Unlawful termination includes (not limited to) the following reasons for a person’s dismissal due to:

• race, colour, sex, sexual orientation, age, mental or physical disability, marital status, family or carer’s responsibilities, pregnancy, religion, political opinion, national extraction or social origin.
Implications

• This case may change how employee rights are viewed in Australia, with Folau’s freedom of religious expression set to go up against Rugby Australia’s rights with regards to an employment contract.
Where to Now?

• Folau’s case coincides with the Morrison government’s potential future review of any amendments to religious freedom laws.
Religious Discrimination Bill 2019 (Cth)

• Unlike other states and territories, NSW and SA do not have legislation that specifically prohibits discrimination on the basis of religious belief.

• Furthermore, Australia has obligations under international law, and under its constitution, to protect the right to freedom of religion and belief.
Conclusion

• The Bill may limit the ability of employers to regulate, respond to and manage inappropriate conduct by an employee that could cause conflict with or detriment to other workers.

• It also limits the ability for employers to protect all employees from harassment and discrimination.
WorkPac v Skene

• Full Federal Court decision
• Casual labour hire worker was entitled to annual leave payments under the NES even though he received casual loading
• Employers ability to claim an off-set
Consequences for Local Government

• Common Law definition
• Casual employees claiming leave entitlements
• Fair Work Amendment (Casual Loading Offset) Regulations
• Workpac v Rossato test case
• Class actions
• LG Union campaigns
What should employers do?

- Review the casual cohort
- Educate stakeholders
- Ensure contracts are clear
- Separately identify the casual loading
Mondelez v AMWU

- Federal Court Decision
- The meaning of 10 days of paid personal/carer’s leave in the FW Act
- 12-hour shift workers paid personal leave at 12 hours per day – the meaning of a “day”
- The Government intervened
- Mondelez & The Government have appealed to the High Court
Implications for Local Government

- Consider your councils payroll systems
- Precedent for state-based employees to utilise in an industrial dispute
Wage Theft

• Potential for Government Inquiry
• Compliance issues
• EBA implications