

Australian Journal of Labour Law (AJLL)
Volume 33 Part 3
(articles included in this part are linked to the LexisNexis platform)

CONTENTS

Articles

[Union Representatives in Enterprise Bargaining: The Debate
over Fiduciary Duty](#)

— *Peter Punch*

229

In its Final Report published in December 2015, the Royal Commission into Trade Union Governance and Corruption concluded that ‘a union and its officials negotiating enterprise agreements on behalf of members are fiduciaries’. Acceptance of this proposition by a superior court could negatively impact on unions’ ability to participate in enterprise bargaining, due to the legal risk and practical impediments it would impose. This article considers the major arguments that have been raised to support or oppose the novel and controversial ‘fiduciary contention’. It highlights the difficulties involved in reconciling the contention with the current statutory objects and framework for enterprise bargaining. It also suggests possible statutory solutions to the problem.

[The Ethical Obligations on Public Sector Employees: When
Private Is Not So Private](#)

— *Stephen Ranieri and Craig Stevens*

254

Public sector employees in Australia are subject to distinctively onerous ethical obligations. Those ethical obligations may converge with an employee’s private life, due to the broader interests that Crown-based employment serves and its public character. The ethical obligations applicable to public sector employment are reflected legislatively including through core values and codes of conduct. The recent decision of the High Court of Australia in *Comcare v Banerji* reconfirmed that the ethical obligations upon public sector employees may reach beyond the workplace and into their ostensibly private lives. We conclude that codification of the ethical obligations upon public sector employees is laudable and encourage the continual evolution of codes of conduct. We also encourage consistent education of public sector employees with a view to clarifying the extent to which their ostensibly private conduct converges with their employment and/or status as a public sector employee, in so far as is reasonably possible.

[Taking a Fresh Look at Criminal Record Discrimination](#)

— *Natalie Wells and Therese MacDermott*

270

Disclosure of criminal record information during the recruitment process makes job applicants vulnerable to discriminatory treatment. At the same time, there may be legitimate reasons for excluding applicants on the basis of their criminal record from particular jobs. This article argues that the various legislative schemes governing this area have not been able to ensure that where there is a discretion regarding the use of criminal record information this is exercised in a way that involves a genuine assessment of whether an individual’s criminal record has an actual bearing on their capacity

to undertake a role. The current legislative framework creates uncertainty and confusion for employers and job applicants alike. This article canvasses potential reform options directed to improving enforcement of federal anti-discrimination obligations, simplifying aspects of spent conviction schemes, providing ways of clarifying how various obligations apply to a particular employment context, and preventing the premature disclosure of irrelevant or inaccurate criminal record information during the recruitment process.

Responsive Sentencing: Non-monetary Orders in Work Health and Safety

— *Angelica Vårhammar and Pia Wimmer*

294

The harmonised work health and safety laws in Australia contain provisions for adverse publicity, restoration orders, project orders, training orders, and court-ordered undertakings. This article argues that these non-monetary orders provide opportunity to go beyond enhancing specific and general deterrence to raising awareness, building capability, and repairing harm in order to secure long-term compliance. While orders of a similar nature are commonly handed down across other areas of law, their use in work health and safety sentencing remains inconsistent across Commonwealth, state and territory jurisdictions. This article encourages regulators to exercise their discretion and advocate for the range of options available under work health and safety laws. Through combining orders and matching the type and level of intervention with the offender's risk and reasons for reoffending, sentencing can become more responsive to the offender's circumstances, and hence more effective at inducing improvements in health and safety.