

## ***Fair Work Commission reminds employers about the risks of poorly drafted workplace policies and challenges the status quo around the collection of employee information***

**By Matilda Fagan-Schmidt, DMAW Lawyers Pty Ltd**

In the recent decision of *Lee v Superior Wood Pty Ltd* [2019] FWCFB 2946, the Full Bench of the Fair Work Commission determined that a dismissal for refusing to consent to the use of biometric fingerprint scanning was unfair.

### **Background**

Mr Lee was employed by Superior Wood Pty Ltd. The company introduced a trial of fingerprint scanning to record employees' attendance at work. Mr Lee refused to register his fingerprints on the basis that he was protecting his personal and biometric data, and instead continued to manually log his start and finish times.

Following the trial period, fingerprint scanning was formally implemented and the company introduced a new site attendance policy (**Policy**). The Policy required employees to scan their fingerprints at the start and finish of every shift.

Mr Lee refused to use the scanners. This resulted in a number of meetings to discuss his concerns. Mr Lee was expressly warned that his employment could be terminated if he refused to comply with the Policy. Mr Lee maintained his position and Superior Wood eventually terminated his employment.

Mr Lee lodged an unfair dismissal application in the Fair Work Commission.

### **The decision of the Commissioner**

At first instance, Commissioner Hunt was satisfied that Mr Lee's dismissal was not in all the circumstances harsh, unjust or unreasonable.

Mr Lee appealed this decision to the Full Bench of the Fair Work Commission.

### **Findings of the Full Bench**

The Full Bench overturned the Commissioner's decision, finding that Superior Wood did not have a valid reason for terminating Mr Lee's employment. In reaching this conclusion, the Full Bench made the following findings.

Firstly, the Full Bench found that compliance with the Policy was not a term or condition of Mr Lee's employment. On a strict reading of Mr Lee's employment contract, the Full Bench was satisfied that he was only bound by the policies which were in force *at the time* he signed his contract (which, relevantly, did not include the Policy).

Given that there was no contractual basis for directing Mr Lee to use the fingerprint scanners, the Full Bench proceeded to consider whether such a direction was lawful and reasonable. In doing so, the Full Bench considered whether the requirements in the Policy were compliant with the *Privacy Act 1988* (Cth) (**Privacy Act**) which regulates (among other things) the collection by entities of "personal information".

Prior to the Full Bench's decision, it was understood that employers could collect employee personal information without regard to the restrictions contained in the Privacy Act on the basis of the "employee records" exemption (provided that collection was undertaken for a purpose directly related to the employment relationship).

The Full Bench took a different approach by limiting the scope of the exemption to records held by the employer after having been lawfully collected in accordance with the Privacy Act requirements. The Full Bench considered that the exemption did not extend to employee records not yet in existence, such as Mr Lee's fingerprints.

The Full Bench concluded that Superior Wood was not entitled to rely on the exemption and was accordingly bound by the requirements in the Privacy Act that:

- "sensitive information" (such as biometric data) not be collected without first obtaining the individual's consent;
- "personal information" not be collected unless collection is reasonably necessary to the entity's functions or activities.

Given that Mr Lee had not provided his consent and there was an alternative means of recording his working hours (i.e. manually), the Full Bench found that the mandatory requirement stated in the Policy that employees use the fingerprint scanners was not a lawful and reasonable direction. As such, there was no valid reason for Mr Lee's dismissal on the basis of his refusal to comply with that requirement.

### **Lessons for employers**

There are two key takeaways from the Full Bench's findings.

Firstly, employers should review the terms of their contracts of employment to ensure that they provide for employees to be bound by all relevant workplace policies and procedures (including those not yet in existence at the time the contract is signed).

Secondly, employers should review the terms of their workplace policies and procedures to ensure they do not contain any requirements which are in fact unlawful. Special care should be taken in respect of policies which relate to the collection, handling and storage of employee information.