Employer Deductions from Amounts Payable under the *Fair Work Act 2009* (Cth): Restrictions on being both the Payer and Payee

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Abstract

This article critically analyses the limited circumstances in which employers are permitted to make deductions from amounts payable to employees under the Fair Work Act 2009 *(Cth) and the significant implications for unlawful conduct that exist. Such implications have intensified following the introduction of the* Fair Work Amendment (Protecting Vulnerable Workers) Act 2017 *(Cth). Relevant case law demonstrates repeated and serious contraventions of the* Fair Work Act 2009 *(Cth) around Australia, including the prominent decision of* Australian Education Union v State of Victoria (Department of Education and Early Childhood Development).[1] *This article attempts to aid with compliance in three ways. First, by correcting any misunderstanding of the permitted deductions provisions that may exist. Second, by making recommendations to practitioners for client management in this area. Third, by making recommendations for industry changes.*

Keywords

Fair Work; Permitted; Non-permitted; Deductions; Money; Employer; Employee

I INTRODUCTION

Historically, Australia's industrial relations laws have restricted employer deductions from amounts payable to employees.[2] Despite this, recent cases evidence significant breaches of the permitted deductions provisions of the *Fair Work Act 2009* (Cth) ('*Fair Work Act*'). Two cases that clearly set out key permitted deductions principles include the high-profile decision of *Australian Education Union v State of Victoria (Department of Education*

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1 [2015] FCA 1196.

2 See Part III below.

and Early Childhood Development)[3] and the unreported decision of *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor*.[4] The *Fair Work Act* firmly stipulates the manner in which employees are to be paid and it is important to correct any misunderstanding about the strict compliance that is required. Indeed, a non-permitted deduction (in regard to employee wages or termination payments) constitutes a breach of a civil remedy provision of the *Fair Work Act*. Such a breach exposes employers to monetary penalties and numerous other court orders. Indeed, the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth) has heightened the risk associated with non-compliance by increasing the Fair Work Ombudsman's enforcement powers in this field. It has also raised the monetary penalties that can be ordered for relevant serious contraventions to the current $126 000 for individuals and $630 000 for bodies corporate. Recommendations are therefore made to assist compliance in this area. Such recommendations include the provision of advice by practitioners to clients on the inability of general authorising provisions in employment contracts to satisfy the requirements of a permitted deduction under the *Fair Work Act*. Moreover, the addition of a paragraph on the permitted deductions provisions under Part 2-9 of the *Fair Work Act* in the Fair Work Information Statement would provide convenient access to information about obligations and entitlements. Finally, a Fair Work Ombudsman educational campaign on the operation of the law on permitted deductions would provide parties with more information about deduction procedures.

II The Historical Underpinnings of Permitted Deductions Law in Australia

A common system of remuneration in colonial Australia was the 'truck system'. The word 'truck' comes from the French word "troquer" which means 'barter'[5] and thus refers to the first element common to truck systems, which was that workers were not paid in money but were instead compensated through 'chit funds' at company stores or through provision of goods. This was generally regarded as exploitative[6] because the terms of the chit funds normally favoured the company store and the value ascribed to the relevant commodities was generally inflated.[7] Moreover, truck systems were also open to exploitation through employer deductions. This could occur as a result of employer decisions to withhold

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3 [2015] FCA 1196.

4 [2014] FCCA 1115.

5 'Truck in Thule', *The Saturday Review of Politics, Literature, Science and Art* (London) 28 January 1871.

6 Simon Stevens, 'A Social Tyranny: the Truck System in Colonial Western Australia, 1829-99' (2001) 80 *Labour History* 83, 83; *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196, 49 [153].

7 G W Hilton, 'The Truck Act of 1831' (1958) 10(3) *The Economic History Review* 470, 470.

remuneration due to alleged disciplinary issues[8] or as a means of forcing workers to stay in employment.[9] The unregulated truck system was also difficult for workers to manage in other ways. For example, many workers were paid solely in alcoholic beverages. This would require the workers to try to barter the alcohol for supplies. However, this was a challenging task when a local market was flooded with alcohol because other employers in the area were also paying workers with liquor.[10] The case of *Bristow v City Petroleum Ltd*[11] describes the successive enactments across the United Kingdom that attempted to address these ills of the truck system, culminating in the *Truck Act 1831* (UK).

This legislative trend was picked up by Australian jurisdictions, beginning with Western Australia. Western Australia introduced the *Truck Act 1899* (WA) following a concentrated set of campaigns against the truck system.[12] As the long title of this statute stated, the legislation was implemented to prohibit the payment of wages otherwise than in money, such as through payment by goods. The *Truck Act 1899* (WA) represented a significant shift from the truck system before it. For example, s 8 of the legislation required that deductions not be made from wages for repairing tools except where such deductions were by agreement and where that agreement had not formed part of the conditions of hiring. However, the former statute had limitations. For example, the statute did not extend to the supply by an employer to a worker of medicine, fuel, materials, tools, appliance or implements to be used by the employee in their work.[13] Over the next two decades New South Wales and Queensland followed suit and introduced their own truck legislation, also inspired by the United Kingdom.[14]

This article is focused on the permitted deductions provisions of the *Fair Work Act* because these provisions represent the national scheme on this matter. However, there remain other industrial instruments and statutes regulating permitted deductions for non-national system employees to whom the *Fair Work Act* does not apply.[15] These include the *Fair Work Act 1994* (SA) s 68; the *Industrial Relations Act 1984* (Tas) s 51; the *Industrial Relations Act 1996* (NSW) ss 117–21; the *Industrial Relations Act 1999* (Qld) ss 391–3; the *Minimum Conditions of Employment Act 1993* (WA) ss 17B–17D; and the *Victorian Workers' Wages Protection Act 2007* (Vic) ss 6–7. It is noteworthy that the *Industrial Relations Act 1996* (NSW)

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8 Breen Creighton, 'Ethical Employment Practices and the Law' in Ashley H Pinnington, Rob Macklin and Tom Campbell (eds), *Human Resource Management: Ethics and Employment* (Oxford University Press, 2007) 81, 86.

9 Simon Deakin, 'Logical Deductions? Wage Protection Before and After *Delaney* v *Staples*' (1992) 55(6) *The Modern Law Review* 848, 849.

10 Stevens, above n 6, 88.

11 [1987] 2 All ER 45.

12 For a summary of these campaigns see Stevens, above n 6, 85–96.

13 *Truck Act 1899* (WA) s 19(2).

14 Creighton, above n 8.

15 *Fair Work Act 2009* (Cth) ('*Fair Work Act*') s 26(1).

has been drafted in a manner which addresses many of the concerns held by employee advocates under the truck system. For example, ss 117–21 of the *Industrial Relations Act 1996* (NSW) require that employees be paid in full, in money, that employers cannot stipulate the manner in which remuneration is spent, that employers are unable to set-off remuneration against goods or services supplied by them and that unauthorised payments will not be regarded as payments for remuneration.

III The Law on Permitted Deductions under the Fair Work Act

Deductions are only permitted in limited circumstances under the *Fair Work Act*. To identify these circumstances, we must first confirm the method and frequency of payment obligations under s 323. Section 323 starts with the position that an employer must pay an employee in full, in money and at least monthly for the performance of work.[16] A strict reading of this section means that stringent compliance with payment of all amounts payable 'in full' is necessary to avoid breaching this provision and therefore to avoid the related legislative penalties under the *Fair Work Act*.[17] Section 323 is a civil remedy provision and is designed to address the problems with the truck system previously raised by state legislation on this topic.[18] A breach of a civil remedy provision under the *Fair Work Act* by an employer leads to exposure of monetary penalties and a variety of other court orders.[19] Such orders may include any order that the court considers appropriate, such as the granting of injunctions or compensation orders.[20] Exceptions to the need to pay an employee in full under s 323 are found in s 324, which is the permitted deductions section of the *Fair Work Act*.

Section 324(1)(a) of the *Fair Work Act* provides that an employer is able to make a deduction from an amount payable to an employee if the deduction is authorised in writing by the employee and is principally for

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16 In regard to the inability of an employer to satisfy s 323 by providing non-wage benefits, see *Nield v Mathieson* [2014] FCAFC 74, 5 [30]; *FWO v Bound for Glory Enterprises* [2014] FCCA 432, 2, 5. See also s 327(a) of the *Fair Work Act*, which would deem such other benefits as taken never to have been given to the employee.

17 See, eg, *Murrihy v Betezy.com.au Pty Ltd* (2013) 238 IR 307, 344 [119]; *APESMA v Wollongong Coal Ltd* [2014] FCA 878, 11 [30]–[31]. But see *AIPA v Jetstar Airways Pty Ltd* [2014] FCA 14.

18 Explanatory Memorandum, Fair Work Bill 2008 205; *CFMEU v Mammoet Australia Pty Ltd* (2013) 248 CLR 619, 634 [45].

19 *Fair Work Act* pt 4-1. For example, a breach of s 323(1) or (3) could lead to a maximum penalty for a non-serious contravention of 60 penalty units for an individual ($12 600) or 300 penalty units for a body corporate ($63 000) and a maximum penalty for a serious contravention of 600 penalty units for an individual ($126 000) and 3000 penalty units for a body corporate ($630 000): *Fair Work Act* s 539(2) and s 546(2); *Crimes Act 1914* (Cth) s 4AA. Issues of undue influence or pressure can also lead to remedies: *Fair Work Act* s 344(e).

20 *Fair Work Act* s 545(1)–(2).

their benefit. The use of the word 'principally' means that a deduction will not be permitted where there is merely 'any' benefit to an employee. Rather, it would appear that the deduction must be predominantly for the employee's benefit. An example of a permitted deduction given by s 324 is that of a salary sacrifice arrangement. There are a number of cases that have found a variety of deductions to be non-permitted.[21]

Employers who seek to discharge debts that employees purportedly owe through deductions may be blocked by s 324, even if such practises are alive in certain industries.[22] This position is supported by the Explanatory Memorandum to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 which treats overpayments from employers to employees as a matter for 'legitimate, mutual negotiations for overpayments to be paid back by an employee to their employer in lieu of legal proceedings',[23] such as in lieu of debt enforcement proceedings. Some may nonetheless try to argue that deductions to discharge debts are allowed by s 324(1)(a) on the basis that there is a benefit to an employee whose debt is discharged because it means that any potential legal action against them for failure to pay will be closed. However, this would not appear to meet the requirements of s 324(1)(a) which is not satisfied by 'any' benefit being provided to an employee but rather which demands that the employee receives the 'principal' benefit of the deduction transaction. The fact that an employer would seek to protect their financial interests by recovering money potentially owed to them indicates that the discharge of a debt is primarily for their benefit and not for the employee's. Indeed, it would be of greater benefit to a debtor to have their debt pardoned than to be required to repay it, whereas this would cause loss to the creditor. Moreover, the argument that legal action would be closed appears to assume that the employer would be successful in any such proceedings, which is not guaranteed. It also assumes that the threat of legal action is an automatic danger for an employee who does not suffer a deduction, but this is also not the case as any one employer may not have the resources or the appetite to undertake legal action.

In addition, a dominant purpose of the introduction of truck legislation was to leave undisturbed a worker's 'capacity to freely apply [their wages] to

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[21] See, eg, *Broomhead v Nibec Pty Ltd* [2015] FCCA 438; *Birch v Bass Strait Oysters Pty Ltd* [2016] FCCA 191; *Brown v Batten t/as Pane in the Glass* [2012] FMCA 296; *Fair Work Ombudsman v Global Express Consultancy Pty Ltd & Anor* [2016] FCCA 2446; *Fair Work Ombudsman v Jooine (Investment) Pty Ltd* [2013] FCCA 2144; *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd & Ors* [2016] FCCA 105; *Fair Work Ombudsman v Timryl Pty Ltd* [2014] FCCA 382; *Maslen v Core Drilling Services Pty Ltd (No 2)* [2015] FCCA 290.

[22] See, eg, Fair Employment Advocate, *Driving Away with Someone Else's Pay* (October 2007) <http://pandora.nla.gov.au/pan/83002/20080407-1656/fairemployment.wa.gov.au/pdf/drive_offs_report.pdf>.

[23] Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017, 13.

any cause the employee genuinely chooses'.[24] If this is so, then surely employees are free to structure their legal affairs in regard to those wages and related potential debts as they see fit. If, for example, a worker seeks to employ the common commercial strategy of withholding payment from another party in order to pressure them into negotiations or a settlement[25] then s 324(1)(a) appears to leave it open for them to do so, as opposed to having that capacity removed by the very party to whom the debt is owed. Further, it hardly seems to be in an employee's interest to lose control over money that they may dispute is owed to their employer in the first place. Indeed, the fact that an employer has control over monies owing to employees and has the practical capacity to deduct debts that may be owed does not make such a practise lawful, as seen in the case of *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor*.[26] It may be for all of these reasons that courts have been resistant to accept the discharging of a debt as principally for an employee's benefit,[27] whereas there has been condemnation of deductions completed in the absence of genuine choice from employees.[28]

Section 324 of the *Fair Work Act* also allows for other kinds of permitted deductions. A second permitted deduction under this section is where the deduction is authorised by the employee in accordance with an enterprise agreement. A third permitted deduction is where the deduction is authorised by or under a modern award or a Fair Work Commission order. A fourth permitted deduction is where the deduction is authorised by or under a law of the Commonwealth, a State or a Territory, or an order of a court.

Sections 325 and 326 of the *Fair Work Act* are related to the provisions in s 324 and further regulate permitted deductions. Section 325 prohibits an employer from directly or indirectly requiring an employee to spend, or pay to the employer or another person, any amount of the employee's money or any part of an amount payable to the employee in relation to the performance of work if it would be unreasonable in the circumstances and (for a payment) where the payment is directly or indirectly for the benefit

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24 *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196, 57 [180].

25 For case law on the acceptability of mere commercial pressure see, eg, *Smith v William Charlick Ltd* (1924) 34 CLR 38; *Eric Gnapp Ltd v Petroleum Board* [1949] 1 All ER 980; *Pao On v Lau Yiu Long* [1979] 3 All ER 65; *Deemcope Pty Ltd v Cantown Pty Ltd* [1995] 2 VR 44.

26 [2014] FCCA 1115.

27 See *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196, 70 [222] but note the unreasonableness of the debt itself, discussed in Part V below. See also *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor* [2014] FCCA 1115, 39 [121] where the court did not accept employer arguments that discharging the relevant debt was principally for the employee's benefit, but also did not ultimately decide the matter.

28 *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196, 59–60 [188].

of the employer or a party related to the employer. Section 325 also applies to prospective employees.[29] The Explanatory Memorandum to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 discussed the purpose of recent changes to s 325. The Explanatory Memorandum provided three examples of circumstances where it would be unreasonable for an employer to receive an employee's money. These included receipt of cashback in exchange for not terminating employment, receipt of cashback to undercut minimum entitlements and compelling an employee to spend their money in a manner which involves undue influence, duress or coercion.[30] Section 325 of the *Fair Work Act* is a civil remedy provision and serious contraventions can lead to 600 penalty units for individuals and 3000 penalty units for body corporates.[31] The *Fair Work Act* also allows the Fair Work Ombudsman to apply to a nominated Administrative Appeals Tribunal presidential member for the issue of a written notice ('FWO notice'), to obtain information, documents or answers to questions in certain circumstances. Such circumstances include where the Fair Work Ombudsman believes on reasonable grounds that a person has information or documents relevant to matters including unreasonable deductions from amounts owed to an employee or the placing of unreasonable requirements on employees to spend or pay amounts paid, or payable, to employees.[32]

Section 326 of the *Fair Work Act* invalidates terms of modern awards, enterprise agreements or contracts of employment where such terms purport to permit deductions or require payments to be made by employees and the deduction or payments are for the benefit of the employer or a related party and unreasonable in the circumstances. Previous examples of unreasonable terms have included the repayment of recruitment costs[33] and the recovery of insurance excess costs following an employee's wrongdoing.[34] Further analysis is included below in relation to the interaction between ss 324 and 326 in classifying a deduction as 'permitted'.

Regulation 2.12 of the *Fair Work Regulations 2009* (Cth) provides two circumstances in which a deduction referred to in s 326(1) will be reasonable. The first is where the deduction is made in respect of goods or services which are provided to the employee in the ordinary course of business of the employer or a related party and the goods or services are provided to members of the general public on the same, or not more favourable, terms than the employee receives them. Two examples provided of such deductions are deductions for health insurance fees by an

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29 *Fair Work Act* s 325.
30 Explanatory Memorandum, Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 12.
31 *Fair Work Act* ss 539, 546.
32 Ibid s 712AA.
33 *Re Radploy Pty Ltd* [2011] FWA 39, 14 [47]–[49].
34 *Re Glen Eden Thoroughbreds Pty Ltd* [2010] FWA 7217, 25 [64]–[65].

employer that is a health fund and deductions for loan repayments by an employer that is a financial institution. The second circumstance is when the deduction is for the purpose of recovering costs directly incurred by the employer due to the voluntary private use by the employee of the employer's property (irrespective of whether the employer authorised the use or not). Examples provided in the regulations of such costs include the cost of items purchased on a corporate credit card for personal use, the cost of personal calls on a company mobile phone and the cost of petrol for the private use of a company vehicle.

Although the operation of the permitted deductions provisions is generally clear, there are still some matters that require further guidance in order to clarify the obligations of employers and employees in this field. The most prominent question is whether it is lawful for clauses in modern awards to contain terms allowing employers to deduct amounts from monies owing on termination when an employee fails to provide appropriate notice of resignation. This matter is currently the topic of submissions as part of the Fair Work Commission common issues case on plain language re-drafting and it is expected that the Fair Work Commission will hand down a relevant decision.[35] Moreover, although the Explanatory Memorandum to the Fair Work Amendment (Protecting Vulnerable Workers) Bill 2017 provided some examples of unreasonable requirements to spend or pay an amount, it only canvassed extreme instances of misconduct and thus questions remain about the exact point that a deduction may become 'unreasonable'. It would therefore be helpful to receive further guidance about the test for determining 'reasonableness' in this respect, in addition to the decisions that have already been discussed.

IV Breach of Civil Remedy Provisions Through Non-Permitted Deductions

Section 324 is not a civil remedy provision. Section 324 merely establishes the basis upon which a deduction will be permitted for the purposes of s 323(1)(a). In this way, an employer effecting non-permitted deductions may be exposed to monetary penalties or other court orders through subsequent breaches of other provisions of the *Fair Work Act*. As explained below, civil remedy provisions that are likely to be breached through non-

[35] For a summary of the arguments for and against the inclusion of such clauses, see Ai Group, Submission to Fair Work Commission, *AM2016/15 – Plain Language Re-Drafting*, 5 September 2017; Australian Manufacturing Workers' Union, Submission to Fair Work Commission, *AM2016/15 – Plain Language Re-Drafting*, 4 September 2017; Australian Council of Trade Unions, Submission to Fair Work Commission, *AM2016/15 – Plain Language Re-Drafting*, 4 September 2017.

permitted deductions include s 323 and provisions of the National Employment Standards (NES) in the *Fair Work Act*.[36]

A *Non-Permitted Deductions from Wages*

Non-permitted deductions from employee wages when an employee is still employed will breach s 323 of the *Fair Work Act*. This was seen in the case of *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)*.[37] Between 1 July 2009 and 29 November 2013 the Department of Education and Early Childhood Development (DEECD) deducted between $4 and $17 on a fortnightly basis from the wages of relevant teachers. Such teachers were participating in a program which was designed to provide them with laptops for work purposes. The teachers were also able to use the laptops for personal purposes, with some conditions. The deductions made were said to be 'contributions' related to the cost of the laptops, in consideration of the personal use. DEECD deducted more than $20 million from the wages of teachers through this program. The deductions were held to be non-permitted and therefore a breach of s 323 of the *Fair Work Act*.[38] These findings led to orders that DEECD make back–payments to provide compensation for its unlawful deductions with interest.[39]

Bromberg J found that the deductions were unreasonable for the purposes of s 326 as part of the analysis that rendered the deductions non-permitted. Bromberg J began by rejecting the argument that the deductions were authorised in accordance with relevant enterprise agreements as 'salary packaging arrangements'. This was because the deductions were not held to have been made for a remunerative benefit.[40] However, on the basis that these findings may be mistaken,[41] Bromberg J also provided guidance about whether the deductions could be seen as unreasonable within the meaning of s 326(1) of the *Fair Work Act*. Section 326 provides that a deduction will be a breach of the *Fair Work Act* even if it is permitted by s 324 where, amongst other matters, the deduction is 'unreasonable in the circumstances'. Bromberg J conducted a global assessment of the circumstances at hand to determine this matter, thus employing a test of fact and degree.

In order to execute such a test, Bromberg J was required to define the meaning of 'unreasonable' for the purposes of s 326(1)(c). A non-

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36 An example of such a provision of the National Employment Standards is s 90(2), which is dealt with below.

37 [2015] FCA 1196.

38 *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196, 115 [382].

39 *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* Order ((P)VID252/2013) (b)–(c).

40 *Australian Education Union v State of Victoria (Department of Education and Early Childhood Development)* [2015] FCA 1196, 43 [134].

41 Ibid 45.

exhaustive list of factors relevant to this assessment was established.[42] One such factor deemed that the reasonableness of a deduction under s 326(1)(c) will be influenced by whether the deduction can be seen as 'principally for the employee's benefit' under s 324(1)(a).[43] Bromberg J held that the deductions were 'unreasonable in the circumstances' and therefore not permitted by terms in the contracts of employment of the relevant teachers.[44] The factors that supported this finding were that the teachers were required to spend money without genuine choice; that the amount that the teachers were required to spend was excessive; that the deductions made were not principally for the benefit of the relevant teachers; and that the ability of the teachers to utilise the laptops for personal use was not sufficient to render the deductions reasonable.[45]

Section 326 also played a determinative role in undermining the argument made by the DEECD that the deductions could be permitted through authorisation by a Ministerial Order.[46] The DEECD submitted that the deductions could be seen as authorised by or under a law of a State in accordance with the requirements of s 324(1)(d). The law of Victoria upon which DEECD sought to rely was the Ministerial Order made under s 5.2.12 of the *Education and Training Reform Act 2006* (Vic).[47] The Ministerial Order sought to deem the relevant deductions lawful. It was dated 19 December 2012 and sought to operate retrospectively from 1 July 2009.[48] Bromberg J did not accept that the Ministerial Order could apply retrospectively to authorise a permitted deduction under s 324(1)(d).[49] However, Bromberg J held that the Ministerial Order could be given partial effect. This meant that further consideration was required to be given to whether s 326(1) would deem the Ministerial Order to be inoperative. In this regard, Bromberg J held that the operation of the Ministerial Order relied on the existence of agreed deductions and that no such agreed deductions were evident. No such agreed deductions were evident because the terms in the agreements under which the teachers putatively agreed to the deductions (accepted as terms of employment contracts) were rendered ineffective by s 326(1). This was because the deductions were for the benefit of DEECD and were unreasonable in the circumstances.[50] To reach this conclusion, Bromberg J held that s 326 could apply to a deduction under s 324(1)(d) where the deduction was authorised by legislative provisions.[51]

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42 Ibid 56–8.
43 Ibid 57.
44 Ibid 71.
45 See ibid 37–9.
46 Ibid 97 [308].
47 Ibid 73 [231].
48 Ibid 74 [232].
49 Ibid 84 [260].
50 Ibid 91 [286].
51 Ibid 91 [290].

B *Non-Permitted Deductions from Termination Pay*

Non-permitted deductions from termination pay can breach civil remedy provisions under the NES of the *Fair Work Act*.[52] This was seen in the Federal Circuit Court decision of *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor*.[53] In this case the relevant employee was employed as a venue manager for the first respondent, Glasshouse Mountains Tavern Pty Ltd. The employee resigned and on termination of employment had accrued leave to the value of almost $8000.[54] However, the employer off-set an amount of almost $4500 for monies that the employer claimed were owed to it against the amount containing the accrued leave. The employer claimed that this off-set was due to the failure of the employee to abide by a six-week notice period in their employment contract.[55] The employer also deducted a debt owed for a gaming nominee licensee fee.[56]

The applicant submitted that such off-setting was a breach of s 90(2) of the *Fair Work Act*.[57] Section 90(2) of the *Fair Work Act* states that on termination of employment an employer must pay an employee for periods of untaken paid annual leave the amount that the employee would have been paid if the employee had taken that period of leave while employed. Indeed, a breach of s 90(2) of the *Fair Work Act* would be a breach of the NES and therefore a breach of s 44(1) of the *Fair Work Act*, a civil remedy provision.

Judge Burnett accepted that s 90(2) of the *Fair Work Act* had been breached when the employer deducted monies from the accrued annual leave of the employee. This finding was based on the reasoning that s 90(2) of the *Fair Work Act* expressly requires the complete value of accrued, untaken paid leave to be paid to an employee on termination of employment. No deviation from this obligation was held to be permissible notwithstanding that monies may have been owed by the employee to the employer.[58] This means that in order to be compliant with the *Fair Work Act*, employers must commence separate proceedings to recover damages for alleged breaches of contract or initiate debt enforcement proceedings in order to recover monies owing. In addition, provisions in the relevant employment contract which sought to displace the operation of s 90(2) of the *Fair Work Act* were held to be unenforceable.[59]

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52 *Fair Work Act* pt 2-2.
53 [2014] FCCA 1115.
54 *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor* [2014] FCCA 1115, 1 [1].
55 Ibid 23 [66].
56 Ibid 1–2 [1].
57 Ibid 23 [67].
58 Ibid 28 [84].
59 Ibid. This decision is also useful for highlighting another potential area of liability for management through the accessory liability provisions of the *Fair Work Act*: *Fair Work*

V PERMITTED DEDUCTIONS CLAUSES IN EMPLOYMENT CONTRACTS

The decision of *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor*[60] highlights the difficulties involved with the drafting of permitted deductions clauses in employment contracts. In that case it was accepted that the relevant employee was contractually required to repay to their employer an amount of just under $500 in relation to a gaming nominee licensee fee. This requirement was based on a provision in the employment contract that required the employee to maintain such qualifications at their own expense.[61] The employer's deduction in turn was based on a clause in the employment contract which provided that 'the employee authorises the employer to deduct any monies owing to them from their pay'.[62] The employer's deduction for the gaming nominee licensee fee therefore required Judge Burnett to assess this clause in the employment contract against the requirements of s 324 of the *Fair Work Act*.

The contractual provision mentioned above was held not to satisfy the requirements of s 324 of the *Fair Work Act*.[63] To come within s 324 of the *Fair Work Act*, a written authorisation must 'specify the amount of the deduction'.[64] Accordingly, Judge Burnett did not accept the 'blanket authorisation' in the employment contract as satisfying the requirements in s 324. The failure of the contractual provisions to refer specifically to the exact amount of the gaming nominee licensee fee meant that the contractual provisions in the employment contract could not be relied on. It followed that the employer deductions for the gaming nominee licensee fee were also unlawful.[65]

VI RECOMMENDATIONS TO AID COMPLIANCE

It is important for practitioners to provide comprehensive advice to clients about the operation of permitted deductions provisions. This is particularly so when clients do not understand the unlawful nature of non-permitted deductions. In this way, employers will benefit from legal advice about the limited operation of permitted deductions clauses in employment contracts.

Act s 550; *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor* [2014] FCCA 1115, 2, 39–40. On this same point see also *Fair Work Ombudsman v Oz Staff Career Services Pty Ltd & Ors* [2016] FCCA 105.

60 [2014] FCCA 1115.

61 *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor* [2014] FCCA 1115, 38 [118]–[119].

62 Ibid 39 [120].

63 Ibid 39 [120]–[121].

64 *Fair Work Act* s 324(2)(a).

65 *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor* [2014] FCCA 1115, 39 [121].

Moreover, it may be prudent for practitioners to refer to the increased risk that may arise for employers who do not cooperate with the Fair Work Ombudsman in related disputes. Indeed, the Fair Work Ombudsman expressly stated that the failure of the employer in *Fair Work Ombudsman v Glasshouse Mountains Tavern Pty Ltd & Anor*[66] to repay the monies owed to the employee in question was a determinative factor in its decision to begin litigation against the relevant respondents.[67]

There are also broader changes that could be made to encourage compliance in this area. The inclusion of a paragraph on the scope of Part 2–9 of the *Fair Work Act* in the Fair Work Information Statement would aid conformity with the law. Such a paragraph would provide employers and employees with access to simple information about their entitlements and obligations in regard to deductions. Further, the Fair Work Ombudsman could also further educate the community about the permitted deductions provisions under the *Fair Work Act*. The cases discussed highlight the overall simplicity and precision with which the *Fair Work Act* requires employees to be paid in full and the few exceptions that exist to this principle. An educational campaign by the Fair Work Ombudsman would improve compliance by providing employers like the DEECD with a greater opportunity to review their processes before unlawful practices are engaged.

VII CONCLUSION

Despite Australia's long history of regulating the payment of wages and the serious consequences of non-compliance, recent cases discussed in this article demonstrate that some enterprises are not abiding by the permitted deductions provisions under the *Fair Work Act*. The operation of the law on permitted deductions is largely unambiguous, although there are still some matters that require additional guidance. Further education for both employers and employees would encourage conformity with the *Fair Work Act*, particularly where breaches of the law are the result of lack of understanding. Such education should start with appropriate advice from practitioners. Further, information about the permitted deductions provisions in the Fair Work Information Statement and an educational campaign on this matter by the Fair Work Ombudsman would place employers and employees in a better position to navigate this area of law. Indeed, it has become particularly pertinent to approach this area carefully

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66 [2014] FCCA 1115.

67 Fair Work Ombudsman, *Court Action over Alleged $8000 Underpayment of Tavern Employee* (6 June 2012) <https://www.fairwork.gov.au/about-us/news-and-media-releases/2012-media-releases/june-2012/20120606-glasshouse-prosecution>.
Moreover, this is consistent with the Fair Work Ombudsman's broader compliance and enforcement policy: Fair Work Ombudsman, *Compliance and Enforcement Policy* (August 2017) Australian Government, 25 <https://www.fairwork.gov.au/about-us/our-vision/compliance-and-enforcement-policy>.

following the introduction of the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth). This is because of the increased enforcement powers and penalties now available under the *Fair Work Act* for relevant breaches. It may be, therefore, that the introduction of the amending legislation will influence a changed approach to employer deductions from amounts payable under the *Fair Work Act*.