

EDITORIAL

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The *University of New South Wales Law Journal* ('*Journal*') last published a Thematic Issue about industrial relations law in 2006, in the wake of the controversial *Workplace Relations Amendment (Work Choices) Act 2005* (Cth). Similarly, Issue 46(4) is published amidst the most significant amendments to the *Fair Work Act 2009* (Cth) ('*FW Act*') since its enactment. At the time of the Issue's publication, the *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (Cth) ('*Secure Jobs, Better Pay Act*') and *Fair Work Legislation Amendment (Protecting Worker Entitlements) Act 2023* (Cth) have passed, and the *Fair Work Legislation Amendment (Closing Loopholes) Bill 2023* (Cth) will be debated next year. Outside of the Australian parliamentary arena, this Issue is also published at the end of a year of immense strikes: as two notable examples, the nationwide and recurring strikes in France against the Borne Government's bill to increase the retirement age from 62 to 64,¹ and the joint WGA and SAG-AFTRA strike in the United States, which marked the first time that actors and writers have walked out simultaneously in 60 years.²

It is now my privilege to introduce Issue 46(4), comprised of six articles within its thematic component – 'Power, Workers and the Law' – and four general articles.

The thematic component opens with three articles considering recent legislative changes or proposals. Anthony Forsyth and Shae McCrystal explore how the *FW Act* has constrained worker power in collective bargaining, identify the shortfalls in the reforms of the *Secure Jobs, Better Pay Act*, and outline further reform proposals. Irene Nikoloudakis and Stephen Ranieri compare the wage theft criminalisation laws in Victoria and Queensland and, in light of the Albanese Government's election promise to criminalise wage theft, put forward the key considerations for lawmakers drafting a federal offence. The little-studied *Workplace Gender Equality Act 2012* (Cth) is analysed through an anti-essentialist,

* Editor, Issue 46(4).

1 'Strike Action over Macron's Pensions Plan Bring Major Disruption to France', *The Guardian* (online, 1 February 2023) <<https://www.theguardian.com/world/2023/jan/31/france-protests-pensions-plan-retirement-age-macron>>; 'French Unions Announce New Day of Pension Protests, Strikes for June 6', *France24* (online, 2 May 2023) <<https://www.france24.com/en/france/20230502-french-unions-announce-new-day-of-pension-protests-strikes-for-june-6>>.

2 Megan McCluskey, 'What Happened the Last Time SAG and the WGA Went on Strike Together', *Time* (online, 14 July 2023) <<https://time.com/6294777/sag-wga-strike-1960/>>; Mariko Oi, 'Hollywood Writers Agree to End Five-Month Strike after Studio Deal', *BBC News* (online, 27 September 2023) <<https://www.bbc.com/news/world-us-canada-66932556>>.

intersectional feminist lens by Caitlin Konzen and Sandy Noakes, who highlight the Act's shortcomings but also the potential of an intersectional approach to gender equality legislation. The thematic component moves on to common law developments. Andrew Stewart, Mark Irving, and Pauline Bomball raise the alarm that the High Court's recent decisions in *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd*³ and *ZG Operations Australia Pty Ltd v Jamsek*,⁴ and their significant implications for determining whether a worker is an employee, will make it easier for employers to contract out of labour standards. Andrew Fell and Elizabeth Rudz meticulously argue that the courts' approach to enforcing non-compete restraints in employment contracts has caused uncertainty and suggest that the significant harm these restraints impose upon employees ought to be considered when evaluating their 'reasonableness'. The thematic component ends by looking to the future, considering how workers will be impacted by climate change – Gabrielle Golding, Phillipa McCormack, and Kerry Brent examine how unfair dismissal, enterprise bargaining, and work health and safety legislation should adapt to environmental crisis.

The first two general articles concern accountability during the COVID-19 pandemic: Harry Hobbs and George Williams raise, concerningly, that Australian Parliaments failed to meet core democratic functions during the pandemic. Vicki Sentas and Louise Boon-Kuo qualitatively analyse the experiences of people and policing during lockdown, concluding that policing undermines social determinants of health and is antithetical to maintaining public safety. Both articles suggest that these failures did not arise from the pandemic, but out of structural and ongoing deficiencies. Next, Samuel Naylor's article is the first to compare the Canadian and Australian courts' approaches to the integration of customary international law in domestic common law and outlines how the Canadian decision in *Nevsun Resources Ltd v Araya*⁵ might assist an Australian judge to give domestic effect to an international customary norm. Finally, Katherine Waller et al comprehensively compare voluntary assisted dying ('VAD') legislation across all Australian states, which is vitally timely as Victoria and Western Australia have conducted mandatory reviews of their VAD legislation this year.

It was not lost on me, editing an Issue with a part-thematic on employment and industrial relations law, that most of the articles published in the *Journal* were rigorously researched, painstakingly written, and generously peer reviewed by workers in the tertiary education sector. The quality of the *Journal's* scholarship is thus totally dependent on the rights and working conditions in this sector. Surely one cannot read Nikoloudakis and Ranieri's article about wage theft without recalling the \$83.4 million owed to higher education workers over the last three years,⁶ nor Golding, McCormack and Brent's article about climate change without

3 (2022) 96 ALJR 89.

4 (2022) 96 ALJR 144.

5 [2020] 1 SCR 166.

6 Nicole Precel and Adam Carey, "'Staggering": Victorian Universities Underpaid Workers by \$50m in Three Years, Report Says', *The Age* (online, 20 February 2023) <<https://www.theage.com.au/national/victoria/staggering-victorian-universities-underpaid-workers-by-50m-in-three-years-report-says>>

remembering the classes that had to be rescheduled due to the floods in 2021–22. As Forsyth and McCrystal note, university management representatives in 2022 and early 2023 refused to commence bargaining after old enterprise agreements had expired. The ivory tower is a workplace, one that is not exempt from the economic and political forces which it studies and is indeed one that is increasingly casualised and precarious. In response to such conditions, university workers have gone on strike for fair pay and work conditions. As only two instances this year, staff at the University of Sydney wrapped up eight days of strikes, the longest industrial action campaign at any Australian university, while staff at the University of Melbourne took five-day strike action twice.⁷ This ability of workers to exercise their industrial power and fight for fair working conditions is critical to the health of academic research. It is in that spirit that I extend my thanks to the 24 authors in this Issue for entrusting their work to us, as well as to all the anonymous peer reviewers whose advice is so invaluable to the editors of a student-run journal.

Special thanks must go to two people whose work opens the Issue. First, I was delighted that Keith Ewing, Professor of Public Law at King's College London, and long-term trade union and civil liberties advocate, accepted our invitation to write the Foreword and deliver the Keynote Address for the Issue's thematic component. His Foreword thoughtfully situates the thematic articles' contributions within Australia's international labour law obligations. Second, thank you to Jacqui Adams, a wonderful activist and artist, for the artwork on the first page of this Issue's thematic component.

I am obviously indebted to the *Journal's* volunteer student Editorial Board. More than even your obsessive pedantry, it is your interest and enthusiasm for the *Journal's* work that has made this Issue a joy to oversee. I have genuinely adored working with you.

The *Journal* could not thrive without the long-term support of multiple parties. We are deeply grateful for the consistently excellent work of our typesetter, Kerry Cooke, and our cover designer, John Hewitt. We are faithfully backed by the UNSW Faculty of Law & Justice and its Dean, Professor Andrew Lynch. The Executive Committee are particularly thankful to our Faculty Advisers, Professors Rosalind Dixon and Gary Edmond, for their eminently prudent advice (sometimes

20230217-p5clfn.html>. See also Julie Hare, 'Melbourne Uni Caught out for Underpaying Staff, Yet Again', *Australian Financial Review* (online, 12 February 2023) <<https://www.afr.com/work-and-careers/education/melbourne-uni-caught-out-for-underpaying-staff-yet-again-20230210-p5cjm0>>; David Marin-Guzman, 'UNSW "Knowingly" Kept Poor Pay Records in Face of Underpayments', *Australian Financial Review* (online, 26 September 2023) <<https://www.afr.com/work-and-careers/workplace/unsw-knowingly-kept-poor-pay-records-in-face-of-underpayments-20230926-p5e7m1>>.

7 Caitlin Cassidy, "'They Know What's at Stake': Inside the Longest-Running Industrial Action at an Australian University", *The Guardian* (online, 3 April 2023) <<https://www.theguardian.com/australia-news/2023/apr/01/they-know-whats-at-stake-inside-the-longest-running-industrial-action-at-a-australian-university>>; Robyn Grace, 'University of Melbourne Teachers, Staff to Strike', *The Age* (online, 23 August 2023) <<https://www.theage.com.au/national/victoria/university-of-melbourne-teachers-staff-to-strike-20230823-p5dyy3.html>>; Robyn Grace and Nicole Precel, 'Hundred of Tutorials Cancelled as University of Melbourne Staff Strike', *The Age* (online, 3 October 2023) <<https://www.theage.com.au/national/victoria/hundreds-of-tutorials-cancelled-as-university-of-melbourne-staff-strike-20231003-p5e9fl.html>>.

at imprudently short notice) and support of our independence. Finally, thank you to our premier sponsors – Allens, Corrs Chambers Westgarth, Herbert Smith Freehills, and King & Wood Mallesons – for hosting our launch events and their investment in legal scholarship.

The penultimate thanks go to those closest to my heart: the members of the Executive Committee who I have worked alongside, for whom I hold the deepest affection and admiration, as well as my parents, sister, partner, and friends, for their steadfast love and support. Finally, thank you to, and solidarity with, the activists and unionists, working always at the coalface of the law's operation.

I hope you enjoy reading this Issue as much as I loved editing it.