

WORK InSights

Autumn/Winter edition 2007

Editorial

This combined Autumn/Winter edition of *Work InSights* has allowed us to explore in more depth four topics which, whilst diverse in subject matter, share the common characteristic that they deal with current day-to-day issues confronting a variety of businesses in Australia.

Changing demographics has seen a progressively younger workforce in Australian businesses. Employing "Generation Y" can be a challenge, and we look at the legal implications of employing this group of young workers, identifying areas of legal and practical concern to employers. The "Work Choices" amendments to the Workplace Relations legislation have raised many issues about the cashing out of leave. Our extensive overview of this confusing area will give employers some guidance about what can be done and where caution needs to be exercised.

The Federal legislation has also seen a new emphasis on the terms of the employment contract itself. In many cases, this has caused the spotlight to focus on workplace policies. How should employers use these, and what pitfalls exist for a business having such policies is examined in our third article. More recently, significant publicity has been given to the introduction of the "Fairness Test". We explore what this test involves, how it works, and the implication for the employers in our final article.

Looking forward, our Spring 2007 edition will look at what the major political parties are saying about industrial relations, and what the implications might be, whichever party wins Government federally in the upcoming election.

Contents

- 1 Generation Y at work: legal obligations and tips for employers with young employees
- 5 Cashing out leave under Work Choices
- 10 Making the most of workplace policies - avoiding the potential legal pitfalls
- 13 The "Fairness Test" and other changes to the *Workplace Relations Act*



Generation Y at work: legal obligations and tips for employers with young employees

Joydeep Hor and Leanne Davies

Introduction

"Generation Y"—the 4.2 million people in Australia aged between 13 and 27 years¹—are an expanding fraction of the Australian labour market. A growing body of research suggests that the increasing employment of Generation Y within organisations is challenging traditional management practices and having a significant impact on the workplace.

In this article, we address the particular legal obligations of employers with young employees in their workforce, as well as some of the practical strategies available to organisations in managing and adapting business practices to its Generation Y.

Who are "Generation Y"?

"Nexters", "Millenials", "Echo Boomers"—Generation Y (as they are most commonly referred to) are the core of altruistic and ideological workers in your organisation aged 27 or less, demanding interesting work, flexible conditions, instant returns and an abundance of opportunity.

Australia's workforce is currently comprised of Builders, Boomers, Generation X and Generation Y.

| Australia's Generation ² | | | | |
|-------------------------------------|-------------|----------|-----------------------|---------------|
| Description | Born | Age | Population (millions) | % of millions |
| Builders | Before 1946 | 61+ | 3.5 | 17 |
| Boomers | 1946–1964 | 42–60 | 5.3 | 26 |
| Gen X | 1965–1979 | 27–41 | 4.4 | 21.5 |
| Gen Y | 1980–1994 | 12–26 | 4.2 | 20.5 |
| Gen Z | 1995–2009 | Under 12 | 3.1 | 15 |

ABS Population Pyramid 2006 & McCrindle Research Study 2006

Generations are accepted as being defined by their age, experiences and social, political and economic conditions³. While a more traditional definition of "generation" is the length of time between the birth of parents and the birth of their children⁴, due to the rapid pace of societal and technological change in recent years, and increasing periods of time between the birth of parents and their children, a more accurate description of "generation" may now be to refer to a group of people born and shaped by a particular span of time⁵.

The age boundaries for Generation Y are generally set as those born between 1980 and 1994, with some allowances for those born as early as 1978 and as late as 1996.

Peter Sheahan, author of "The Y Factor: Thriving (and Surviving) with The Y Generation in the Workplace", identifies nine key traits of Generation Y which distinguish them from other generations:

- Street smart;
- Aware;
- Lifestyle centred;
- Independently dependent;
- Informal;
- Tech savvy;
- Sceptical;
- Stimulus junkies; and
- Impatient⁶.

How does Gen Y impact on the workplace?

Generation Y are described as "the most high maintenance generation to ever enter the workforce"⁷. Even those who know little of Generation Y are likely to be aware of their notoriously short-lived tenure with an employer—Australian Bureau of Statistics figures indicate that each year around 25 percent of workers aged between 20 and 24 change jobs⁸.

In 2006, Australian company McCrindle Research conducted a nation-wide survey of 3000 employees to assess the attitude of Generation Y to work. In broad terms, the research found that Generation Y, when compared to other generations, are more likely to want to progress quickly within an organisation, experience genuine flexibility and work-life balance, see more money sooner rather than later, find enjoyment and variety in their work, and desire opportunity, involvement and training⁹.

While these characteristics are likely to give rise to new challenges and perspectives from a managerial point of view, employers should also focus on the legal issues that may arise due to the increasing presence of Generation Y in the workplace.

Tips for employers when dealing with Generation Y

1. *Ensure you comply with any legislative or regulatory obligations associated with employing workers under 18 years*



With Generation Y spanning ages 13 to 27, employers should be aware of the implications of legislation in Queensland, Victoria and New South Wales regulating the employment of children.

Queensland's Child Employment Act 2006 and *Child Employment Regulation 2006* place restrictions on the type of work an employee who is aged less than 18 years may be engaged to perform, and also impose record keeping obligations.

In New South Wales, the *Industrial Relations (Child Employment) Act 2006* imposes record keeping and other requirements relating to conditions of employment on employers who are constitutional corporations, in respect of their employees who are less than 18 years old. Notably, the legislation extends the operation of State awards to these workers, and confers on them a right to bring an unfair dismissal action against their employer under the *Industrial Relations Act 1996 (NSW)*. The legislation also requires the Full Bench of the NSW Industrial Relations Commission to set principles associated with the employment of children, able to be used by it when assessing whether a child has, on balance, been subjected to a net detriment in the terms and conditions of their employment, when compared to applicable minimum conditions.

These principles were handed down by the Commission on 22 May 2007 in the *Child Employment Principles Case 2007*. Employers should be aware that the Commission has determined that the absence of certain key conditions from a child's employment arrangement will automatically lead to the conclusion that the child is subject to a net detriment in their employment. These key conditions

include:

- payment of at least the minimum award base rate of pay, plus wage-related allowances, for all hours worked;
- special requirements for the employment of children (including but not limited to supervisory arrangements);
- limitations on work late at night or early in the morning and late transportation arrangements;
- reasonable notice of rosters and changes of shift/working hours;
- entitlements to annual leave and other forms of leave; and
- occupational health and safety.

A number of other factors will be taken into account in assessing whether a child has been subjected to a net detriment, where their conditions of employment differ from a comparable award or legislation. Some of these factors include the number and spread of hours of work, breaks, overtime and choice of superannuation fund. Other relevant considerations will involve the child's age, whether they are still engaged in education, the type of work and when it is required to be performed, whether the employer has explained the child's conditions to them in an appropriate manner, and the circumstances in which the terms and conditions of employment were negotiated.

In Victoria, the *Child Employment Act 2003* applies to employees less than 15 years old, and places restrictions on employers as to the permissible working age and types of duties that can be performed by young workers.

2. If you plan on entering into AWAs with young workers, be aware of additional agreement-making requirements

The individual nature of Australian Workplace Agreements under the *Workplace Relations Act 1996* may make them an attractive mode for employers to accommodate the flexible arrangements attributed as being desirable to Generation Y.

That Act imposes an additional requirement for making AWAs with an employee who is less than 18 years old, that an “appropriate person” (such as a parent or guardian) must sign the AWA in addition to the employee.

Further, the outcome of a recent focus group survey on the attitudes of younger workers to workplace flexibility and individual bargaining indicated that many expressed anxiety at bargaining individually with their employer¹⁰. Employers should be acutely aware of the potential penalties for coercion and duress under the *Workplace Relations Act 1996* in connection with agreement making.

3. If young workers are progressing rapidly within the organisation, ensure their contract of employment is relevant and up-to-date

McCrindle Research identifies within Generation Y a desire for challenge, variety and change, estimating that around 86 percent will want a promotion within two years¹¹. It is important for employers to ensure that employees’ contracts stay aligned with changed work arrangements. In addition to situations such as an increase in remuneration or changes to an employee’s position, duties and/or title, common instances where a new contract should be issued include a shift from full-time to part-time or casual employment (and vice versa), or a move from contractor to employee status.

Where a contract does not reflect an employee’s current employment situation, employers are potentially exposed to disputes in relation to entitlements and in particular, “reasonable notice” claims in circumstances where the employee’s employment is terminated.

A successful claim in respect of reasonable notice may involve a term being implied into the employee’s contract as to an appropriate notice period, which could be significantly longer than that initially agreed upon, taking into account factors such as length of service, remuneration, mobility, and any inducements that were given by the employer to the employee to leave his or her previous employment.

4. Ensure adequate policies and guidelines are in place to accommodate flexible working practices

Generation Y are life-style driven¹². The outcome of this is an expectation of genuinely flexible work practices—in particular, variable work hours.

In order to minimise conflict around flexible practices, employers should ensure that appropriate policies are in place around these issues. Particular attention should be given to outlining the expectations on employees who take advantage of flexible work options, with a view to minimising the potential for disputes to occur.

Guidelines should be created for managers that are designed to ensure flexibility is offered and applied in a consistent and lawful manner.

5. Consider the OH&S implications of accommodating work/life balance by allowing employees to work from home

Generation Y demand genuine work/life balance. For some employers, this may mean expanding existing expectations of when, and where, work will be performed.

Employers should take a broad view of the “workplace” and incorporate this into its health and safety strategy. Employers have an obligation to eliminate or minimise risks in the workplace, including a home-office environment. This may involve, for example, having an employee complete a hazard identification checklist for their home work environment and/or having an appropriately qualified person inspect the employee’s home.

6. Consider ways of adapting the minimum conditions in the Australian Fair Pay and Conditions Standard to achieve flexibility

Following the implementation of Work Choices last year, many employees are now covered (or will in future be covered) by the Australian Fair Pay and Conditions Standard (“AFPCS”). The AFPCS prescribes five core minimum conditions around wages, hours of work, annual leave, personal carer’s leave and parental leave.

Work Choices offers both employers and employees significant flexibility in the type of agreement that can be made in relation to work conditions. Research has highlighted a reluctance of Generation Y to sacrifice lifestyle for money¹³—therefore, some options such as cashing out annual leave and personal carer’s leave may not be appealing.

However, for employees with a preference for additional time off over additional remuneration¹⁴, employers may consider options such as:

- allowing employees to take double the amount of annual or personal leave to which they are entitled each year at half pay;
- not limiting the number of personal leave days an employee may take as carer’s leave (the default position under the *Workplace Relations Act 1996* is that an employee cannot take more than their annual entitlement of personal leave as carer’s leave);
- averaging hours – the *Workplace Relations Act 1996* allows written agreements to be made between an employer and employee whereby the



number of hours an employee works is averaged over a period of not more than a year.

Each of the options outlined above will allow an employer to meet its minimum statutory obligations whilst accommodating flexibility for the individual employee.

7. Generation Y are unlikely to stick around for long—be sure to capitalise on the investment you make in them, and protect your business once they leave

Current research indicates that Generation Y employees are unlikely to be with one organisation for more than a few years. Average tenure is now approximately four years¹⁵, with around one quarter of Generation Y indicating they would stay with a single employer for five years¹⁶.

During this time, Generation Y's technical savvy, desire to be involved in the organisation and expectation of interesting, project-based work make it likely that a significant investment will have been made in their training and development, and that the individual will have acquired substantial knowledge of the organisation and generated and been exposed to sensitive and valuable information.

Employers should translate the possibility of an ex-employee working for one, if not many, of its competitors into appropriate protections designed to safeguard the interests of the business when workers exit.

The starting point is the employee's contract of employment. Relevant considerations include:

(a) **Notice Periods:** Many employers simply adopt a "standard" one-month notice period. A more useful strategy is to assess, and then draft into the contract, a notice period that will be long enough to secure a replacement and effect adequate handover.

(b) **Confidential Information:** In the absence of relevant contractual obligations, only very limited categories of information can be protected at law once the employment relationship ends. The more common categories of valuable information that, absent a contractual clause, may not be protected relate to a business's customer base, products and services, business practices and marketing strategies. Employers can enter into agreements with employees to vastly expand the categories of information required to be kept confidential both during and after the employment relationship. Clauses dealing with confidential information should be appropriately tailored to the specific industry, business and position held by the employee.

(c) **Intellectual Property:** Employers should attempt to secure the rights to any intellectual property either developed or improved by the employee during the course of their employment, including consent to the organisation's ownership and use of the property.

(d) **Restraints:** An appropriate and reasonable restraint can prevent an ex-employee from working for particular competitors for a specified time. A restraint may be particularly unattractive to Generation Y, given their

unwillingness to lock into a particular employment situation¹⁷. Employers may consider financial compensation on termination in connection with the restraint, converting the obligation in effect to a paid period of unemployment, which may be attractive to life-style centred Generation Y.

Conclusion

Employers should adopt a balanced approach to the emergence of Generation Y in the workplace. It has been estimated that only around 83 percent of a "generation" exhibit the mindset and behavioural traits that are usually assigned to them¹⁸. Some researchers still maintain that "Generation Y" is no more than media hype, and organisations that base their management and retention strategies on generation are flawed¹⁹.

In deciding if and how to react to Generation Y, employers should bear in mind that the changes presented by this generation are contextualised within other broader and significant national trends, such as high employment²⁰, an ageing population and skills shortage. Viewed in combination, these factors provide strong impetus for organisations to focus on properly managing, and capitalising on the contribution made by, its young talent.

Many of the strategies outlined above are in any event sound management and business practices able to be adopted by an organisation that, irrespective of generational traits and differences, will assist it to retain employees and protect the interests of the business in the event employees do exit.



ENDNOTES

- 1 McCrindle Research, "New Generations at Work: Attracting, Recruiting, Retraining & Training Generation Y", Whitepaper presented by Mark McCrindle in his session "Attracting and retaining Generation Y", HR Summit 06, Melbourne, 3-4 October 2006.
- 2 Extracted from McCrindle Research, (2006), above at 1.
- 3 Above at 1.
- 4 Above at 1.
- 5 Above at 1.
- 6 Sheahan, P, 'Are you ready for The Y Generation?' accessed 11/10/2006 from www.ygeneration.com.au
- 7 Breaux, J, (2003), *Face of American workplaces is changes, human resource professionals say*, Knight Ridder/Tribune Business News, cited in Eisner SP, below at 13.
- 8 ABS Labour Mobility Australia Cat 6209.0, cited in McCrindle Research (2006), above at 1.
- 9 See generally, McCrindle Research, (2006) above at 1.
- 10 Denniss, R, (2005) "Young People's Attitudes to Workplace Bargaining", 56 *Journal of Australian Political Economy*, 145.
- 11 McCrindle Research (2006), above at 1.
- 12 Fragiaco, L, "Capturing the Y", MIS Australia, 1 December 2004.
- 13 Eisner, S P, (2005) "Managing Generation Y", 70 *SAM Advanced Management Journal* 4.
- 14 Eisner, S P, (2005), above at 13.
- 15 ABS Australian Labour Market Statistics Cat 6105.0, cited in McCrindle Research, (2006), above at 1.
- 16 McCrindle Research, (2006), above at 1.
- 17 Fragiaco, L, (2004), above at 12.
- 18 Fragiaco, L, (2004), above at 12.
- 19 Chaminade, B (October 2005), "Generation gap—Retention policies based on age groups are flawed", *HR Monthly*.
- 20 Unemployment was published in January 2006 as being at 5.1%, nearly half the unemployment rate which existed in Australia in the early 1990's: ABS Australian Labour Market Statistics Cat 6105.0 cited in McCrindle Research, (2006), above at 1.



Cashing out Leave under Work Choices

Greg Robertson and Louise Keats

One question commonly asked by employers is whether they are legally entitled to cash out an employee's entitlements to leave (annual, long service or personal leave). "Cashing out" involves providing pay in lieu of the entitlement. Prior to the Work Choices amendments, the answer to this question varied according to the State in which the employee worked. However, for the majority of Australian employees, the *Workplace Relations Act 1996* now provides some uniformity.

Leave under the Australian Fair Pay and Conditions Standard

Entitlement to leave

The Work Choices amendments set up the Australian Fair Pay and Conditions Standard. The Standard establishes minimum entitlements in five key areas, including annual leave, personal leave, and parental leave, for employees who are covered by the Act (with some exceptions, detailed below). Long service leave is not directly governed by the Standard, but is discussed separately below.

As to annual leave, the Standard sets how such leave is to be accrued, credited and paid. In broad terms the Standard gives full-time employees an entitlement to four weeks' annual leave each year (five weeks for shift workers).

"Personal leave" comprises paid sick leave and paid carer's leave (together, called "personal/carer's leave"), as well as unpaid carer's leave and paid compassionate leave. All permanent employees are entitled to personal leave; casual employees are entitled to unpaid carer's leave only. In broad terms, full-time employees are entitled each year to ten days' personal/carer's leave and two days' paid compassionate leave. Other entitlements also exist under the heading of "personal leave" but are not directly relevant to "cashing out" questions.

To whom does the Standard apply?

Generally, the Standard applies to any employee of an employer covered by the Act—for example, employees of constitutional corporations, employees of Commonwealth agencies or employees in one of the Territories. It applies to any employee covered by the Act who is employed only under a common law employment contract, as well as those who are covered by a "workplace agreement" made after 27 March 2006, when Work Choices commenced.

"Workplace agreement" is defined to mean an Australian Workplace Agreement (AWA) or a collective agreement. An AWA and a collective agreement are both statutory forms of agreement defined in the Act. An AWA is an individual agreement

between an employer and an employee and “collective agreements” cover various forms of agreement, the two main types being an employee collective agreement (between an employer and a group of employees) and a union collective agreement (between an employer and a union representing the employees).

The Standard, however, is limited in its application to employees covered by other instruments. It does not apply to an employee subject to any of the following instruments:

- a preserved state agreement (the name given to State enterprise agreements which have transitioned into the Federal system following Work Choices);
- a pre-reform certified agreement;
- a pre-reform AWA; or
- an award made under section 170MX of the pre-reform Act,

so long as the instrument deals with the matters governed by the Standard. If the instrument does not deal with a matter governed by the Standard (for example, if it is silent in relation to parental leave), then the provisions of the Standard relating to that matter will apply.

For an employee covered by a “notional agreement preserving state awards” or “NAPSA” (the name given to State awards which have transitioned into the Federal system following Work Choices), the leave provisions of the Standard apply, except where the employee’s entitlements under the NAPSA are “more generous” than his or her corresponding entitlements under the Standard, in which case the former award entitlements prevail.

Similarly, if an employee’s leave entitlement under a Federal award is “more generous” than his or her corresponding entitlement under the Standard, the Federal award will prevail and the Standard will be excluded (but only in relation to that particular entitlement).

Annual leave

Cashing out under the Act

The Act provides that an employee is entitled to “forgo an entitlement to take” an amount of annual leave entitlement if:

- a provision in an applicable workplace agreement allows for “cashing out”—the provision must entitle the employee to forgo an entitlement to annual leave and to receive pay in lieu at a rate no less than the employee’s basic periodic rate of pay (expressed as an hourly rate) at the time the election to “cash

out” is made (note the terminology of the section (forgoing entitlements, not “cashing out”): the agreement should use the correct terms);

- the employee gives his or her employer a written election to forgo the amount of annual leave;
- the employer authorises the forgoing of leave; and
- the amount forgone during any 12-month period does not exceed two weeks’ annual leave for full-time employees (pro-rata for part-time employees).

Employers are prohibited from requiring the cashing out of annual leave or from exerting undue influence or pressure on an employee in relation to his or her decision whether to cash out.

What if there is no workplace agreement?

A question that often arises is whether an employee who works under an ordinary employment contract, not covered by a workplace agreement, can cash out annual leave.

There is no express prohibition on the cashing out of leave for such employees in the Act, but the Standard does provide that employees are entitled to “accrue an amount of paid annual leave” and only allows an employee to “forgo an entitlement to take an amount of leave credited to the employee” if certain statutory conditions (including a provision in a workplace agreement allowing cashing out) are met. Where those conditions are not met, arguably no entitlement exists and cashing out is therefore prohibited. The view that such action is not permitted is taken by a Fact Sheet produced by the Federal Government relating to annual leave, which states:

An employee cannot cash out any portion of annual leave unless a term in a workplace agreement expressly permits cashing out.

Despite this, some have argued that because the Act does not expressly prohibit employees who are not party to a workplace agreement from cashing out leave, those employees are free to reach agreement with their employers to do so. Employers should be cautious about accepting such views.

Under the Act, the Standard prevails over a common law employment contract to the extent to which the Standard provides a “more favourable outcome” for the employee. Further, it is not possible to contract out of the Standard. Is an entitlement to *take* annual leave a more

favourable outcome than an entitlement to *cash out* annual leave?

This is a difficult question, because the only source of comparison is the entitlement under the Standard to “take” leave. There is, however, case law which supports the view that the right to take annual leave is an important one and should not be lightly relinquished. In 2000, in *Just Cuts (Canberra and Queanbeyan) Agreement*, the Australian Industrial Relations Commission noted that cashing out provisions:

have the potential to undermine, substantially if not completely, the purpose of annual leave. That purpose is to provide a reasonable period of physical and mental respite from work.

While there may be scope for arguing that employees who are not party to a workplace agreement could at least cash out the same amount of leave without falling foul of the Standard (particularly where the employment contract included the same conditions as the Standard, namely, the need for written election by the employee, pay in lieu at a rate no less than the employee’s basic periodic rate of pay, authorisation by the employer, and a cap of two weeks’ leave cashed out per year), employers should be aware that such a view has not been considered by any court and is attended by significant legal risk. If this view was rejected, employers who had allowed cashing out under an employment contract may not only face a penalty (of up to \$33,000) for breaching the Standard but could also face significant claims by employees for



leave which had been “untaken”, even though “cashed out”.

If cashing out is a significant issue (as it may be for some high-income earners, who are unlikely to be covered by a workplace agreement), employers may be well advised to consider a limited form of AVA, for example, that allows for little more than the cashing out of leave.

While the view that the Standard prohibits cashing out of annual leave for employees not covered by a workplace agreement is a conservative legal view, it does have the benefit that it is legally risk-free as it does not expose an employer to a finding that the employer has breached the Standard, nor to claims for untaken leave.

Cashing out pre-reform annual leave

The Act does not address the issue of whether or not pre-reform annual leave may be cashed out. Section 232(1) provides that for the purposes of the Division of the Act dealing with annual leave, annual leave means leave to which an employee is entitled under the Standard’s annual leave guarantee. With some minor exceptions set out in Regulation 2.23 in Chapter 7 of the *Workplace Relations Regulations 2006*, leave accrued before 27 March 2006 is not therefore covered by the Standard. A note to Regulation 2.23A(1) of Chapter 7 of the Regulations confirms this:

The Standard does not apply to annual leave entitlements of an employee that accrued before the Standard applied to that employee as a result of the operation of subsection 232(1)...

Whether this means that employers are free to cash out such leave is controversial. Employers would do well to obtain legal advice before embarking on such a step, and in any case, if an AVA was not possible, should seek to follow as far as possible the provisions of the Standard, and seek to protect their interests with a Deed of Release from the employee concerned.

Personal leave

Prior to amendments to the Act in December 2006, clause 7.1(11A) of Chapter 2 of the Regulations provided that a workplace agreement or written employment contract which allowed an employee to cash out any of his or her minimum entitlement to paid personal/carer’s leave would not be “more favourable” than the Standard, with the result that the Standard entitlement to take leave would prevail. However, this broad prohibition against cashing out the Standard’s minimum personal/carer’s leave



entitlement has now been changed.

The December 2006 amendments introduced a new section 245A which provides an express entitlement to cash out paid personal/carer’s leave (but not compassionate leave). This provision enables employees to request the employer to be allowed to cash out an amount of personal/carer’s leave each year, provided that, for full-time employees, a minimum balance (called a “protected amount”) of at least 15 days’ leave remains available after the cashing out. For part-time employees, this protected amount is calculated on a pro-rata basis.

According to the Supplementary Explanatory Memorandum to the December 2006 amendments, the new section 245A “is intended to provide flexibility for employers and employees to manage personal/carer’s leave balances in ways that suit their particular circumstances, while ensuring that a minimum amount of leave is available to an employee in the event of illness or injury”.

As with annual leave, the provision sets out certain conditions which must be met before cashing out will be allowed, as follows:

- a provision in an applicable workplace agreement must allow for “cashing out” (the provision must entitle the employee to forgo an entitlement to an amount of paid personal/carer’s leave that exceeds the protected amount, as well as to receive pay in lieu at a rate that is no less than the employee’s basic periodic rate of pay at the time the election to cash out is made);
- the employee must give his or her employer a written election to forgo

the amount of personal/carer’s leave; and

- the employer must authorise the forgoing of leave.

The requirement for a written election is supported by a provision in the Regulations which states that a term of a workplace agreement is “prohibited content” to the extent that it deals with the cashing out of paid personal/carer’s leave credited to an employee otherwise than at the employee’s written election.

Section 245A prohibits an employer from requiring the cashing out of personal/carer’s leave or from exerting undue influence or pressure on an employee in relation to his or her decision whether to cash out.

Section 245A does not provide for the “cashing out” of paid compassionate leave accrued under the Standard. However, the Regulations appear to allow this in some limited circumstances. Firstly, the part of the Regulations dealing with the Standard provides that for a workplace agreement or written contract of employment which provides for greater than the Standard in relation to compassionate leave, the Standard will provide a more favourable outcome if the employee is permitted to forgo more than the amount of compassionate leave that exceeds the Standard. Thus, for example, a workplace agreement which provides for three days’ compassionate leave for each permissible occasion (that is, one day more than the Standard) will not breach the Standard if an employee is allowed to forgo no more than one day’s compassionate leave. Secondly, the Regulations in relation to “prohibited content” in a workplace agreement

provide that forgoing paid compassionate leave is not “prohibited content” so long as the amount of compassionate leave which is forgone “would result in a more favourable outcome than the Standard”. How these provisions are to be read together raises some difficulties: clearly a workplace agreement that provided four days’ compassionate leave and allowed the cashing out of one (leaving the employee one day better off than the Standard) will meet both tests, but an agreement that provided for three days’ leave and allowed cashing out of one passes the first test (forgoing no more than the excess over the Standard) but arguably fails the second “prohibited content” test as it results in the employee having just two days’ compassionate leave (with one cashed out), the same as the Standard, but not a “more favourable outcome”.

Cashing out pre-reform personal leave

The issue of whether personal/carer’s leave and compassionate leave which accrued prior to the commencement of the Work Choices reforms can be cashed out was addressed by amendments to the Regulations which took effect on 21 September 2006. The amended Regulations now provide that:

- the Standard does not apply to personal/carer’s leave or paid compassionate leave that accrued before the Standard applied to that employee;
- a term of a workplace agreement which allows for the forgoing of pre-reform personal leave for pay or other benefit is not “prohibited content”; and
- an employee wishing to forgo an amount of pre-reform personal leave must elect to do so in writing.

The Explanatory Statement to the September 2006 amendments notes that:

Under the regulation, it is possible for the parties to agree to cash out some or all of the employee’s accrued pre-reform personal/carer’s or compassionate leave entitlement, and this will not be prohibited content in a new agreement.

The Explanatory Statement suggests that pre-reform personal leave will continue to operate under the relevant pre-reform rules which governed such leave. However, the amendments have capped this continuing operation for a five-year period, ceasing on 26 March 2011. After this time, it appears that the Standard will apply to any remaining pre-reform

personal leave (unless the employee is covered by an instrument which excludes the Standard’s application—discussed above). Despite the apparent continuing operation of applicable pre-reform rules, the amendments have added one new condition (which may or may not already form part of such rules), namely that cashing out of pre-reform leave will only be allowed in circumstances where the employee has made a written election.

Cashing out long service leave

Section 16 of the Act broadly provides that the Act is intended to apply to the exclusion of all State and Territory employment-related laws. However, there are a number of exceptions to the exclusion, one of which is any laws dealing with long service leave. The effect of this exception is that State and Territory laws relating to long service leave continue to apply to employers and employees who are covered by the Act (so long as there is no Federal award or workplace agreement overriding those laws—we discuss this below).

Cashing out under State legislation

Each Australian state and territory has its own legislation governing long service leave, for example, in New South Wales the *Long Service Leave Act 1955*, in

Queensland the *Industrial Relations Act 1999* and in Victoria the *Long Service Leave Act 1992*.

Each statute has its own rules in relation to whether or not an employer is permitted to provide its employees with pay in lieu of their entitlement to long service leave. In broad terms, the legislation which applies in the Australian Capital Territory, New South Wales, Northern Territory and Victoria provides that cashing out of long service leave is allowed only where an employee’s employment ceases, including as a result of the employee’s death. The legislation in South Australia, Tasmania and Western Australia is more relaxed, and generally allows cashing out where there is written agreement and the employee elects to cash out. In Queensland, cashing out is permitted in either of the following circumstances:

- if an industrial instrument that covers an employee provides for cashing out, payment may be made in accordance with the industrial instrument if the employee and employer agree to such in a separate signed agreement; or
- if there is no industrial instrument allowing cashing out, cashing out is only allowed if ordered by the Queensland Industrial Relations Commission on application by the employee.



Cashing out under the Federal Act

Because the Act expressly preserves the continuing operation of State and Territory long service leave legislation, it does not contain separate provisions or entitlements in relation to long service leave.

However, this does not mean that the Act has no impact on long service leave. Section 17 of the Act provides that workplace agreements prevail over state and territory laws to the extent of any inconsistency. Accordingly, if an employer and employee based in, say, New South Wales, entered into a workplace agreement which provided that the employer could cash out the employee's long service leave entitlement, then this provision would prevail and the New South Wales legislation, which broadly prohibits such cashing out, would have no effect.

Another impact of section 17 is that, under a workplace agreement, employers and employees can agree to modify or exclude altogether a long service leave entitlement provided by State or Territory law.

Section 17 also provides that Federal awards prevail over State and Territory laws to the extent of any inconsistency. However, unlike workplace agreements, the terms that may be included in Federal Awards are limited to a list of "allowable award matters". Long service leave is not included in this list, although it was on the list of allowable award matters under the pre-reform Act and so pre-reform awards may include provisions relating to long service leave. The Act expressly protects any term of a pre-reform award relating to long service leave and allows such a term to form part of a rationalised award. Such a term is called a "preserved award term".

Employers who wish to cash out their employees' entitlements to long service leave need to have regard to several factors:

- Because the Act preserves the ongoing operation of State and Territory laws relating to long service leave, employers need to understand the operation of the law which applies in the State or Territory in which they are based. As discussed above, for some employers, that law will allow cashing out simply by written agreement with the employee.
- Employers should be aware that the power of the State industrial relations tribunals to make State long service awards in relation to employers under



the Federal Act is currently being considered by the Federal Court. If that Court finds the State tribunals do have such a power, employers other than those in Victoria may also need to consider any such awards if made by the relevant State body.

- Where the State or Territory law which applies to an employer does not entitle the employer to cash out its employees' long service leave (unless the employees cease to be employed), the employer may consider entering into a workplace agreement which includes an express provision regarding cashing out of long service leave. That provision can be phrased in whichever terms the employer and employees decide. As outlined above, it may even adjust the amount of the long service leave entitlement which applies in the State or Territory in which the employer is located.
- Where an employer is covered by a Federal award, the employer should have regard to any long service leave provisions in that award. As discussed above, long service leave provisions in pre-reform awards are preserved award terms and may be included in a rationalised award. An award may entitle an employer to cash out long service leave and, under section 17, the award would prevail over any State or Territory law to the extent of any inconsistency.

Some cautions in conclusion

As the discussion above demonstrates, the law in relation to cashing out leave is complex and there are many subtleties to grapple with for employers attempting to understand their legal position.

While the new rules on "cashing out" various forms of leave allow employers and employees a great deal of flexibility, employers should bear in mind the overall impact of allowing exchange of leave for cash. For example, leave legislation in each State was originally a form of safety legislation, and employers who allow extensive cashing out of all forms of leave may face some scrutiny by State occupational health and safety inspectors if the health of employees, or their safety, is seen as compromised by the resulting longer periods at work. It is instructive that while the Federal legislation prevents an employer from requiring an employee to cash out leave, the ultimate decision about whether an employee who seeks to cash out leave is to be allowed to do so rests with the employer, who must approve the request before any leave can be cashed out. Thus, in keeping with occupational safety laws generally, it will be the employer who will bear ultimate responsibility for any adverse impact that lack of leave may have on health or safety. Similarly, employers should consider issues such as effect on morale and productivity of both employees who cash out leave and those who do not, and the need to ensure employees who seek to cash out leave understand the practical implications for them if they do so (for example, that cashing out sick leave balances may result in periods of unpaid absence if they become ill at a later date). This will minimise industrial issues at a later time.

Employers who wish to allow cashing out or who are faced with an employee request for cashing out would be advised to seek legal advice in relation to their rights and obligations.

Making the most of workplace policies - avoiding the potential legal pitfalls

Greg Robertson and Hamish Black

Last year, the Federal Court awarded a former employee of a company \$515,869 in damages for breach of contract after finding that the company had failed to follow a number of its workplace policies.

The case, *Nikolich v Goldman Sachs J B Were Services Pty Ltd*¹, which was referred to in the Winter 2006 edition of *Work InSights*, serves as a useful reminder to employers that workplace policies may be of significant legal importance and that, as such, they need to be treated with great care.

Workplace policies: a legal perspective

Understood from a legal perspective, we may say the following about workplace policies:

- they will in most cases be a source of legal rights and obligations for both employees and employers; and
- depending on what they say, and how they are implemented, they may operate to *reduce* or *increase* an employer's exposure to legal proceedings, compensation orders and fines.

A source of legal rights and obligations

Employees

Workplace policies typically contain commands such as: "Employees must wear goggles when using welders" or "Employees must not disclose the company's confidential information to third parties".

In most cases, these commands will be contractually binding on employees. This is because all contracts of employment contain a term requiring an employee to obey all reasonable and lawful directions of an employer (this term is automatically implied by law and, as such, it does not matter if there is no written term to this effect).

Accordingly, to the extent a workplace policy can be said to contain reasonable and lawful directions from an employer to an employee, and those directions have been relevantly communicated to the employee, they will be contractually binding on the employee.

Another reason why workplace policies are often contractually binding on an

employee is because, frequently, the employee's contract of employment will contain a term expressly stating that he or she must comply with the employer's workplace policies.

Employers

As far as an employer's contractual obligations (as opposed to its rights) are concerned, the implied term to obey lawful and reasonable directions has no relevance and there is no corresponding implied term. Further, it is comparatively unusual for an employment contract to contain a written term requiring an employer to comply with its own workplace policies.

Despite this, the courts appear to be very willing to hold that workplace policies are contractually binding on employers. Accordingly, it would be unwise for an employer to act as though it was not contractually bound, unless it received clear legal advice to that effect.

The factors which the courts may consider in determining whether an employer is contractually obliged to an employee to comply with its workplace policies include:

- whether or not there are written contractual terms dealing with the application of workplace policies, and what they say;
- whether the policy deals with a subject matter that is typically included in a contract of employment (such as rates of pay and termination payments): such a policy is more likely to be considered contractually binding on an employer than a policy that does not (such as a policy dealing with the procedures applicable to making claims for reimbursement of workplace expenses);
- whether or not the employee was provided with workplace policies at the same time he or she was provided with a contract of employment; and
- whether or not the employer required the employee to become familiar with the terms of the workplace policy prior to commencing employment.



Damages, injunctions and other contractual remedies

Importantly, if a workplace policy is contractually binding, a failure to act in accordance with the policy will result in a breach of contract and a potential right to a remedy under the law of contract. These remedies include damages and a right to treat the contract as having ended.

An employer will rarely sue for damages if an employee breaches his or her contract. Rather, it will more typically treat the breach as a reason to terminate the contract in accordance with any relevant terms (such as notice and pay in lieu of notice provisions) or assert that the employee's breach was serious enough to justify the contract being treated as being at an end, thereby excusing the employer from any obligation to act in accordance with the termination provisions of the contract (again, such as a provision requiring a payment in lieu of notice).

While not as common, where an employer has breached its contractual obligations, the employee may also be able to argue that he or she is relieved from complying with any relevant contractual terms. This can be significant, as an employee may be able to avoid compliance with, for example, a post-employment restraint in the contract.

Employees will, however, more usually seek damages or attempt to force the employer to act in accordance with its obligations (for example, to make a payment in lieu of notice or a severance payment). Damages claims may be substantial, as in *Nikolich v Goldman Sachs J B Were Services Pty Ltd* where, as indicated above, Mr Nikolich was awarded \$515,869.

Contractual lessons: drafting and implementation of workplace policies

The fact that workplace policies are very likely to be sources of contractual rights and obligations, and can therefore give rise to costly breach of contract proceedings, means that they need to be treated very carefully.

Drafting policies

In the first place, it is important for employers to ensure that policies are carefully drafted. In this regard, being likely contractual documents, workplace policies should:

- only impose obligations that employers are prepared to accept;
- clarify rights and obligations rather than confuse them; and



- ideally, be subject to the same level of sign-off that would apply to any other contractual document.

Employers should also give careful consideration to how workplace policies are treated and referred to in contracts of employment. In particular, consideration should be given to how workplace policies are to apply, contractually, to employers. That is, should there be an express provision stating that they do not apply contractually to the employer, or that some policies do and some do not, or that they all apply?

Implementing policies

While drafting is obviously important, implementation of workplace policies is also critical. In this regard, to ensure that those who are responsible for carrying out policies act in accordance with them and do not commit contractual breaches, regular training is highly recommended. A critical aspect of such training would be, obviously, to emphasise the likely contractual nature of the policies and that a failure to follow them may give rise to breach of contract proceedings.

Workplace policies and employment legislation

As indicated above, workplace policies can cut both ways in terms of legal risk. This has already been observed in relation to the law of contract. On the one hand, for example, workplace policies can reduce legal risk by clarifying legal rights

and obligations. On the other, being likely contractual documents, they can give rise to breach of contract proceedings in the event of non-compliance.

This duality is also apparent in other legal areas, in particular, in the context of employment legislation imposing obligations on employers or giving rights to employees.

Workplace policies can operate to minimise the incidence of unfair dismissal claims if, in the first place, they are fair and reasonable. In this regard, industrial tribunals may find that while an employee wilfully acted contrary to a policy, dismissing the employee for doing so was unfair because the policy was, for example, irrational or discriminatory.

Workplace policies may also minimise exposure to unfair dismissal claims by setting out clear guidelines for managing employee conduct and performance and terminations of employment which, if followed, will reduce a former employee's capacity to make out a claim that his or her dismissal was unfair. On the other hand, if they are not so drafted, and give rise to misunderstandings on the part of those who implement them or, worse, provide incorrect guidance, workplace policies may increase an employer's exposure to unfair dismissal claims.

This logic is also applicable to workplace policies dealing with occupational health and safety, anti-discrimination and sexual harassment. The focus here, however, is

ensuring that the policies send the right “message” to all employees (as opposed to only those responsible for performance management and employee terminations, such as human resource officers and line managers). In this regard, policies need to be drafted in a way that ensures that employees will understand their obligations and appreciate their gravity.

Employers need to ensure that their policies are otherwise compliant with relevant legislative standards. A current, relevant example (for those employees who are subject to the *Workplace Relations Act 1996*) is to ensure that policies dealing with hours of work, annual leave, personal/carer’s leave and parental leave are compliant with the Australian Fair Pay and Conditions Standard.

Again, however, it is not a mere matter of getting the content of relevant workplace policies right, but also of ensuring that they are properly implemented. Workplace policies must be living and breathing documents rather than collecting dust on a bookshelf. Numerous sentencing decisions have made this clear in the context of occupational health and safety prosecutions, where courts have afforded very little or no leniency to employers who have excellent policies but have failed to put them into practice, through proper inductions, regular training and the like.

In the context of unfair dismissal claims, it has also been made clear that an employee may be found to have been unfairly dismissed if his or her employer was not consistent in the application of a workplace policy. A common example is where an employer has let some employees “off” with light warnings or no punishment for breaching a particular policy (for example, to not drink alcohol during lunch breaks), but has dismissed others.

Conclusion

Workplace policies bring many potential benefits. These include:

- clarifying expectations, roles, responsibilities and obligations;
- establishing and maintaining appropriate standards of conduct and behaviour;
- assisting an organisation to run in an efficient, effective and orderly manner; and
- minimising legal risks.



However, these are only potential benefits because, like laws, workplace policies can be good or bad depending on what they say, and, importantly, how they are implemented.

By way of summary, the following are some of the ways to minimise the legal risks associated with workplace policies and to maximise their potential benefits:

- in the absence of clear legal advice to the contrary, ensure that those responsible for implementing policies are aware that they are very likely to have contractual effect;
- ensure policies are clear and unambiguous;
- policies should be subject to the same level of sign-off that would apply to any other contractual document;

- ensure policies are fair and reasonable, say what is intended and do not impose any unwanted obligations;
- review whether specific terms should be included in contracts of employment dealing with workplace policies and what these should say;
- apply care when amending workplace policies (are you, for example, potentially taking away an employee’s contractual rights without his or her consent?);
- ensure that policies are applied correctly and consistently; and
- ensure that the content of policies is adequately communicated through inductions and regular training.

¹. Please note that at the time of writing, an appeal from the decision in *Nikolich v Goldman Sachs J B Were Services Pty Ltd* had been heard by the Full Court of the Federal Court and the decision was reserved.

The “Fairness Test” and other changes to the Workplace Relations Act

Stephen Boatswain and Jenny King

Recent amendments to the *Workplace Relations Act 1996* have introduced significant changes to some areas of industrial relations under the Federal Act. In particular, a “Fairness Test” now applies to certain workplace agreements lodged from 7 May 2007 (the *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* being in this respect retrospective in operation) and employers are obliged to give their employees a “Workplace Relations Fact Sheet”. Other changes include:

1. establishment of the Workplace Authority Director (previously the Employment Advocate) as a statutory office holder, and creation of the Workplace Authority (previously the Office of Employment Advocate) as a statutory agency;
2. establishment of the Workplace Ombudsman as a new statutory office holder, and creation of the Office of the Workplace Ombudsman as a new statutory agency in place of the former Office of Workplace Services;
3. provisions ensuring that bargaining fee clauses are now included in the list of “prohibited content” which can not be included in workplace agreements;
4. allowing unions and employer organisations to maintain their Federal registration, even if they did not have a majority of members in the Federal industrial relations system; and
5. extension of the redundancy protection in a transmission of business from 12 months to 24 months.

Here, we examine the new “Fairness Test”, and also mention the issues of prohibited content and the form of notice required to be given to employees.

The Fairness Test

The New Fairness Test—the Context

Since 27 March 2006, a workplace agreement made under the *Workplace Relations Act* was taken to include “protected” terms of an applicable award, unless those terms were expressly excluded or modified by the workplace



agreement itself. Protected terms were defined in the Act to mean provisions dealing with meal breaks; incentive-based payments and bonuses; annual leave loadings; observance of public holidays (or substituted days) and payment for those days; monetary allowances for expenses, special skills or responsibilities, or for disabilities associated with the work; overtime loadings; and penalty rates. The Regulations could add to this list.

As well as the terms of a Federal award, protected conditions arise from the terms of a notional agreement preserving a State award, the terms of a preserved State agreement and certain State or Territory industrial laws.

There was prior, to the amendments, no requirement for an employer to provide compensation to employees for the exclusion or modification of any “protected” terms. Workplace Relations Minister Joe Hockey has now stated that it “was never the intention that it may become the norm for protected conditions such as penalty rates to be traded off without proper compensation”.

The Act therefore changes the former position:

- by requiring certain workplace agreements lodged from 7 May 2007 to pass the Fairness Test by providing “fair compensation” to an employee in

lieu of the exclusion or modification of any “protected” conditions; and

- by creating a process for the Workplace Authority Director to “designate” an award for the purpose of applying the Fairness Test to employers not bound by a Federal Award, a Preserved State Agreement, or a Notional Agreement Preserving State Award, if an award “usually” applied to the industry or the occupation but an employer was not otherwise bound by an award before making a new workplace agreement.

When does the Fairness Test apply?

The Fairness Test applies to workplace agreements:

- (a) lodged on or after 7 May 2007;
- (b) in which either:

- the employer is bound by an award, preserved State agreement or notional agreement preserving State awards; or
- at least one employee is employed in an industry or occupation in which terms and conditions for the work to be performed:
 - are usually, or but for the workplace agreement or another instrument would be, regulated by an award; or

— were usually, immediately prior to 27 March 2006, regulated by a State award, or would have been regulated by a State award but for a State employment agreement applying; and

(c) which exclude or modify one or more “protected” conditions.

All collective agreements that meet these three criteria will be covered. If the agreement is an AWA, there is an additional test: the annual base salary (or piece-rate, or the full-time equivalent) is less than \$75,000. No monetary limit applies to collective agreements.

Employers should be careful about the \$75,000 limit—employees may be receiving more than \$75,000, but still be covered if the “salary” component is less than that figure, but the take home pay is supplemented by particular allowances or penalties. The \$75,000 does not include incentive-based payments and bonuses, loadings other than casual loadings, monetary allowances, penalties (or any similar entitlements to these), or superannuation. Secondly, it should be noted that it may be the case that “second generation” agreements are not caught by the Fairness Test, as the Award would have been displaced by the first generation of workplace agreement.

What is Fair Compensation?

A workplace agreement will satisfy the Fairness Test if it provides “fair compensation” in lieu of the exclusion or modification of protected conditions. A collective agreement will satisfy the Fairness Test if, **on balance**, it provides “fair compensation” in its overall effect in lieu of the exclusion or modification of the protected conditions.

There is no definition of “fair compensation” in the Act. However, the Act sets out a hierarchy of considerations relevant to determining whether “fair compensation” has been provided. These considerations are:

- any monetary and non-monetary compensation provided, and the work obligations of the employee(s), **must** be taken into account by the Workplace Authority Director in determining the question of “fair compensation”;
- the personal circumstances of the employee(s), including family responsibilities, **may** be taken into account by the Workplace Authority Director in considering “fair compensation”; and

- the industry, location or economic circumstances of the employer, and the employment circumstances of the employee(s), **may** be taken into account by the Workplace Authority Director in **exceptional circumstances**, and only if it is not contrary to the public interest to do so.

“Non-monetary compensation” is defined to mean compensation for which there is a “money value equivalent” or to which a money value can reasonably be assigned and which confers a benefit or advantage on the employee “of significant value to the employee”.

It is within the context of the above considerations that employers will now need to consider whether a proposed workplace agreement provides fair compensation for excluded or modified “protected” conditions.

Some unanswered questions about “compensation” remain. For example, can amounts that were payable under earlier arrangements, continued under the workplace agreement but not part of the Standard or the protected conditions, be counted as compensation? Could, for example, the provision of long service leave, which could otherwise be excluded under Federal law, be classed as compensation for loss of one or more of the conditions, even though the employees had been entitled to such leave in the past?

Similarly, there are unanswered questions about the concept of a collective agreement providing compensation that “on balance” provides for fair compensation? What if the majority of employees are better off but a small minority are negatively affected?

Designated Awards

The Workplace Authority Director may determine a “designated” award for the purpose of applying the Fairness Test if:

- the employer is not bound by a State Preserved Agreement or by a Notional Agreement Preserving State Award; and
- there is no award that is binding on the employer before the new workplace agreement is made; and
- the employee(s) will be employed in an industry or occupation in which the terms and conditions of the kind of work performed by the employee(s) is “usually” regulated by an award; and
- the “designated” award regulates terms and conditions of employment of employees engaged in the same kind of work as the work performed under the workplace agreement; and
- the “designated” award is appropriate for the purposes of the Fairness Test; and
- the award is not an enterprise award.

Circumstances in which no award will regulate the kind of work to be performed but an award “usually” applies to the industry or occupation, or where there is no award appropriate for the purpose of the Fairness Test, are likely to be limited.

Implications for employers

Many aspects of the legislation remain unclear at the time of writing.

Employers who have been using generic forms of workplace agreements, supplementing them with more generous



forms of common law contracts tailored to the specific role of the employee may now find it necessary to change their strategy, as the “bare bones” agreement may not pass the Test, even if the common law contract would make the overall arrangement more advantageous to the employee. Such a strategy could affect large employers with diverse staff, or firms which are engaged in labour hire.

For employers already bound by an award, it will be necessary to ensure that any new workplace agreement that they lodge provides fair compensation for any protected terms that are excluded or modified by the new agreement. Compensation will normally be a payment of money. Where some other form of compensation is made, employers should ensure it has a monetary value, or that a monetary value can easily be applied, and that it is of “substantial” benefit to an employee, or otherwise face the risk that that compensation is not counted in the assessment of fairness.

Employers not already bound by an award, or by a Preserved State Agreement or Notional Agreement Preserving State Award, will now need to consider, firstly, whether they are in an industry “usually” covered by an award, and secondly, (if the answer to the first question is no) whether the agreement will cover employees in occupations “usually” covered by an award. If so, employers, will need to appreciate that any new workplace agreement lodged may need to meet the requirements of the Fairness Test as measured against a “designated” award. Therefore, these employers will need to give consideration to protected terms when making a new workplace agreement, in circumstances where that would not have been necessary prior to the introduction of the Fairness Test.

Prohibited Content

Under section 357, an employer faces a civil penalty if “prohibited content” is included in a workplace agreement. Prior to the amendments, prohibited content was defined solely in the Regulations. Amendments to the Act have moved some forms of prohibited content into the legislation and added some new forms of prohibited content (thus preventing any future government changing them administratively by amending the regulations).

Areas now prohibited by the Act itself, rather than being found in the Regulations, include provisions that:

- require or permit conduct contravening the Freedom of Association provisions



of the Act (Part 16);

- directly or indirectly require a person to encourage, or discourage, another person in relation to becoming or remaining a member of a union
- indicate support or opposition to being a member a union; and
- require or permit the payment of a “bargaining fee service”.

The power to include prohibited content by Regulation is retained, however, and employers will need to be careful to consult both the Act and the Regulations to ensure they have the most up-to-date list of prohibited content.

Workplace Relations Fact Sheet

Under the amendments all employers in the Federal system (being the vast majority of Australian employers) are required to provide their employees with a Workplace Relations Fact Sheet (available from the Workplace Authority by download or in hard copy).

The Fact Sheet summarises employees’ rights under the Act, including their entitlements under the Australian Fair Pay and Conditions Standard, the right to join

or not join a union, and protection from unlawful termination. It also provides information to employees about the Fairness Test, described above. Information is also provided about the offices and roles of the Workplace Ombudsman and the Workplace Authority.

The Fact Sheet infers that the conditions contained in the Australian Fair Pay and Conditions Standard apply to all employees. This may confuse employees currently employed under an Australian Workplace Agreement or collective agreement made prior to 27 March 2006 (neither of which need comply with the Standard). Employers who have employees in this situation should consider providing additional information (for example, by memorandum or email) to those employees, explaining what conditions do apply and why.

Employers will have until 20 October 2007 to give the Fact Sheet to their existing employees, and from 20 July 2007 are required to issue the Fact Sheet to any new employees within 7 days of those employees commencing work. Failure to provide employees with the Fact Sheet within the appropriate timeframe may result in fines of up to \$110.

About Us

Harmers Workplace Lawyers focuses on high quality problem solving and a preventive approach to workplace law as well as the identification of opportunities and innovations across all areas of employment and industrial law.

Harmers Workplace Lawyers has consolidated its reputation as Australia's leading workplace law firm by being awarded the "Employment Specialist Law Firm of the Year" at the ALB Australasian Law Awards for both 2006 and 2007. With Offices in Sydney, Melbourne and Brisbane and over 30 lawyers, Harmers is one of Australia's largest workplace relations firms.

Our client base is diverse and includes many of Australia's most prominent blue chip companies, employer associations, media personalities and senior executives. We also have a pro bono component consistent with our charter to ensure fairness in the workplace.

If you would like more information regarding Harmers Workplace Lawyers, or would like to discuss any aspect of this newsletter, please contact one of our experienced professionals.

Michael Harmer

Chairman & Senior Team Leader
michael.harmer@harmers.com.au

Joydeep Hor

Managing Partner & Team Leader
joydeep.hor@harmers.com.au

Stephen Boatswain

Partner & Team Leader
stephen.boatswain@harmers.com.au

Chris Molnar

Partner & Team Leader
chris.molnar@harmers.com.au

Emma Pritchard

Partner & Team Leader
emma.pritchard@harmers.com.au

Jamie Robinson

Partner & Team Leader
jamie.robinson@harmers.com.au

Shana Schreier-Joffe

Partner & Team Leader
shana.schreier-joffe@harmers.com.au

David Stewart

Partner & Team Leader
david.stewart@harmers.com.au

Sandra Marks

General Counsel
sandra.marks@harmers.com.au

Greg Robertson

General Counsel & Team Leader
greg.robertson@harmers.com.au

Margaret Diamond

Senior Associate & Team Leader
margaret.diamond@harmers.com.au

Bronwyn Maynard

Senior Associate & Team Leader
bronwyn.maynard@harmers.com.au

HARMERS

Workplace Lawyers

SYDNEY

Level 28 St Martins Tower
31 Market Street
Sydney NSW 2000
tel: (02) 9267 4322
fax: (02) 9264 4295
sydney@harmers.com.au

MELBOURNE

Level 10
224 Queen Street
Melbourne VIC 3000
tel: (03) 9612 2300
fax: (03) 9612 2301
melbourne@harmers.com.au

BRISBANE

Suite 16 Level 10
320 Adelaide Street
Brisbane QLD 4000
tel: (07) 3016 8000
fax: (07) 3016 8001
brisbane@harmers.com.au

www.harmers.com.au

© Copyright Harmers Workplace Lawyers 2007. All rights reserved. No part of this publication may be reproduced, in whole or in part, by any means whatsoever, without the prior written consent of Harmers Workplace Lawyers.

Disclaimer: This newsletter provides a summary only of the subject matter covered without the assumption of a duty of care by the firm. No person should rely on the contents as a substitute for legal or other professional advice.