

WORK InSights

Autumn edition 2009

Editorial

As this edition of *Work InSights* is being prepared, Senators are considering potential changes to the *Fair Work Bill*. It is therefore appropriate that we start to look at some of the areas in the new legislation that will affect employers. Changes to the unfair dismissal regime will be amongst the earliest areas to be affected, and so we look at what will change and how employers may sensibly respond to avoid costly claims. "Modern awards" have now occupied the attention of the Australian Industrial Relations Commission and the parties appearing before it for some time, and some practical tips for working under the modern award system can be found in our second *Fair Work* article. We also examine the good faith bargaining provisions of the *Fair Work Bill*, and consider the opportunities this new framework provides for employers to benefit from adopting a more cooperative approach to workplace bargaining.

Given the economic crisis which appears to dominate the news every day, it is also appropriate to review strategies for managing redundancies in such a climate, and our feature article for this edition deals with legal and practical issues in ending employment in those circumstances.

The next edition of *Work InSights* will concentrate on what should be by then the *Fair Work Act 2009*, with an analysis of the major provisions of the legislation in its final form (once passed by the Senate) and what impact it will have on Australian workplaces. It will be an edition well worth the wait.

Contents

- 1 Safe exits: managing redundancies
- 4 Performance management in anticipation of unfair dismissal changes
- 6 Ignore at your peril: implications for employers from the award modernisation process
- 10 A new framework for cooperation?
Good faith bargaining and the *Fair Work Bill*



Safe exits: managing redundancy

Shana Schreier-Joffe and Manoj Dias-Abey

The current economic crisis gripping world financial markets has been described by former Chairman of the United States Federal Reserve, Alan Greenspan, as "one of the worst by far" that he has witnessed. In this climate of uncertainty, redundancies are likely to become a major feature of the labour market as employers look at making savings by paring back labour costs within their organisations.

The process of making a decision about the necessity for redundancies; complying with all relevant legal obligations; managing the termination process; and putting into place a communication strategy to maintain workplace morale for remaining employees, can be a difficult process for employers. Mismanaging this process has the potential to leave the organisation exposed to expensive legal actions, cause affected employees unnecessary psychological harm and irreparably damage workplace morale as remaining employees are left feeling less secure in their employment.

This article outlines several important aspects that should be addressed in conducting large-scale redundancies.

A change management strategy

A company facing economic circumstances which require it to make a significant portion of its workforce redundant should ensure that the redundancies are treated as a part of a broader change management process. A change management strategy involves viewing the process in a holistic way and covers various aspects, including: investigating other potential alternatives, determining legal obligations, devising a communication strategy, undertaking risk minimisation and engaging in contingency planning.

The communication aspect of the process is especially important. A redundancy process which is badly handled in terms of the way communication is undertaken runs the risk of damaging the company's brand in the marketplace as well as injuring the company's relationship with remaining employees, which in fact may jeopardise the long-term health of the company.

STOP PRESS:

While this issue of *Work InSights* was in final production, the *Fair Work Bill* became law, though with a number of amendments. Rather than delay production, this edition still refers to the position under the Bill as it stood in February 2009. As noted above, we will publish a more detailed analysis of the *Fair Work Act 2009* shortly.

Valid reasons for the redundancies

At law, a redundancy occurs “not on account of any personal act or default of the employee dismissed or any consideration peculiar to [to the employee], but because the employer no longer wishes the job the employee has been doing to be done by anyone” (a widely recognised quotation from a 1977 South Australian decision).

It is important that prior to undertaking any redundancies, the employer establish that there are no other cost cutting measures that the organisation can adopt as an alternative to redundancy. In addition, establishing a valid reason for the redundancies which can be communicated widely to the organisation’s workforce will form an important element of a communication strategy to maintain employee morale. If there are financial pressures on an organisation, these should be communicated to the workforce well in advance of any notice of intention to make employees redundant.

Consultation

It is fairly commonplace for an industrial instrument to prescribe that consultation must be undertaken prior to making a decision about redundancies. The relevant provisions may prescribe that consultation is necessary with any affected employees and/or relevant trade union. The *Workplace Relations Act 1996* (Cth) also contains consultation requirements which may be triggered in certain circumstances.

Where consultation has not occurred in accordance with the stipulated procedure, an organisation may face the risk of being in breach of an industrial instrument or the *Workplace Relations Act*, which can sound in civil penalties.

Consultation generally means that an employer must provide information to the parties about the necessity for the redundancies; how the redundancies are to proceed; and take into consideration the views of employees before any final decision is made. Consultation does not require an organisation to change its position on redundancies based on the feedback received. However, consultation must not simply be used to rubberstamp a predetermined conclusion.

Even where a formal consultation process is not required under law, it is generally recommended that a proper consultation strategy be developed and that an employer discuss any proposed redundancy with employees prior to actually making a final decision on the issue. Consultation



with affected employees is about ensuring integrity of the redundancy process and affording employees procedural fairness. It is entirely conceivable that an employee may be able to make a persuasive case as to the necessity of their position to the business going forward. Arbitral proceedings which have examined redundancy processes have often looked at the level of consultation undertaken as a key criterion to establish that a redundancy process has been fair and reasonable.

Finally, it is essential that employees who are not to be made redundant and are to remain in the organisation are given some form of information about the rationale for the redundancies. It is also important that those who remain as well as those that may be made redundant feel that although the redundancies were necessary and that they were carried out in a fair and reasonable manner. This will go a long way in ensuring that the relationship of trust and confidence between the employer and employees is maintained.

Selecting employees

The employees who are to be terminated on the grounds of redundancy should be selected in a fair manner. As part of this, it is necessary for the organisation to establish fair selection criteria.

The selection criteria should correspond to your business needs. The criteria should be weighted appropriately, meaning that fairness will allow certain criteria to carry greater weight than others. For example, the skill and expertise of individual employees carries more weight than length of service.

It is preferable if the main criteria can be objectively assessed (such as length of service and employee’s skills, qualifications,

training, level of experience). The criteria must not discriminate on unlawful grounds. These grounds include such characteristics as: age, sex, pregnancy, race, marital status, disability and union membership. It is also important that the basis on which employees are selected for redundancy does not have a disproportionate impact on any particular category of employees to avoid suggestions that the employer has indirectly discriminated against a particular prescribed group of employees. For example, if the company chooses to implement a “last on, first off” policy for selecting employees for redundancy, this may have a disproportionate, and thus, discriminatory effect on females if newer recruits were mostly females.

Legal requirements

Once a decision has been made to make an employee or group of employees redundant based on an assessment of the business needs of the organisation, the next step is to determine the organisation’s legal obligations in respect of any severance payments which need to be made. This step often belies a complexity that is not readily apparent and it is advisable to seek legal advice during this step.

As a matter of course, employees who are to be made redundant are usually entitled to the following:

- (a) notice of termination;
- (b) payment in respect of any accrued and unused statutory entitlements, such as annual leave and long service leave; and
- (c) severance pay.

It will be necessary to consult relevant legislation; statutory industrial instrument (such as an award, collective agreement

or Notional Agreement Preserving State Awards) applying in respect of an affected employee; the express terms (whether written or oral) and implied terms of an employee's contract of employment; and company policies to determine the extent of these obligations.

An employer is able to provide employees with a severance package which is more generous than their strict legal obligations at any point in this process. This should be especially considered where the organisation's strict legal obligations fall well below industry standards.

It is worthwhile noting that the current position is that there is no statutory obligation to provide severance pay where this requirement is not contained in an industrial instrument, employment contract and/or company policy. However, from 1 January 2010, the Australian Government will introduce a general requirement to provide redundancy pay in accordance with a specific scale which rewards length of service.

There are limited circumstances in which an organisation will be relieved of the obligation to provide severance pay. Further advice should be sought in relation to whether the organisation's requirement to provide severance pay can be avoided on a number of legitimate grounds, such as: the procurement of suitable alternative employment for affected employees, financial incapacity to pay, or the existence of a transmission of business.

Major risks for employers

Employees who seek to challenge their redundancy, or the quantum of the payment they have received in respect of their redundancy, have several legal avenues open to them.

Unfair dismissal claims

Prior to the *Work Choices* reforms, the most common means by which an employee challenged their redundancy was by bringing an application for unfair dismissal. The ability of employees to bring unfair dismissal proceedings has been severely curtailed by *Work Choices*. An employer has a number of grounds which it can rely upon to have an application for unfair dismissal dismissed, including, *inter alia*, "genuine operational reasons" for the employee's termination; the organisation employs fewer than 100 employees; and the employee has been employed for less than six months.

Employers who believe that they fall within one of the exceptions should proceed with caution and not act as though they have been given a *carte blanche* when

it comes to making employees redundant. An examination of the case law in this area should cause employers to be a little more wary of the extent to which the exceptions can be utilised. Where an employer intends to rely upon the genuine operational reasons exception, for example, the employer will still be required to demonstrate the existence of genuine operational reasons as one of the reasons for ending the employment.

Breach of contract claim

A breach of contract claim involves an employee arguing that their dismissal was contrary to the terms of their contract. Importantly, the contract comprises not only express terms, but also a range of "implied" terms, such as the duty to preserve the relationship of mutual trust and confidence as well as provisions contained in company policies which may have contractual force depending upon the particular circumstances.

Another common legal claim averred by employees in this situation is a claim for "reasonable notice" upon termination. An employee may have an argument that they have an implied right to reasonable notice notwithstanding an explicit notice provision in a written contract of employment. An employee may be able to argue that the contract no longer validly covers their employment as a result of a number of promotions during the period of their employment. What constitutes reasonable notice will be assessed with reference to the employee's particular circumstances, including seniority, age, length of service and employee's profession.

Discrimination / unlawful termination claim

A discrimination claim is likely to arise where an employee can establish that they have been dismissed for a reason

protected by legislation, such as race, sex, age or disability. It is essential that employees are selected for redundancy on an objective and fair basis to reduce the chance of a discrimination claim being brought.

Trade practices claim

Trade practices legislation prohibits employers from misleading or deceiving employees in relation to their employment, and especially when offering employment and during contract negotiations. For this reason, employers need to take particular care when making representations regarding job security or expected length of employment, or an employee's entitlements.

In the 2002 case of *O'Neill v Medical Benefits Fund of Australia*, Mr O'Neill was able to establish that his employment had been terminated contrary to a representation made to him about the security of his position. Due to the fact that Mr O'Neill had been enticed away from a previous position, damages in this case was calculated by reference to how long he would have likely remained employed in his previous position had the misrepresentation not been made.

Conclusion

The need to "downsize" an organisation in a time of economic turbulence is an unfortunate reality. However, by ensuring the integrity of the process and respecting the dignity of those affected, an employer will go a long way towards reducing the impact upon employees. Furthermore, following best practice guidelines in relation to redundancy can have an enormous impact on maintaining employee morale in the organisation and help maintain a cooperative workforce united on achieving the organisation's goals well into the future.



Performance management in anticipation of unfair dismissal changes

Margaret Diamond

Early start date for unfair dismissal changes

The anticipated start date for the unfair dismissal component of the Federal Government's industrial relations changes is 1 July 2009. These changes to unfair dismissal laws will extensively expand the range of employees who have access to the unfair dismissal redress and create new legal consequences where the process of termination of employment is not handled appropriately.

What are the unfair dismissal changes?

The Federal Government's new unfair dismissal regime is contained in the Fair Work Bill 2008. The Fair Work Bill, once enacted, will be the substantive legislation used to implement the industrial relations election commitments made by the Labour Party in its Forward with Fairness policy.

The Fair Work Bill is currently making its way through Parliament. Amendments may be made to the Bill before it becomes law as part of this process.

Significant aspects of the Fair Work Bill provisions in relation to unfair dismissals as they currently stand are:

- Unfair dismissal protection is restored to a large section of the workforce;
- The current exclusion of employers with less than one hundred employees will be removed;
- Unfair dismissal protection will, however, only be available to employees who have completed a minimum employment period of 6 months (or 12 months for small businesses);
- To be eligible for unfair dismissal protection employees must also be employees over whom the Commonwealth has constitutional coverage who are either covered by a modern award or enterprise agreement or who are instrument free, but earn less than the high income threshold, which is currently set at \$100,000;
- An exclusion for employees genuinely made redundant is retained, but the concept of a genuine redundancy will be narrower than the current "genuine operational reasons" exclusion;

- Applications in relation to unfair dismissals are to be made to the new body Fair Work Australia;
- Applications must be made within 7 days of the dismissal;
- In considering whether a person has been unfairly dismissed, Fair Work Australia must be satisfied, among other things, that the dismissal was harsh, unjust or unreasonable and that the dismissal was not consistent with the Small Business Fair Dismissal Code, in the case of employees of small businesses;
- The Small Business Fair Dismissal Code will apply to businesses with fewer than 15 employees, the intention being that Fair Work Australia must be satisfied that the dismissal was not consistent with the Code before finding that the employee has been unfairly dismissed;
- The Bill sets out some specific factors which Fair Work Australia must take into account in deciding whether a dismissal is harsh, unjust or unreasonable;
- Fair Work Australia will determine unfair dismissal claims by holding a conference or a hearing if there is a dispute about the facts. A hearing will only be held if Fair Work Australia considers it appropriate, after taking into account the views of the parties and whether it would be the most effective and efficient way to resolve the matter;
- The rights of appeal from a decision of Fair Work Australia are limited; and
- There is an increased emphasis on reinstatement as the primary remedy.

Unlawful termination

The current unlawful termination provisions relating to termination for discriminatory and other prohibited reasons will be retained. These provisions apply to a wider group of employees than the unfair dismissal provisions because the provisions rely for their constitutionality on international agreements relating to discrimination and termination of employment.

A proposed new feature of the provisions

contained in the Fair Work Bill is that an employee will be able to seek an injunction to prevent an employer from taking action to terminate his or her employment for a discriminatory or other prohibited reason.

An application in relation to unlawful termination must be made to Fair Work Australia within 60 days of the termination.

It will be easier for applications in relation to unlawful termination to proceed to court level, than it will be for applications in relation to unfair dismissals.

Implications for performance management

The new provisions in relation to unfair dismissal in the Fair Work Bill contain a list of factors that Fair Work Australia must take into account in considering whether it is satisfied that a dismissal was harsh unjust or unreasonable. These are:

- whether there was a valid reason for the dismissal related to the person's capacity or conduct (including its effect on the safety and welfare of other employees); and
- whether the person was notified of that reason; and
- whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person; and
- any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to dismissal; and
- if the dismissal related to unsatisfactory performance by the person—whether the person had been warned about that unsatisfactory performance before the dismissal; and
- the degree to which the size of the employer's enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- the degree to which the absence of dedicated human resource management specialists or expertise in the enterprise would be likely to impact on the procedures followed in effecting the dismissal; and
- any other matters that Fair Work Australia considers relevant.

Many of the above factors will be familiar to employers as part of standard best practice in performance management and termination of employment procedure.

There is often a gap in Australian workplaces between what we know and what we do. While most employers have an understanding of what might constitute best practice in this area, practical implementation is another matter. Performance management issues can be difficult to confront and handle optimally. Many employers are uncomfortable dealing directly with performance issues and would prefer to work around them. Such an approach can lead to inefficiencies in the way the workplace operates and to eventual unavoidable unpleasantness, when the situation becomes intolerable. There are thus operational imperatives for adopting a best practice approach to performance management, apart from any legal issues involved. An employer's obligation to treat employees with dignity and respect also has implications for the approach employers should take to performance management.

After July of this year the importance of adhering to best practice performance management procedure may be heightened by employees' increased access to unfair dismissal redress, should the procedure adopted by the employer fall short in some way.

Key steps for a best practice approach to performance

We set out below some key steps for a best practice approach to performance management:

- Identify the work standards expected of employees;
- Recruit employees who will be able to meet these standards;
- Put probationary periods in place so that employee's ability to meet expected work standards can be assessed;
- Put in place a performance assessment process to identify when expected standards have not been met;
- Let employees know in a clear and timely manner if their performance has not been satisfactory;
- Discussions with employees about performance should be:
 - specific—using particular at-work examples and giving an indication of the corrective action required. The focus should be on instances of behaviour which are observable and verifiable rather than generalisations;
 - timely—occurring soon after the behaviour has occurred,

and in time for improvements to performance to be made;

- regular—feedback should be given whenever needed, not saved up for formal performance appraisal time;
 - clear—make sure the important information is not buried;
 - positive and constructive—focus on what the employee can do to improve, not just on what the employee is doing wrong; avoid becoming personal or derogatory.
- Take steps to address unsatisfactory performance such as providing training and mentoring opportunities, and thus reduce the possibility of future termination of employment;
 - After taking the above steps, if the performance problems persist, consideration may be given as to whether the performance problems are of sufficient gravity to justify dismissal;
 - If it is considered that the performance problem is of sufficient gravity to justify dismissal this should be clearly communicated to the employee, preferably in writing by way of a written warning prior to any action being taken by the employer;
 - The warning given to the employee (preferably in writing but can be given verbally) should clearly state that the employee's unsatisfactory performance is at such a level that

termination of employment will result if the employee's performance does not improve;

- A reasonable period of time should be allowed for the employee to improve his or her performance;
- If performance does not improve to a sufficient level within a reasonable time, termination of employment may be justified;
- Before proceeding to dismiss an employee the employer should check the employee's contract of employment and any relevant industrial instrument or employment policy applicable to the employee to ensure that any obligations contained in these documents relating to termination of employment are complied with, for example, in relation to notice period, or particular procedure to be followed;
- Before the employee is dismissed the employee must be informed of the reason for the proposed dismissal and the employee must be given an opportunity to respond;
- The employee should be allowed a support person present to assist at any discussions relating to the dismissal unless it would not be reasonable to do so; and
- The employer should keep records of discussions held with the employee about the employee's performance, records of any warnings given and records of discussions about termination of employment.



Ignore at your peril:

Implications for employers from the award modernisation process

Shana Schreier-Joffe and Manoj Dias-Abey

Despite the historical role that industrial awards have played in the Australian industrial relations landscape, there is little doubt that the previous Coalition Government held a deep-seated aversion to awards as a means of regulating the relationship between employers and employees. Critics of the award system have tended to view awards as hindering productivity gains by subjecting employers to unnecessarily complex and detailed regulation.

Under the Labor Government's proposed industrial relations system, awards once again occupy a central position. However, under this system, rather than being the primary means of regulating the employment relationship, awards will be a safety net for employees. Employers are encouraged to bargain collectively with employees to determine workplace-appropriate terms and conditions, subject however, to the important caveat that these terms and conditions are more favourable to employees than contained in any applicable modern award.

It is the intention of the Labor Government that the award modernisation process currently underway, spearheaded by the Australian Industrial Relations Commission, will result in a number of user-friendly awards for employers that will also provide an effective safety net for employees.

At present, employers need to comply with a confusing web of federal awards and/or state-based Notional Agreements Preserving State Awards. Modern awards take advantage of the increased coverage of the federal industrial relations system brought about by the *Work Choices* amendments by providing that all employees of federal-system employers that work in a particular industry or occupation will be covered. That is, modern awards will have "common rule" application from 1 January 2010, and apply to all employers within its scope of coverage across Australia.

The Award Modernisation Request

On 2 April 2008, the Minister for Employment and Workplace Relations, the Hon. Julia Gillard, directed the Commission to commence the award modernisation process by way of an Award Modernisation Request.

As a starting point, the Award Modernisation Request requires that all modern

awards contain a model flexibility clause which will allow an employer to reach an individual flexibility arrangement with an employee to meet the genuine needs of both the employer and employee. The precise operation of the model flexibility clause has been a major source of contention between unions and employer associations. Whether or not the model flexibility clause in its current form allows employers the flexibility necessary to operate their business will be a key question for determination.

The Award Modernisation Request also clarifies how terms of modern awards will interact with the terms contained in the expanded National Employment Standard.

The Award Modernisation Process

Upon receiving the Award Modernisation Request, the Commission determined that modern awards would be made in several stages (for an outline of the timing for various industries/occupations, please see Table 1 on page 9). It was decided that the first stage would deal with "priority industries/occupations", which were determined on the basis of industries or occupations which had a high incidence of Australian Workplace Agreements and Notional Agreements Preserving State Awards. Priority industries and occupations included: clerical, hospitality, mining and the retail industry. The final form of the modern awards that will apply to the priority industries and occupations were released in December 2008 and are now available from the Commission's website.

During each stage, interested parties, such as relevant trade unions, employer associations, affected employers or individuals, have had a number of opportunities to make submissions. The Commission has followed the practice of releasing "exposure drafts" of the modern awards to allow parties an opportunity to properly provide feedback prior to releasing the final form.

During the consultation process, parties have submitted "pre-drafts" of certain modern awards in an attempt to influence the Commission's ultimate decision. Considered pre-drafts, made in consultation with other key stakeholders, have proven an influential means of persuading the Commission to adopt a particular position. Employers that intend

to intervene in a future stage of the award modernisation process may like to consider adopting such a strategy.

The Commission is currently in the midst of stage 2 of the award modernisation process. Stage 2 industries and occupations include: cleaning and manufacturing, building and construction, information and communication technology and financial services. The final date for making stage 2 modern awards is 3 April 2009.

Stage 3 includes the following industries: airlines, pharmaceutical, vehicle manufacturing and wholesale industries. Exposure drafts of stage 3 modern awards will be available from 22 May 2009. After allowing time for consultation over June, July and August, final stage 3 modern awards will be released on 4 September 2009.

Finally, stage 4 modern awards in industries and occupations including fire-fighting and local government will commence on 4 August 2009. Exposure drafts of stage 4 modern awards will be available for parties to make submissions from 25 September 2009 and the final form of these modern awards will be released on 4 December 2009.

Major issues for consideration

Throughout the award modernisation process a number of important issues have arisen which warrant further consideration.

Model flexibility clause

The Award Modernisation Request requires all modern awards to contain a model flexibility clause. Employers can use the model flexibility clause to develop flexible arrangements with individual employees that contain terms and conditions that differ from the terms of the model awards in certain respects, so long as the arrangements do not disadvantage the employees in comparison to the relevant modern award.

A few key features of the model flexibility clause as determined by the Commission include:

- the model flexibility clause will not allow an employer to make a flexibility arrangement with an employee prior to the employee's commencement of employment;
- most modern award terms can be the subject of a flexibility arrangement, with the exception of: minimum wages (other than arrangements which increase wages); terms which provide for the facilitation of flexible



arrangements for employees with family responsibilities; matters dealt with in the National Employment Standards; superannuation; procedures for consultation; representation; and dispute settlement;

- flexibility arrangements cannot be used to disadvantage an employee and any flexibility arrangement needs to satisfy the “better off overall test” as compared with any terms and conditions contained in the modern award, any applicable collective agreement and any relevant State or Commonwealth legislation;
- union involvement with the making of flexibility arrangements will not be mandatory;
- the dispute resolution methods contained in the award can be utilised to resolve disputes about the operation of flexibility arrangements made under the model flexibility clause;
- a model flexibility clause can be terminated at any point by either party giving four weeks’ notice to the other party; and
- parties will be able to seek a private ruling from the Commission as to whether a particular arrangement disadvantages an employee on a purely voluntary basis.

The content of the list of “allowable matters” which can be the legitimate subject of a flexibility arrangement is fairly broad, and exclude terms of modern awards which in the Commission’s view would not be the subject of an industrial arrangement. The range of matters which can be the proper subject of a flexibility arrangement include arrangements relating to when work is performed; penalty rates; overtime rates; allowances; and leave loading.

The model flexibility clause requires an assessment to be made of whether there is a diminution in the employees’ terms and conditions of employment considering any applicable agreement made under the *Workplace Relations Act 1996* and also any other relevant Commonwealth, State or Territory law. Where an employee will only be governed by a modern award, this new requirement will mean that State or Territory long service leave legislation will also be considered in assessing disadvantage.

There are two drawbacks that relate to the model flexibility clause. The first disadvantage is that a flexibility arrangement can be terminated unilaterally by either party by giving four weeks’ notice. This has the potential to lead to instability as it does not allow a business sufficient certainty to plan for the future. However, this will not necessarily prove to be a problem in circumstances where an employee genuinely consents to the flexible arrangements. The second drawback is that flexibility arrangements which change certain modern award terms cannot be made prior to an employee commencing employment. This means employees will have to commence employment on the award terms and then agree to the flexible arrangements.

The presence of the model flexibility clause in modern awards throws into question the ongoing use of “all-up clauses” in contractual arrangements, which many employers currently use to “off-set” Notional Agreements Preserving State Awards and other award conditions. Although it is not entirely clear yet, it is unlikely that Fair Work Australia will allow employers to unilaterally designate over-award payments as satisfying the need to pay other entitlements, such as overtime and penalty rates, in circumstances where the model flexibility clause provides an

express process for allowing movement away from award terms.

Over \$100,000 remuneration exemption

The Labor Government’s policy platform prior to the federal election in 2007 indicated that employees who earned over \$100,000 in a year would be exempt from the operation of modern awards. The situation under the Fair Work Bill represents a departure from the pre-election policy because the Bill does not provide for an automatic exemption. Instead, the Fair Work Bill provides that in circumstances where a “high income employee” is given a guarantee of annual earnings above the “high income threshold”, an employer may write to the employee informing them that the terms of a modern award will not apply to that employee. What constitutes the “high income threshold” will be prescribed in the Fair Work Regulations which are yet to be released.

Furthermore, employers should be aware that only employees who have a guaranteed annual income above the high income threshold are eligible to be exempted from the operation of modern awards. This means that an employee’s remuneration for the purposes of calculating their guaranteed annual income may not include any incentive or bonus amounts.

Consultation provisions

The Commission has determined that all modern awards must contain a consultation provision that requires an employer to consult with employees in circumstances where the employer intends to introduce a major change to the workplace. Although most Notional Agreements Preserving State Awards and federal awards currently contain similar consultation requirements, employers have largely been able to ignore these obligations with impunity. However, if the Fair Work Bill becomes law, employers will need to prove that they have complied with consultation obligations under the relevant industrial instrument to satisfy Fair Work Australia that the termination of an employee is a “genuine redundancy”, and therefore, not an unfair dismissal.

State-based differences

Although the *Workplace Relations Act 1996* states that modern awards are not to contain state-based differences, that Act allows a period of five years for state-based differences to be phased out, beginning from 2010 (that is, state based differences are allowed to operate in modern awards until 2015). In the Commission’s decision of 19 December 2008, the Commission stated that it

expected to make a final decision about how modern awards would deal with the issue of state-based differences once the Fair Work Bill 2008 and any transitional legislation were passed by Parliament. In the interim, the Commission has only included limited state-based differences in the modern awards created so far.

This issue has proved to be a highly vexed one for the Commission because in determining how to deal with the issue of state-based differences, the Commission is faced with the unenviable task of trying to reconcile, arguably, two contradictory imperatives to which the Commission must have regard; namely, to ensure that employees are not disadvantaged and that employers do not face increased costs.

The manner in which the Commission has decided to resolve state-based differences has already attracted significant criticism from the union movement. During the Senate Submission process for the Fair Work Bill, the Australian Services Union submitted that the Commission's treatment of state-based differences in respect of the modern clerical award had the potential to lead to certain groups of employees being significantly disadvantaged.

Concluding remarks - what employers will need to consider

The award modernisation process appears to be largely delivering on the policy objectives stated at the inception of the process. Modern awards which will begin to operate from 1 January 2010 will be very different creatures from the current generation of awards which are both unnecessarily complex and cumbersome.

However, to determine whether modern awards will be a suitable form of industrial regulation for a particular workplace will require a thorough audit of the terms of a modern award in tandem with an assessment of the needs of the business. We recommend that employers should consider carefully these following factors:

- Employers should make an assessment of which modern awards will apply to them. It may be the case that employers that have traditionally not been subject to award coverage will now be covered by modern awards (for example, currently, employees who perform work in call centres in NSW have been award-free which will not be the case going forward).
- Whether the specific demographics of a workplace make the terms of modern awards particularly onerous. Some particular cases we have identified, include:

- most modern awards require that employees be paid a casual loading of 25% which may represent a significant increase for certain employers who employ a large casual workforce and currently are only required to provide a loading of 20% under Australian Pay and Classification Scales; and
- employers who have a workforce that is required to work after-hours and on weekends and have traditionally used contractual arrangements to pay above award rates of remuneration to satisfy particular penalties and loading provided for in awards may no longer be able to do so outside of the model flexibility mechanisms, and as such, may face increased labour costs.
- In addition, employers should carefully consider whether there are any particular workplace traits which will make the use of the model flexibility clause a difficult proposition in their workplace.
- If it appears that modern awards will not be a suitable form of industrial regulation for their workplace, employers should consider mechanisms to "insulate" themselves from the force of modern awards, such as a collective agreement.



Table 1: Timing of Award Modernisation

The AIRC is expected to complete the award modernisation process by the end of 2009. The process is well underway and has involved extensive consultation with major stakeholders and interested parties.

The AIRC is conducting the award modernisation process in four stages as follows:

Stage 1 – Priority Industries

Stage 1 of the award modernisation process involved making modern awards for certain “priority” industries. These awards, which were finalised and published in December 2008, comprise the following:

- Black Coal Mining Industry Award 2010
- Clerks—Private Sector Award 2010
- Fast Food Industry Award 2010
- General Retail Industry Award 2010
- Hair and Beauty Industry Award 2010
- Higher Education Industry—Academic Staff—Award 2010
- Horse and Greyhound Training Award 2010
- Hospitality Industry (General) Award 2010
- Manufacturing and Associated Industries and Occupations Award 2010
- Mining Industry Award 2010
- Pharmacy Industry Award 2010
- Racing Clubs Events Award 2010
- Rail Industry Award 2010
- Security Services Industry Award 2010, and
- Textile, Clothing, Footwear and Associated Industries Award 2010.

Although these priority awards do not take effect until 1 January 2010, they are now publicly available at <http://www.airc.gov.au/awardmod/fullbench/awards.htm>.

Stage 2 (October 2008 – April 2009)

Having released these priority industry awards, the AIRC is preparing the modern awards for other Australian industries. The remaining industries have been grouped in three further stages.

The Stage 2 industries are as follows:

- Agriculture group (includes agriculture industry and wool industry)
- Building, metal and civil construction group (includes building, metal and civil construction industries, electrical contracting industry, painting industry, plumbing industry)
- Cleaning services
- Financial services group (includes banking services, finance and investment services, health insurance industry, insurance industry)
- Graphic arts group (includes graphic arts, printing industry)
- Health and welfare services (excluding social and community services)
- Information and communications technology group (includes business equipment industry, communications industry, data processing industry, market and business consultancy services, telecommunications services)
- Manufacturing group (includes aircraft industry, brush and broom making industry, chemical industry, clay and ceramics industry, furnishing industry, glass industry, gypsum, plaster board etc. manufacturing industry, insulation materials manufacturing, paint manufacturing industry, rope, cordage and thread industry, saddlery, leather and canvas industry)
- Private transport industry (road, non passenger)

- Quarrying industry, and
- Sanitary and garbage disposal services.

Stage 3 (March 2009 – September 2009)

The Stage 3 industries are as follows:

- Airline operations
- Airport operations (other than Retail)
- Aluminium industry
- Arts administration
- Cement and concrete products inc asphalt and bitumen
- Cemetery operations
- Coal treatment industry
- Defence support
- Educational services (other than Higher Education)
- Electrical power industry
- Entertainment and broadcasting industry (other than Racing)
- Food, beverages and tobacco industry (manufacturing)
- Grocery products manufacture
- Journalism
- Licensed and registered clubs
- Liquor and accommodation industry (manufacturing)
- Maritime industry
- Meat industry
- Offshore island resorts
- Oil and gas industry
- Paper products industry
- Pet food manufacturing
- Pharmaceutical industry
- Photographic industry
- Port and harbour services
- Postal services (other than Australia Post)
- Private transport industry (remaining sectors)
- Public transport industry (other than Rail)
- Publishing industry
- Scientific services (including Professional Engineers and Scientists)
- Storage services
- Sugar industry
- Technical services
- Timber industry
- Tourism industry
- Travel industry
- Vehicle industry (repair, service and retail)
- Vehicle manufacturing industry, and
- Wholesale and retail trade (wholesale) and commercial travellers.

Stage 4 (July 2009 – December 2009)

Finally, the Stage 4 industries are as follows:

- Christmas Island
- Cocos (Keeling) Islands
- Diving services
- Dry cleaning and laundry services
- Fire fighting services
- Funeral directing
- Gardening services (other than Racing)
- General award (see consolidated Request clause 4A)
- Grain handling industry
- Health and welfare services (remainder)
- Industries not otherwise assigned
- Local government administration
- Mannequins and modelling industry
- Northern Territory (remainder)
- State government administration, and
- Water, sewerage and drainage services.

A new framework for cooperation?

Good faith bargaining and the Fair Work Bill

Greg Robertson and Paul Lorraine

Introduction

The *Fair Work Bill 2008* creates a new framework for agreement making that is very different from the existing system. The object is to provide a “simple, flexible and fair” framework for collective bargaining at the enterprise level, and to improve productivity.

Good faith bargaining is central to the framework. The Bill introduces “*good faith bargaining requirements*” and gives Fair Work Australia (FWA) the power to make orders to ensure compliance with those requirements. It creates a new obligation on employers to bargain with employees where there is majority support to negotiate a new agreement.

At its most basic level, requiring good faith imposes a procedural compliance threshold for anyone seeking to make an agreement. More realistically, employers who are not used to dealing with unions are afraid that the Bill increases union rights and power. Although the Bill is ostensibly agnostic about unions, it gives automatic rights of recognition to any union that has a member in the workplace.

At another level, good faith does have the potential to improve the quality of the negotiation process, which will be reflected in the outcomes. Because the requirements are mutual, this is as much an opportunity for employers as it is for employees or unions.

By understanding the good faith requirements and combining them with accepted principles of good management practice, employers can lead the bargaining agenda, hold unions accountable to the process and improve long-term relationships with employees.

Snapshot of agreement making under the Bill

- One stream of agreement making, the Enterprise Agreement (EA), between employer and employees.
- Previous distinction between union and non-union agreements abolished.
- Employees have the right to appoint anyone as their “bargaining representative”, and the employer must notify each employee of that right.

- However, a union is recognised as the bargaining representative of a union member, unless the member appoints someone else.
- Unions are not parties to agreements. Instead, a union that was a bargaining representative can apply to FWA to be “covered” by an EA.

The good faith bargaining requirements

The Bill specifies that bargaining representatives must:

- Attend and participate in meetings at reasonable times;
- Disclose relevant information (other than confidential or commercially sensitive information) in a timely manner;
- Respond to proposals made by other bargaining representatives in a timely manner;
- Give genuine consideration to the proposals of other bargaining representatives, and give reasons for the responses to those proposals;
- Refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- Recognise and bargain with the other bargaining representatives.

Bargaining representatives are specifically **not required** to make concessions or reach agreement.

Role of FWA

FWA has a general role in “facilitating” bargaining and has the power to make orders where participants are not bargaining in good faith.

Bargaining order: if the requirements are not being met, or the process has broken down because there are multiple bargaining representatives, a bargaining representative may apply for a bargaining order.

The order must specify actions to be taken to meet the requirements. For example if the breakdown was due to having multiple bargaining representatives, the order may require them to meet and appoint one to represent them.

Failure to comply attracts a civil remedy. If the breach is “serious and sustained”, and significantly undermines the bargaining process, as a last resort, FWA may make a “*serious breach declaration*”. This may lead to FWA making a “*bargaining related workplace determination*”, deciding terms that will apply to the workplace.

Majority support determination: if a majority of the employees want to bargain and the employer refuses, a bargaining representative may apply for a majority support determination. In all cases, the group to be covered must be “fairly chosen”.

To work out whether a majority of employees want to bargain, FWA may use “any method FWA considers appropriate”.

Conversely, if an employer wants to bargain and the employees refuse to consider proposals, the employer could seek a bargaining order.

Scope order: if bargaining stalls because the agreement will cover the wrong employees, a bargaining representative who has met the good faith requirements may apply for a scope order to specify who will be covered, and the group must be fairly chosen.

Disputes: any bargaining representative may apply to FWA to deal with a dispute about the proposed agreement, regardless of whether the other bargaining representatives agree to the application. If all of the bargaining representatives agree, FWA may arbitrate.

What does “good faith” mean, and how will the system work?

The government’s policy is to encourage an open bargaining process, allowing employers and employees to meet, exchange relevant information, respect each other’s right to be represented and consider and respond to each other’s positions.

Good faith is not a new concept. It is well known in other jurisdictions and other fields of Australian law, such as commercial contracts, the *Native Title Act 1993* (Cth) and company directors’ obligations. Good faith requirements in the former *Industrial Relations Act 1988* (Cth) (section 170QK) were interpreted narrowly to mean only that the parties could be ordered to meet and confer (see the 1995 case of *Asahi Diamond Industrial Australia Pty Ltd v Automotive, Food, Metals and Engineering Union*).

However, good faith is an evolving concept and there is no working standard.

Acting in good faith basically means acting honestly and applying reasonable commercial standards for fair dealing, with an open mind and a willingness to reach agreement. FWA will have the task of assessing the existence or absence of good faith case by case, based on the actual conduct and the legislative requirements.

Bargaining is largely a process of information exchange and concession making: "give and take". Information becomes a major source of leverage, which is why good faith requirements are mostly to do with information and communication, to keep the process moving. How much disclosure is enough is a point of contention, although good faith does not generally require full disclosure. How FWA structures and facilitates the process will greatly influence its success.

The ongoing debate

Is good faith simply a device to increase union involvement, and stop bargaining directly with employees? Or is it a legitimate framework for cooperation, imposed to keep bargaining going in a positive direction? Either way, self interest is protected because participants are free to withdraw at any time. If they fail to reach agreement, their options appear to be:

- Agree to walk away, and the existing arrangements continue in force;
- Ask FWA to resolve a dispute or help them reach agreement;
- Jointly ask FWA to determine particular matters;
- Depending on the circumstances, take protected action; or
- Arbitration if there is a serious and sustained breach of the good faith requirements, although this is reserved for exceptional circumstances, and FWA will not step in to resolve protracted disputes.

Ultimately, the shape of the new system will be determined by the manner in which FWA exercises its powers and develops its facilitative role.

Does good faith create a framework for cooperation?

Good faith is more than a mere procedural requirement, but does it promote cooperation? It is not to be mistaken for a "soft option": self interest is preserved, no-one is prevented from using "hard bargaining" tactics and protected industrial action is available.



Employers who have a strong working relationship with their employees and who wish to bargain directly with them may do so. In reality, however, union members will probably choose to be represented by their union, which must now be recognised.

Recognition gives employees (and unions) a voice to suggest proposals and influence the outcomes of bargaining. On the other hand, recognition brings with it an obligation to comply with the good faith requirements, which enables the employer to hold the union accountable in the bargaining process.

The effectiveness of the process will depend on how management, employees and unions interact, and the new ground rules, based on good faith and supported by FWA as facilitator, appear to suggest that the participants will achieve more under the new system if they adopt an attitude of cooperation.

The strategic opportunity for employers

In preparation for bargaining under the new legislation, employers should consider adopting the following strategic approach:

- Review current workplace arrangements: map out what agreements are in place, who is covered and when agreements expire;
- Provide clear leadership and direction, by demonstrating good faith;

- Develop a proactive good faith bargaining strategy: scope out issues and create a bargaining agenda;
- Be prepared to share appropriate information about business performance and any underlying problems, and consider the most effective means of communicating with employees and their representatives on these issues;
- Plan to utilise FWA if necessary, to assist with: reaching agreement on a process, including timeframes and what information will be exchanged; coordinating the process; and holding representatives accountable if they display bad faith; and
- Prepare a legal strategy that is integral to the process and transparent, so that all participants understand the good faith requirements and the role of FWA in supporting the process.

As the current economic downturn deepens, the need to explore options for productivity improvement will become even more acute.

That being the case, although the good faith provisions in the Bill only relate to collective bargaining, there are sound business reasons for embracing good faith as a guiding ideal for cooperation in all aspects of the employment relationship.

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 2006, 2007 and 2008. With offices in Sydney, Melbourne and Brisbane and approximately 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

Lesley Maclou

Partner & Team Leader
lesley.maclou@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

Margaret Diamond

General Counsel & Team Leader
margaret.diamond@harmers.com.au

Sandra Marks

General Counsel
sandra.marks@harmers.com.au

Greg Robertson

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

Nichola Constant

Senior Associate & Team Leader
nichola.constant@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 2009. 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.