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Workplace View

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Shorten Introduces Amendments to Fair Work Act, But It Is Still No Shorter

Just when you were getting relaxed and comfortable with the *Fair Work Act 2009* (**FW Act**), further change is a foot – including a change to the name of Fair Work Australia (**FWA**). On 30 October 2012, the Workplace Relations Minister, Bill Shorten, introduced into Parliament the *Fair Work Amendment Bill 2012* (**FW Bill**) which aims to amend the FW Act to give effect to a number of the "non-contentious" recommendations made by the Fair Work Act Review Panel in its report "Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work Legislation."

Most of the amendments are technical or clarifying amendments which are likely to pass through the Parliament without controversy.

The proposed amendment likely to have the biggest impact is the reduction of the time limit for adverse action claims, from 60 days to 21 days, and the increase of the time limit for unfair dismissal claims, from 14 days to 21 days.

Other proposed amendments set out in the FW Bill include:

- Preventing employers from making an enterprise agreement with a single employee.
- Prohibiting "opt out" clauses in future enterprise agreements and making existing "opt out" clauses unlawful.
- Preventing union officials from being bargaining representatives (even in a private capacity) for employees not eligible to be members of their union.
- Requiring bargaining notices (which must be sent to all employees who it is proposed will be covered by an enterprise agreement) to only contain the information that the regulations prescribe and not additional information.
- Increasing Fair Work Australia's powers to dismiss unfair dismissal cases and to award costs against parties, lawyers and other agents.
- Clarifying that the provisions in subsection 570(2) of the FW Act relating to costs apply to "matters arising" under the FW Act and not just to matters where a court is "exercising jurisdiction" under the FW Act. This amendment confirms the position that generally the FW Act provides for a "no costs" jurisdiction.

A large number of the proposed amendments relate to changes to FWA itself. They include:

- Changing the name of FWA to the Fair Work Commission (**FWC**).

- Creating an expert panel to conduct the annual minimum wage review and assess the eligibility of MySuper products for nomination as default super funds in modern awards.
- Creating two new positions of Vice President to assist the President with his functions.
- Giving new powers to the President to deal with complaints about members of the FWC and to recommend who is to be appointed as the General Manager of FWC
- Making provision for the appointment of Acting Commissioners to fill short term vacancies and/or to assist with the FWC's workload.

The proposed amendments in the FW Bill deal with 17 of the 53 recommendations made by the Review Panel and represent a "first tranche response to the Report". While a second wave of amendments to the FW Act has been foreshadowed by Minister Shorten, it is not yet clear when they will be introduced or which of the remaining recommendations they will relate to. What is clear is that it is unlikely any amendments dealing with the more controversial recommendations will be introduced into the Parliament without some level "consensus" among unions and employer organizations.

Rectification of Employment Agreements: The Act of Putting It Right

In the recent case of *Russell v RCR Tomlinson Ltd* [2012] WASC 405, the Supreme Court of Western Australia employed the little used equitable doctrine of rectification to "put right" the contract of a terminated employee that did not reflect the terms agreed during pre-employment discussions and enabled him to claim a significant retirement benefit.

Notwithstanding a term in the contract of employment that said the plaintiff had to have five years' service before being eligible for a retirement benefit, the plaintiff claimed he was entitled to nearly AU$300,000 as a retirement benefit even though he was employed for less than a year before being terminated without cause by the defendant.

The Court's Decision

The court found that the plaintiff, prior to accepting the position of Executive General Manager with the defendant, had two discussions with the defendant's outgoing chief executive officer. During those discussions the plaintiff raised a number of concerns about the security of the employment being offered given:

- the contract provided for a five year restraint period
- the contract only required the defendant to provide him with a minimum one month's notice of termination without cause
- there was likely to be a restructure of the defendant at the initiative of the incoming chief executive officer

According to the plaintiff, the defendant's former chief executive officer (who was not called to give evidence) reassured the plaintiff had during both discussions that if his employment was terminated by the incoming chief executive officer, he would be entitled to the retirement benefit regardless of

whether he had been employed for five years.

Having accepted the plaintiff's evidence the court found that it was the plaintiff's intention that the contract he signed would include a term making it clear that he would be entitled to payment of the retirement benefit irrespective of his length of service if he was terminated other than for cause. The plaintiff thought that the terms of the contract he signed had that meaning. The court also found that the defendant's outgoing chief executive officer had intended the contract to include such a term. That is, the parties had the common intention and the only reason the contract did not include the intended term was because of a "common mistake". Having made these findings, the court could use the equitable doctrine of rectification as "a device by which the contract is made to conform to the true nature of the agreement between the parties" to uphold the plaintiff's claim for the retirement benefit.

Implications for Employers

The case highlights for employers the importance of:

- ensuring contemporaneous notes of important discussions (such as negotiations relating to terms and conditions of employment negotiations) are made
- ensuring (where possible) that a representative from HR participates in any pre-employment discussions or negotiations relating to contractual terms
- ensuring that when template or pro forma contracts are used that they are appropriately amended to accurately reflect negotiated terms
- carefully reading the contract before it is executed to ensure it reflects the agreed terms

Did You Know?

Rolling Eyes may Constitute "Bullying" Under Definition in New Code of Practice

The definition of "bullying" under the new harmonised *Work Health and Safety Act 2011* (Cth) will be:

> *Repeated, unreasonable behavior directed towards a worker or a group of workers, that creates a risk to health and safety.*

The definition, contained in the draft Preventing and Responding to Workplace Bullying Code of Practice (**Code**), has drawn scorn from the Federal Opposition. Eric Abetz, the Shadow Workplace Relations Minister, has claimed that this definition means that trivial acts, such as eye rolling, may potentially qualify as bullying. His argument comes from the Code's definition of "unintentional bullying", which is:

> *Actions which, although not intended to humiliate, offend, intimidate or distress, cause and should reasonably have been expected to have that effect.*

According to Mr Abetz, this has created an extra layer of red tape that employers will have to deal with. This is because now they will have to consider whether the trivial actions of their employees have to potential to humiliate, intimidate or distress other employees. This could potentially encompass all sorts of behaviour including, for example, not providing an employee with enough

work or setting tasks that are below an employee's skill level.

For further information on the issues raised above, or if you have any other questions, please contact one of the lawyers below or your usual Squire Sanders contact.

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