SQUIRE PATTON BOGGS

WORKPLACE VIEW

July 2014

The Latest in Enterprise Agreements

By Naomi McCrae, Associate

Five years after the commencement of the *Fair Work Act* 2009 (Cth) (**Act**), the enterprise agreement making process continues to evolve as the Fair Work Commission (**FWC**) and the courts determine cases arising under the relevant provisions of the Act. Below, we summarise some of the recent key decisions.

Strict Compliance with the Pre-approval Steps

Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FWCFB 2042

This case dealt with the employer's obligation to notify each employee of their representational rights at the beginning of the bargaining process, and the content and form such notification must take.

The employer provided the required Notice of Employee Representational Rights (**Notice**) with two bargaining representative nomination forms pages stapled to it. The FWC held that, while other materials can be provided to employees at the same time as the Notice, in this instance, providing the Notice with the "other content" stapled to it changed the form and content of the Notice as prescribed by section 174(1A) of the Act and, therefore, the FWC could not approve the agreement.

This decision reinforces the FWC's approach that strict compliance with the pre-approval steps is required for an agreement to be approved.

Annual Leave Cannot be Loaded into the Rate of Pay

Caravan Building Pty Ltd [2014] FWCFB 3202

The issue of whether annual leave can be incorporated into an hourly rate of pay in an enterprise agreement and whether, by doing so, the enterprise agreement excludes annual leave as a National Employment Standard (and therefore cannot be approved under section 55(1) of the Act) has been the subject of conflicting decisions by the FWC.

In this case, the FWC rejected the proposition for two reasons:

- the obligation to pay annual leave under section 90(1) of the Act is at the employee's base rate of pay at the time leave is taken. If the employee is paid annual leave on a progressive basis in advance, it may permit payment at an earlier and lower rate of pay than the rate applicable when the leave is actually taken; and
- "paid annual leave" is a composite expression, in which "payment for the leave is inextricably linked to the leave itself". This means that paid annual leave, by its ordinary meaning, is annual leave provided together with pay.

Variation of Enterprise Agreements

Marmara v Toyota Motor Corporation Australia Limited [2013] FCA 1351

The issue of whether an agreement can be varied when it includes a standard "no-extra claims during the life of the agreement" clause is currently on appeal before the Full Federal Court.

In the past, variations to agreements have been approved by the FWC when the relevant agreement included a standard "no extra claims" clause. But in this case, workers at Toyota claimed the making of the proposed variations (which included a wide range of reduced pay and conditions) contravened the agreement.

Justice Bromberg in the Federal Court found that so long as the capacity for parties to access the variation process of the Act was not ousted, a term imposing restrictions is not necessarily inconsistent with the Act. The existence of the clause in the Toyota agreement providing there be "*no extra claims in relation to wages or any other terms and conditions of employment*" did not prevent a variation to amend this clause – which could then allow for Toyota's proposed variations (therefore a two-step process). **The appeal decision is expected in the coming months.**

"Fairly Chosen" Group of Employees

John Holland Pty Ltd v Construction, Forestry, Mining and Energy Union [2014] FCA 286

This decision concerned the meaning of a "*fairly chosen*" group of employees under section 186(3) of the Act (which applies when an agreement does not cover all of an employer's employees) and the breadth of scope clauses for enterprise agreements. Under section 186(3A) of the Act, the FWC, in determining whether the group of employees "***was*** *fairly chosen*" is required to take into account whether the employees are "*geographically, operationally or organisationally distinct*".

In this case, the scope clause in the proposed agreement purported to cover **all employees** engaged by the employer in Western Australia (in the various specified classifications), but to exclude employees who would be covered by any project or site-specific agreement entered into by the employer in future. The agreement had been made with **three employees** engaged five weeks before the agreement was submitted and approved by a Deputy President of the FWC.

The CFMEU appealed against the decision to approve the agreement and the Full Bench of the FWC upheld the appeal. The Full Bench held that, given the open-ended nature of the exclusion provision, *"it is not possible to identify with any certainty the group of employees to be covered by the Agreement* [and therefore] *it is not possible to be satisfied that the group of employees was fairly chosen as required by s186(3) or to apply the requirements of s186(3A)."* Further, the Full Bench considered the agreement undermined collective bargaining given it could potentially cover many other employees on multiple sites.

Overturning the Full Bench decision, Justice Siopis in the Federal Court held that the Full Bench had fallen into "*jurisdictional error*" because there is no provision in the Act which permits the FWC to withhold approval of an enterprise agreement on the grounds that the FWC is of the view that approval would undermine collective bargaining. He found that the use of the past tense in the requirement that the FWC be satisfied that the group of employees "**was** fairly chosen" meant that the members of the FWC needed to make their decision on the basis of the employees who made the agreement, not the employees who will be, or may be, covered by the agreement in future.

In determining whether the group was fairly chosen, the FWC should consider whether the criteria reflects that identified in section 186(3A) of the Act (or some other legitimate business-related characteristic) rather than an extraneous characteristic.

The CFMEU has confirmed its intention to appeal this decision.

Implications For Employer

Siopsis J acknowledges that the Full Bench clearly believed there was *"something wrong"* with three employees being able to conclude an agreement that would cover more than just their own work classifications. In this regard, he commented that "*…if there is a lacuna in the Fair Work Act, on which I express no view, then the remedy would appear to lie in legislative amendment*".

- Despite Siopsis J's comment, legislative amendment any time soon appears unlikely given the coalition's policy for enterprise bargaining, including easier access for employers to individual flexibility arrangements and greenfields agreements.
- Therefore, for the time being, the John Holland decision confirms the ability of employers to enter into enterprise agreements with only a select group of employees, with the potential for a much larger group to be covered by the agreement in future. But employers should note that such a strategy may be change in the event of a different outcome in appeal proceedings.

Did You Know?

It is not unlawful to make an employee redundant whilst they are on maternity leave provided the decision is unrelated to the employee's gender, pregnancy, or family responsibilities.

In a number of recent cases in the Federal Court, Justice White held that the redundancies of two female employees by the Service to Youth Council Incorporated (SYC) during periods of maternity leave did not constitute unlawful discrimination. Justice White found that the redundancies were a result of restructuring and shifts in strategy, rather than the employees' pregnancies. This was despite the fact it had been the employees' absences which caused the employer to realise that their positions were no longer needed.

Further, Justice White found that the redundancies did not breach the employer's obligation to keep the positions open during the maternity leave as those positions were no longer available after the restructure.

Justice White did, however, fine the SYC for failing to promptly respond to the employees' requests for flexible working arrangements.

Poppy v Service to Youth Council Incorporated [2014] FCA 656

Stanley v Service to Youth Council Incorporated [2014] FCA 643

Stanley v Service to Youth Council Incorporated (No 2) [2014] FCA 644

WORKPLACE VIEW

Employer Reminder

High Income Threshold has increased

As of 1 July 2014, the high income threshold will increase to AU$133,000. The high income threshold is relevant to determining whether an employee can access Fair Work unfair dismissal laws and also to the application of modern awards to employees. The unfair dismissal compensation limit has also increased to AU$66,500.

Client Quiz

The National Employment Standards provide a minimum safety net for all employees including those earning over the AU$133,000 income threshold – true or false?

The first correct entry emailed to luci.browne@squirepb.com will win a West Australian Good Food Guide (delivery within Australia only).

Save the Date! Events Update

Squire Patton Boggs Australian Labour and Employment Breakfast Series – Contact isla.rollason@squirepb.com to register your interest

16 July

Executive Employment Issues

Breakfast seminar – Level 10, 1 Macquarie Place, Sydney

27 Aug

Privacy Law Reform – How to Ensure Compliance Following the 2014 Changes

Breakfast seminar – Level 21, 300 Murray St, Perth

26 Nov

Safety Prosecutions – Lessons Learned

Breakfast seminar – Level 21, 300 Murray St, Perth

Legislation Update

Legislative Instrument	Status	Key Proposed Changes
Fair Work (Registered Organisations) Amendment Bill 2014 (Cth)	Introduced into Parliament on 5 June 2014; currently before the House of Representatives	• Strengthens disclosure and transparency obligations; • Increases penalties and offences for breaches of officers' duties; and • Establishes a Registered Organisations Commission to act as a 'watchdog' for registered organisations. The Commission will have powers similar to those of ASIC in respect of unions and employer associations.

Contacts

Kylie Groves
Partner
T +61 8 9429 7475
E kylie.groves@squirepb.com

Bruno Di Girolami
Partner
T +61 8 9429 7644
E bruno.digirolami@squirepb.com

Felicity Clarke
Senior Associate
T +61 8 9429 7684
E felicity.clarke@squirepb.com

Dominique Hartfield
Senior Associate
T +61 2 8248 7804
E dominique.hartfield@squirepb.com