SQUIRE PATTON BOGGS

# Workplace View

September 2016

## Enterprise Bargaining – Why All the Fuss?

By Tammy Tansley, Principal of Tammy Tansley Consulting and Help Me HR

A well-negotiated enterprise agreement can provide terms and conditions that support rather than obstruct business strategies and, as a result, make it easier to do business.

There is little doubt that enterprise negotiations, when done well, can improve engagement, trust and communication with employees. However, an enterprise agreement negotiation can also be resource hungry and time consuming. The agreement itself will have an impact on the organisation and its people for years beyond the actual negotiation.

And that's before we even get into situations where negotiations go wrong and there's industrial action or disputation as part of the process.

It is often a process for which organisations are not well prepared, and where organisations view the process as something to get through or be tolerated, rather than as an opportunity to maximised.

Given the high proportion of wages and conditions as part of the overall cost of running an organisation, it makes sense to get the absolute best possible terms and conditions – the best bang for your buck.

This doesn't necessarily mean the lowest wages or stripped back conditions, but rather wages and conditions that enable the organisation to meet its strategic objectives and financial performance rather than inhibit it. If your organisation is covered by one or more enterprise agreements, at their best they can be a very useful vehicle for just that; an enabler of business performance and a negotiation process that creates trust and engagement.

**Planning to Achieve the Best Possible Outcome**

To maximise the benefit of an agreement, it needs to be considered as part of an organisation's people plan or workplace relations strategy. Ideally, it is part of an ongoing workplace relations strategy, not just a one off event.

Treating a negotiation like any other key project within the business is key to the success of a negotiation.

This means resourcing it accordingly in terms of appropriately skilled people who have the available capacity to devote appropriate time to the process, rather than have it as an additional job for a reluctant participant to do on top of their already full load.

It means doing robust research prior to the negotiations commencing. For example: what is the current state of play industrially, internally and externally? What are your competitors doing? What are the unions looking for (locally and more broadly)? What's the current political environment? What works about the current agreement? What doesn't? What's on the horizon for the business over the coming five years, and how does this agreement need to meet those challenges and enable those changes? What is the risk profile of the negotiation compared with the risk appetite of the organisation?

Critically, it means engaging with the senior leadership team from the beginning and having senior sponsorship of the process, the desired outcomes, any risk and contingency planning.

It means creating a communication and engagement plan that ideally dovetails with other people strategies so that it's a seamless and consistent approach to communication and consultation, rather than an afterthought in response to employee discontent or grumblings.

And importantly, much of this planning is done well before any face-to-face negotiations commence.

HR professional Tammy Tansley, who is also a Sunday Times columnist on HR issues, is a good friend of our L&E team. Together with Rachael McGann, Tammy is the co-author of *Enterprise Agreements – Made Easy*, a concise book that through practical examples, case studies, checklists and resources, enables an organisation to appropriately plan and resource and successfully navigate through their enterprise agreement negotiation. It's based on many decades of practical experience of negotiations from both authors. The book is aimed at operational managers and those in HR who have been tasked with negotiating an enterprise agreement or supporting the negotiations.

## Employer Reminder

By Jessica Geelan Associate

Employers should be reminded that from 29 July 2016 important changes took effect to paid annual leave entitlements under many modern awards. As part of the four year modern award review, the Fair Work Commission (**FWC**) issued its decision on model terms for cashing out annual leave, managing excessive annual leave accruals, taking annual leave in advance, and payment of annual leave.

### Cashing Out Annual Leave

Employees are now allowed to cash out accrued annual leave provided that:

- It is agreed in writing with their employer.
- They retain at least four weeks of annual leave after cashing out.
- No more than two weeks is cashed out in any 12 month period.

### Excessive Annual Leave

Employers will be able to *direct* employees with excessive leave accruals (at least eight weeks) to take annual leave if an agreement can't be reached as to when the employee should take annual leave. The employee must retain a leave balance of at least six weeks and must be given eight weeks' notice before the leave must be taken.

### Taking Leave in Advance

Employees can now request annual leave before it has accrued, provided it is agreed to in writing by the employer specifying how much leave is to be taken and when it is to commence. An employer may deduct an amount for any annual leave taken but not yet accrued on termination of employment.

### Payment

A number of awards were amended to remove the requirement that the employer pay for annual leave *prior to* the employee taking the leave. The effect of the amendment is that where employees are paid by EFT, they may now be paid their annual leave in accordance with their usual pay cycle, rather than being paid prior to commencing their period of annual leave.

While the changes will provide some welcome flexibility for employers regulated by the *Fair Work Act 2009* (Cth) in respect of annual leave, it is important to remember:

- If a modern award applies to your employees, you should review the new award terms and update any annual leave policies or procedures.
- If an enterprise agreement applies to your employees, we recommend you seek advice regarding how the new modern award terms may apply to you and your employees.

See which modern awards are affected.

## OSH Update

### By Jillian Howard, Senior Associate

Although drug and alcohol testing is generally recognised as forming part of an employer's strategies for managing its health and safety obligations, a recent FWC decision has provided a salutary reminder that employers who fail to follow best practice when conducting tests risk being on the wrong end of an unfair dismissal finding.

Drug and alcohol testing is becoming increasingly commonplace in Australian workplaces, with testing even being a mandatory statutory requirement in some industries such as mining and public transport. In recent times, the most contentious issue regarding drug and alcohol testing has related to the method of testing. For this reason, employers are recommended to have in place a drug and alcohol policy which deals with issues such as how tests will be validated, counselling and rehabilitation of employees, and makes clear when disciplinary action may be warranted.

However, as the recent case of *Moore v Specialist Diagnostic Services Pty Ltd T/A Dorevitch Pathology* (U2016/6425) illustrates, the first step is to have a drug and alcohol policy in place; the second step is to follow it!

In this case, in response to an anonymous tip off about drug use by some employees, Ms Moore was called to a meeting with her line manager and Dorevitch's HR Officer at which she was directed to provide a urine sample (which would be collected by her line manager) to determine if she had illicit drugs in her system. Ms Moore became distressed in the meeting and declined to take the test. She left the workplace and, despite requests for her to return, did not do so and later submitted a medical certificate.

Dorevitch subsequently dismissed Ms Moore on the basis that she had failed to follow a management instruction. Ms Moore claimed that the dismissal was unfair.

While Dorevitch ultimately lost the case because it was unclear whether the applicant was dismissed due to her refusal to undertake the test or because of her failure to return to work when asked to do so, the FWC concluded that Ms Moore's refusal to undertake the test had not been unreasonable. Although Dorevitch had a drug and alcohol policy in place, the test proposed by Ms Moore's line manager and the HR Officer was in breach of the company's policy and also the Australian and New Zealand Standard (AS/NZS 4308). Significantly, the Commissioner noted that:

- The process being proposed failed to comply with chain of custody requirements stipulated in the policy and ANZ Standards.
- Although the line manager had been a pathology collector 15 years ago, she had not undertaken drug screens in the last four years.
- Fundamentally, it would not be appropriate for a test to be conducted by someone the employee works with and particularly not by an employee's line manager.

## Did You Know?

### By Jillian Howard, Senior Associate

The High Court recently brought an end to the ongoing battle between the Federal government and the Maritime Union of Australia (**MUA**) about the visa status of offshore workers in the oil and gas industry.

Prior to 2013, visas were not required for non-citizens working on vessels involved in oil and gas offshore activities, provided they were not attached to the seabed or to a resource installation in the Australian migration zone. In 2013, the Labour government introduced changes to the *Migration Act 1958* (Cth) (**Act**) which meant all non-citizens undertaking offshore resource activities to hold a valid visa. A power was reserved to allow the government to except some operations or activities from the definition in future.

The amendments raised concern in the industry that Australia's competitiveness would be compromised due to the additional costs and red tape involved in obtaining visas for a limited number of highly specialised workers who often never enter an Australian port.

In response, the coalition in 2015 used the reserved power to introduce a determination excepting for *all* operations and activities using a vessel or structure that is not a resource installation. The practical effect was to once again remove the need for non-citizens engaged on a vessel or structure not attached to the seabed to hold a valid visa.

Following a challenge by the MUA, the High Court unanimously found that the determination exceeded the limits of the government's powers. The Court found that the Act only permits limited exceptions for particular activities or operations from time to time. The general nature of the determination undermined the intention of the 2013 amendments to the Act and therefore declared it to be invalid.

So where does that leave non-citizens working in the offshore industry? From 31 August 2016 all foreign workers engaged on vessels or structures involved in offshore activities must hold a valid visa, usually a subclass 400 visa or subclass 457 visa. Employers who engage such workers are encouraged to seek urgent assistance on what steps must now be taken.

## Events

- Seminar series Sydney – **Migration – Staying on the Right Side of the Migration Trap** – 19 October 2016 at 8 a.m., Squire Patton Boggs (Sydney) - presented by Jillian Howard and Emily Tan
- Seminar series Perth – **Migration – Staying on the Right Side of the Migration Trap** – 26 October 2016 at 8 a.m., Squire Patton Boggs (Perth) - presented by Jillian Howard and Emily Tan
- Seminar series Perth – **Investigations** – 24 November 2016 at 12 p.m., Squire Patton Boggs (Perth) - presented by Dominique Hartfield and Elizabeth McLean

## Meet the Team

### Louise Boyce

Head of Tax Strategy & Benefits – Squire Patton Boggs Australia

**My first ever job was…** Selling dried fruit and nuts in the wholesale fruit market. It involved waking up at 3am!

**What I like about my current job is…** I get to solve a different problem every day. It is always challenging and I never stop learning.

**A random fact about me is…** I have been to four Olympic Games - Sydney, Beijing, London and Rio. I love visiting a new and amazing city every four years.

**The two rules I try to live by are…** Treat others as you would like to be treated yourself and don't sweat the small stuff.

**My favourite quote is…** The secret of getting ahead is getting started.

**My last supper would be…** Raspberries and ice cream.

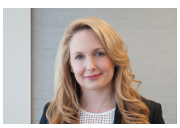
## Contacts


**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

**Anna M. Elliott**
Partner
T +61 2 8248 7804
E anna.elliott@squirepb.com

**Felicity Clarke (Editor)**
Of Counsel
T +61 8 9429 7684
E felicity.clarke@squirepb.com



**Dominique Hartfield (Editor)**
Senior Associate
T +61 8 9429 7500
E dominique.hartfield@squirepb.com