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Editorial

As Australia gets set for a federal election on 24 November, the industrial relations policies of the two major political parties are the subject of much scrutiny and discussion by the media, business groups, unions and industrial relations professionals. In the meantime, the amendments to the *Workplace Relations Act 1996* made by the federal government in March 2006 continue to be tested and considered by the courts and tribunals.

In this edition of the *IR Bulletin*, we look at a range of recent decisions which consider such topics as when employees on AWAs can vote on a protected action ballot, when a protected ballot action will be refused because a party has not genuinely tried to reach agreement and when State Industrial Relations Commissions will have jurisdiction to deal with claims for contractual benefits.

This edition also includes articles about perennial employment issues such as when a labour hire arrangement is really an employment relationship and what constitutes reasonable notice of termination of employment.

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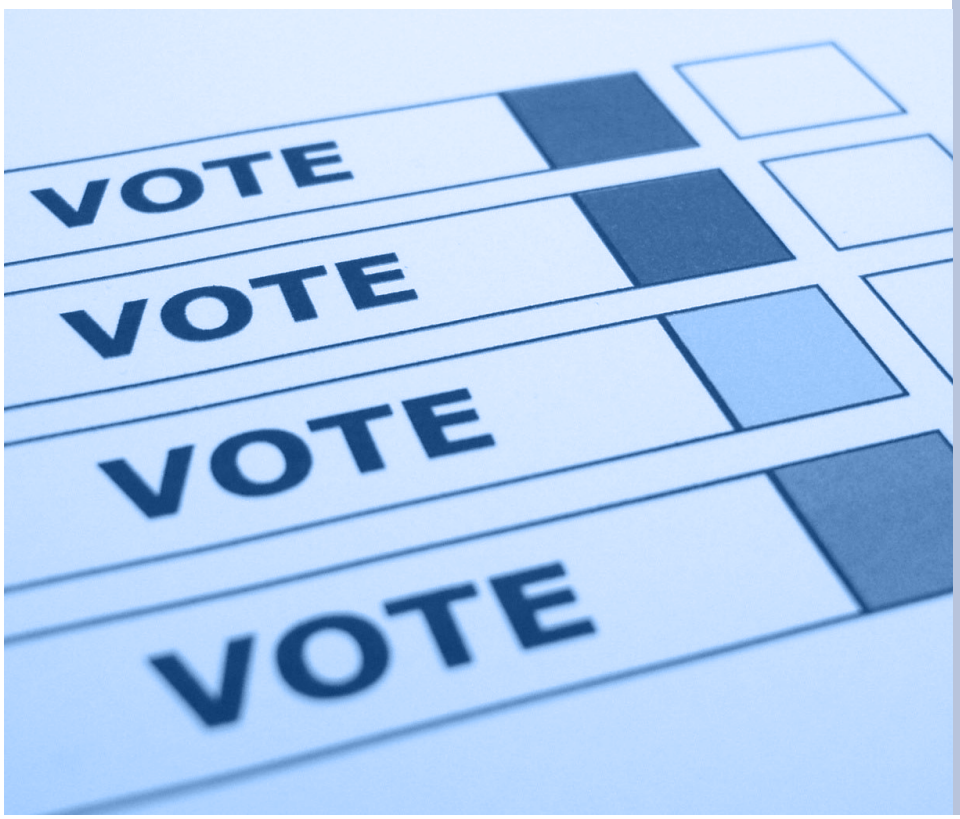

in this issue

Lessons for employers

- **Employees on expired pre-reform AWAs can take industrial action in support of a new collective workplace agreement.**
- **In formulating employee relations strategies under the current legislation, employers using AWAs will need to take into account the existence of two distinct classes of AWA employees – those on pre-reform AWAs and those on post-reform AWAs. The rights of each group are likely to differ on important procedural matters.**

Can employees on AWAs vote on a protected action ballot?

A Full Bench of the Australian Industrial Relations Commission has upheld a decision that employees employed on Australian workplace agreements made prior to the amendments to the *Workplace Relations Act 1996* in March 2006 are eligible to be on the roll of voters for a protected action ballot: *CFMEU v Programmed Maintenance Services Limited* [2007] AIRC FB 620 (27 July 2007).

One of the preconditions to eligibility to vote on a protected action ballot is that the person "will be subject to the proposed collective agreement". The question before the Full Bench was whether employees on pre-reform AWAs outside their nominal terms could be eligible to vote, an issue not dealt with specifically in the transitional provisions to the Work Choices amendments.

The Full Bench held that those employees were eligible because:

- section 495 provides that an employee bound by an AWA must not engage in industrial action before the nominal expiry date of the AWA has passed;
- section 467(2) provides that a person is not eligible to be included on the roll of voters for the ballot if, on the day the ballot order was made, the person was bound by an AWA whose nominal expiry date had not passed;
- by implication, a person bound by an AWA whose nominal expiry date has passed is eligible to be included on the roll of voters for the ballot, and to engage in industrial action.

The employer argued that the proposed collective agreement would *have no effect* in relation to the employees on pre-reform AWAs, and that therefore their employment would not be *subject to* the collective agreement in the sense required. The Full Bench dismissed this argument and held that the phrase "whose employment will be subject to the agreement" refers to a proposed agreement, and it is the intention of the proposing party (in this case, the union) that is relevant as to who will be bound.

The conclusion is a controversial one. A pre-reform AWA can only be terminated by agreement of the parties, or by the Commission. Unless one of these two events occurs, the employee will not be subject to the proposed agreement, as section 450 requires.

There is a potential for similar reasoning to be applied in interpreting other sections of the Act. For example, section 327 uses the phrase "whose employment will be subject to the agreement" to define the class of employees eligible to approve an employee collective agreement although there are additional important considerations in respect of such an approval process.

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The question before the Full Bench was whether employees on pre-reform AWAs outside their nominal terms could be eligible to vote, an issue not dealt with specifically in the transitional provisions to the Work Choices amendments.

When is a labour hire arrangement really an employment relationship?

The Federal Court of Australia has recently considered whether workers engaged through a labour hire arrangement were really employees of the company using their services and, therefore, entitled to the same remuneration as other employees: *Wilton v Coal & Allied Operations Pty Ltd* [2007] FCA 725 (15 May 2007).

Facts

In 2003, Mining & Earthmoving Services (MES) entered into a supplementary labour hire agreement (the Supply Agreement) with a coal mining company, Coal & Allied Operations Pty Ltd. Kevan Wilton and Steven Cumberland brought an application against Coal & Allied which engaged them through MES.

The applicants claimed that they were not supplied to Coal & Allied pursuant to the Supply Agreement as they commenced work for Coal & Allied prior to 2003. They further claimed that they had become employees of Coal & Allied under the general law and were therefore entitled to the same remuneration as Coal & Allied employees under its certified agreements. The applicants sought a declaration that they had been underpaid and an order that Coal & Allied pay them their entitlements, interest and penalties.

The applicants claimed that Coal & Allied:

- controlled their work and all related matters, including discipline;
- provided and maintained the equipment used in the work;
- allocated them to crews and provided them with rosters;
- dictated the place and hours of work;
- required them to perform duties that were almost identical to those performed by Coal & Allied employees;
- exercised the right to dismiss or suspend for all practical purposes; and
- merely outsourced remuneration and "paper matters" to MES.

Decision

Justice Conti dismissed the application finding that the matters raised provided by the applicants were insufficient to indicate the existence of an employment relationship and were equally reflective of a labour hire arrangement. He ruled that the applicants were employed by MES, not Coal & Allied.

Justice Conti considered the following facts relevant:

- there was no intention to enter legal relations – the parties did not discuss or consider essential contractual terms;
- MES remunerated the applicants according to its labour hire arrangements with Coal & Allied and the applicant's claim that the wages were merely outsourced to MES was wrong;
- it is not sufficient to characterise the applicants as employees of Coal & Allied merely because they performed similar duties to Coal & Allied employees;
- the submission that the applicants were not covered by the Supply Agreement because they commenced work for Coal & Allied prior to its formation was rejected as the applicants had worked under the labour hire arrangement between Coal & Allied and MES for some time; and
- neither of the applicants engaged in conduct which showed that they regarded themselves as being employed by Coal & Allied.

Lessons for employers

- **When determining whether a purported labour hire arrangement is really an employment relationship, the courts will have regard to all relevant factors, not just the formal written terms.**
- **When engaging workers through labour hire arrangements employers need to be conscious of these matters and ensure that there are mechanisms to limit the possibility of labour hire workers successfully claiming to be employees.**

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Lessons for employers

- **If there is no contractual provision relating to notice of termination of employment, an employee must be given reasonable notice.**
- **Various factors, such as those considered in this case, must be taken into consideration when determining what constitutes reasonable notice of termination.**
- **Employers should always deal carefully with the rules governing termination in employment contracts for staff – both for new starters and for those who may have entered the employment without such a contract or had since changed roles.**

What is reasonable notice of termination of employment?

In *Taske v Occupational and Medical Innovations* [2007] QSC 11, the Queensland Supreme Court found that an employee had not repudiated his employment contract and therefore should not have been summarily dismissed. As a result, the employee was entitled to reasonable notice of termination of employment. In the absence of a contractual provision relating to notice of termination, the Court considered the various factors which must be taken into consideration when determining what constitutes a reasonable notice period. The Court found that the employee was entitled to nine months notice.

A number of factors must be considered in determining what period of notice of termination of employment is "reasonable". The Court found that the following factors entitled the employee to nine months notice:

- the position was a senior one;
- the remuneration was at a high level;
- the plaintiff's age, qualifications and experience were such that he had limited prospects of obtaining an equivalent position in a company conducting a business of the kind conducted by the defendant; and
- the plaintiff gave up a position in the United States to take up the position with the defendant.

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STOP PRESS: ALRC Proposes Privacy Changes

The Australian Law Reform Commission (ALRC) released a discussion paper on 12 September 2007 outlining its proposal for an overhaul of privacy legislation in Australia.

Employee records exemption

Of particular interest to employers is the proposal to remove the employee records exemption that currently exists under the *Privacy Act 1988* (Cth) making the National Privacy Principles applicable to the personal information of current and former employees held by employers.

In response to concerns by some stakeholders that the removal of the exception may affect the ability of prospective employers to engage in full and frank discussions with a job applicant's previous employers, the ALRC has also proposed that provision be made within the *Privacy Act* that would have the effect of enabling, for example, a comment about a prospective employee to be kept confidential from the subject employee.

Statutory cause of action

The ALRC also proposes the creation of a statutory cause of action for invasion of privacy in circumstances where:

- there has been interference with an individual's home or family life;
- an individual has been subjected to unauthorised surveillance; or
- sensitive facts about an individual's private life have been disclosed.

This would allow an individual to take action in court to seek a range of remedies, including compensation. It would apply only where there is a reasonable expectation of privacy and where the action that is the subject of the complaint is serious enough to cause substantial offence to an ordinary person.

The ALRC is seeking submissions in response to its proposals. The closing date for submissions is 7 December 2007.

Commission Curbs Award Variation

In *ECA Training Pty Ltd t/as NECA Group Training* [2007] AIRCFB 368 (9 May 2007) a Full Bench of the Australian Industrial Relations Commission decided that it did not have the power to bind a union to an award, or to vary substantive terms and provisions of an award.

ECA Training Pty Ltd t/as NECA Group Training, a group training company, brought an application in the Australian Industrial Relations Commission to be bound by the *National Electrical, Electronic and Communications Contracting Industry Award 1998* (the Federal Award).

The application was made under section 558 of the *Workplace Relations Act 1996*, which relevantly states that an "employer may apply to the Commission for an order varying a specified award to bind the employer and a specified class or specified classes of employees of the employer". Section 558 then sets out the criteria about which the Commission must be satisfied to vary an award.

In its application, NECA sought variations of the Federal Award, which included:

- that it bind NECA, its employees and the CEPU; and
- that it incorporate a list of "preserved notional terms" from a State award which previously bound NECA.

The Commission stated that it could only vary an award to bind a new organisation if that organisation brought an application under section 560 of the Act, which sets out other criteria that the Commission must be satisfied have been met, for example, that the order is necessary to enable the organisation to represent the industrial interests of its members. Since NECA had brought this application, the Commission held that it did not have power to make the order sought.

The Commission characterised the amendments sought in NECA's application to incorporate preserved notional terms as amendments to substantive terms and conditions of the Federal Award, which were not necessary to effectively bind NECA and its employees. The Commission found that it could only vary the substantive terms of an award in limited circumstances (including as part of rationalisation or simplification), and not in an application to bind an additional employer to an award. For this reason, the Commission held that it did not have jurisdiction to incorporate the preserved notional terms into the Federal Award.

Lessons for employers

- **An employer may only apply to the Commission to vary a federal award to bind its employees and the employer, but not to bind a union.**
- **The Commission may only vary the substantive terms of an award in limited circumstances.**
- **Employers should ensure that any application to the Commission to be bound by an award does not seek any orders which are not within the Commission's power because the offending provisions may result in the dismissal of the entire application.**

The Commission also found that under section 558 of the Act it did not have power to sever these parts of the application because its power to vary an award was limited to varying an award as specified in the application.

For these reasons, the Commission held that it did not have jurisdiction to vary the Federal Award and dismissed NECA's application.

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Union found to have engaged in secondary boycott, industrial tort and coercion

In *A & L Silvestri Pty Ltd v Construction, Forestry, Mining and Energy Union* [2007] FCA 1047 (13 July 2007), the Federal Court found that a union had made threats with the intent of coercing a company to make a certified agreement under the *Workplace Relations Act 1996,* had engaged in a secondary boycott under the *Trade Practices Act 1974* and had committed the industrial tort of inducing breach of contract.

Background

The *Workplace Relations Act* prohibits a person from taking or threatening to take any industrial action or other action with intent to coerce another person to agree to make a certified agreement.

Section 45D of the *Trade Practices Act*, in summary, prohibits a person from engaging in conduct in concert with a second person that hinders or prevents a third person from supplying or acquiring goods or services to or from a fourth person for the purpose, and that would have, or be likely to have the effect, of causing substantial loss or damage to the business of the fourth person.

Facts

In 2003, LGB Contracting Pty Ltd commenced development and construction of a project worth approximately $16 million in Wollongong.

Shortly after work commenced, LGB was approached by a CFMEU organiser who was seeking that LGB enter into an enterprise bargaining agreement (EBA) and a site agreement with the CFMEU. The organiser also expressed a preference for major contractors on site to have an EBA with the CFMEU and made it clear that there would be disruption on site if the CFMEU demands in relation to an EBA and site agreement were not met by all contractors, including LGB. Within hours of the organiser's first visit, WorkCover inspectors arrived on site and the site was shut down for two days because of safety issues.

LGB subsequently contracted A & L Silvestri Pty Ltd, a family owned contractor, to carry out demolition and excavation works. Two CFMEU organisers then threatened disruption to the site if Silvestri commenced work on site. The objection to Silvestri was the fact that Silvestri did not have an agreement with the CFMEU. One of the organisers told LGB that if Silvestri was used, the site would be shut down and disruptions would occur. He said he would cause stoppages and delays and drive his car across the driveway, stopping trucks from entering or leaving the site.

When Silvestri commenced work these threats were carried into effect.

LGB subsequently terminated Silvestri's services. The reason for this was reflected in a note written by the LGB site manager saying that LGB were threatened by the CFMEU with shutdowns and disputes if they did not remove Silvestri from the site and employ a CFMEU recommended contractor.

Silvestri and the Building Industry Taskforce initiated proceedings against the CFMEU and three of its organisers.

Decision

The Federal Court found that the CFMEU and one of its organisers had made threats to LGB with the intent of coercing LGB to enter into an EBA with the CFMEU. Threats were made to disrupt the site, such as engaging in a picket if an EBA was not entered into. While the site may have been shut down on two occasions for legitimate reasons, the Court said that, "[i]t was important that the power to give effect to disruption by whatever means were at hand was demonstrated." And, while the action when Silvestri commenced work was directed largely at Silvestri, it was a "demonstration of the reality of the threats made by [the CFMEU organiser] to LGB." The actions by the CFMEU organisers in blocking the driveway and inspecting Silvestri's excavator were also unlawful.

The Court found that the CFMEU and the three organisers breached section 45D of the *Trade Practices Act*. The organisers had engaged in conduct that hindered or prevented LGB from acquiring services from Silvestri. The aim of the CFMEU had been to stop Silvestri carrying out the work it had been engaged by LGB to do. This was achieved. The Court said that the conduct was also engaged in for the purpose and would have, or be likely to have, the effect of causing substantial loss or damage to the business of Silvestri.

The Court also ruled the conduct involved a clear case of interference with contractual relations by the organisers and that the CFMEU was also liable.

Lessons for employers

- **Employers should ensure that they have a clear understanding of union rights, powers and obligations, including rights of entry.**
- **Employers should ensure that they (and their subcontractors) have sound legal strategies and contingency plans to manage any industrial or boycott activity that may arise.**
- **Employers do not have to tolerate unlawful union harassment and intimidation.**

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Piece rate pay and classification scale for commission employees

The Australian Fair Pay Commission has issued a new pay and classification scale for commission only employees on the basis that they are piece rate employees. The new instrument is the Real Estate Agents' (Commission Only) Australian Pay and Classification Scale [2007] APCS 3.

A pay and classification scale is a set of provisions relating to pay and loadings for particular employees and operates as an element of the Australian Fair Pay and Conditions Standard.

The unusual feature of this scale is that it makes provision for commission only arrangements. In other words, it does not make provision for an hourly rate of pay or require that employees be paid on a time basis.

The pay scale covers employees engaged by real estate agents to perform the functions of a real estate agent. The employee must be qualified to perform the work of a real estate agent under the local laws and have agreed with his or her employer, in writing, to be remunerated on a commission only basis. Additionally, the employee must not be under 21 years of age, engaged as a casual employee or subject to a training arrangement.

Finally, the pay scale is not applicable if the employee is engaged under a particular named award applying to rural real estate agents.

An interesting feature of this pay and classification scale is the question whether, in truth, commission employees are piece rate employees. A piece rate of pay is defined in the *Workplace Relations Act 1996* as a rate of pay "expressed as a rate for a quantifiable output or task (as opposed to being expressed as a rate for a period worked)". Examples are given in the legislation pointing to a rate calculated by reference to a number of articles produced, a number of kilometres travelled, a number of articles delivered or sold, or a number of tasks performed. The examples coincide with the ordinary earning of *piece work*.

It is not obvious that this description would cover a commission arrangement for a real estate sales person or other employees where the commission operates as a percentage of sales achieved. Can it be said that such a rate is a *rate for a quantifiable output or task*?

In any event, the decision indicates the view of the Commission on this point. It also demonstrates a willingness of the Commission in an appropriate case to make a new pay and classification scale which provides for commission only earnings.

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Lessons for employers

- **Where commission only arrangements are integral to employment in a particular industry, steps should be taken to ensure that those arrangements are able to be continued consistently with the Act.**
- **A commission only arrangement is considered by the Commission as possible under the Australian Fair Pay and Conditions Standard.**

Order for protected action ballot refused – failure to genuinely try to reach an agreement

In *Liquor, Hospitality and Miscellaneous Union – Western Australian Branch v CSBP Limited* [2007] AIRC 469 (15 June 2007), Deputy President McCarthy refused to grant an application for a protected action ballot order in relation to the employees of CSBP Limited. Having regard to the union's conduct as a whole, it was found that the union was not genuinely trying to reach agreement.

Facts

The case concerned negotiations between CSBP and various unions for a new workplace agreement.

One of the unions, the LHMU, had served notice on CSBP to initiate a bargaining period. On two previous occasions the LHMU had applied to the Australian Industrial Relations Commission for protected action ballots. Both times orders were made for a protected action ballot to be held.

Throughout the period of negotiations, and in particular during the April bargaining period, each time an agreement was in sight, the LHMU would add to or alter the issues to be resolved. The LHMU's behaviour extended the length of negotiations and prevented an agreement from being reached. Negotiations stalled.

The LHMU applied to the Commission for a further order for a protected action ballot. CSBP opposed the ballot order application and applied for an order suspending or terminating the bargaining period on the ground that the union was not genuinely trying to reach agreement.

Decision

In considering an application for an order for a secret ballot the Commission must be satisfied that during the bargaining period the applicant genuinely tried to reach agreement with the employer of the relevant employees.

In addition, before terminating or suspending a bargaining period the Commission must be satisfied that the negotiating party did not genuinely try to reach an agreement with the other negotiating party before organising or taking the industrial action.

"Genuinely try" test

CSBP asked Deputy President McCarthy to consider the "genuinely try" test as one that includes an obligation on the initiating party to bargain in good faith. CSBP argued that the conduct of the LHMU was similar to that which is described as "receding horizon bargaining" in Canada, and such conduct was indicative of not bargaining in good faith. CSBP also referred the Deputy President to a native title decision which identified various factors relevant to determining whether a party has negotiated in good faith. CSBP highlighted the factor of "shifting position just as agreement seems in sight" and argued that the LHMU, by consistently adding to the issues to be agreed, had prevented the reaching of an agreement and therefore had not genuinely tried to reach agreement.

A genuine attempt to reach agreement?

Deputy President McCarthy ruled:

- Whether a party is genuinely trying to reach an agreement must be considered on a case by case basis, having regard to the conduct as a whole, and may be determined by reference to a pattern of behaviour.
- While the actions of the union caused frustration, something more than mere frustration is required.
- The LHMU's statement that "nothing is agreed until everything is agreed" does not provide immunity from the obligation to genuinely try to reach agreement.
- Raising additional matters after meeting CSBP's initial requests meant that the positions taken by CSBP were made on the wrong premise as they were based on what the union had originally stated.
- The LHMU had readily added claims and easily abandoned them at critical stages of negotiations, and this behaviour was indicative of not genuinely trying to reach agreement.

In light of this, Deputy President McCarthy held that the LHMU was organising industrial action without having genuinely tried to reach agreement and he terminated the bargaining period. The union was prevented from initiating a new bargaining period before 17 August 2007.

Lessons for employees

- **During a bargaining period, consistently shifting position just as agreement seems in sight may be evidence that a party is not negotiating in good faith.**
- **In establishing whether a party has "genuinely tried" to reach an agreement, regard will be had to the conduct of a party as a whole and will not be confined to a single isolated incident.**

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Dispute about termination of employment is not a "dispute over the application of an agreement"

In *Minister for Employment and Workplace Relations v CPSU* [2007] AIRCFB 476 (13 June 2007) the Minister sought a review of a decision where it was held that a dispute about a decision of the State Library of Victoria to terminate the employment of an employee was a dispute over the application of a pre-reform certified agreement.

The State Library decided to terminate Ms Sindici's employment because, as a result of continuing disabilities, she was unable to perform the inherent requirements of her job. The CPSU disputed that the tasks Ms Sindici was unable to perform were inherent requirements of her job and argued that the decision to terminate her employment was unlawful discrimination.

The CPSU notified a dispute to the Australian Industrial Relations Commission pursuant to section 170LW of the pre-reform *Workplace Relations Act 1996*. Under section 170LW, the Commission has jurisdiction to hear disputes over the application of a pre-reform certified agreement.

The State Library's pre-reform certified agreement contained:

- an anti-discrimination clause stating the State Library would ensure that the agreement clauses and their operation were not discriminatory in their effect; and
- a clause stating the periods of notice to which an employee was entitled if the State Library terminated the employee's employment.

The CPSU argued that the dispute about the merits of the decision to terminate Ms Sindici's employment was a dispute over the application of the certified agreement because the decision to terminate her employment was contrary to the anti-discrimination clause in the agreement. The Commission, at first instance, agreed.

The Minister sought a review of this decision by the Full Bench on the basis that the decision was contrary to the public interest. The Minister argued that the decision could be relied on in future cases to allow the Commission to deal with disputes under section 170LW about the merits of a particular decision to terminate an employee's employment.

On reviewing the decision, the Full Bench found that the dispute about the termination of Ms Sindici's employment was not a dispute about the application of the agreement.

The Full Bench determined that:

- the anti-discrimination clause required the State Library to ensure that all clauses in the agreement did not have a discriminatory effect;
- the notice of termination clause set out the benefits to which an employee was entitled on the termination of employment by the State Library; it did not deal with the State Library's right to decide to terminate an employee's employment;
- there was no clause in the agreement which dealt with the State Library's right to decide to terminate an employee's employment; and
- the State Library's right to decide to terminate Ms Sindici's employment was provided by the general law governing employment, not the agreement.

Lessons for employers

- **There are many pre-reform certified agreements still in force which are likely to contain similar clauses. It is generally unlikely that a dispute about a decision to terminate an employee's employment will be a dispute about the application of a pre-reform certified agreement. However, this will depend on the particular wording of the agreement applying to the employee and his or her employer.**
- **Employers should take care when including aspirational clauses in workplace agreements to avoid unintentionally affecting general managerial prerogatives or the operation of other provisions in the workplace agreement.**

Accordingly, because the decision to terminate Ms Sindici's employment was not made in accordance with a clause under the agreement it could not be in contravention of the anti-discrimination clause in the agreement. In these circumstances, the dispute was not about the application of the agreement and the Commission did not have jurisdiction to hear the dispute.

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Entitlements to contractual benefits may remain within the jurisdiction of a State Industrial Relations Commission

In *Smith v Albany Esplanade Pty Ltd T/as The Esplanade Hotel* 2007 WAIRC 00192 (2 March 2007), Senior Commissioner Smith expressed a view that the Western Australian Industrial Relations Commission did not have jurisdiction to deal with a claim for a contractual benefit where the benefit accrued after 27 March 2006 when amendments to the *Workplace Relations Act 1996* took effect.

In brief

- **Employees who have accrued contractual entitlements prior to 27 March 2006 may still be able to bring claims in the Western Australian Industrial Relations Commission alleging denial of those entitlements.**
- **Otherwise, employees of corporations are generally excluded from the State jurisdiction.**

Subject to certain exceptions, section 16(1) of the *Workplace Relations Act 1996* generally excludes the operation of State or Territory industrial laws if the employer is a corporation such as the company operating The Esplanade Hotel. This section commenced operation on 27 March 2006. Certain claims are, however, preserved under the *Workplace Relations Regulations 2006*.

Ms Smith alleged she had been constructively dismissed from her position on 2 March 2006 as sales manager of the Hotel when she was directed to perform duties which she believed were inconsistent with her job. Ms Smith filed an application under the Western Australian *Industrial Relations Act 1979* (the State Act) alleging she had been unfairly dismissed and denied contractual benefits by way of payment in lieu of notice.

The Hotel argued that Ms Smith was not dismissed as she voluntarily resigned from her position. Furthermore, the Hotel argued that even if the Commission found that she had been dismissed, the Commission did not have jurisdiction to deal with her claim for contractual benefits because of the operation of section 16(1).

Senior Commissioner Smith found that Ms Smith had not been constructively dismissed by the Hotel and, accordingly, her unfair dismissal claim failed as did her claim that she had been denied payment in lieu of notice.

However, Senior Commissioner Smith went on to express a view as to the jurisdiction of the Commission. She noted that section 16(1) excluded the jurisdiction of the Commission to deal with claims for contractual benefits accrued after 27 March 2006 because provisions of the State Act were rendered inoperative generally in respect of persons employed by constitutional corporations. She found, however, that the right to bring a claim for contractual benefits under the State Act, where the entitlement accrued before 27 March 2006, was preserved.

Under the Regulations, section 16(1) does not apply to a State law to the extent that it relates to compliance with an *obligation* under that law and *in respect of an act or omission* which occurred *prior to the reform commencement* (27 March 2006). A denied contractual benefit application under the State Act gives rise to a right to have the application dealt with. Consequently, there is an obligation on the Commission to deal with the application pursuant to the provisions of the State Act. As to the additional requirement that the obligation must be in respect of an "act or omission", the act of Ms Smith's employment coming to end on 2 March 2006 would have satisfied this requirement.

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Refusal to accept a job reassignment: a genuine operational reason for dismissal?

A Full Bench of the Australian Industrial Relations Commission has held that the dismissal of an employee by Boeing, which was triggered by the employee's refusal to accept a reassignment to another position, was for reasons which included genuine operational reasons: *Boeing Australia Limited v Acworth* [2007] AIRCFB 730 (3 September 2007).

Facts

Mr Acworth was employed by Boeing Australia Limited in Brisbane in May 2004 as a Process Improvement Engineer on a particular project. His contract of employment contemplated that he might be reassigned and required to work in another part of the business or location to meet business needs. During his employment he was reassigned several times.

The particular assignment Mr Acworth was working on was due to be completed in March 2007. From September 2006, Boeing consulted with Mr Acworth about a number of alternative positions potentially available to him after March 2007. Boeing reassigned Mr Acworth to a new position in January 2007 and sought his confirmation of the reassignment. Mr Acworth rejected the reassignment and, as a consequence, Boeing terminated Mr Acworth's employment. Mr Acworth did not receive severance payments under Boeing's redundancy policy. According to Boeing, Mr Acworth's employment was terminated because his assigned role had come to an end and he had failed to accept any of the alternative positions available to him.

Mr Acworth brought an unfair dismissal application in the Australian Industrial Relations Commission. Boeing moved for the dismissal of the application on the basis that the Commission did not have jurisdiction to deal with the application because the employment was terminated for genuine operational reasons.

At first instance, Senior Deputy President Richards declined to dismiss Mr Acworth's application. He concluded that there was no genuine operational reason for the termination but that, properly characterised, the reason for termination was the employee's refusal to carry out a reasonable and lawful direction to accept the reassignment consistent with the terms of his contract of employment. Boeing appealed this decision.

Full Bench decision

The Full Bench held that the reasons for terminating Mr Acworth's employment as advanced by Boeing did include genuine operational reasons. In particular, the decision maker at Boeing believed there was no ongoing role for Mr Acworth at Boeing. The Full Bench said, "where an employer terminates the employment of an employee with particular qualifications and experience because no suitable assignment can be found for an employee with those qualifications and experience, the termination is for an operational reason. The reason is structural in nature."

While Boeing's reaction to Mr Acworth's refusal to accept the assignment offered was part of the reasons for the decision to terminate his employment, the decision maker's belief that there was no suitable assignment was a genuine operational reason, even if it was not the exclusive reason for the decision.

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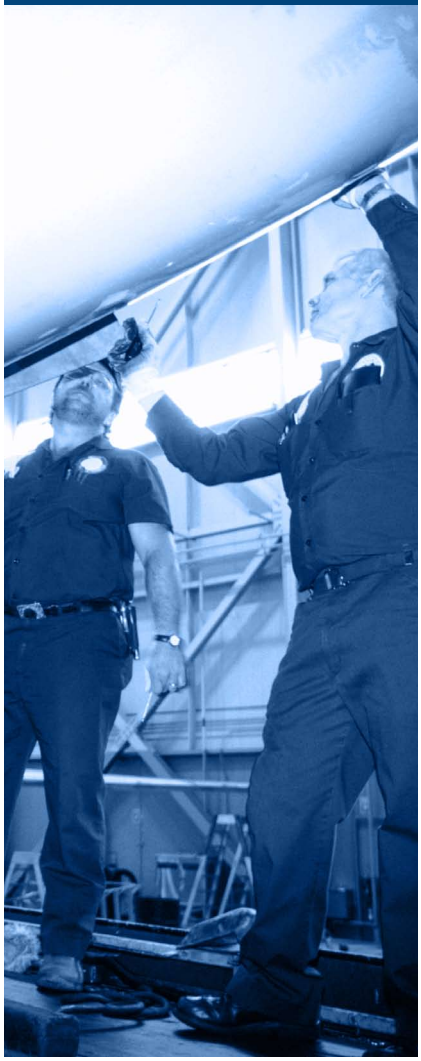
Lessons for employers

- **A decision to terminate an employee's employment may not be subject to an unfair dismissal application where reasons for the decision to terminate include genuine operational reasons. A genuine operational reason does not have to be the exclusive reason for the decision.**
- **Where the job an employee is performing is no longer required and no suitable alternative job can be found for the employee or a suitable alternative job is rejected by the employee the termination of the employee's employment is for an operational reason.**



Australian Fair Pay Commission's wage-setting decision flowed on to transitional and pre-reform awards

On 16 August 2007, a Full Bench of the Australian Industrial Relations Commission handed down its Wages and Allowance Review decision for 2007: see [2007] AIRCFB 684.

The Commission flowed on the major elements of the wage setting decision published by the Australian Fair Pay Commission (AFPC) on 5 July 2007 to wage rates and wage-related allowances in 13 transitional awards and wage-related allowances in 13 pre-reform awards.

Key elements of the AFPC's wage-setting decision include:

- $10.26 per week increase to the standard federal minimum wage;
- $10.25 per week increase to all adult pay scales that currently provide for a basic periodic rate of pay up to $700 per week;
- $5.30 per week increase to all adult pay scales that currently provide for a basic periodic rate of pay above $700 per week;
- the increases in the federal minimum wage and the pay scales take effect from the first full pay period on or after 1 October 2007.

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Lessons for employers

- **For employees on award wages or the federal minimum wage, increases set out in the AFPC's decision take effect from the first full pay period on or after 1 October 2007.**
- **The Commission flowed on the AFPC's decision to wages in transitional awards (which cover, for example, employers who are not constitutional corporations or otherwise covered by the Federal industrial relations system).**
- **Wage-related allowances in transitional and pre-reform awards may be increased in accordance with the Commission's usual principles for the adjustment of allowances.**
- **The Commission's decision to flow on the AFPC's wage setting decision applies to 26 transitional and pre-reform awards. Applications to vary wage-related allowances in all other transitional and pre-reform awards may now be filed with the Commission. Allowance increases will not apply before 1 October 2007.**

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