

# NEWSLETTER

SEPTEMBER 2010

## Cornwalls' E&IR Team Welcomes

The E&IR team is enjoying the assistance of new Trainee, Matt Southwell. Matt completed his Bachelor of Biomedical Science with Honours, before attaining his Bachelor of Laws at Monash University. In December 2008, Matt undertook a seasonal clerkship with Cornwalls and was based in the Corporate & Commercial and Commercial Property groups. We are pleased to welcome Matt to the E&IR team, where he has already proved to be a valuable resource.

In other exciting E&IR news, we have two new additions to the extended Cornwalls family.

Louise Houlihan has given birth to a beautiful baby boy, Daniel. He's a very good baby, apparently eating and sleeping well!

Clare Hudson has also added to her family with the arrival of her son, Idris. Bea now has a lovely little brother to play with and we are happy to report that Clare is doing well (although not getting nearly enough sleep!).

### Tracey Davies

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\*Click on image to view Tracey's profile

## Scope of Union Representational Rights

A Full Bench of Fair Work Australia (**FWA**) has ruled that employers are obliged to issue notices of representational rights to all workers covered by the scope of union-proposed deals.

The Liquor, Hospitality and Miscellaneous Union (**LHMU**) commenced enterprise agreement bargaining with MSS Security Pty Ltd (**Company**) on behalf of employees who worked on the Western Australian Public Transport Authority. During negotiations, the LHMU proposed an agreement to cover three categories of employee; however the Company agreed to bargain only in relation to one category, and issued a notice of representational rights to those employees only.

The LHMU brought proceedings for a protected action ballot order in relation to all of the employees who fell within the different categories, which was granted by FWA.

The Company launched an appeal against the decision, claiming that the union could not apply under s437 of the *Fair Work Act 2009* (Cth) (**Act**) for a protected action ballot order for employees it was not representing in bargaining and that it could not be a bargaining representative for employees until the Company had issued a notice of representational rights to them in accordance with s173.

The Full Bench rejected this argument.

The Full Bench held that an employer is not obliged to agree to

bargain or to commence bargaining for an enterprise agreement in response to a union proposal. An employer may refuse to bargain or agree to commence bargaining subject to a condition precedent as to the scope of any agreement. However, once the employer has agreed to bargain, the bench found the employer is in fact obliged under s173(1) to issue representational notices to all employees covered by the broader scope of the agreement proposed by the union (and to bargain in good faith). If it were otherwise, it would mean that an employer could always prevent an agreement having a broader scope than it desired by simply refusing or failing to issue notices of representational rights outside its desired scope, and this would be inconsistent with the Act.

In this case, the Company had agreed to bargain – and had in fact been bargaining – in relation to one category of employee within the scope of the agreement proposed by the LHMU. Whether or not the Company had agreed to issue a notice of representational rights to 'all employees' was not strictly relevant in the circumstances of the case. The Company was obliged to commence bargaining in good faith and the scope of the agreement was itself a matter for bargaining.

The Full Bench was satisfied that Commissioner Cloghan was correct in granting the LHMU's application for a protected action ballot order and upheld the order.

## Implications for businesses

- An employer may refuse to bargain; however, once the employer



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has agreed to bargain or commences bargaining, the employer is obliged to issue representational notices to all employees covered by the scope proposed and to bargain in good faith.

- Bargaining may have commenced even though the parties to the bargaining process are in disagreement about the scope of the proposed agreement. The remedy for the party wanting a narrower scope is provided by s238 (scope order).
- An employer who enters into negotiations for the purposes of agreeing an enterprise agreement will be prevented from withholding notices of representational rights as a method of limiting the scope of the agreement.

## Voluntary hours clauses approved for seasonal workers

Fair Work Australia (FWA) has approved two enterprise agreements containing voluntary hours clauses covering seasonal workers, despite



the agreements failing the Better Off Overall Test (BOOT).

FWA engaged its 'public interest' power to approve the agreements (subject to undertakings by the employers). The agreements were 'not contrary to the public interest' due to the exceptional circumstances that existed.

### The First Agreement: Samphie Pty Ltd T/A Black Crow Organics

In the decision of *Samphie Pty Ltd T/A Black Crow Organics*, FWA approved an agreement containing voluntary additional hours arrangements. The agreement enabled employees of the Queensland potato farm to choose to work additional hours in order to maximise their income during the peak harvesting season and forgo overtime penalty rates.

Commissioner Ashbury found that agreements could include voluntary hours clauses provided they satisfied the no-disadvantage test, yet in this case there were insufficient countervailing benefits to allow the agreement to pass the test. Nonetheless, the Commissioner found the seasonal nature of the agricultural industry and its detrimental effect on the ability of casual workers to earn a steady income during the off-season was an 'exceptional circumstance' for the purposes of s189 of the *Fair Work Act 2009* (Cth), and approving the agreement would not be contrary to the public interest.

### The Second Agreement: Top End Consulting Pty Ltd

In *Top End Consulting Pty Ltd*, FWA determined once again that an agreement which failed to satisfy the BOOT was valid. The agreement, which covered employees working in seasonal industries in Western Australia and the Northern Territory, contained voluntary hours clauses allowing the employer to forgo penalty rates for overtime, weekend and

public holiday work where the employee 'voluntarily agreed' to perform the work.

Top End Consulting, a labour-hire company, argued that the clauses enabled workers to earn more money and there was wide employee support for the provisions. However, Deputy President Bartel was unable to conclude that the agreement passed the BOOT because the more beneficial terms of the agreement were limited and did not outweigh the voluntary hours provisions.

Top End Consulting also argued that the agreement could be approved in accordance with s189, which allows for the approval of an enterprise agreement that has not satisfied the BOOT where FWA is satisfied that, due to exceptional circumstances, the approval of that agreement would not be contrary to the public interest.

The exceptional circumstances relied on by the company included such things as the predominantly casual labour workforce, the business being subject to peaks and troughs, its clients' inability to pay penalty rates, and the highly transient and large proportion of employees travelling through Australia who remained in the location for a relatively short duration.

FWA held there was nothing unusual or uncommon in the high level of casualisation, which was directly related to the nature of the employer's labour-hire business.

However, Deputy President Bartel held there was an 'exceptional circumstance' in the convergence of the profile of the employees, the provision of labour to seasonal industries (in contrast to usual business peaks and troughs) and the employer's business operating predominantly in the tropics. He therefore approved the agreement

(subject to an employer undertaking to confine the operation of the provisions to seasonal industries).

## Implications for businesses

The inclusion of a voluntary hours provision is not necessarily fatal to an agreement where that provision does not satisfy the BOOT.

FWA may approve an agreement that does not pass the BOOT, so long as it is not contrary to the public interest.

One factor clearly relevant is the seasonal nature of the industry in which the employer operates.

## Fair Work Australia rules on when it is 'appropriate' to terminate an agreement

A recent ruling by Fair Work Australia (FWA) has given detailed consideration to its discretionary power to terminate enterprise agreements under the *Fair Work Act 2009* (Cth) (**Act**).

In the first contested application to terminate an agreement under the Act, Vice President Lawler refused Xstrata subsidiary Tahmoor Coal Pty Ltd's (**Company**) bid to end two agreements covering its underground mine and washery employees.

Both of the agreements had passed their nominal expiry date and provided that the parties would commence bargaining for a replacement agreement no later than six months before the nominal expiry date. Although bargaining commenced as contemplated, the company and the CFMEU's mining and energy division became involved in prolonged negotiations to replace the agreements.

Under s225 of the Act, an employer, employee or employee organisation covered by an enterprise agreement may apply to FWA to terminate their agreement if it has passed its nominal expiry date. The Company applied to FWA to have the agreements terminated. Those agreements imposed several constraints on the Company including minimum staffing requirements, limits on the use of contractors, restrictions on working hours and shift arrangements, as well as provisions relating to retrenchment and dispute resolution. His Honour accepted that the constraints materially affected the mining company's productivity. Nevertheless, he said, employees had a legitimate interest in retaining most of the constraints, particularly those provisions relating to job security.

He dismissed the application, deciding it was not appropriate to terminate the agreements at this time.

## The 'appropriateness' test

In determining whether the agreement should be terminated, FWA is mandated by s226 to terminate the agreement if:

- (a) FWA is satisfied that it is not contrary to the public interest to do so; and
- (b) FWA considers that it is appropriate to terminate the agreement, taking into account all the circumstances.

These two preconditions involve a degree of subjective judgment. 'Appropriateness' is a broad discretionary standard. Vice President Lawler acknowledged that 'reasonable minds may...differ sharply, on what is appropriate in any given set of circumstances'. Thus, the power conferred on FWA to terminate an agreement turns on what is effectively an exercise of broad discretion.

This is the first time the tribunal's power to terminate agreements has been subject to a criterion of appropriateness, meaning there is little assistance from earlier authorities on this issue.

In determining whether it is appropriate to terminate the agreement, s226(b) specifies matters that FWA may consider:

- (i) the views of the employees, each employer, and each employee organisation covered by the agreement; and
- (ii) the circumstances of those employees, employers and organisations, including the likely effect that the termination will have on each of them.



Vice President Lawler said in relation to the matter specified in s226(b)(ii), it appeared the legislative intention of the tribunal was to weigh up the beneficial and detrimental effects of the termination. If the termination resulted in one party being 'disproportionately' worse off, this would indicate the inappropriateness of the termination. However, his Honour accepted that this sort of comparison would be problematic because of the difficulty in comparing different species of benefit and detriment.

He further stated the objects of the Act were clearly relevant. Of particular importance were the productivity objectives and their achievement through the bargaining process. His Honour held that it would be inappropriate to terminate an agreement that has passed its nominal expiry date if bargaining for a replacement agreement is ongoing, and there remains a reasonable prospect that bargaining will result in a new agreement. This would be so even where the bargaining has become protracted.

His Honour held that while every case turns on its own circumstances, the precedence assigned to achieving productivity benefits through bargaining (evident in the objects of the Act) suggests that it is generally inappropriate for FWA to interfere in the bargaining process so as to substantially alter the status quo in relation to the balance of bargaining between the parties.

In this case, it was clear that the termination of the agreements would alter the status quo in a fundamental way – in fact, it would effect a very substantial improvement to the Company's bargaining position and an equivalent weakening in the bargaining position of the employees. Moreover, if FWA had terminated the agreements, the Company would have effectively achieved all that it sought out of the bargaining process.

While the employees would not lose monetary or leave entitlements (due to a Company undertaking), they would lose other substantial benefits, and they had a legitimate interest in seeking the retention of at least most of the constraints (particularly those relating to job security).

Although his Honour accepted that terminating the agreements would probably have led to an increase in productivity, he concluded that it would reduce the prospects of reaching agreement via bargaining. The Act entitles bargaining parties to decline to make concessions on matters that are important to them. Both parties in this case had arguably exercised that right. His Honour found it inappropriate to terminate the agreements at this time, but conceded that the Company would not be obliged to remain subject to the expired agreements indefinitely and could bring a further application at a later date.

Having determined the issue on the basis of appropriateness, his Honour did not go on to consider the public interest aspect.

## For employers

This decision highlights:

- that applications to terminate agreements that would significantly alter the status quo are unlikely to be successful;
- the unlikelihood of FWA terminating agreements that are currently being renegotiated; and
- that FWA has a broad discretionary power to terminate agreements on the basis of appropriateness.

## Workplace Relations Highlights (Watch this Space)

FWA has found an employee was validly dismissed for his personal use of the internet at work. The employee was expressly told not to use it for this purpose and was therefore aware of the restriction. ***Francis Owusu-Ansah v Danoz Direct Pty Ltd [2010]***

Australia's first national Paid Parental Leave Scheme is due to commence on 1 January 2011. The current scheme (to be fully funded by the government) will provide eligible working parents with 18 weeks' pay at the weekly rate of the National Minimum Wage. The ALP has announced plans to include 2 weeks' paid paternity leave from 1 July 2012.

As part of their proposed tax reform changes, the federal government has planned increases to the current superannuation guarantee rate from 9 to 12 per cent over the next 9-10 years. The proposed changes have not yet been passed through parliament. The Coalition has criticised the proposal; the Independents' view is unclear. Watch this space for further developments!

FWA has declined to vary the Social, Community, Home Care and Disability Services Award. Commissioner Cribb noted that the award modernisation full bench had considered and rejected each of the proposed clauses put forward by employer group AFEI. The Commissioner said AFEI had also failed to establish that the variations sought were necessary to achieve the modern award objectives. Those variations would have increased flexibility for employers. ***Australian Federation of Employers and Industries [2010]***