NEWSLETTER

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APRIL 2013

Employment & Industrial Relations Newsletter

Cornwalls' E&IR Team News

In this newsletter we discuss the three significant areas of legal reform in employment, namely:

- the proposed amendments under the new Fair Work Amendment Bill 2013, including changes regarding workplace bullying, union right of entry, parental entitlements, and remuneration for employees working outside normal hours;
- the proposed consolidation of federal anti-discrimination legislation and its contentious definition of unlawful discrimination; and
- the proposed changes to the skilled migration program (457 visas).

Our next HR seminar will be on Contracts and Policies, and will be held on 30 May 2013. Anyone interested in attending this free seminar is encouraged to respond early because places are limited.

Louise Houlihan
Partner and Head of E&IR
Phone (direct) **+61 3 9608 2273**
Mobile **+61 409 835 809**
Email **l.houlihan@cornwalls.com.au**

*Click on image to view profile

March at a glance

- The 2013 Key Work Health and Safety Statistics report was released, finding that Australia's 1100 OHS inspectors issue about 60,000 notices a year and undertake more than 140,000 workplace interventions.
- Safe Work Australia has published a new guide for medical practitioners undertaking or supervising the health monitoring of workers exposed to hazardous chemicals, lead and asbestos. Corresponding guides have been published for businesses and workers.
- The Fair Work Commission has released a new draft practice notice, which sets out appeal rights and the procedures followed by the Commission in the listing, hearing and determination of appeals.
- Attorney-General Robert Clark has been appointed the Minister for Industrial Relations in Victoria.
- The NSW Dust Diseases Tribunal has awarded a record $1.3m in damages to a former labourer who was recently diagnosed with mesothelioma.

Proposed changes to the *Fair Work Act 2009*

The Fair Work Amendment Bill 2013 (**Bill**) has been released, which if passed, will significantly amend the *Fair Work Act 2009* (Cth) (**Act**).

The Bill was originally intended to include amendments that provided access to Fair Work Commission (**Commission**) arbitration when greenfields bargaining reached an impasse. While this part of the Bill has been omitted, there are still a number of major changes that employers need to be aware of, including:

Bullying remedy

Under the proposed amendments, a victim of bullying will be able to seek recourse through the Commission. Any 'worker' will be able to bring an application. Employers can be liable for bullying behaviour perpetrated by any person at the workplace, including visitors. The Bill defines 'bullying' as repeated unreasonable behaviour towards a worker or group of workers that creates a risk to health and safety.

It should be noted that compensation will not be available to victims of bullying. Nonetheless, breach of an order made by the Commission can attract significant pecuniary penalties.

To avoid escalation of bullying disputes, employers will be required to act quickly and efficiently. Employers should ensure they have a formal workplace bullying policy in place and an effective grievance procedure to handle complaints (before their escalation to the Commission).

Right of entry

The proposed amendments will also enable the Commission to deal with disputes about union rights of entry. If the Commission is satisfied that the frequency of visits by a union or permit holder would require an unreasonable diversion of the employer's critical resources, then it can make any order it considers appropriate.

Importantly, if the Bill is passed, an employer may have new obligations regarding travel and accommodation for unions and permit holders seeking to travel to remote locations.

Employers should be aware of their new rights and obligations in dealing with unions. While employers may now have an avenue of redress for over-enthusiastic union visits, on the flip side, an employer who cannot reach an agreement with the union representative over where to hold discussions will be required to let that representative use employee meal or break rooms.

Concurrent unpaid parental leave and entitlements for pregnant employees

The amount of concurrent unpaid parental leave two parents can take will be increased from three to eight weeks under the new amendments. The leave may also be taken in separate blocks of at least two weeks each at any time during the first 12 months after the birth or placement of a child. This amendment is intended to better align concurrent leave entitlements with Dad and Partner Pay, which can be accessed at any time within the first year of the birth or placement of a child.

Further amendments directed at improving the safety and wellbeing of pregnant employees have been proposed. Pregnant employees may be entitled to unpaid special maternity leave in addition to their entitlement to unpaid parental leave. Pregnant employees (whether or not they have completed at least 12 months' service at the time of birth) will also have the right to transfer to a safe job if they cannot continue in their usual role due to an illness or risk arising from pregnancy. At present, this right only exists for pregnant employees who have met certain requirements including at least 12 months' service.

Employers should familiarise themselves with the entitlements of new parents to ensure compliance.

Flexible working arrangements

Under the Bill, the right to request flexible working arrangements will be extended to other groups of employees, including employees with caring responsibilities, employees who have a disability and employees aged 55 and over.

An employee returning from parental leave will also have an explicit right to request part-time hours.

These amendments are likely to create rights for many (or even most) employees to request flexible working arrangements. Employers need to review what capacity they may have to provide flexible working arrangements and what specific reasonable business grounds they may be able to rely on when considering requests.

Remuneration for work outside normal hours

The Bill also amends the modern awards objective to ensure that the Commission takes into account the need to provide additional remuneration to employees working outside normal hours when determining a fair and relevant minimum safety net of terms and conditions. Hours that are outside normal hours include overtime; unsocial, irregular or unpredictable hours; working on weekends or public holidays; or working shifts.

This change may lead to increased costs for employers. Employers should be especially wary of the need to meet their pay obligations to ensure they do not underpay workers and face underpayment claims and possible prosecution.

Protection from changing rosters at short notice

Workers will also be protected from the impact of work rosters changing at short notice under amendments proposed by the Bill. Employers will have an obligation to provide employees with information about changes to their roster or hours of work and consult with employees on the impact any changes will have, including on the employees' family and caring responsibilities.

Employers should note that this will involve genuine consultation with an employee when changing the employee's hours or rosters.

Consolidation of discrimination legislation

The federal government's Human Rights and Anti-Discrimination Bill 2012 (**Bill**) is proving controversial and it is not clear when the Bill will be put before parliament. The Bill, if passed, is intended to consolidate and harmonise all five of the commonwealth anti-discrimination statutes.

One of the main issues with the Bill is the definition of 'unfavourable treatment'. The current definition outlaws conduct that insults, intimidates or offends based on certain characteristics. It has been argued that this definition is too broad because it makes merely offensive conduct unlawful. Several organisations have argued that this definition is likely to limit free political debate.

A second major issue with the Bill is that it reverses the onus of proof in unlawful discrimination cases. As with the general protection provisions in the *Fair Work Act 2009* (Cth) (**Act**), the respondent will need to prove they did not engage in conduct for a discriminatory reason or purpose. The shifting burden of proof will increase the costs borne by organisations in defending complaints.

In addition, the federal government has proposed amendments to the *Sex Discrimination Act 1984*, which would introduce new protected attributes including sexual orientation, gender identity and intersex status.

It seems unlikely that the Bill will be adopted in its present form, given its contentious history. However, if it is adopted, employers should be aware that:

- the introduction of new protected attributes may increase your obligations, depending on which state or territory you operate in;
- your exposure to discrimination claims in the federal jurisdiction may also increase, and claims will be more difficult to successfully defend; and
- you will still need to comply with your obligations under the current relevant state and territory legislation, as well as the general protection provisions of the Act.

Proposed amendments to skilled migration program (457 visas)

The federal government has announced changes to the skilled migration program (457 visas).

Under the 457 visa, skilled overseas workers who are sponsored by an Australian employer can work in Australia temporarily for up to four years. Under the proposed reforms:

- employers will be required to demonstrate that a genuine skills shortage exists and they will have to make genuine efforts to find local labour;
- English language requirements for certain positions will be raised;
- on-hire arrangements of 457 visa workers will be restricted; and
- additional compliance and enforcement powers will be introduced to prevent employers abusing the 457 system.

Fair Work Ombudsman inspectors will be given new powers to ensure that 457 visa holders are being paid market rates and are working in their approved roles (as specified in their visas).

The move to further tighten visa requirements may significantly affect individuals and employers who rely on the temporary work visas and we recommend you seek further advice if these changes are likely to affect you.

Workplace Relations Highlights (Watch this Space)

- The federal government has released draft model rules to help registered organisations comply with the new financial disclosures and accountability standards introduced last year. Unions and employer associations should be aware that they must comply with the new legislative requirements by 29 June.
- The Fair Work Ombudsman (**Ombudsman**) has announced plans to update its complaints process for unpaid work arrangements.
- Safe Work Australia has agreed to release a revised draft of the bullying Code of Practice. The Code sets out guidelines for the prevention of workplace bullying. It is likely to be made available for public comment in early April.
- A Melbourne distributor is to face court over a $124,000 underpayment claim. The Ombudsman has launched a prosecution against the grocery importation business for allegedly underpaying a delivery truck driver over a five-year period. The case is listed for a directions hearing in June 2013.