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paper

Industrial Reforms – The Government's Plan

Mark Dunphy and Karl Rozenbergs

On 20 September 2005, Andrew Robb AO MP, Chairman of the Coalition's Industrial Relations Task Force indicated that the legislation required to implement the Government's Industrial Relations reforms, will be introduced to Parliament in October 2005, with a view to most of the amendments applying from March 2006.

To recap, the information released by the government to date indicates the major changes are likely to include the following:

- The government will continue to work toward a unified national industrial relations system and will seek the co-operation of all states to refer their industrial powers to the Commonwealth, as Victoria did in 1996.
- Businesses with up to 100 employees will be exempt from unfair dismissal laws. In addition, employees with less than six months employment will not be able to make a claim.
- Both the minimum wage and award based classification wages will be determined by a new body, the Australian Fair Pay Commission.
- The procedure for making Australian Workplace Agreements ("AWAs") will be simplified. In particular, the no disadvantage test is to be determined against a new Australian Fair Pay & Conditions Standard instead of a relevant award as is currently the case.
- The Australian Industrial Relations Commission will no longer be involved in the process of certification of certified agreements. This will now be carried out by the Office of the Employment Advocate.
- Awards will be further simplified. The number of allowable award matters will be reduced to exclude provisions relating to jury service, notice of termination, long service leave and superannuation.
- All existing award classification structures will be reviewed by a special task group within 12 months, with a view to rationalising classification structures.
- Stronger laws will be enacted with regard to industrial action. The taking of secret ballots will become a pre-ondition to the taking of industrial action.
- Pattern bargaining will be actively discouraged.
- A single union right of entry to the workplace regime will be created.

Hall & Wilcox will continue to monitor the proposed changes and will update clients as further information regarding the reforms is released.

If you would like to receive these e-mail updates, please forward your contact details to *workingpaper@hallandwilcox.com.au*.

Inside:

Increased long service leave entitlements for Victorian employees

Easier entry? Union right of entry and the new Victorian OH&S Legislation

An employee policy you can do without

Vicarious liability under the Privacy Act

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Increased long service leave entitlements for Victorian employees

Mark Dunphy and Jessica Fletcher

From 1 January 2006 the State Government's changes to the Long Service Leave Act 1992 ("LSL Act") will apply. The policy behind the amendments is to bring the minimum statutory entitlement to long service leave in Victoria in line with the entitlements in other States.

The key changes to the LSL Act are:

- An entitlement to long service leave after 10 years of service
- An entitlement to a pro-rata long service leave after 7 years of service upon termination of employment for whatever reason
- Wider definition of "employee" to include casual and/or seasonal employees and apprentices
- Wider definition of "continuous employment"
- New formula for calculating ordinary pay
- Not including public holidays in the period of long service leave
- Ability for employees to request extended periods of long service leave at half pay
- Employers can give notice of when an employee is to take long service leave
- Increased penalties for contravention of the LSL Act

Below, we set out the amendments in greater detail and provide some insight as to their likely impact.

Long service leave after 10 years of service

Currently in Victoria, employees are entitled to take 13 weeks long service leave after 15 years of continuous service. This means that employees accrue approximately 0.86 weeks of long service leave per year of service.

From 1 January 2006 employees have the option of taking long service leave after 10 years of service. This will entitle employees to 8.6 weeks long service leave. This is in line with long service leave entitlements in most other States.

However, the entitlement to long service leave after ten years service is being "phased in" so it is not too onerous on employers. Under the new provisions of the LSL Act, only two thirds of the employee's previous service as at 1 January 2006 will count as service for the purpose of calculating the ten years. Below is an example of how the transitional provisions work:

> *If an employee has 11 years' continuous service with his/her employer as at 1 January 2006, then two thirds of that 11 year period (namely 7.3 years) will be taken into account when determining when the employee can take long service leave. Accordingly, once the employee has completed a further 2.7 years of service, they can take long service leave. The amount of long service leave the employee can take is 1/60th of the total period of service (13.8 years), which is approximately 11.96 weeks.*

Pro-rata payment on termination of employment

Currently, the LSL Act provides that employees are only entitled to a pro rata long service leave payment after 10 years of service and only if the employee is not dismissed for serious misconduct. Under the amendments, an employee whose employment is terminated after seven years (but less than 15 years) of continuous service will be entitled to a pro-rata payment of long service leave, even if the employee is terminated for serious misconduct.

Employers should note that no transitional provisions apply, so the whole of the employee's service is used to calculate whether the employee has exceeded the seven year period.

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Wider definitions of employee and continuous employment

Overriding the Victorian decision of MCC v Clohesy, the LSL Act will now apply to casual and seasonal employees and apprentices.

In order for a casual or seasonal employee to be entitled to long service leave, they must have been "continuously" employed by the one employer for the relevant period. Under the LSL amendments employment for casual and seasonal employees will be "continuous employment" if the employee is employed more than once over a period and:

- there is no more than an absence of three months between each instance of employment in the period; or
- there is more than an absence of three months between two particular instances of employment, but the length of the absence is due to the terms of the engagement of the employee by the employer.

A casual and/or seasonal employee will be entitled to long service leave even in instances where they are engaged in other employment during the period or are engaged on separate employment agreements.

Continuity of employment for all employees will no longer be affected by:

- absences approved by the employer, including absences for carer's leave, irrespective of whether the absences are paid or unpaid; or
- any period taken as parental leave not exceeding 12 months or any longer period provided for in the employee's employment agreement, which includes an Australian Workplace Agreement.

Calculating ordinary pay

The LSL Act amendments introduce a new formula for calculating "ordinary pay". Under the changes, ordinary pay will be calculated based on the employee's average over a 12-month period or five-year period, whichever is the greater, expanding the current 12-month period. These changes should assist employees who may be working on a part time basis at the time of taking leave, when previously they may have worked on a full time basis.

Public holidays are excluded

Public holidays that fall during a period of long service leave are not counted as part of the leave, thereby extending the total leave available.

Taking leave at half pay

The amendments introduce a new provision of the LSL Act, allowing an employee to request to take their long service leave for twice the period but on half the pay.

An employer must grant the request if it is reasonable to do so, having regard to the needs of the employee and the needs of the employer's business.

"We recommend employers review their workplace agreements to see whether they comply with the new laws and if not, have them amended."

Employers can give notice of when an employee must take long service leave

Usually an employer and employee will agree on when the employee must take long service leave. However, under the new provisions if the parties can't agree, then the employer can direct the employee to take the leave upon giving the employee at least three months' notice.

Increased penalties

Currently a breach of the LSL Act attracts a penalty equivalent to 2 penalty units. From 1 January 2006 this will increase to 20 penalty units, which is approximately $2,097.

What do employers need to do?

We recommend employers review their workplace agreements to see whether they comply with the new laws, and if not, have them amended. Also, where a sale of business takes place the parties should review the sale of business agreement to ensure appropriate adjustments are made for long service leave.

Easier entry? Union right of entry and the new Victorian OH&S Legislation

Karl Rozenbergs and Fiona Jamieson

In our December 2004 edition, we addressed the rights and obligations of employers with respect to union right of entry under the *Workplace Relations Act 1996 (Cth)* (WPRA). The introduction of the *Occupational Health and Safety Act 2004 (Vic)* (OHS legislation) on 1 July 2005 again raises the issue of union right of entry, due to its controversial introduction of the right of a registered employee's authorised representative (usually an officer of a union) to enter an employer's workplace if they have a reasonable suspicion of a breach of the OHS legislation.

When can the union enter your workplace to investigate suspected contraventions of OHS legislation?

The OHS legislation provides for right of entry where there is a reasonable suspicion of an employer's breach of the OHS legislation which relates to or affects work carried out by:

- a member of the registered organisation or union;
- a person whose employment is subject to a certified agreement which binds the organisation or union; or
- a person who is eligible to be a member of the organisation and whose employment is not subject to a certified agreement which binds the organisation or union.

As the duties of employers under the OHS legislation are broad, the bases upon which a union official may seek to enter due to employers' suspected breaches of their obligations under the OHS legislation are equally diverse.

Prior to exercising any right of entry, the union official must apply for and obtain an entry permit from the Magistrates' Court. On entry, the permit holder must take all reasonable steps to immediately produce his or her permit to the employer, together with the production of a notice which includes a description of the alleged contravention. Once present at a workplace, the permit holder may exercise powers of inspection, observation and consultation.

Under what circumstances may employers refuse union right of entry?

The only basis upon which an employer may refuse the entry of union officials to their workplaces pursuant to the OHS legislation is if the union official fails to show the employer his or her entry permit. Unlike union right of entry under the WPRA, employers cannot refuse entry on the basis that their employees are all employed pursuant to an Australian Workplace Agreement (AWA), or on the basis that 24 hours notice of entry has not been provided. The right of entry under the OHS legislation is therefore more expansive than that under the WPRA due to the serious consequences of OH&S breaches.

Limits to right of entry under the OHS legislation

A union official may only enter an employer's workplace for the purpose of investigating the alleged contravention of the OHS legislation. There are penalties for abuse of right of entry powers. Further, as right of entry powers may not be exercised if the result is a cessation of work, right of entry may often be confined to meal or other breaks.

Union right of entry under OH&S legislation in New South Wales

Finally, it is important to note that union right of entry powers under the OHS legislation are weaker than those under the equivalent New South Wales legislation, which has been in force since September 2001 and provides union officials with the ability to investigate and even prosecute offences.

An employee policy you can do without

Karl Rozenbergs and Laura Ross

The recent decision of the Federal Magistrates Court in Dare v Hurley[1] provides a reminder of the legal implications of dismissing an employee.

In this case, Dare, a pregnant employee, was dismissed without notice and without any warnings about her performance. Her employer was Patrick Hurley, trading as PGH Environmental Planning (PGH).

Dare brought a claim under the *Sex Discrimination Act 1984* (Cth), alleging that she was dismissed because she was pregnant.

She also alleged that PGH had breached her employment contract when it terminated her employment without adhering to a disciplinary procedure set out in the company's policies and procedure manual.

PGH denied that Dare's pregnancy was the reason for her dismissal, instead citing instances of misconduct.

The Court held that the real reason that PGH had terminated Dare's employment was the fact that she was pregnant. This was evidenced by a file note prepared by Hurley's wife, which indicated that she was concerned about the fact that Dare would require maternity leave.

Further, the alleged instances of misconduct that PGH used to justify the dismissal were unsubstantiated and not sufficiently serious to warrant dismissal. PGH used these alleged incidents as an excuse to dismiss Dare. Accordingly, the Court held that PGH had breached the *Sex Discrimination Act 1984* (Cth).

With regard to the breach of contract claim, the Court held that PGH had breached the contract because it had failed to provide the period of notice required under the contract.

Of greater interest, is that the Court found that PGH had also breached the employment contract by failing to comply with the termination policies contained in the employment manual. These policies were held to constitute terms of the employment contract, which were binding on PGH.

This was the case even though the employment contract did not expressly state that PGH was bound by these policies. The contract expressly provided that Dare was bound to follow the policies contained in the employment manual, but did not impose a reciprocal obligation on PGH.

However, the Court held that such an obligation should be implied, because an employment contract imposes mutual obligations. The obligations would be unworkable if only one party had to adhere to them.

> *"... the alleged instances of misconduct that PGH used to justify the dismissal were unsubstantiated and not sufficiently serious to warrant dismissal."*

In addition, the Court held that the employment contract contained an implied term of mutual trust and confidence. It would be inconsistent with this to compel Dare to abide by the policies and procedures but permit PGH to ignore them at will.

Therefore, PGH's failure to adhere to the policies relating to termination of employment constituted a breach of contract.

The Court awarded Dare damages in the amount of $12,005.51 for distress and economic loss resulting from the termination of her employment.

The key lesson for employers, apart from not to dismiss an employee for discriminatory reasons, is that they must ensure they comply with their own policies and procedures, especially any policy that regulates the disciplinary process.

Generally, we recommend that disciplinary procedures contained in an employment manual are deleted as they are unnecessarily restrictive on an employer's ability to discipline/terminate an employee.

[1] [2005] FMCA 844

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Vicarious liability under the Privacy Act – are you at risk?

Alison Baker

If you don't have effective privacy policies and procedures in place, you could be held vicariously liable under the *Privacy Act 1988* (Cth) ("the Privacy Act") for your employees' misuse of individuals' personal information.

The obligation on an organisation to comply with the Privacy Act when handling individuals' personal information extends to ensuring that its employees also comply. This is because the Privacy Act provides that an act engaged in by an employee of an organisation in the performance of their work is deemed to have been engaged in by the organisation.

The National Privacy Principles

Generally, to comply with the Privacy Act, an organisation must comply with ten National Privacy Principles ("the NPPs") when handling personal information. The NPPs require that an organisation must, amongst other things:

- Only collect personal information if it is necessary for one or more of its functions or activities ("primary purpose") (NPP 1).
- Not use or disclose personal information about an individual for a purpose ("secondary purpose") other than the primary purpose of collection unless:
  - the secondary purpose is related to the primary purpose; or
  - the individual would reasonably expect the organisation to use or disclose the information for the secondary purpose (NPP 2).
- Take reasonable steps to ensure that personal information it collects, uses or discloses is accurate, complete and up-to-date and protected from misuse (NPP s 3 and 4).

Vicarious liability

A situation where an organisation would clearly be held to be vicariously liable for an employee not handling personal information in accordance with the requirements of the NPPs, would be where the organisation requires and/or authorises the employee to misuse the personal information.

However, even without such an express requirement or authorisation, an organisation can still be held vicariously liable for an employee failing to handle personal information as required by the NPPs. This is particularly so where an organisation authorises its employee to access and use personal information as part of their employment but fails to take any steps to set parameters for how, when and why the employee can access and use that personal information.

Recommendations for minimising liability

To minimise exposure for liability we recommend you take the following steps:

- Provide ongoing education
- Include privacy clauses in employment contracts
- Obtain acknowledgements from your employees that they will comply with your privacy policy

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