

Introduction of the “Fairness Test” for Workplace Agreements

The *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* (Cth) (“the Bill”) was introduced into the House of Representatives on 28 May 2007. The purpose of the Bill is to amend the *Workplace Relations Act 1996* (Cth) (“the WPR Act”) to establish both a fairness test for workplace agreements, and two new statutory agencies – the Workplace Authority and the Workplace Ombudsman. The legislation has now been passed by Parliament

The key amendments proposed by the Bill would:

- establish the Workplace Ombudsman and the Workplace Authority Director as statutory office holders appointed by the Governor General, and create the Office of the Workplace Ombudsman and the Workplace Authority as statutory agencies;
- require the Workplace Authority Director to be satisfied that specified workplace agreements provide fair compensation in lieu of the modification or exclusion of protected award conditions that apply to an employee or employees (“**the Fairness Test**”); and
- establish a compliance framework to ensure the effective operation of the Fairness Test.

Schedule 1 of the Bill would introduce the Fairness Test that would apply to workplace agreements (and variations to workplace agreements) lodged on or after 7 May 2007 that:

- (i) cover employees who work in industries or occupations usually regulated by awards; and
- (ii) modify or exclude “protected award conditions”.

The Fairness Test would not apply to Australian Workplace Agreements (AWAs) covering employees with full-time (or full-time equivalent) base salaries of \$75,000.00 or more.

Section 354 of the WPR Act provides that a workplace agreement is taken to include “protected award conditions” which would

have effect in relation to the employment of the person subject to the workplace agreement. However, section 354 permits a workplace agreement to expressly exclude or modify all or part of the protected award conditions.

Protected award conditions would be those that apply under a federal award, or a preserved State award, which binds the employer. The WPR Act provides that terms in awards which are in relation to the following are “protected award conditions”:

- Rest breaks;
- Incentive-based payments and bonuses;
- Annual leave loading;
- Monetary allowances;
- Observances of and payment for public holidays;
- Overtime and shift loadings; and
- Penalty rates.

If there is no relevant federal or preserved State award which binds the employer, the protected award conditions would be those in an award designated as appropriate by the Workplace Authority Director for the purpose of the Fairness Test.

The Fairness Test would require the Workplace Authority Director to be satisfied that:

- In the case of an AWA – the agreement provides fair compensation to the employee in lieu of the modification or removal of the employee’s protected award conditions;
- In the case of a collective agreement – on balance, the agreement provide fair

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compensation, in its overall affect on employees, in lieu of the modification or removal of the employees’ protected award conditions.

In determining whether fair compensation has been provided, the Workplace Authority Director would primarily consider the value of any monetary and non-monetary compensation. The personal circumstances of employees, including their family responsibilities, would also be taken into account. In exceptional circumstances, and where it is not contrary to the public interest to do so, the Workplace Authority, Director would also be able to have regard to the employers industry, location or economic circumstances and the employment circumstances of the employee or employees.

If a workplace agreement does not provide fair compensation in lieu of the protected award conditions, the Workplace Authority Director will provide advice on how the agreement could be varied to pass the Fairness Test. The employer will have 14 days to vary the agreement.

If the employer does not vary the agreement within this period, the agreement would cease to operate. If the employer does vary the agreement within this period, the Workplace Authority Director would test the varied agreement. If the agreement still does not pass the test, the Workplace Agreement would cease to operate.

When the agreement ceases to operate the employer and employee would become bound by the industrial instrument that would otherwise have applied to them in the absence of the unfair agreement. This instrument could either be an earlier agreement, or the relevant federal, state or designated award.

Where an agreement does not pass the Fairness Test, the Bill would entitle an employee to recover compensation for any shortfall arising if the value of entitlements under the “unfair” agreement is less than the value of entitlements under the otherwise applicable instrument, or the protected award conditions in a designated award, had they applied during the period.

It has generally been understood that an increase in an employee’s remuneration which takes into account the value of the protected award conditions removed (such as overtime and penalty rates) would be taken to adequately compensate the employee for the removal of protected award conditions and satisfy the Fairness Test. However, the extent to which a particular workplace agreement will pass the Fairness Test will depend on the circumstances of each case and it unclear how the Fairness Test will be applied in practice at this point. Having regard to the number of workplace agreements which have been lodged since 7 May 2007 (the date upon which the Fairness Test came into effect), employers can expect significant delays between the date a workplace agreement is lodged and any feedback from the Workplace Authority in relation to whether the agreement satisfies the Fairness Test.

Transmission of Business

A further amendment to the WPR Act proposed by the Bill aims to close the apparent loophole which has permitted new employers who become the successor, assignee or transmittee of an existing business to require employees who are being transferred to the new employer to enter into an AWA as a condition of ongoing employment. Currently, section 400 of the WPR Act prohibits an employer from applying duress to an employee in connection with an AWA. However, an employer does not apply duress merely because the employer requires the employee to enter into an AWA as a condition of engagement. This effectively entitles employers to adopt a “take it or leave it” approach when offering employment to new employees.

The proposed amendment makes it clear that the current prohibition against AWA duress applies to the situation where an employer who has purchased business requires an existing employee of that business to make an AWA as a condition of ongoing employment.

Unfair and “Sham” Independent Contracting Arrangements

Following from the “Work Choices” legislation introduced in March 2006, the Federal Government has recently legislated to bring independent contractors within the sphere of national regulation.

The *Independent Contractors Act 2006* (Cth) (“the IC Act”) came into effect on 1 March 2007. In addition, the *Workplace Relations Act 1996* (Cth) (“WPR Act”) has been amended with effect from 1 March 2007 by the *Workplace Relations Legislation Amendment (Independent Contractors) Act 2006* (Cth).

The IC Act relates to “services contracts” which are defined as contracts for services:

- (a) to which an independent contractor is a party; and
- (b) that relates to the performance of work by the independent contractor; and
- (c) that has the “requisite constitutional connection”.

A contract for services has the “requisite constitutional connection” if at least one party to the contract is a “constitutional corporation”, being a corporation to which section 51(xx) of the Constitution applies (i.e. a financial, foreign or trading corporation).

Importantly, the IC Act does not define the term “independent contractor” beyond its meaning under the common law. Therefore, only those individuals who are true independent contractors in accordance with the common law test will have rights under the IC Act. The courts have adopted a multi-factored test to determine whether a person is an employee or independent contractor. No single issue concerning control, economic independence or the description of the relationship in a contract will be determinative, however, courts will place greater weight on some matters, and in particular, on the right to control the manner in which the work is performed. Historically, independent contractors have been perceived as running their own business and working under commercial, not employment, contracts. In contrast, employees have been seen to be under the control and direction of their employer.

An independent contractor is a person who contracts his/her labour to a principal for a specified purpose but remains apart from the principal and is not part of the principal's business. Independent contractors are therefore not employees. A close examination of all the relevant facts and circumstances of a case is necessary to distinguish between a true independent contractor and an employee. Typically, the relationship between an employer and an employee is a contractual one which is referred to as a contract of service. The independent contractor on the other hand is usually hired to do a defined task under a contract referred to as a contract for services. It is usually the case that the relationship between the principal and

the contractor is intended to come to an end at the completion of the tasks. The contract usually describes the parties as being independent of each other, and has no provisions for annual leave, sick leave or other statutory entitlements that an employer/employee relationship would include.

The IC Act essentially undertakes to give independent contractors access to a federal unfair contracts jurisdiction by allowing the Federal Magistrates Court, as well as the Federal Court of Australia, to hear applications to review alleged unfair or harsh independent contracting arrangements. Such applications may be made even if the contract was entered into before the commencement date of the IC Act (1 March 2007). Previously, independent contractors could apply pursuant to section 106 of the Industrial Relations Act 1996 (NSW) to the NSW Industrial Relations Commission for orders declaring void or amending unfair contracts. Similar “unfair contracts” legislation exists in Queensland. Section 7 of the IC Act expressly provides that State or Territory laws in relation to unfair services contracts no longer apply to independent contractors covered by the IC Act. Proceedings under such State or Territory laws that were commenced prior to 1 March 2007 are preserved.

In determining whether an independent contractor arrangement is unfair under the IC Act the Federal Magistrates Court or Federal Court may have regard to a number of factors including:

- the relative bargaining power of the parties;
- whether undue influence or pressure was asserted on, or any unfair tactics were used against, a party to the contract;
- whether the contract provides total remuneration that is less than that of an employee performing similar work.

Significantly, the unfair contracts provisions of the IC Act apply to both independent contractors who perform work as individuals and incorporated independent contractors where work is performed in connection with a contract for services by a director of the corporation or a member of the director's family.

In addition, the amendments to the WPR Act which also came into effect on 1 March 2007 prohibit employers from entering into “sham arrangements” with employees. The amendments impose penalties of up to \$33,000.00 per offence on an employer who:

Unfair and “Sham” Independent Contracting Arrangements (cont.)

- describes an employment relationship as an independent contractor relationship;
- offers work, which in fact would involve an employment relationship, on the basis that it entails an independent contractor relationship;
- dismisses an employee for the sole or dominant purpose of re-engaging them as an independent contractor;
- knowingly makes false statements to induce an employee to accept an engagement as an independent contractor.

The sham arrangements provisions of the WPR Act apply in relation to contracts between employers who are constitutional corporations and “individuals”. The term “individual” is not defined in the WPR Act and as such it is afforded its ordinary meaning, which would specifically exclude an incorporated entity or family trust. Therefore, proceedings would not be able to be commenced against an employer under the sham arrangements provisions in respect of an independent contractor who provides his or her services through an incorporated entity or family trust.

A workplace inspector, the individual affected by the contravention and an organisation of employees of which the individual affected by the contravention is (or has applied to become) a member can all apply for an order imposing a financial penalty on an employer who has contravened the sham arrangements provisions.

These recent legislative amendments should highlight the importance to corporations who engage independent contractors of ensuring that the terms of the arrangement are clearly set out in a written independent contractor agreement providing terms and conditions which are fair and reasonable. Corporations should to the greatest extent possible only engage independent contractors who provide their services through incorporated entities in order to reduce the possibility of “sham arrangement” litigation being commenced.

Implied Duties in Australian Employment Law

A decision of the New South Wales Supreme Court may provide opportunities under the common law for employees to circumvent the restrictions on unfair dismissal in the post “Work Choices” environment.

The decision is important because it provides qualified support for the proposition that the common law duties of good faith and mutual trust and confidence are implied into contracts of employment in Australia. Whilst these implied duties had long been accepted in the United Kingdom, there was considerable uncertainty as to whether the duties were recognised in Australia. In *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney & Anor* [2007] NSWSC 104, the New South Wales Supreme Court was asked to consider whether a dismissed employee could rely on these implied terms in a claim against a former employer and if so, what damages might be awarded?

Facts

The Plaintiff, David Russell was employed as the Director of Music at St Mary’s Cathedral in Sydney. It should be noted that Mr Russell did not have a written employment contract. Following a complaint by a former Choir member, Mr Russell was arrested and charged with sexual misconduct offences. The charges against Mr Russell were dismissed and thereafter he resumed full duties

without restriction. Following a request from the New South Wales Ombudsman’s office, the Church was directed to undertake a further investigation of the allegations against Mr Russell. As a consequence of that investigation, the Church terminated Mr Russell’s employment. Mr Russell commenced unfair dismissal proceedings under section 84 of the Industrial Relations Act 1996 (NSW). Following a hearing before the Industrial Relations Commission, Mr Russell was reinstated to his former position. In pursuing reinstatement, Mr Russell had incurred legal costs in excess of \$350,000 and sought to recover these costs (and other damages) in the Supreme Court proceedings.

In the superior court proceedings, Mr Russell alleged that in terminating his employment, the Church had breached the implied term to act in good faith and had also breached the implied duty not to conduct itself in a manner likely to destroy or seriously damage the relationship of mutual trust and confidence: *Burazin v Blacktown City Guardian* (1996) 124 ALR 144. In the alternative, Mr Russell also alleged wrongful dismissal.

Implied Duties in Australian Employment Law (cont.)

Implied Duty of Good Faith

Mr Russell argued that the implied duty of good faith was recognised in contracts of employment in Australia. His Honour, Justice Rothman stated that whilst there had been “muted acceptance” by the courts, such acceptance had only been assessed at an interlocutory level and the issue had not been conclusively determined. After consideration of the United Kingdom and American legal authorities, his Honour stated that the duty of good faith is not a duty of upmost good faith and is something less than a fiduciary duty. The duty imports a requirement that the person doing the act exercise prudence, caution and diligence, which would mean due care to avoid or minimise adverse consequences to the other party. Mr Russell alleged that the breach of the implied duty of good faith arose because of the Church’s delay in undertaking the investigation ordered by the Ombudsman. Further, Mr Russell alleged that the inquiry established by the Church was procedurally flawed because the Church failed to interview the former student who had made the allegations against him.

The Court found that the Church acted in breach of its duties in failing to act with prudence, caution and diligence in balancing its rights against the potential disadvantage to the employee. However, the Court considered that Mr Russell had suffered no loss or damage in relation to the breach of the implied term of good faith.

Mutual Trust and Confidence

Justice Rothman stated that the duty of mutual trust and confidence was an essential element of the contract of employment. Mr Russell’s claim was put on the basis that by purporting to terminate his employment for cause, the Church had breached the implied duty not to destroy the relationship of trust and confidence.

Damages

As a preliminary issue, his Honour determined that the implied terms referred to above do not affect an employer’s

right to terminate the employment contract “without cause” by giving notice or by making payment in lieu of such notice. Having found that the Church was in breach of the implied duties, the Court then considered what damages, if any, should be awarded. His Honour rejected the claim for damages arising from the delay in undertaking the investigation because Mr Russell had not suffered any loss as a consequence of the “timelessness of the response”. Similarly, the Court found that whilst the investigation carried out by the Church was procedurally flawed, that failure did not alter the outcome of the Church’s inquiry. Accordingly, Mr Russell had suffered no damage.

Although the court found that Mr Russell had been wrongfully dismissed, he had not suffered any damage on account of his reinstatement to his former position. Further, the Court rejected the claim for payment of Mr Russell’s legal fees in the earlier proceedings on the basis that it would be “inconsistent” with the statutory unfair dismissal regime for the common law courts to award the costs of earlier proceedings as a head of damage. Finally, the Court held that any injury to Mr Russell’s reputation was caused by the publicity of the proceedings and not the fact of his dismissal and therefore no damage had been sustained.

Summary

As a caveat, his Honour Justice Rothman opined that the issue of implied terms may require “definitive classification by an appellate court”. In the meanwhile, the case is qualified authority for the proposition that the implied duties of good faith and mutual trust and confidence form part of Australian employment law and may provide a basis for future common law claims arising from the employment relationship. It remains to be seen whether the courts will adopt the reasoning in the *Russell* decision and, if so, what direction the courts will take in the award of damages arising from such claims.

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