STEVENS & ASSOCIATES LAWYERS

FEBRUARY 2017

A VISION IN THE WORKPLACE

In this edition of *Vision in the Workplace we* examine recent Fair Work Commission ('**FWC**') decisions that demonstrate the importance of adhering to FWC forms and offer some practical tips and reminders to kick-off your New Year workplace policy review.

Remember to dot the I's and cross the T's

Two recent decisions of the FWC have once again highlighted the importance of strict adherence to the requirements in FWC forms, particularly those pertaining to bargaining for and approval of an enterprise agreement ('**EA**').

In *Uniline Australia Limited* [2016], the Full Bench declined to approve the EA on the basis of the deficient Notice of Employee Representational Rights ('**NERR**'). The NERR, being the form that notifies employees that bargaining has commenced for a new EA, was issued to employees outside of the 14 day limit mandated by the *Fair Work Act 2009* (Cth)('**FW Act**').

Pursuant to section 173(3) of the FW Act, an employer negotiating an EA is required to issue the NERR within 14 days of "*notification time*", defined to mean when:

(a) The employer *agrees to bargain or initiates bargaining*; or
(b) A majority support determination in relation to the proposed agreement comes into operation; or
(c) A scope order in relation to the agreement comes into operation; or
(d) A low-paid authorisation in relation to the agreement comes into operation.

The decision reinforces the importance of correctly identifying when the employer has agreed to bargain or has initiated bargaining.

Giving due consideration to this important step is will go a long way to mitigate the risk that later in the process (and even following a successful vote) the EA will not be approved.

The Full Bench in *Maritime Union of Australia v MMA Offshore Logistics* decision ('**Maritime**') overturned the approval of two EAs and again demonstrated its unwillingness to overlook seemingly minor deficiencies in a NERR.

In Maritime, the FWC restated its previous position in *Peabody** that there is "*no capacity to depart from the* [NERR] *template in the FW regulations*" and failure to strictly comply with such template will render a NERR invalid.

In Maritime, the inclusion of the Fair Work Ombudsman telephone number *instead of* the required FWC Info Line phone number in the NERR proved fatal. The employers seeking to have the EAs approved unsuccessfully argued that the incorrect telephone number did not undermine the purpose and intent of the NERR. The Commission held that the prescribed NERR form required the inclusion of the FWC Infoline number and absence of that number is sufficient to invalidate the NERR.

Following Maritime, Employment Minister Michaelia Cash commented that the government will introduce legislation to "*fix these anomalies and enable common sense to prevail*" stating that the relevant provisins of the FW Act "*are clearly not operating as intended*".

These recent decisions remind us of the importance of attention to detail even prior to the EA bargaining phase to ensure an otherwise successfully bargained EA is not compromised by earlier seemingly minor deficiencies.

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If you would like further information regarding the process of bargaining for, voting on, and/or approval of EAs, please do not hesitate to contact Nick Stevens, Megan Cant, or Jane Murray on (02) 9222 1691.

New Year, Shiny New Policies

Each workplace is unique. An effective workplace policy will ensure that its workplace policies and practices evolve with the organisation and its internal and external environment. That said, the reason for policies remains the same: to mitigate legal risks for the organisation and align its employees with the organisation's expectations and procedures.

For many human resources professionals a logical New Year's resolution may be to dust off and mark-up their organisation's suite of workplace policies.

In this regard, we provide (as a starting point) some practical tips and considerations based on decisions that may have been handed down since your last review.

It is important to bear in mind that workplace policies need to be carefully tailored to your organisation and when updated, clearly communicated to employees.

A) Drug and Alcohol Policies: Zero tolerance?

In 2015, the Full Federal Court ('**FFC**') somewhat clarified its position on the implementation of zero tolerance policies in relation to drugs and alcohol. In *Toms v Harbour City Ferries Pty Limited* [2015] ('**Toms**'), a ferry master was dismissed after testing positive for marijuana at work.

The FFC appeared to endorse the employer's reliance on a zero tolerance drug and alcohol policy, because the relevant work had a "*safety-critical*" element. In Toms, a ferry master was dismissed after testing positive for marijuana at work.

Bearing in mind the issues raised by Toms and similar decisions, it is important to consider when drafting or updating a workplace drug and alcohol policy:

- Does the nature of work at your organisation have a safety critical element that warrants the implementation of a zero tolerance drug and alcohol policy?
- Is your workforce sufficiently varied (for example, a combination of office workers and forklift operators) to warrant separate policies?
- Is there a risk of unlawful discrimination if separate policies are implemented within one organisation or if a single policy is applied differently to different employees?

B) Employee benefits - policy or contractual?

Between 2009 and 2016, the Royal Bank of Scotland and ABN AMRO Holdings Limited ('**AAAH**') were the subject of a protracted legal battle brought by two former executive employee s ('**the Executives**'). The protracted battle highlights the importance of clear drafting of the parties' intentions in both policies and contracts of employment.

In *McKeith v Royal Bank of Scotland Group PLC; Royal Bank of Scotland Group PLC v James* [2016],the dispute turned on whether policies pertaining to bonus and severance entitlements had been incorporated into contracts of employment and therefore were due to the Executives upon termination in circumstances of redundancy.

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Ultimately, the Court of Appeal of the Supreme Court of NSW held that the relevant policies were not contractual. Relevant to this conclusion was the fact that the employer deliberately withheld access to the relevant policies.

The decision re-examines a key question considered in earlier key decisions such as *Romero v Farstad Shipping (Indian Pacific) Pty Ltd* [2014] - "*when will workplace policies contractually bind employers and employees*?"

In light of the AAAH decision, as part of your review, it is worthwhile to consider which workplace policies (if any) are intended to contractually bind your organisation and its employees and ensuring that the policies are drafted to that effect.

In particular, it is prudent to ensure policies that may impart benefits such as a bonus, or redundancy pay in excess of the statutory minimum are drafted in a manner that is not contractual, and affords your organisation sufficient flexibility and discretion.

C) General Considerations

We hope the above provides a helpful starting point. The following list of overarching considerations is provided to assist with your review:

- Are your workplace policies consistent and can they operate harmoniously?
- Do the policies afford your organisation sufficient flexibility?
- Are the policies clear, accessible and easy to understand and then apply?
- Do you have a consistent approach to ensuring employees have access to workplace policies?
- Do your policies strike a balance between discharging work health and safety obligations and protecting your business without unduly encroaching on employee privacy?

If you require assistance to ensure your workplace policies are drafted to best practice standards, and in a manner that minimises your organisation's exposure to unnecessary risks, please do not hesitate to contact Nick Stevens, Megan Cant, or Jane Murray on (02) 9222 1691.