

FOCUS

WORKPLACE RELATIONS



September 2008

AWARD MODERNISATION, DRUG TESTING AND OTHER ISSUES

In this issue we look at the Federal Government's award modernisation draft, drug testing in the workplace, the issue of restraints in fixed-term contracts, and the Safe Work Australia legislation.

Award modernisation,
drug testing in the
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Safe Work Australia
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DRAFT MODERN AWARDS FOR 14 PRIORITY INDUSTRIES

Draft awards have been issued in 14 priority industries and occupations as the initial step in a four-stage award modernisation process. Senior Associate Stacey Van der Meulen reports.

HOW DOES IT AFFECT YOU?

- It is not currently clear how the Government proposes to deal with the transition from pre-reform federal awards and former state awards (*NAPSAs*) to modern awards, and in particular, what force (if any) pre-reform federal awards will have from 1 January 2010.

- It is expected that these transitional issues will be dealt with in the Government's substantive legislative amendments to the *Workplace Relations Act 1996* (Cth) which are intended to begin on 1 January 2010.
- The draft modern awards are open for public comment until 10 October 2008.

BACKGROUND

A key component of the Government's proposed industrial relations system is the simplification and modernisation of awards. Modern awards will be limited to 10 matters. They are:

- minimum wages;
- type of employment;
- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- annualised wage or salary arrangements;
- allowances;
- leave, leave loadings and arrangements for taking leave;
- superannuation; and
- procedures for consultation, representation and dispute settlement.



There will be two types of modern awards – modern industry awards and modern occupational awards. Modern industry awards will apply to an industry, such as the coal mining industry, and modern occupational awards will apply to an employee occupation, such as private-sector clerical workers.

Together with the proposed 10 National Employment Standards, this system of modern awards is intended to guarantee a ‘fair’ safety net of minimum terms and conditions for employees in the Federal system.

The Australian Industrial Relations Commission (**AIRC**) has now released exposure drafts of the modern awards in 14 priority industries and occupations (those with high numbers of AWAs and NAPSAs), including:

- mining;
- private-sector clerical;
- metal and associated industries; and
- retail.

The 14 draft modern awards are open for comment until 10 October 2008. According to the AIRC award modernisation timetable, final versions of the awards will be released in December 2008. The remaining modern awards will be drafted and finalised between now and 31 December 2009.

APPLICATION AND FLEXIBILITY

Each draft modern award has an application clause indicating to whom it applies and on whom it is binding. The draft modern awards, however, do not prescribe the pre-reform federal awards and NAPSAs that they will replace. According to the AIRC’s statement, it is intended that such information will be published separately by Fair Work Australia.

It is not clear how the Government proposes to deal with the transition of employers from pre-reform federal awards and NAPSAs to modern awards, and in particular, what force (if any) pre-reform federal awards will have from 1 January 2010 for employers caught by the scope of a modern award. It is expected that such transitional issues will be dealt with in the Government’s substantive legislative amendments to the Workplace Relations Act 1996 (Cth), which are intended to begin on 1 January 2010.

There is some scope for flexibility with each draft modern award as they contain the AIRC’s draft model flexibility clause. That clause allows an employer and an individual employee to vary the application of certain terms of the award to meet the genuine individual needs of the employer and employee. The individual arrangement, however, must not disadvantage the employee overall.

The terms that can be varied in an individual flexibility agreement are:

- arrangements for when work is performed;
- overtime rates;
- penalty rates;
- allowances; and
- leave loadings.

A modern award can provide the parameters within which flexibility arrangements could be made under the flexibility clause in that award, to suit the needs of the particular industry or occupation. However, with the exception of the textile, clothing, footwear and associated industries, the AIRC did not modify the substance of the model flexibility clause in any of the draft modern awards.

Procedural requirements for making an individual flexibility arrangement are also set out in the model flexibility clause. Importantly for employers, as the clause is currently drafted, there will be no need for the individual flexibility arrangement to be lodged with Fair Work Australia or any other regulatory body.

CHANGING TRENDS IN WORKPLACE DRUG TESTING

As more workplace drug-testing is taking place, a preference for saliva testing over urine testing for drugs has started to emerge. Senior Associate John Naughton and Law Graduate Rebecca Campbell report on recent decisions embracing the less invasive technique.

HOW DOES IT AFFECT YOU?

- With a growing emphasis on safety, more employers are implementing workplace drug testing practices.

- As saliva testing becomes more widely available, employers are expected to prefer that method over urine testing. This is despite the limitation that saliva testing identifies only very recent drug use and not habitual use.
- Employers may limit drug testing to certain groups of employees within their workforces if there is an objective basis for doing so.

BACKGROUND

Shell Refining (Australia) Pty Ltd (*Shell*) introduced a revised drug and alcohol policy for the Clyde Refinery and Gore Bay Terminal. When the Construction, Forestry, Mining and Energy Union (the *CFMEU*) raised concerns about the policy, the parties asked the AIRC to determine whether Shell should be required to:

- apply random drug testing to all employees and contractors at the sites, or whether it could be applied to operational employees only; and
- restrict initial random drug testing to saliva testing, rather than urine testing.

DECISION

The AIRC accepted evidence that saliva testing detects drug use only in the previous few hours, whereas urine testing detects drug use over the previous few days.¹

The CFMEU argued that clinical impairment resulting from drug use tends to last for hours rather than days, and therefore, saliva testing should be sufficient for Shell's purposes. The CFMEU also argued that saliva testing should be preferred because it is less invasive to employee privacy.

Shell argued that its policy was designed to address the risks created by actual impairment, as well as habitual use of alcohol and drugs. As such, Shell submitted that urine testing provided more of the information it required to make its policy operate more effectively. Shell referred to the 1998 *BHP Iron Ore* case,² in which urine testing was found to be fair and reasonable.

The AIRC found that a urine testing regime has a wide 'window of detection' that may interfere with employees' private lives. It accepted that it would be unjust and unreasonable to allow urine testing when a more precise method is available, which was:

- likely to indicate actual impairment (Shell's main concern); and
- unlikely to detect drug use having 'no consequential effect on the employee's performance'.

The AIRC qualified those findings by noting that:

- no laboratories have been accredited to carry out saliva testing under the relevant Australian Standard (*AS 4760*); and
- if a company wants to test its employees for a drug for which AS 4760 does not stipulate target concentration levels, the company, the union and the laboratory must agree that the testing for that drug may take place and what the target concentration level should be.

The AIRC concluded that, once those issues are resolved, any future random drug testing should be conducted using an employee's saliva. Until then, urine testing regimes could continue.

The Commissioner also found that it is not unjust or unreasonable for:

- some employees to be subject to testing and not others if there is an objective reason for the difference in treatment. In this case, the decision regarding who was to be tested was taken following a reasonable risk assessment process; and
- some employees to be tested when contractors are not. However, the employer is to ensure that contractors also adopt appropriate drug and alcohol policies.

The use of urine-based testing is likely to be subject to more scrutiny as saliva testing becomes available. For example, the dispute considered in the recent case of *CFMEU v Coal & Allied Mining Services Pty Ltd*³ arose when the employer refused to implement saliva testing, despite previously agreeing to do so when an Australian Standard was finalised.⁴

1. *Shell Refining (Australia) Pty Ltd, Clyde Refinery v Construction, Forestry, Mining and Energy Union* [2008] AIRC 510.

2. *BHP Iron Ore Pty Ltd v Construction, Mining, Energy, Timberyards, Sawmills and Woodworkers Union of Australia (WA Branch)* (1998) 82 IR 162.

3. [2008] AIRCFB 1159.

4. No substantive comments were made on the merits of saliva testing as opposed to urine based testing in that case.

RESTRAINTS IN FIXED-TERM CONTRACTS

It may be unreasonable to restrain an employee for the balance of a fixed-term contract even if the employee resigns in breach. Partner Jamie Wells and Lawyer Andrew Stirling report.

HOW DOES IT AFFECT YOU?

- Post-employment restraints must be no longer than reasonable for the legitimate protection of the employer's interests. For restraints based on a customer connection, this will be a period long enough for the employer to replace the departing employee and for the new employee to develop the confidence of the employer's clients.
- It is unlikely that the employer's interest extends over the entire term of a fixed-term contract, even where the employee improperly terminates that contract.

BACKGROUND

Tullett Prebon (Australia) Pty Ltd (*Tullett Prebon*) employed Simon Purcell on a three-year fixed-term contract. The key terms of the contract were:

- neither party could terminate the contract in the first two years, after which it could be terminated on three months' notice;
- Tullett Prebon was not required to give Mr Purcell any responsibilities during the notice period (ie they could put him on 'garden leave'); and
- Mr Purcell was subject to a three-month, post-termination restraint.

Less than a year into his contract, Mr Purcell accepted an offer from one of Tullett Prebon's competitors. Despite the contract with Tullett Prebon not allowing for termination within two years, Mr Purcell proceeded to terminate.

Tullett Prebon refused to accept Mr Purcell's termination and sought to restrain him from working for its competitor for the duration of the fixed term. During that time, it proposed to pay him his base remuneration as if still actively employed.

DECISION

The Supreme Court of New South Wales rejected Tullett Prebon's attempt to restrain Mr Purcell in this way.⁵ It decided that a restraint of that length was longer than was necessary to protect Tullett Prebon's interests including its client relationships, and its willingness to pay Mr Purcell did not change the relevant interest. Instead, it decided a reasonable period of restraint would be six months. It formed this view on the basis that, had Mr Purcell terminated the contract with proper notice after two years, he would have been:

- put on three months' 'garden leave' during a notice period; and
 - restrained from working in competition with Tullett Prebon for three months after termination,
- and that this reflected the extent of Tullett Prebon's interest.

SAFE WORK AUSTRALIA TAKES SHAPE

The Federal Government has introduced new legislation into Parliament that proposes a new national body, Safe Work Australia, which will oversee occupational health and safety and workers' compensation reform. Special Counsel Rowan Kelly and Law Graduate Chris Rosario report.

HOW DOES IT AFFECT YOU?

- While the new legislation – the Safe Work Australia Bill 2008 (Cth) (the *SWA Bill*) – will not have an immediate impact on employers, it is part of the Federal Government's National Review into Model Occupational Health and Safety Laws (the *National OHS Review*), which aims to harmonise occupational health and safety (*OHS*) laws.
- Employers should follow the progress of the National OHS Review to ensure that they are fully compliant when (and if) the new OHS laws are implemented. The first report by the National Occupational Health & Safety Review Panel on the National OHS Review is due on 31 October 2008.

5. *Tullett Prebon (Australia) Pty Ltd v Simon Purcell* [2008] NSWSC 852.

BACKGROUND

Across Australia, OHS is governed by a complex web of legislation in nine different Commonwealth and state jurisdictions. It was against this background that the Australian Labor Party proposed, in its 2007 election campaign, to:

- harmonise OHS laws (through co-operative federalism instead of a Federal takeover);
- replace the Australian Safety and Compensation Council (**ASCC**) with an independent body to direct policy and process development; and
- examine the financial status of the Comcare scheme and its financial viability and its ability to ensure workers get appropriate compensation and OHS coverage.

Safe Work Australia is the independent body that will replace the ASCC, and it is intended that it will play a central role in the reform of OHS and workers' compensation laws. It will have representatives from Commonwealth, state and territory governments, employers and unions.

MAIN FUNCTIONS

Initially, the main functions of Safe Work Australia are to:

- develop a national policy relating to OHS and workers' compensation;
- prepare a model OHS Act, Regulations and codes of practice (for adoption nationally by all jurisdictions);
- develop a compliance and enforcement policy to ensure nationally consistent regulatory approaches across all jurisdictions;
- monitor the adoption of the model OHS Act, Regulations and codes of practice;
- continue the work of the ASCC and the National Occupational Health and Safety Commission, and further develop the National OHS Strategy 2002-12; and
- advise the Workplace Relations Ministerial Council (a body consisting of Ministers from the Commonwealth, states and territories) on OHS and workers' compensation matters.

If you have any queries about these or any other workplace relations matter, please contact us.



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