

## Double the Trouble Means Double Dissolution

**The Bills rejected by the Australian Senate triggering the decision to dissolve both houses of the Australian Parliament are primarily remedial measures to reform major failings in Australian workplace relations - union governance and the rule of law in building and construction. However, it is unlikely that the contest for high office will be fought on these issues. Inevitably as the election campaign winds its long and tortuous path to 2<sup>nd</sup> July, the justification for the election will be lost in the tumult and shouting. So here is a reminder.**

The [Fair Work \(Registered Organisations\) Amendment Bill 2014 \(No.3\)](#) was designed to amend the *Fair Work Act 2009* and *Fair Work (Registered Organisations) Act 2009* to establish the Registered Organisations Commission and provide it with investigation and information gathering powers to monitor and regulate registered organisations currently undertaken by the General Manager of the Fair Work Commission. It also amended the requirements on officers' disclosure of material personal interests and changed the grounds for disqualification and ineligibility for office as well as increased financial accounting and disclosure obligations for registered organisations and their officers. Civil penalties would increase commensurate with penalties for breaches of company law. It also would have introduced criminal offences for serious breaches of officers' duties and new offences in relation to the conduct of investigations.

The [Building and Construction Industry \(Improving Productivity\) Bill 2013 \(No.2\)](#) was to re-establish the Australian Building and Construction Commission (ABCC) and enable the Employment Minister to issue a Building Code, provide for the appointment and functions of the Federal Safety Commissioner, prohibit certain unlawful industrial action, coercion, discrimination and unenforceable agreements. The Bill provides the Australian Building and Construction Commissioner with powers to obtain information and issue orders for contraventions of civil remedy provisions and other enforcement powers. There are miscellaneous amendments in relation to self-incrimination, protection of liability against officials, admissible records and documents, protection and disclosure of information, powers of the Commissioner in certain proceedings, and jurisdiction of courts.

In effect, these two Bills serve different but related purposes. Reforming governance of trade unions is aimed at overcoming the systemic corruption evidenced by the Royal Commission by imposing standards of probity, transparency and accountability similar to standards not-for-profit organisations and companies comply with everyday. The building and construction unions would also be covered by this reform. However, corruption, standover threats, coercion and collusion is so ingrained that it is necessary to re-establish the ABCC and suspend certain rights against self-incrimination, to address the rampant lawlessness in that industry.

There is ample evidence to support these reforms and it is disappointing that the Senate voted against them. If eventually passed into law, one would expect to see improvements in the quality of union management and representation of employees, reinstatement of the rule of law on building sites as well as significant efficiencies in the cost of major building and construction projects. These and other reforms to competition policy, minimum wage regulation and rationalisation of the institutional framework (featured in the [ER News Summer 2016 edition](#)), are well worth considering when casting your vote.

## The Federal Budget 2016

The budget announced by the Treasurer Scott Morrison in May contained several measures that will affect small to medium businesses, families and high income earners. There is also some good news for young people seeking work opportunities.

### Small Business

The small business entity turnover threshold will be increased from \$2m to \$10m from 1 July 2016 for the purposes of accessing certain existing income tax concessions. The increased threshold will not apply for the purposes of accessing existing small business capital gains tax concessions.

The government is set to gradually increase the size of businesses that can access the lower company tax rate of 27.5% and eventually reduce the tax rate for all businesses to 25%. Supposedly the threshold will increase every year until 2023/24 before a final tax cut for all businesses to 25% in 2026/27. Simultaneously, the instant tax deduction for business equipment under \$20,000 will also be extended to businesses with a turnover of less than \$10m.

## Personal income tax

The threshold for the second highest tax bracket of 37 cents in the dollar will increase from \$80,000 to \$87,000. Employees falling within that range will therefore remain on the 32.5% tax rate.

The temporary budget repair levy will be removed 1 July 2017. The levy is currently payable at an additional rate of two per cent of each dollar of a taxpayer's taxable income over \$180,000.

## Superannuation

The high-income threshold at which a person will pay additional contributions tax will be lowered to \$250,000 from 1 July 2017. The annual cap on concessional superannuation contributions will also be reduced to \$25,000.

The tax exemption on earnings of assets supporting *Transition to Retirement Income Streams* will be removed from 1 July 2017. A lifetime non-concessional contributions cap of \$500,000 will be introduced.

The current restrictions on people aged 65 to 74 from making superannuation contributions for their retirement will be removed from 1 July 2017.

Individuals with a superannuation balance less than \$500,000 will be allowed to make additional concessional contributions where they have not reached their concessional contributions cap in previous years, with effect from 1 July 2017.

From 1 July 2017, all individuals up to age 75 will be allowed to claim an income tax deduction for personal superannuation contributions.

A low-income superannuation tax offset will be introduced to reduce tax on superannuation contributions for low-income earners from 1 July 2017.

The income threshold for the receiving spouse (whether married or de facto) of the low-income spouse tax offset will be increased to \$37,000 from 1 July 2017.

A balance cap of \$1.6m on the total amount of accumulated superannuation an individual can transfer into the tax-free retirement phase will be introduced from 1 July 2017.

The anti-detriment provision in respect of death benefits from superannuation will be removed from 1 July 2017.

## Women having children

Women who take time off work to have children will get up to \$500 tax refunded if they earn less than \$37,000 and will be able to roll over superannuation balances for a period of five years when they contribute less than \$25,000 a year into superannuation.

Their partners will also be entitled to tax offsets if they contribute into their low-income spouse's superannuation during this period.

## Low income refunds and exemptions

Low-income taxpayers will continue to be exempt from paying the Medicare levy after the low-income threshold was increased to \$21,335 for a single person. Low income taxpayers will also benefit from a government tax offset resulting in them receiving \$500 of the tax they pay into their super refunded if they earn less than \$37,000 per year.

## Internships for unemployed youth

From April 2017, and as part of the *Youth Jobs Path — Prepare, Trial, Hire* program, job seekers under the age of 25 will be able to register for intensive, pre-employment skills training. The job seeker will then work 15 to 25 hours a week for between one and three months as part of an internship program introduced between government and business. During this internship, the government will top up the job seeker's regular income with \$200 per fortnight.

The government will also give businesses \$1,000 upfront for taking on the interns and if the interns are employed at the end of their internship, the government will contribute an additional \$6,500 to \$10,000 towards their wage, depending on their job readiness.

## SuperStream

The deadline for small business employers (19 or fewer employees) to meet the SuperStream standard is fast approaching – 30 June 2016.

Under SuperStream, you need to pay super contributions for your employees electronically (EFT or BPAY) and send the associated data electronically linking accounts through a unique payment reference number.

According to the genius' at the Australian Tax Office SuperStream is wonderful because you can make all your contributions in a single transaction, even if they're going to multiple super funds as a unique payment reference number links them.

The good news for some is you don't need to use SuperStream for:

- Contributions to your own self-managed super fund (SMSF) (i.e. if you're a related-party employer – for example, if you're an employee of your family business and your super guarantee contributions go to your SMSF)

- Personal contributions – for example, if you're a sole trader and you contribute to a super fund for yourself.

For these types of contributions you can continue using your previous processes.

[\[More\]](#)

## Workplace Gender Equality Agency Reporting

The Workplace Gender Equality Act 2012 requires all private sector Australian companies with 100 or more staff to report each year to the [Workplace Gender Equality Agency \(WGEA\)](#). Employers have until 31 May 2016 to provide this information to WGEA.

The reporting requirements from 2016 have changed. In particular, companies will now be required to provide additional data relating to:

- The gender composition of the workforce.
- Equal remuneration between women and men.
- The availability and utility of employment terms, conditions and practices.
- Flexible working arrangements for employees.
- Working arrangements supporting employees with family or carers responsibilities.

Employers are able to report online via the [WGEA website](#) using its reporting portal.

If an employer fails to submit a report, WGEA may name a non-compliant employer in a report to the Minister. More importantly, non-compliant employers may not be eligible to tender for contracts under the Commonwealth and some state procurement frameworks and may not be eligible for some Commonwealth grants or other financial assistance.

## TIP OF THE MONTH: Acceptable Alternative Employment in Redundancy

**Introducing significant changes to a business that may result in redundancy of jobs and loss of employment is difficult enough without having to contend with the uncertainty of the rules regulating alternative employment and redundancy payments. It has been a common view that as long as an employer obtains an acceptable alternative job for an employee then the employee will not be entitled to redundancy pay. However, is that always the case?**

In this article I explain the meaning of obtaining acceptable alternative employment and the consequences for redundancy payments.

### The National Employment Standard

The National Employment Standards (NES) prescribe the minimum terms and conditions, including redundancy pay, which cannot be displaced, even if similar provisions are provided in enterprise agreements or awards. Such terms operate in parallel with the employee's NES entitlement, but not so as to give the employee a double benefit.

There are four circumstances in which redundancy payment to an eligible employee pursuant to the NES, may be varied or not paid at all.

- (1) The employer obtains other acceptable alternative employment for the employee,
- (2) The employer cannot pay the amount due,
- (3) Prior service is recognised for all purposes when an employee transfers to a new employer or
- (4) An employee rejects an offer of transfer from the new employer that is on terms and conditions substantially similar to, and, considered on an overall basis, no less favourable than, the employee's terms and conditions of employment with the first employer and their prior service is recognised for the purpose of future redundancy.

No redundancy payment is due in circumstance (3). If the Fair Work Commission is satisfied that the circumstances of (1) or (2) prevail or (4) operates unfairly to the employee, it may reduce the amount of redundancy pay or order the employer to pay an amount of redundancy pay the Commission considers appropriate. The reduction may be nil payment.

### Acceptable alternative employment

It is important not to confuse internal transfers of employment with the circumstances listed above. If an employee transfers to an alternative position with the same employer even with lower paid duties, and within acceptable bounds, their employment is not technically terminated and therefore would not be entitled to redundancy pay.

The test to be applied in determining whether alternative employment is 'acceptable' is an objective one having regard to the particular circumstances of each case, including the impact on the employee.

As usual employers bear the onus of proving the acceptability of its offer of employment by reference to such things as:

- Wages, salary and fringe benefits
  - hours of work
  - seniority
  - job status or security, and
  - other relevant matters such as the cost or dislocation of additional travel to work
- i. discussions with representatives of the new contractor about the employees' future engagement
  - ii. providing the new contractor with the contact details of the employees who agreed to allow that to be done
  - iii. providing the new contractor with information about the arrangements within the enterprise agreement which covered the employees, and
  - iv. providing advice to the new contractor that the it had paid the employees their wages up to a relevant date, together with all accrued leave entitlements.

The practical test is to consider whether the alternative arrangements are reasonably within the scope envisaged by the terms of the person's employment. For example, a job paid at the same salary but performed in a different suburb with little to no difference in travel would be acceptable especially where the employment contract clearly states that the employee may be deployed in various locations to meet the needs of the business. On the other hand, a change of status from full-time to part-time with commensurate reduction in salary or change to casual employment is unlikely to be acceptable alternative employment, unless of course, the employee agrees to the alternative.

### Obtaining acceptable alternative employment

Objectively deciding whether the alternative position is acceptable is only one of the hurdles employers must overcome. You must also be able to show you actually '*obtained*' the acceptable alternative employment.

Obtaining acceptable alternative employment for a redundant employee means to '*get or acquire*' an offer of alternative employment which the employee can choose whether or not to accept.

The meaning of 'get' or 'acquire' is not necessarily black and white so an example of how this is decided in practice may clarify the matter. For example take the case of an employer that loses a contract to provide goods or services to a business client and therefore the employer no longer requires the employees that were employed to deliver that work. The employer attempts to obtain alternative employment for the redundant with the new contractor. What do they need to do?

The Australian Federal Court recently considered the evidence of what a business had done to obtain alternative employment in these circumstances. The Court found that the employer had taken some steps to facilitate employees securing employment with the new contractor in anticipation of it replacing it as contractor to its previous client including:

However, the Federal Court said that these steps weren't enough to 'obtain' acceptable alternative employment.

The judges believed the meaning of 'obtained' doesn't necessarily require a strong effort, or the employer be a strong moving force to bring about an offer of employment from the new employer. Rather, 'obtaining' means the result of the conscious, intended, acts (as distinct from, for example, coming into possession of something by gift or inheritance). In the example provided, the Court concluded that the employer may have facilitated the opportunity for them to apply for employment with the new contractor, but what it obtained for them was something less than offers of employment which they could accept or decline as a matter of choice.

### Conclusion

Notwithstanding the objective test of 'acceptability' it seems that the legal bar to reducing or eliminating the right to redundancy pay by obtaining acceptable alternative employment is quite high even though it doesn't require a strong effort or strong moving force.

Employers should make the offer themselves or effectively secure an offer of employment from another employer on behalf of the employee. If the employer is able to satisfy these tests then where the employee rejects the offer, employers may rightly withhold or reduce redundancy pay, subject to an order of the Fair Work Commission.

Whenever the alternative position includes significant reductions in entitlements then the best course of action is to offer a choice of the job or redundancy pay.

## In the Commission: What's happening at the Fair Work Commission

There is always something happening in the Fair Work Commission. Here are some of the most significant, and interesting news and events.

### 4-Year Modern Award Review

The [4-Yearly Modern Award Review](#) continues into 2016 with ever-increasing complexity to the range of decisions, statements, determinations and directions issue by the Fair Work Commission. I attempt to summarise some of the more relevant matters.

### Penalty rates

The Fair Work Commission has concluded it's hearing of submissions and evidence on the application to rationalise/simplify penalty rates for employees and employers covered by the following retail and hospitality industry awards:

- Hospitality Industry (General) Award 2010
- Registered and Licensed Clubs Award 2010
- Restaurant Industry Award 2010
- General Retail Industry Award 2010
- Fast Food Industry Award 2010
- Hair and Beauty Industry Award 2010
- Pharmacy Industry Award 2010

The Penalty rates case commenced in early 2015 and focused on arguments from employers that Sunday penalty rates should be aligned with Saturday rates and contemporary economic, social and religious lifestyles. According to the Fair Work Commission, over 450 submissions and witness statements were filed. The hearings concluded on 14 April 2016 and a decision is expected prior to the next Federal election on 2 July

### Exposure drafts of awards

The Fair Work Commission has published for comment various exposure drafts incorporating proposed variations to modern awards that it is reviewing listed in Group 3. For example the Commission has prepared an [exposure draft](#) incorporating proposed variations to the Clerks Private Sector Award and a [comparison table](#) with the current award. The Commission is currently accepting submissions on the exposure drafts and will publish further exposure drafts of award listed in Group 4 in the latter part of May this year.

Go to the list of [awards under review](#) to view specific exposure drafts and comparison tables.

### Annual leave

The Fair Work Commission decided in June 2015 to amend modern awards allowing:

- Individual agreement for employees to cash out 2 weeks annual leave each year, as long as they retain at least 4 weeks accrued leave
- Employers to direct employees to take excessive annual leave where they have accrued at least 8 weeks leave and have not agreed on a time to take the leave.
- Electronic funds transfer payment of wages on normal pay day during annual leave rather than payment in advance in 51 modern awards
- Taking of annual leave in advance of an entitlement to leave accruing, by agreement between an employer and employee.

After some delay and adjustments the Commission published for comment a [schedule of draft determinations](#) to implement the decision. Hearings on the draft determinations were held in December 2015. However, due to the high number of submissions received the Commission is re-examining the detail of its draft determinations before finalizing the variations. No further decisions have been made this year.

### Award flexibility

After deciding last year that modern awards would be varied to make employers retain a record of every instance in which an award covered employee agrees to time off in lieu of overtime payment (TOIL), the Fair Work Commission has now accepted the principle that modern awards that provide TOIL at the equivalent penalty rate may require fewer safeguards than a term providing for TOIL on a time for time basis.

The [model TOIL clause](#) requiring signed records created in each instance will be inserted into [26 modern awards](#) that do not currently provide for time in lieu of overtime payment. A further draft variation determinations will be published for the twenty-one modern awards that presently contain a penalty basis TOIL term, and interested parties will be provided with an opportunity to comment. This leaves a further 75 modern awards that either do not currently have overtime or TOIL provisions, or are subject to contested claims. These are subject to separate decisions of the Commission.



## Apprentices

The Australian Council of Trade Unions (ACTU) and affiliated unions applied to vary [37 modern awards](#) to include the conditions of employment determined by the Full Bench of the Fair Work Commission in its decision of 22 August 2013 relating to Apprentices' wages and conditions of employment (the *Apprentices Decision*). Approximately 70% of all apprentices in-training are covered by modern awards that have already been varied to provide the relevant conditions of employment as a result of the *Apprentices Decision*. [The Fair Work Commission](#) accepted that the variations to the [37 modern awards](#) would bring the entitlements of apprentices covered by these awards into line with the entitlements already available to apprentices under other modern awards. This would ensure that modern awards provide a fair and relevant minimum safety net of terms and conditions for all apprentices.

## Casual and part-time employment

There are several applications to vary modern awards to prescribe minimum part-time hours of work, limitations on casual employment and a right to permanent part-time and full-time employment for long-term casual employees. There are multiple submissions on the matter, which has been ongoing since 15 October 2014. A decision is not expected until mid-2016.

## Family and domestic violence leave

The ACTU has applied to insert into modern awards a right to leave and other support from employers where employees are experiencing domestic violence. The Commission will hear this matter in October 2016.

## Family friendly work arrangements

The ACTU has applied to insert into modern awards a right to return to work on part-time or reduced hours after a period of parental leave. This right would extend for 2 years after the birth of the child. It is also seeking paid leave to attend antenatal classes and related activities. The case is scheduled for hearing in August 2017.

## Micro-business schedules

Australian Business Industrial and NSW Business Chamber is seeking a schedule to be added within 93 modern awards whereby businesses that employ less than five employees, (micro businesses) would be entitled to apply a simplified set of terms and conditions covering the types of employment, hours of work, overtime and breaks. A second schedule would be added to allow micro businesses to agree with employees to substitute public holidays to other days. Interestingly, the

alternative provisions are not dissimilar to the general provisions that are already in place. It is difficult to see what advantage such micro business schedules would create. The hearing of this application is likely to occur in September 2016.

## Public holidays

The Shop Assistants Union has applied for enhanced public holiday entitlements for employees that work over 7 day rosters including additional days for part-time employees that would not have been rostered to work on the public holiday. The hearing of this application will occur on a date to be determined in 2016.

## Advice, Knowledge, Support, Representation

On 1 September 2015 we launched [Employee Relations Online for Small Business](#). A specialist advice service designed for Australian small to medium enterprises. The aim is to provide a comprehensive suite of informative guides, fact sheets and resources backed up with expert advice to manage your obligations as an Australian employer. Online and over the phone, monthly or yearly membership is a cost effective way to receive advice from us including:

- 1300 Priority Help desk
- 24/7 access to our library of templates, guides, fact sheets and model employment resources to use in your organisation
- ERO Updates regularly delivered to your mailbox
- Connects you with other small and medium enterprise managers and HR practitioners

Designed and managed by [Maguire Consulting](#), it covers all employee relations topics including: award pay rates, National Employment Standards, modern award conditions, leave and holidays, enterprise bargaining, termination of employment, employee tax and superannuation, health and safety and national benchmarks in human resource management.

It is the most cost effective method of getting the advice that you need to operate your business. Sign up for the [HR Essentials membership](#) or refer your business clients today. It is free and you can upgrade at any time.

Contact [Paul Maguire](#) for further information.