

23 January 2012

## Adverse action provisions must change: Lawyers

The Fair Work Act's adverse action provisions are the biggest cause of headaches for employers and should be modified, according to employment lawyers.

The federal government has appointed a panel to conduct a review of the Act, and last week released a background paper that canvasses the aims of the legislation.

It says those seeking to argue the legislation is failing to meet its objectives should provide evidence to support their views.

The panel - comprising Dr John Edwards, Professor Emeritus Ron McCallum AO and the Hon Michael Moore - is due to report to the Government by the end of May this year.

### **Adverse action and unfair dismissal**

According to employment lawyers contacted by HR Daily, the Fair Work Act's adverse action provisions are not operating as intended.

"There's no question that [the provisions] have not had the desired effect," says People & Culture Strategies managing principal Joydeep Hor. "Particularly in NSW it is now being seen as the backdoor way for senior executives to challenge their terminations, and very much akin to the old unfair contract jurisdiction that used to exist here.

"While those on the executive side might say that at least there's something that keeps employers honest, I can't help but think that that has been an unintended consequence of the legislation. I think there needs to be a long hard look at whether that was really part and parcel of the Fair Work package."

Hicksons partner Brad Swebeck agrees, adding that "the 'workplace right' aspect of it is being abused".

"For example, if you can't bring an unfair dismissal claim because you haven't done the minimum period you'll lodge a claim under the general protections... I think that's a fault. There needs to be a minimum period introduced, for example, to general protections. I think that's just a glaring omission from the legislation."

The Act has brought a return to "the bad old days of employers being hit with unmeritorious [unfair dismissal] claims", Swebeck told HR Daily.

"Most applicants know that employers would rather settle at conciliation than pay quite expensive litigation fees to law firms, and they just make commercial decisions - particularly the small to medium-

size businesses. Big business can look after itself, in my view; they either decide to compromise and make a commercial decision, or they fight, because they've got... deep pockets, huge in-house HR/IR departments, and they've got firms that they use to fight long and hard - particularly those unmeritorious claims."

Swebeck suggests that no employer should be exempt from the unfair dismissal jurisdiction, but that following a minimum qualifying period (12 months for small business, the cap for which should be increased to 25 employees; nine months for businesses with fewer than 50 employees and six for those with more than 50), "if an employer could show the unfair dismissal code was followed, the application should be dismissed without any need for conciliation - unless the employee could show what the unfairness is".

"That is, the onus shifts immediately to the employee and not the employer. Additionally, there should be no getting around the minimum period by using the general protection sections to seek reinstatement."

### **Good faith bargaining and enterprise agreements**

The Act's good faith bargaining provisions are another area where "things haven't gone to plan", says Hor.

"The Qantas example serves as one case in point. I think the difficulty that presents itself in the legislation is that when you compel employers, in particular, to bargain in good faith, but you don't necessarily provide the circuit breakers for when that bargaining - either actually or perceived - is not happening in good faith, you do tend to find there's some unintended consequences."

Hor adds that a number of employers have found themselves exposed to industrial action in circumstances where they "have probably done more by way of genuine negotiations with unions than they might have previously".

"The good faith bargaining hangs over their head... and the natural flow-on from that seems to be that industrial action is taken a bit earlier in the piece than probably should be the case.

"It just seems wrong that employers who provide terms and conditions that are so far in excess of what their award obligations might be can find themselves exposed to industrial action. That is just, on any assessment, so incredibly wrong, and I think the government has got to address that."

According to Swebeck, the approach taken towards agreement making can be "very pedantic".

"We can have an approach taken that if you haven't crossed a 't' or dotted an 'i' there might be some issues with the procedural aspects of it. Undertakings can assist - I think that's a very valuable tool in helping to have agreements processed - but you can sometimes strike some difficulties where different [tribunal] members strike the bar a bit high in so far as the 'better off overall test' is concerned.

"We need some more guidance to how that test is meant to be satisfied, because some members take a view that a test is satisfied with a particular term and condition, then you go before another member and they say 'No, until I get a full bench decision I'm not going to follow that single member'. There's some inconsistency in approaches."

### **Where it works**

On a positive note, Swebeck says the transparency the Act reintroduced to agreement processing is "a much better system than the system we had under Work Choices where it was all done behind closed doors and you were never given a reason as to why your agreement was rejected. I'm a big supporter of having Fair Work Australia involved in the processing of agreements."

Hor adds that the Act's enforcement mechanisms also seem to be working well.

"I think the Fair Work Ombudsman has done a very good job under this new legislation of making themselves known and developing a level of prominence. And there's no doubt that employers have responded well around their own due diligence and getting their compliance house in order."

### **Questions for the review**

The Fair Work Act Review Background Paper poses 69 example questions that parties might choose to address in their submissions.

These include:

- Has the Fair Work Act facilitated flexible working arrangements to assist employees to balance their work and family responsibilities?
- What has been the impact, if any, of the Fair Work Act on labour productivity?
- What has been the impact of providing an award system which includes modern awards that cannot be varied (except in limited circumstances) other than during four-yearly reviews by FWA, or in the initial FWA interim review in 2012?
- Did the replacement of the fairness test with the no-disadvantage test and then the better off overall test improve protection of employment conditions in the agreement-making process?
- How have the good faith bargaining requirements affected enterprise agreement negotiations?
- Does the new broader definition of transfer of business help to clarify when a transfer of business occurs?
- Do the general protections provisions provide adequate protection of employees' workplace rights, including the right to freedom of association and against workplace discrimination?
- Do the unfair dismissal provisions balance the needs of business and employees' right to protection from unfair dismissal?
- Are employees able to resort to protected industrial action more easily or quickly since the passage of the Fair Work Act? If so, which provisions of the Act facilitate this?
- Do the right of entry provisions balance the right of unions to enter workplaces to meet with employees and investigate breaches of legislation and the right of employers to go about their business without undue inconvenience?

- In comparison to the previous arrangements, does the increased educative role for the FWO help employers and employees to better understand their rights and obligations under the Fair Work Act? Submissions should be emailed (in Word or PDF format) by 17 February 2012 to [fairworkactreview@deewr.gov.au](mailto:fairworkactreview@deewr.gov.au).

URL:

[http://www.hrdaily.com.au/nl06\\_news\\_selected.php?act=2&nav=1&selkey=2060&utm\\_source=daily+email&utm\\_medium=email&utm\\_campaign=Daily+Email+Article+Link](http://www.hrdaily.com.au/nl06_news_selected.php?act=2&nav=1&selkey=2060&utm_source=daily+email&utm_medium=email&utm_campaign=Daily+Email+Article+Link)