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MULLINS
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Fair Work Act 2009

NIGEL INGLIS

The Rudd Government's highly anticipated Fair Work Policy regime is in part about to commence through the introduction of the new *Commonwealth Fair Work Act* (the Act). A large part of the Act commences on 1 July 2009, with the second phase of reforms due to commence on 1 January 2010.

The key elements of the new system are:

- A comprehensive safety net of ten minimum employment conditions called the National Employment Standards;
- A system centred around bargaining in good faith at the enterprise level;
- Broader protection from unfair dismissal for all employees;
- Protection for low paid employees and the ability to collectively bargain;
- New measures regarding the balance between work and family; and
- A right to be represented in the workplace through bargaining representatives.

A new regulator, called Fair Work Australia, will be created to oversee the new national workplace relations system. The seven existing workplace relations agencies will be amalgamated to form a new institutional framework comprising Fair Work Australia and the Office of the Fair Work Ombudsman.

Fair Work Australia and the Fair Work Ombudsman will, amongst other things, provide an information line, advice and assistance on workplace issues and also be the regulator for compliance and prosecution purposes. Both Fair Work Australia and the Office of the Fair Work Ombudsman commence operation on 1 July 2009.

A new unfair dismissal system is also being introduced. It will be the subject of a review by Fair Work Australia in 2012. In the meantime, from 1 July 2009, employers will no longer be able to rely on the "100 employees or less" rule to avoid an unfair dismissal claim. The new system provides protection for employers so long as employees serve minimum periods of employment. For employers

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who have fewer than 15 full time equivalent employees, the minimum period of employment is one year. (The "full time equivalent" calculation will apply until 1 January 2011. After that time the calculation will be fewer than 15 employees based on a simple head count.)

For employers with 15 or more employees, before an employee can make an unfair dismissal claim, the employee will need to have worked for a minimum period of six months.

However, regardless of how many employees a business may have, the employee must meet other minimum requirements, such as:

- The employee must earn less than $100,000 per year;
- The employee must not be engaged for a specified task or be on a fixed term contract; and
- The termination must not be a case of a genuine redundancy.

For employers with less than 15 employees, if they comply with the new Small Business Unfair Dismissal Code they will have a complete defence to an unfair dismissal claim.

For employers with less than 15 employees, if they comply with the new Small Business Unfair Dismissal Code they will have a complete defence to an unfair dismissal claim. However, employers should note that compliance with the Code itself will require careful consideration of the checklist that will be scrutinised by Fair Work Australia. Even though compliance with the Code provides a complete defence, the interpretation by Fair Work Australia of the information entered on the forms may not be so certain.

Employers should seek advice about how best to comply with the Code to ensure the risks against an employee succeeding in an unfair dismissal claim are minimised.

Global Financial Crisis increases mortgage hardship help

JANE NEWMAN

The global financial crisis has increased the risk of unemployment and mortgage defaults. The Federal Government has now announced a mortgage relief deal with four major banks. However, hardship relief provisions already exist in loans that are regulated by the Consumer Credit Code (**Code**). Code regulated loans are those that are for personal, domestic or household matters and are not limited to just home mortgages but include other loans, such as car loans. Currently, hardship relief provisions are only available on loans up to $312,400 but the Government has announced that from 1 November 2009, this limit will increase to $500,000.

Under the hardship provisions of the Code, the contract can be varied by:

1. Extending the period of the contract and reducing the amount of each payment due under the contract accordingly, without a change being made to the annual percentage rate; or
2. Postponing during a specified period the dates on which payments are due under the contract, without any change being made to the annual percentage rate; or
3. Extending the period of the contract and postponing during a specified period the dates on which payments are due under the contract, again without a change being made to the annual percentage rate.

Some lenders may offer other options such as transferring a home loan to the lowest variable interest rate available. Importantly, these hardship relief provisions are also available from building societies, credit unions, smaller banks and non-bank lenders who offer Code regulated loans.

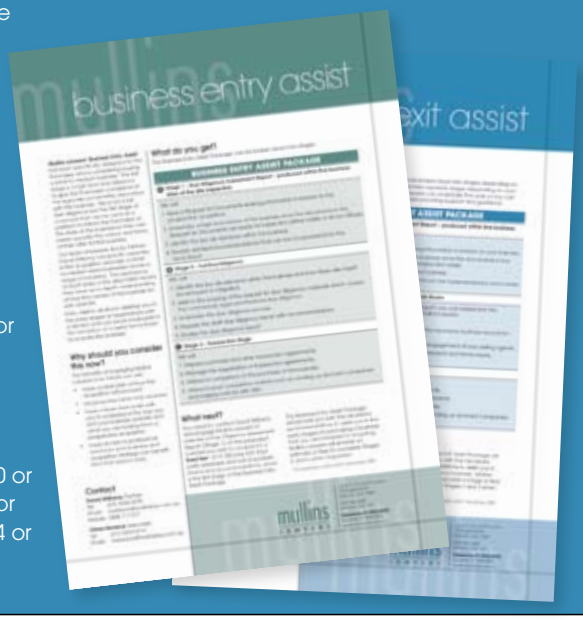
However, while the hardship relief provisions will soon be available to a greater number of borrowers, the decision about what form of relief will be offered to a borrower, if any, will be made by that particular lender following the lender's assessment of the borrower's ability to meet any new contractual obligations in the long term. Therefore, it is not simply a matter of asking for hardship relief. Borrowers will have to show that they can meet any new contractual obligations in order for the lender to agree to that particular relief plan.

The best approach is for borrowers to watch their financial position and if they encounter difficulties, such as unemployment or ill health, speak to their lender sooner rather than later about obtaining hardship relief.

ENTRY ASSIST & EXIT ASSIST

Mullins Lawyers has experience Australia-wide in the merger and acquisition of businesses. The Business Services Group has developed two unique products - **Entry Assist** and **Exit Assist**. These products are designed to provide high level due diligence assistance to both buyers and sellers in preparation for the purchase or sale of a business.

If you would like to discuss either of these products, you can contact David Williams on 07 3224 0270 or dwilliams@mullinslaw.com.au or Olivia Versace on 07 3224 0314 or oversace@mullinslaw.com.au.



HOW CAN A LEASE BE "GREEN"?

REBECCA CASTLEY

Climate change is now a mainstream issue and governments are increasingly focused on how to minimise carbon emissions.

Commercial buildings are a significant part of the climate change problem. Did you know that energy emitted from commercial buildings represents about 8% of Australia's emissions?

Some landowners are now designing and constructing "green buildings" and entering into "green leases" with their tenants. The demand for "green" space is also on the rise. Historically, this has been driven by government and major corporations whose environmental performance is a matter of corporate responsibility. This is set to increase given the expected rise in energy costs if a national emissions trading scheme is implemented. It is also likely that there will be future increased regulation aimed at efficiency of energy and water use.

The environmental performance of buildings is often assessed through the Green Star program operated by the Green Building Council of Australia. This measures a building's "design" or "as built" performance by eight environmental categories. Six stars recognise world leadership, five stars mean Australian excellence and four stars mean best practice.

The other commonly used rating tool is NABERS (formerly ABGR), run by the NSW Department of Environment and Climate Change. It rates a building's greenhouse performance based on water and energy use by collecting 12 months of performance data.

"Green leases" incorporate, in addition to usual lease terms, provisions so that environmental benchmarks can be maintained. For example, a "green lease" may include:

- acknowledgments as to environmental objectives (eg tenancy fitout of 4.5 stars);
- an obligation for the landlord to report performance against targets for energy and water usage;
- an obligation for the tenant to meet fitout requirements (eg recycled materials);
- obligations regarding recycling, air conditioning use, water, lights and other services; and
- consequences for non-compliance (eg damages, abatements, rectification costs, termination).

To achieve environmental outcomes, it is essential that landlord and tenant work together. The "green" provisions generally adopt a co-operative approach and often provide for the parties to work within agreed environmental management plans.

At this stage, green buildings tend to be "new builds". The refurbishment of existing buildings to become "green" remains challenging for owners from cost and building management perspectives. However, "green" leasing is sure to become commonplace in the future.

The Truth about Redundancies

PAT MULLINS

Most employees whose entitlements are governed by Federal industrial instruments or State ones preserved as NAPSAs (Notional Agreements Preserving State Awards) under the Work Choices Legislation have enforceable redundancy entitlements. Under the new Fair Work Australia Legislation, employees in the Federal system will have a statutory entitlement to redundancy benefits. Employers in the State system (going forward) have an entitlement to apply to the State Industrial Relations Commission to set the amount of a redundancy payment.

Redundancy occurs when the employer no longer wants a particular employee (or anyone else) to perform the duties of a particular position. In those circumstances, the position becomes redundant. The incumbent in the position then has the right to the payment prescribed as the redundancy entitlement. However, there is no entitlement when the employer finds suitable comparable employment for the employee.

There is no current redundancy entitlement for employees on salary arrangements (as opposed to Award arrangements). The only exception is that these employees have a right to apply to the State Commission. There is no redundancy entitlement enforceable at common law for these employees and the costs, time and trouble of an application to the Commission is often a real disincentive.

Under the Fair Work Australia Legislation, salaried employees of trading corporations will have a statutory entitlement going forward. For salaried staff of partnerships, sole traders or unincorporated bodies, the only way they may secure an enforceable entitlement would be to have a specific term incorporated into their individual contract of employment.

The myth was that redundancy pay was an unusual entitlement. That was never the case. Under the new Fair Work Australia Legislation, redundancy entitlements will become far more widespread. Employers will need to look carefully before using the business restructure scenario and the current redundancy mechanism as a way of laying off staff.

In these difficult economic times it is better to be absolutely honest with staff. Where business downturn requires lay-offs, then dressing them up as redundancies will carry an unfortunate sting in the tail for most employers in the future.

The reality is that when terminating staff (just as when engaging staff) honesty is always the best policy.

COURT APPROVES AN UNSIGNED, UNDATED WILL

MICHAEL KLATT

Our firm recently acted for the family of a client who died leaving a number of documents which could have formed his last Will. The *Succession Act* still provides that a Will must be signed by or on behalf of a person in the presence of two witnesses. In 2006, the legislation was amended to provide the Court with the power to dispense with these execution requirements for a Will if the Court was satisfied that a document was intended by the person to form their Will or an alteration to the Will. Until recently, the Court had only exercised this jurisdiction on a few occasions, mainly in respect of suicide notes, which were signed and dated but not witnessed.

In the current case, our client had handwritten his wishes in a Will kit booklet, but had not signed nor dated the document and obviously had no witnesses sign the document either.

The case was even more complicated by the fact that he had made a properly executed Will in 1993, but had stapled pages on the front of this original document and written alterations to that 1993 Will on those pages on two occasions. These alterations were signed and dated, but had no witnesses.

Ultimately, we were able to provide the Court with sufficient evidence that the Will kit had been written by the deceased in his handwriting. We were also able to provide evidence as to the fact that it was written subsequent to the last alteration to the 1993 Will. The family considered that the Will kit best represented his last intentions so, fortunately, the Court approved this document.

There are many documents that may now constitute a Will or alteration to a Will. This could include:

- a draft Will prepared by a lawyer, which was approved by the client, but unsigned at the date of their death;
- handwritten notes in relation to particular property, including jewellery and personal items; and
- handwritten amendments on a copy of a Will.

The problem, however, will be determining whether, in fact, a document did reflect a person's testamentary intentions or was merely a work in progress.

There is obviously no substitute for having your Will properly signed and witnessed so the estate does not incur unnecessary expense applying to the Court for a determination as to whether a Will is valid.

JOHN MULLINS
EDITORIAL

I am writing this editorial shortly after the announcement of the federal budget. The anomaly which has been picked up by all the journalists in the government announcement is that whilst "we are in unchartered waters" the predictions of the recovery from the recession are based on prior history.

The reality is that no one knows with any degree of certainty when the recession will end and what the rate of recovery will be. The recession has undoubtedly impacted upon the vast majority of Australian businesses. It has impacted on our business and unless you are a very lucky person, it has impacted upon yours.

There is a great deal of editorial space being taken up in trying to assess where Australia is on the current curve. Are there green shoots of resurgence as suggested by President Obama, or are we still awaiting the worst of it?

In my view what all businesses need to do is persevere, harness all of their strengths and talents which has helped the business succeed, take away or cut away the distractions and unnecessary expenses, re-work forecasts and budgets, be optimistic, think creatively, but most importantly, persevere.

Inevitably a number of the articles in this publication relate to situations relevant to the current crisis including mortgage hardship and redundancies.

Despite the state of the economy, there are changes in the legal regime occurring regularly. Probably the most significant is the new Industrial Relations (IR) laws. Businesses need to focus on how these new laws will impact upon them. Despite the fact that re-engineering the IR basis of your business in a recession may be undesirable, that is what businesses need to do. It is important that the time and effort (and where necessary, expense) are put in place to ensure that your business is on a solid footing.

Over recent years there has been a push in the market place for commercial buildings to be more environmentally responsible. There is a very interesting article about green leases.

Finally, one of our partners, Michael Klatt, was recently featured in The Courier Mail as a result of a landmark case of a Will admitted to probate, which was not signed by the testator or witnessed. This case highlights two points – the need to get good legal advice when dealing with the Will of a deceased person, but more importantly the need to ensure that each of us has a proper, effective and enforceable Will.

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