HopgoodGanim
LAWYERS

Hospitality, Tourism and Gaming

Fair Work Reform: Implications for the Hospitality and Gaming Industry

APRIL 2010

Andrew Tobin

a.tobin@hopgoodganim.com.au

INGRAINED INTELLIGENCE

HopgoodGanim LAWYERS

Fair Work Reform: Implications for the Hospitality and Gaming Industry

All of the workplace relations reforms proposed by the Rudd Government are now up and running. In particular, these include a new award safety net and a new set of default employee entitlements contained in the *National Employment Standards*, applicable from 1 January 2010.

Employers that have not adapted to the reforms, and the individuals responsible for running their businesses, run the risk of prosecution by the federal regulator, the Fair Work Ombudsman, for recovery of large civil penalties: up to $33,000 per breach for corporate employers, and up to $6,600 per breach for sole traders or managers 'involved in' contraventions.

Less dramatically, employers in this position also run the risk of incurring significant liabilities for unpaid or underpaid wages, plus interest.

Some of the compliance areas you should review in the course of your business operations include the following:

1. Have you identified the new award safety net applicable to your business?

The State and federal awards and the pay scales derived from them previously applicable under the Work Choices system have been replaced by 122 modern awards.

The modern awards now potentially applicable to employers and their employees in hospitality and gaming businesses include, among others, the *Alpine Resorts Award* 2010, the *Hospitality Industry (General) Award* 2010, the *Racing Clubs Events Award* 2010, the *Registered and Licensed Clubs Award* 2010 and the *Restaurant Industry Award* 2010.

Where they apply, the awards prescribe minimum terms and conditions of employment. In general terms, coverage of the modern award safety net is broader than any safety net that has applied to Australian employers before. Many groups of employees who were not previously covered by awards are now covered in the new system.

If you are not clear about the award or awards applicable to your business, you need to make that determination a priority to avoid the possibility of facing prosecution.

2. Having identified the applicable award safety net, does your business comply?

The obvious area in which compliance is going to be significant is whether your working hours and remuneration arrangements comply with the requirements of the applicable awards.

In this, there are many traps. Here's a big one.

Many employers rely on complying with their award obligations by 'all-in' salaried arrangements, intended to 'buy-out' all award entitlements using a fixed annual salary sufficient to absorb everything prescribed by the applicable award including the base pay rate, penalty and overtime rates, leave loading and the whole grab-bag of award allowances.

The demanding nature of hospitality work, and the span of typical working hours, means that the legitimacy of these arrangements is critical. If they are not properly implemented, their effectiveness as a compliance tool can be very limited. Ineffective salaried arrangements do next to nothing to protect the employer from liability for underpaid wages or civil penalties.

Special rules have always applied to making effective salaried arrangements. Some of these changed - against employers - when the Work Choices reforms began on 27 March 2006. As a result, many employers already have exposure to liabilities historically accrued in the federal system between then and the start of the new system on 1 January this year.

Further, some modern awards have introduced new and additional rules applicable to annual salaried arrangements for employers and the employees they cover. Under these rules, salaried arrangements can be legitimate, but they require

© HopgoodGanim Lawyers April 2010

more than mere payment of an annual salary theoretically calculated to meet all relevant award requirements applicable over the course of a year.

Employers should review all salaried arrangements to ensure that they properly comply with the new safety net requirements, at least in the future. Some employers may discover from this exercise that they have a substantial back-pay liability, and should be developing strategies to fix it. Unpaid wage claims (and prosecutions for penalties) can be brought up to six years after the liability was incurred.

3. Do you use preferred hours arrangements?

Other employers rely on 'preferred hours' arrangements to comply with their award obligations. These are arrangements where, in effect, employees 'volunteer' to work hours that would ordinarily attract penalty or overtime rates, on the basis that they will be paid at 'ordinary time' rates or something else less than full penalty rates.

Theoretically 'preferred hours' arrangements are attractive, from the employee's perspective, to those for whom 'regular' working hours are not suitable, including those with parental or care obligations, study, sporting or other external commitments or interests. The theory is that, for their personal convenience, these people 'choose' to work odd hours for 'normal' pay.

Historically, such arrangements could be formally legitimised, usually through some kind of collective/enterprise agreement or (before March 2008) an Australian Workplace Agreement (an AWA) or (between March 2008 and 31 December 2009) an Interim Transitional Employment Agreement (an ITEA).

From the employer's perspective, preferred hours arrangements have been difficult to justify and legitimise, because regulators have always taken the view that these arrangements could possibly exploit vulnerable groups of workers. They could never legitimately be made 'on the side'.

The Fair Work reforms have complicated the issue further, in at least three ways.

1. It is no longer possible to make an individual statutory agreement, like an AWA or an ITEA, although individual agreements incorporating preferred hours arrangements made and approved under previous legislation continue to operate in the new Fair Work system (subject to transitional arrangements).

   It is still possible under the Fair Work legislation to make a collective or 'enterprise' agreement incorporating preferred hours arrangements. As with pre-existing AWAs and ITEAs, preferred hours arrangements operating under collective agreements made before 1 January 2010 will also continue to be effective.

2. All modern awards include, and collective enterprise agreements made from 1 July last year must include, a 'flexibility' term. The 'model flexibility term' prescribed by the legislation allows employers, by individual agreement with employees, to make an agreement varying the applicable award or enterprise agreement in relation to working hours, overtime, penalty rates, allowances and leave loading.

   The model flexibility term lends itself to making 'individual flexibility arrangements' (IFAs) of various kinds, including those that provide for working 'preferred hours' at something less than penalty or overtime rates. However, such arrangements must meet particular - and quite technical - requirements. If they do not, they will be ineffective.

3. An effective IFA, whether made under an award or enterprise agreement, must pass the 'better off overall' test. The test requires that the IFA results in the employee being better off overall than the employee would have been if no IFA had been agreed to. Under the old rules, such arrangements were subject to a different test, the 'no disadvantage' test.

   The boundaries of the better off overall test, especially for preferred hours arrangements, are still being decided in proceedings currently pending before Fair Work Australia, which has replaced the Australian Industrial Relations Commission. As at April 2010, the law is very uncertain. Again, an IFA that does not pass the better off overall test will be ineffective.

© HopgoodGanim Lawyers April 2010

Using award and agreement based flexibility provisions to implement preferred hours arrangements is, at least for now, a risky compliance strategy. Unlike such arrangements proposed as part of an enterprise agreement to be approved by Fair Work Australia, IFAs are not subject to regulatory approval. The employer entirely carries the risk of getting it right and the potential cost of getting it wrong. The risk is something that may take years to crystallise.

Further, some of the other limitations on the use of IFAs may compromise their usefulness in many situations. IFAs can only be made with existing employees, so that employment cannot be offered to a potential new employee using terms that incorporate a preferred hours arrangement. In addition, once an IFA has been made, the employee can terminate it on four weeks notice, so the longevity of any arrangement made is not secure.

Employers who are using or thinking about implementing IFAs incorporating 'preferred hours' arrangements need to be extremely careful. For the foreseeable future, existing arrangements should be monitored against relevant case determinations coming out of Fair Work Australia to ensure that they are effective as intended.

4. What other safety net issues do you need to consider?

Separate from the requirements of applicable modern awards, employers should also have reviewed, and where necessary changed, their systems, processes, employment contract templates and staff policies to ensure they comply with the *National Employment Standards*.

Potential problem areas include, as examples:

- **Record keeping of delivery of the Fair Work Information Statement**

  Most employers will know that, from 1 January 2010, new employees have to be provided with the *Fair Work Information Statement* in the form prescribed by the Ombudsman.

  However, providing the statement to new employees is only the first part of the compliance process. If required, you also need to be able to prove that the statement was in fact given. If your systems and processes don't allow you to prove that you have complied, you will still be exposed to the *Fair Work Act* civil penalty regime.

  There are several ways you can record that you have given new employees the statement. You should ensure that you implement one of them as part of your record keeping processes. The issue is similar to that associated with being able to prove, under the superannuation guarantee legislation, that new employees have received the super choice form that has been required by that legislation since 1 July 2005.

- **Circumstances in which employees can be directed by their employer to take a period of annual leave**

  The rules previously applicable under the Work Choices legislation have changed, and many modern awards incorporate particular requirements additional to those now prescribed by the *National Employment Standards*. The rules in any one workplace can vary between employees, depending on the industrial arrangements that apply to each of them.

  Many employer contracts and policies incorporate rules that are no longer consistent with the requirements of the *National Employment Standards* for annual leave. These should be rectified so that there is no prospect for accidental contravention of the applicable safety net requirements, based on outdated industrial arrangements.

- **Managing requests for flexible working arrangements**

  One of the new elements of the *National Employment Standards* is the introduction of a formal 'right' for some employees to request unspecified flexible work arrangements to accommodate parenting responsibilities.

  Most employers have not developed their systems and processes to a point where they could be confident dealing with such a request. Employers are entitled to refuse requests for flexible working arrangements on 'reasonable

© HopgoodGanim Lawyers April 2010

business grounds', but many employers are uncertain how these requirements fit within the context of their organisations.

The risk in responding improperly, or not at all, to a request for a flexible work arrangement is exposure to a variety of potential claims, ranging from prosecution by the Ombudsman for a civil penalty through to any one of several different types of claims alleging unlawful discrimination.

The challenge for employers is to develop a process for considering and responding to requests for flexible work arrangements that is consistent with both the new safety net requirements, and also with the ongoing labour requirements of their business.

It would be a mistake to leave the issue until a request is made, in the hope that you will be able to deal with it 'on the fly'.

- **Inconsistency between pre-existing statutory agreements and the requirements of the National Employment Standards**

  Employers who had a pre-existing collective/enterprise agreement, AWA or ITEA applicable to any of their employees before 1 January 2010 will, for those employees, have some degree of 'insurance' against non-compliance with the new system.

  With two exceptions, such agreements will usually continue to operate according to their terms until terminated or replaced with a new enterprise agreement in the new system.

  The first exception is that base rates of pay prescribed by a modern award that would apply if it wasn't for the agreement will prevail over any lesser pay rates prescribed by the agreement.

  The second exception is that agreement provisions which fall short of the requirements of the *National Employment Standards* will be superseded by, and operate subject to, those requirements. In many cases, applying this exception will be relatively straightforward. In other cases, however, it might be more difficult to determine whether agreement provisions are in fact consistent with the requirements of the *National Employment Standards*. In those cases the legislation prescribes some guidance on how to conduct the comparison exercise.

  Employers operating under statutory agreements made before 1 January 2010 need to do whatever is reasonably required to be sure that, when implementing those agreements, they are acting consistently with current safety net requirements.

These matters are additional to the range of other reforms bought into effect by the Fair Work legislation. Notable among these are changes to the collective bargaining rules, expansion of the unfair dismissal jurisdiction, and the introduction of new rights of action for employees subjected to a variety of 'adverse action'.

Adapting to the new system is a challenge for all employers and will take time. So far as modern awards are concerned, employers will be helped to some extent by the transitional arrangements prescribed by the awards. These include the current ability for the absorption of award payment obligations into over award payments, and the deferred commencement of changing wage rates over a period of three years commencing 1 July 2010.

For more information about the Fair Work reforms, please contact HopgoodGanim's Industrial and Employment Law practice.

The contents of this paper are not intended to be a complete statement of the law on any subject and should not be used as a substitute for legal advice in specific fact situations. Hopgood Ganim cannot accept any liability or responsibility for loss occurring as a result of anyone acting or refraining from acting in reliance on any material contained in this paper.