

EMPLOYMENT BRIEFLY

REVIEW OF INDUSTRIAL RELATIONS IN SOUTH AUSTRALIA

Many readers will be aware that the new State Government has instituted a review into the South Australian Industrial Relations system. Terms of Reference were published, and the Co-ordinator of the Review, former Deputy President of the Industrial Relations Commission of South Australia, Greg Stevens, has released a Discussion Paper with respect to the Review.

People who wish to contribute to the Review are invited by Mr Stevens to make submissions to his office by no later than 31 July 2002.

A copy of the Discussion Paper is available on the Internet at <http://www.eric.sa.gov.au>.

Through our association with Business SA and the Local Government Association we are aware that both these industry bodies are preparing submissions, and no doubt, you may provide input by contacting these organisations, if relevant to your industry.

For further information about issues covered in this article, please contact Ian Colgrave on +61 8 8210 1203 or E-mail icolgrave@normans.com.au.

REVIEW OF WORKERS COMPENSATION AND OCCUPATIONAL HEALTH, SAFETY AND WELFARE

Similar to the above, the Government has created Terms of Reference for a Review of the Workers Compensation and OH&S systems in South Australia.

Mr Brian Stanley, the former President of the Industrial Relations Court and Commission and Workers Compensation Tribunal has been appointed to direct the review.

He will be assisted by Ms Francis Meredith (a former Workers Compensation Review Officer) and Mr Rod Bishop.

A Discussion Paper has not yet been published, but will no doubt follow shortly.

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PROBATIONARY PERIODS – DOES SIZE MATTER?

Yes.

Many readers would be aware that pursuant to both the Federal and State industrial relations legislation, probationary employees are excluded from making applications alleging harsh, unjust or unreasonable dismissal provided that the probationary period is of a reasonable length (having regard to the type of employment) and that it is also determined prior to the employment commencing.

A recent decision of the Australian Industrial Relations Commission (relating to an application pursuant to the Workplace Relations Act) involved consideration of a probationary period.

Commissioner Grainger noted in the decision that probationary periods are to be judged on a "case by case basis".

The employee in question was a Senior Technical Representative. His contract of employment included a six-month probationary period.

The Commission found that due to the high level and nature of the employee's duties, which covered a wide range of activities, a five-month probationary period was reasonable in order to allow his employer time to be satisfied of his competence. (See *Conway v Norman G Clark (Australasia) Pty Ltd*).

It is, in light of this decision, highly conceivable that senior management employees could be engaged with a six-month probationary period, and that such a period would be found to be reasonable.

On the other side of the coin, base level process workers on a production line could conceivably only have a reasonable period of probation of two weeks or less.

Therefore, employers should consider the nature of the employment for which they are setting the probationary period.

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CONTRACTING OUT/TAKEOVERS – TRANSMISSION OF AWARD CONDITIONS

The “transmission of business” provisions in the Workplace Relations Act (Section 149(l)(d) and 170MB) provide that an Award continues to bind a “successor, assignee or transmittee” of a business or part of a business when there is a “substantial identity” between the activities carried out by the previous employer and those now carried out by the transferee. This would include any purchaser of a business or contractor operating part of a principal’s business.

However, the introductory words in Section 149 state that the provisions of that section are “subject to any order of the Commission”. This, Senior Deputy President Lacy found recently, meant that the AIRC has power to make an order that particular Awards did not bind transferees or transmittees for a particular period.

However, the particular employer in this case had strong reasons why the transmitted Award(s) were inappropriate for its business circumstances. They were that the Award(s) in question would not normally be binding upon them and their activities; such activities being of the type transferred, and that they normally engaged employees via AWA’s.

(See *Rans Management Group Pty Ltd (2002) 51AILR*).

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PAID MATERNITY LEAVE: THE DEBATE

As most readers would be aware, the Federal Government is facing mounting pressure to introduce a national paid maternity leave scheme, after a report released by Federal Sex Discrimination Commissioner Pru Goward was released in April this year. The paper entitled “Valuing Parenthood: Paid Maternity Leave –

Interim Options Paper” revealed that Australia is lagging behind other developed countries in its attitudes towards paid maternity leave.

The report has sparked debate across various sectors of the community, with arguments being presented both for and against the proposed scheme. Ms Goward argues that a national paid maternity leave scheme is needed to tackle women’s relative disadvantage in the workforce and the declining birth rate.

The real source of debate, however, is the question of who will pay. Ms Goward’s report outlines a number of funding models for paid leave, including a fully government-funded scheme, an employer levy and a superannuation-type scheme based on contributions from government, employers and employees. The Democrats introduced a private member’s Bill into Federal Parliament seeking to establish a government-funded maternity leave scheme on 16 May 2002. The scheme includes 14 weeks pay at the federal minimum wage rate for women working in the private sector.

The debate will no doubt continue, and it remains to be seen whether Australia will follow suit, and join the remainder of the OECD group (with the exception of the United States) and introduce a scheme of paid maternity leave.

The paper “Valuing Parenthood: Paid Maternity Leave – Interim Options Paper” can be downloaded from http://www.humanrights.gov.au/sex_discrimination/pml/index.html .

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VOLUNTEERS PROTECTION ACT 2001

Late last year, in recognition of the role of volunteers, the South Australian Parliament passed the *Volunteers Protection Act 2001*. The Act came into operation on 15 January 2002.

Parliament recognised that volunteers make a major contribution to the South Australian community and essentially wanted to foster and encourage volunteering in the community. Parliament also recognised that a major disincentive to volunteering was the prospect of serious personal liability for damages and legal costs in proceedings for negligence.

The introduction of this legislation protects volunteers from personal liability for negligence of a volunteer who works for a community organisation, and transfers the liability that would, apart from this Act, attach to the volunteer to



the community organisation. The Act also limits the right to bring proceedings against the volunteer personally and, as a consequence, reduces the risk of a volunteer incurring legal costs as a result of voluntary work.

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NOT SO PRIVATE

Readers may recall from the May edition of the Employment Briefly that some employee records are exempt from the strict regulations of the Privacy Act, the reason being that employee records are regulated by workplace relation's law and practice.

However, in an announcement made by the Federal Privacy Commissioner in May 2002, it was emphasised that this exemption is limited to acts and practices directly related to current and former employment relationships.

There has been a suggestion that employers use confidentiality clauses when exchanging references about past or prospective employees, as a means of protecting themselves against unwanted litigation from unsuccessful job applicants, who feel that their privacy has been abused during the selection process.

Whilst it is not clear whether the use of such clauses will, in fact, enable an employer to avoid access obligations under the Privacy Act, the Federal Privacy Commissioner has expressed his "disappointment" at the proposed use of such confidentiality clauses.

He has stated that the Privacy Act starts with the intention to provide individuals with access to personal information about them. For employers, this means that where the employee records exemption does not apply and it is unclear how the law of confidentiality applies to the specific circumstance, organisations may run the risk of breaching the Privacy Act if they rely on the law of confidentiality, as a means of avoiding their obligations to provide access under the National Privacy Principles.

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