



Productivity Commission Submission

Transfer of business

Allens acts in numerous transactions every year that involve employees transferring from one employer to another. These transactions range from small business asset sales and discrete outsourcing and insourcing of work, to very large privatisations of government entities. This experience makes us uniquely placed to comment on the effectiveness of the transfer of business rules in the *Fair Work Act* (the **Act**).

In our experience, most transactions involving the transfer of assets will include a requirement that the purchaser make offers of employment to the vendor's employees on terms and conditions that meet the requirements in section 122(3) of the Act. This is the default commercial position and if it is not adopted it is usually only because there is a significant imbalance in the parties' bargaining power (eg if the vendor is insolvent).

Where the default commercial position is adopted, the parties to the sale rely on the transfer of business rules to facilitate a seamless transfer of employment from the vendor to the purchaser. This is ideal for transferring employees, who remain in employment with minimal disruption.

The existing transfer of business rules are adequate for simpler transactions. However, complex transactions can involve large and complicated corporate groups. Even though the parties want the transfer of business rules to apply, the size and complexity of the corporate group can make this difficult. Parties can incur significant expense ensuring that the transfer of business rules apply, both in advisory costs and in the costs associated with remodelling the preferred corporate structure.

In our submission, if the parties want the transfer of business rules to apply, this is an employee protection that should be easily available to them. We recommend that the Productivity Commission consider two solutions to this problem:

- allow one of the parties to a transaction to obtain a 'pre-approval' or ruling from the Fair Work Commission (**FWC**) or Fair Work Ombudsman (**FWO**) that the proposed transaction triggers the transfer of business rules.

This could operate similarly to the ACCC's merger-clearance or the ATO's private rulings on proposed structures; or

- include a new 'connection' for the purposes of section 311(1)(d) of the Act – an order by the FWC that the old employer and new employer are relevantly connected. The FWC could make the order, regardless of whether any of the other existing connections in s311 were satisfied as part of the transaction. In making the order, the FWC could take into account matters similar to those in section 319(3) of the Act.

General protections

Allens broadly supports Draft Recommendation 6.2 concerning modifying the meaning and application of a workplace right. However, in our submission, the protection of a workplace right to make a 'complaint or inquiry' should be limited to complaints or inquiries that:

- arise from a statutory, regulatory or contractual provision (ie complaints that have a basis in an actual right or entitlement); and
- are directly related to the employee's employment.

Our submission is based on our experience and the broad interpretation of the protection in recent decisions.

Allens has acted in a number of general protections disputes in which the alleged complaint arose from within the workplace but was not directly connected to the complainant's employment. Most of the complaints relate to the employee's concern about whether other employees are complying with laws or the employer's policies.

Courts have adopted differing approaches when determining whether a complaint or inquiry is protected. However, numerous cases such as *Evans v Trilab Ltd* [2014] FCCA 2464 suggest that only an indirect nexus with a person's terms or conditions of employment is required for the complaint to be protected. This broad interpretation of the protection gives an almost limitless scope to what can be a complaint in relation to employment. An example of this broad approach is the case of *Henry v Leighton* [2015] FCCA 1923, where the court accepted that a complaint

about an employer's financial reporting and compliance with legislation could be protected.

Allens endorses Draft Recommendation 6.3.

Allens also submits that the Act should be amended to clarify the protection from discrimination because of a person's political opinion. In several recent cases, the courts have adopted an extremely broad interpretation of 'political opinion'. For example, in *Henry v Leighton*, the court found that an employee's complaint about the employer's compliance with legislation was a 'political opinion' because it concerned how corporate citizens conduct themselves in society. In our view, the protection should not go further than anti-discrimination legislation, which protects a person's political belief or activity only where it bears on the role and structure of government.

Unfair dismissal

The Productivity Commission draft report records that there is good statistical evidence that the findings in unfair dismissal cases have '...allowed some inconsistencies to creep into judgments', noting also that the Act sometimes compels members of the FWC to '...give too much weight to procedure over substance...'

Allens agrees that consistency of decision-making by the FWC, including in unfair dismissal cases, is highly desirable. However, Allens is not optimistic this can be achieved based on the current detailed criteria within section 387 of the Act for the identification of harsh, unjust or unreasonable dismissals. For that reason, Allens advocates a fundamental change to the current test when considering the 'harshness etc.' of a dismissal. In particular, Allens recommends:

- (a) that 'unfair dismissal' be re-framed as 'unreasonable dismissal'; and
- (b) FWC's review of an employer's decision to dismiss should not involve a determination of whether the dismissal was 'harsh, unjust or unreasonable'. Instead, the test should be whether the employer's decision was, in all the circumstances, so unreasonable that no reasonable employer could have made it.

The effect would be to redirect the relevant enquiry, from a mandatory requirement to take into account each of the criteria in s387 of the Act to the extent they are relevant, to a more practical enquiry regarding whether the employer's decision was unreasonable in the circumstances.

Allens expects this approach would have the advantage of focusing attention on whether the dismissal was warranted in the circumstances of a particular case. This would avoid the risk of weight being placed unduly on procedural

aspects or other matters, with reference instead to a relative standard being applied by other employers.

We expect that a body of precedent would develop quickly, giving guidance to employers and practitioners alike. We consider that the wide experience of FWC members with employers, irrespective of FWC members' backgrounds, is more likely to result in similar outcomes in similar factual circumstances than application of the current s387 criteria.

To further direct the relevant enquiry, Allens also:

- (a) submits that procedural defects in dismissal procedures should only be a relevant consideration in circumstances where a different decision would have been reached had the procedural defect not been present; and
- (b) supports Draft Recommendation 5.3 to remove the emphasis on reinstatement as the primary goal of the unfair dismissal provisions of the Act. The observation by the Productivity Commission, that the remedy is '...rarely achieved and not necessarily even in the interests of the parties involved', is apposite and accords with our experience.

Finally, in Allens' submission:

- (a) Form F4 (Unfair Dismissal Application) should be amended to require applicants to provide more detailed information regarding the circumstances of their termination; and
- (b) the current focus by conciliators on resolution of the claim should not preclude or limit discussion of the merits of the claim, having regard to the more detailed information provided in the (amended) Form F4 in a particular case.

For example, Form F4 might also include questions regarding whether the applicant was under a performance-improvement process or investigation for misconduct in advance of their termination, or whether they had previously been warned or counselled about their performance or conduct. Form F72 (Order to Stop Bullying Application) might provide an appropriate starting point when considering what further information could be sought. This will have the effect of ensuring that discussions at mediation may focus with more precision on the merits of the dismissal, consistent with the Productivity Commission's Draft Recommendation 5.1.

Enterprise agreements

Notice of Employee Representational Rights

Allens supports the Productivity Commission's Draft Recommendation 15.1 to give the FWC discretion to approve an enterprise agreement despite deficiencies in the notice of employee representational rights (**NERR**), in circumstances where employees are not disadvantaged by the deficiencies.

In a number of recent decisions, the FWC has required strict compliance with the NERR form and content requirements prescribed by the Act.¹ Many of our clients would fall foul of these procedural requirements if they did not seek our advice and they are often surprised about how strictly they must comply with them.

In many cases, a procedural defect, such as adding extraneous information or omitting a minor detail, will have no material impact on the substance and effect of the NERR. Despite this, failure to satisfy the requirements will render the NERR invalid, so that the FWC cannot approve the enterprise agreement. This may cause significant delays in the bargaining process, or require the parties to recommence bargaining, even after an application has been made for the FWC's approval. In our submission, rejecting an otherwise acceptable enterprise agreement is unjustified in circumstances where the procedural defects have had no material impact.

Allens supports the Productivity Commission's practical recommendation to give the FWC the discretion to approve an agreement despite any procedural defects, provided there is no disadvantage to employees.

Greenfields agreements

Allens supports the Productivity Commission's Draft Recommendation 15.3 that the Act include an option for the nominal term of a greenfields agreement to match the life of the greenfield project.

Any amendment to the Act would need to be carefully drafted to ensure that the nominal term could extend beyond four (or five) years only if the greenfields agreement was for a project with a limited lifespan, rather than for an ongoing business, activity or undertaking.

The proposed reform would ensure that a project's timetable and profitability would not be affected by industrial action. In particular, the reform would ensure that

projects are not interrupted at critical and late stages when there is an imbalance in bargaining power. The proposed reform would eliminate the risks and cost associated with bargaining that are likely to deter investors and inhibit the viability of greenfields projects.

Allens also supports the Productivity Commission's Draft Recommendation 15.7, which proposes that, after three months of bargaining, parties to a greenfields agreement who have not reached a negotiated outcome be able to:

- request that the FWC undertake 'last offer' arbitration; or
- submit the proposed agreement for approval, with a nominal term of only 12 months.

Termination of agreements

The Productivity Commission has not made any recommendations regarding the termination of enterprise agreements that have passed their nominal expiry date.

The FWC and the Federal Court have recently overturned the line of authority that made it almost impossible to unilaterally terminate an enterprise agreement during bargaining for a replacement agreement. However, the FWC has thus far approved the unilateral termination of an expired agreement only in exceptional circumstances (such as where an employer provides appropriate undertakings, the agreement includes unusually restrictive terms, or where the negotiations for a new agreement have been protracted and fruitless, etc).

This historical approach makes it extremely difficult for employers to negotiate and implement efficiency improvements in a replacement agreement. Keeping an expired agreement in operation may not be appropriate in circumstances where its terms are no longer commercially viable. For example, one of our clients had an expired agreement that contained wage rates and allowances that were well above market, and that therefore precluded our client from working on a number of major projects. Rather than implement redundancies, our client sought to bring down its pay rates in its draft replacement agreement (while still remaining above the rates prescribed by the relevant award). The parties were bargaining for months, but the relevant unions and employee bargaining representatives refused to agree to new rates. Our client determined that, given the FWC's historical approach, it was not worth trying to terminate its expired enterprise agreement.

Allens submits that the Productivity Commission consider the following options in response to this issue:

- allow a party to an enterprise agreement to apply to the FWC for the automatic termination of an enterprise agreement after its nominal expiry date; or

¹ See, for example, *Peabody Moorvale Pty Ltd v Construction, Forestry, Mining and Energy Union* [2014] FWCFB 2042, *Shape Shopfitters Pty Ltd re Shape Shopfitters Pty Ltd Enterprise Agreement 2013-2017* [2013] FWC 3161 and *Methodist Ladies' College and Independent Education Union of Australia & Capewell* (2015) C2015/4657 (28 July 2015).

- (b) introduce additional criteria into section 226(b) of the Act to require the FWC to consider the economic circumstances of the employer or market conditions in determining whether it is appropriate to terminate an enterprise agreement.

Industrial action

Allens supports the Productivity Commission's Draft Recommendations 19.3 and 19.4 that:

- (a) employers be allowed to stand down employees without pay if they do not go ahead with notified industrial action; and
- (b) the FWC have the discretion to withhold a protected action ballot order for up to 90 days where it is satisfied a group of employees has previously used repeated withdrawals of protected action as an industrial tactic.

The difficulties faced by employers who receive notice of industrial action was illustrated in *AMIE v JBS Australia Pty Ltd* [2014] FWC 2254. The employer, who operated a meatworks plant, received notice of multiple stoppages of work during different shifts on the one day. For reasons relating to animal welfare, food safety, product quality and health and safety, the employer considered there was no option but to defer delivery of stock for the day. The meatworks plant was closed for the day, as there was no work for the employees to perform.

The FWC ruled that the closure was unprotected industrial action by the employer. This was because the threatened industrial action by the employees had not yet occurred. Had the employer instead waited for the first stoppage to commence, and then shut down the plant, the shutdown would have constituted employer response action. This clearly left the employer in an invidious position of having to keep the plant open, and choosing between:

- (a) allowing for the delivery of stock to go ahead, and be faced with animal welfare and food safety issues, should the stoppages occur; or
- (b) halting the delivery of stock, and risk having a workforce with no work to do for the day, if the stoppages did not go ahead.

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To address this issue, Allens supports the Productivity Commission's Draft Recommendations 19.3 and 19.4.

Right of entry for safety reasons

The Productivity Commission has not made any recommendations regarding right of entry for WHS reasons.

Allens submits that there should be a federal regime governing right of entry for suspected breaches of WHS laws. This regime could include requirements that:

- (a) at least 24 hours' notice of entry be given, unless the WHS entry permit holder can prove there is an imminent risk to safety;
- (b) WHS entry permit holders have a reasonable suspicion that a contravention is occurring, and that this suspicion be explained to the occupier before entry; and
- (c) the WHS entry permit holder prove their suspicion was reasonable in any prosecution.

The current state and territory WHS right of entry regimes are inconsistent and particularly impact on companies engaged in the areas of construction and major projects. WHS entry permit holders are able to (and, in our experience, do) misuse the right of entry provisions for industrial purposes. This is due to there not being:

- (a) a requirement for notice of entry before entering a workplace in any state or territory (other than Queensland, although the Queensland State Government has now introduced a Bill to remove that requirement);
- (b) in Western Australia, a requirement that WHS entry permit holders have a reasonable suspicion that a contravention is occurring or has occurred; or
- (c) any mechanism for the occupier to test the validity or reasonableness of the permit holder's suspicion of a contravention. The only option available to the occupier is to refuse entry, and potentially breach the Act.

Allens submits that these issues would be addressed by our proposals above.