

May 2010 Newsletter

This newsletter deals with new Australian consumer law, Australian work visas and a brief FIRB update

NEW AUSTRALIAN CONSUMER LAW

On 14 April 2010, the Governor-General assented to the first part of the new Australian Consumer Law. A second, and larger, set of changes was introduced to Parliament in March 2010, but has not yet passed into law.

The most significant issue coming out of the first set of amendments is the potential for unfair standard form contract terms to be unenforceable.

Unfair Contract Terms

The unfair contract terms provisions void “unfair terms” in standard form contracts with consumers. The unfair term is rendered entirely void and has no further operation. There is no provision to rewrite the term in a reduced but fair way.

Under the new law, a term is unfair if:

- it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
- it is not reasonably necessary to protect the legitimate interests of the party who would be advantaged by the term; and
- it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

The law also gives examples of things that may be unfair, including terms penalising one party for breaches and not the other, and terms allowing one party to unilaterally vary the contract. One frequently discussed example is penalty fees, although penalty fees may already be problematic if not a genuine estimate of costs.

Given the risk of complete loss of the term when it is “unfair”, businesses should seek to review

their contracts and to soften terms which otherwise might be caught by the new law.

Civil Penalties under the Trade Practices Act

The changes made also include a civil penalties system (with the prosecution having an easier burden) and disqualification orders for a wide range of breaches of the *Trade Practices Act*. The prohibition on misleading and deceptive conduct is excluded from these penalties; however related provisions, such as the prohibition on false or misleading representations, are included.

A significant aspect of the new system is that penalties may be imposed even if the company believed in “facts” which would prevent there being a breach. For example, where there is a false representation, the company may have to pay the penalty even if it believed the representation was true. Depending on the provision breached, the penalties can be up to \$1.1million for corporations and \$220,000 for individuals.

Other Changes

Other changes in the first part of the new law include:

- disqualification orders for directors involved in some breaches of the Trade Practices Act;
- substantiation notices whereby the ACCC can require a company to substantiate any claims it has made;
- orders to pay consumers damages on the application of the ACCC;
- an infringement notice regime for breaches of the Act.

The unfair contracts provisions will commence at a future date, but no earlier than 1 July 2010. The other changes commenced on 15 April 2010.

Similar changes have been made to the consumer laws affecting financial services.

Response to ACCC enquiries

With the ACCC having greater powers, well managed businesses will be more proactive in ensuring knowledge by their staff of the trade practices and consumer laws, including by having appropriate training and compliance schemes. The existence of a training and compliance scheme will not only reduce the risk of breach, but may reduce the penalty where there is a breach.

Troy Rollo

Email: troy@parrycarroll.com.au

Phone: +61 2 8257 3177

Selwyn Black

Email : selwyn@parrycarroll.com.au

Phone :+61 2 8257 3113

MIGRATION LAW

Australian Work Visas (Subclass 457) – New Tests and Obligations

Subclass 457 visas allow an Australian company to employ a non-resident for a period of up to 4 years. Projections going forward suggest the total temporary and permanent migrant intake for the next 3 years will be 400,000 per annum, 457 visas will be vital for the ongoing growth of the Australian economy.

The changes affecting all new and existing 457 visa holders from 1 January 2010 can be summarised as follows:

- (a) rigorous sponsorship obligations with penalty provisions;
- (b) an obligation to pay market salary rates;
- (c) the terms and conditions of employment to be no less favourable to those of comparable Australian employees of the sponsoring company;

- (d) the obligation for market earnings not to be below the ‘temporary skilled migration income threshold’ (TSMIT);
- (e) employees not responsible for any costs associated with the visa;
- (f) training benchmarks, record keeping and monitoring.

Looking at some of the critical changes affecting both sponsors and visa applicants:

1. Sponsorship obligations

The employer will need to sign a declaration that they have read and accept the 9 legally enforceable categories of sponsorship obligations. A failure to comply with sponsorship obligations could result in fines of \$16,000 or 6 months imprisonment for individuals or fines of \$33,000 for companies and a ban on future sponsorships or administrative sanctions.

The employing sponsor can no longer recover all or any part of the costs involved in sponsorship including:

- (a) recruitment costs;
- (b) migration agent costs;
- (c) sponsorship or being a sponsor;
- (d) travel costs;
- (e) relocation and removal costs.

2. Market Rates

Employees earning less than \$180,000 per annum will need to show that their earnings **agreed in advance** are at least equivalent to an Australian worker undertaking the same work in the employer’s business at the same location. Earnings include base rate of pay, payments by direction i.e. additional superannuation, living away from home allowance (**LAFHA**) and the value of pre-agreed non-monetary benefits such as a motor vehicle. However, they will not include payments of amounts which cannot be determined in advance (such as performance based bonuses or commissions), reimbursements, fringe benefit tax payments and the like.

Base rate of pay means base wage for the position for ordinary hours (i.e. 38 hours) of work not including:

- incentive base payments and bonuses.
- loadings;

- monetary allowances;
- overtime or penalty rates;
- any other separately identifiable amounts.

The earnings must be above the TSMIT currently \$45,220pa. If the market earnings fall below the TSMIT then the nomination may fail.

These matters can be proved by an offer of an employment, employment contracts with existing workers, payslips of comparable employees, pay scale information, surveys, etc.

If there is no equivalent Australian worker undertaking the same work in a sponsor's workplace, the visa applicant must then look to the industrial award, enterprise agreement or labour agreement that would apply to the nominated position. This could be extremely difficult where say a renowned greenkeeper may attract a market salary of \$150,000 whereas the award provides for the highest level of classification of \$35,308 per year, being below the TSMIT.

Sponsors are obliged to ensure that the market rate is adjusted up as required. The salary cannot fall without a new nomination being lodged.

3. Terms and Conditions

Any contract of employment will need to ensure that all of the FairWork Australia standards together with the new national industrial awards introduced 1 January 2010 are met.

Sponsors who are parties to approved labour agreements must pay their overseas workers in accordance with the terms of any labour agreement for that workplace.

The Department of Immigration and Citizenship (DIAC) will check to ensure that the offer of employment and any draft contract is no less favourable in terms of the overall package than the earnings of the comparable Australian employee in that workplace. Issues such as taxation rates and other guaranteed grossed up amounts of earnings will need to be taken into account.

4. Health Insurance

Employers are no longer obliged to cover the health costs of employees (and/or dependants) sponsored after 14 September 2009. All new visa applicants must satisfy DIAC that they have and

will maintain suitable private health insurance whilst they are in Australia on a 457 visa. If the visa holder is eligible for Medicare, then obtaining a Medicare card is considered sufficient. A failure to do so could mean that the visa could be rejected or cancelled. To the extent that the person has not yet arrived in Australia, they will need to have travel insurance and subsequently enrol in Medicare or private health insurance upon arrival (unless an Irish citizen).

There is an ongoing responsibility to continue to meet the health costs incurred in a private hospital of sponsored employees and their sponsored family members who are on 457 visas granted before 14 September 2009. DIAC says that this responsibility follows the visa holder to any new employer.

5. Training Benchmarks

An employer applying for approval under the 457 visa program must demonstrate their contribution and commitment to the training of Australians. The benchmarks are currently being developed by DEEWR. There are currently two benchmarks:

Training Benchmark A – Industry Training Fund. Paying the equivalent of at least 2% of recent payroll expenditure to an industry training fund i.e. TAFE or Sydney University.

Training Benchmark B - Evidence of spending the equivalent of 1% of payroll on training for their employees who are Australian citizens or permanent residents. The key requirement is that training is formal, structured and independently verifiable. Whilst on the job training will count towards this benchmark it must be part of a structured learning and development program, with identified learning outcomes. It must be relevant to the applicant's business activity. Where apprenticeships or traineeships are utilised 100% of the salary can be counted towards the training benchmark.

For further information on migration issues contact.

Chris Perry

Email: chris@parrycarroll.com.au

Phone: +61 2 8257 3175

FIRB

Back to the future

The Government has moved to limit one of the FIRB concessions for residential purchases announced during the GFC. Temporary residents are now required to obtain FIRB approval before buying residential real estate.

Selwyn Black

Email : selwyn@parrycarroll.com.au

Phone :+61 2 8257 3113
