Statutes Amendment (South Australian Employment Tribunal) Bill 2016

Recently, the Attorney General and Minister for Industrial Relations, John Rau, notified the South Australian Parliament of the Labor Government's intention to introduce the above Bill.

In essence, the Bill significantly expands the jurisdiction of the South Australian Employment Tribunal ('the SAET'). The Minister had previously issued a Discussion Paper indicating a number of different jurisdictions that he believed would be best dealt with by the SAET.

Largely, the proposed amendments simply formalise and transfer jurisdiction from the old Industrial Relations Court and Industrial Relations Commission to the SAET. A number of sitting members of the SAET already exercise concurrent appointments in those other jurisdictions. From a practical perspective, therefore, there is not a lot of difference brought about by the proposed changes to the jurisdiction.

However, there are some proposed amendments that employers, and those who advise them, need to be aware of if the Bill passes through the Parliament in its current format.

Criminal jurisdiction

Part 2 of the Bill amends the *South Australian Employment Tribunal Act 2014* and elevates the SAET to what is called a Court of Record. A Court of Record means that the decisions of the SAET can be used as precedents in future cases. The SAET, when it sits as a Court, will also be known as the South Australian Employment Court, which will be relevant for some of the other jurisdictions that are then transferred to the SAET.

The SAET will now have both a civil and a criminal jurisdiction. The criminal jurisdiction will mainly deal with health and safety prosecutions, which previously have been dealt with by the Adelaide Magistrates Court (albeit the jurisdiction is in fact exercised by Industrial Magistrates of the Industrial Relations Court sitting as Magistrates of the Adelaide Magistrates Court).

The SAET will be able to deal with summary, or minor indictable offences, but not major indictable offences. In the main, offences under the *Work Health and Safety Act 2012* ('the WHS Act'), are summary offences, but if the Court determines that a defendant found guilty of a major indictable offence should be subject to a fine exceeding $300,000.00, then the Court may remand the defendant to appear for sentencing in the District Court. It would appear the proposed amendments do not change that situation. The SAET cannot impose a fine that exceeds the maximum fixed by the relevant Act or $300,000.00 (whichever is the lesser) and the Court cannot impose a sentence of imprisonment that exceeds the maximum fixed by the relevant Act or two years.

That level of fine or potential sentence of imprisonment generally would only cover Category 1 offences under the WHS Act, which may have to be referred to the District Court for sentencing. There is also the ability for a defendant to elect for a jury trial at the District Court. We expect that in the difficult area of industrial prosecutions, most persons or companies would still want to have the matter dealt with by a Magistrate or a Judge with specialist knowledge of the area, given such prosecutions often involve difficult scientific and technical information.

The criminal jurisdiction of the SAET will also encompass offences against the *Return to Work Act* ('the RTW Act'). Therefore, for example, a fraud prosecution under the RTW Act would now be dealt with by the South Australian Employment Court, rather than the Magistrates Court.

Industrial jurisdiction

The proposed amendments abolish the Industrial Relations Court and Industrial Relations Commission and transfer those current jurisdictions to the South Australian Employment Court. The Court is elevated to a similar level to the Supreme Court at first instance, with the President of the Court now being a Judge of the Supreme Court. The current Deputy Presidents then become Judges of the District Court (although a number of them already hold concurrent appointments at the District Court).

The next major change brought about by the proposed Bill is the insertion of Part 2, Division 6, into the SAET Act. **This vests jurisdiction to hear and determine questions arising under contracts of employment to the South Australian Employment Court**, if those contracts are covered by the *Fair Work Act 2009 (SA)* ('the SA FW Act'). In the main, State Government and Local Government employees are still covered by the SA FW Act. Therefore, if there is any issue arising out of a contract of employment, such as a claim for damages with respect to a breach of contract of employment, or claims to recover monies owed under a contract of employment, then those matters will now be dealt with by the South Australian Employment Court.

Previously some of those matters, such as a claim for damages arising out of a breach of contract of employment, had to be dealt with by the District Court. Neither the Industrial Relations Court, or the Industrial Relations Commission had jurisdiction to deal with those types of claims, which are often brought by higher paid executives whose level of remuneration exceed the limits set by the SA FW Act. The Court will also have an expanded ability to order specific performance or injunctions, if those forms of judicial relief are appropriate.

The monetary jurisdictions of the old Industrial Relations Court will be transferred to the South Australian Employment Court, for example claims for underpayment of wages. Monetary claims under the SA FW Act, any Award or Enterprise Agreement, or contract of employment will now be dealt with by the Court. The Court will also be able to deal with matters arising under the Commonwealth legislation, affecting Federal system employees as well.

For local government employers this means any employment related disputes involving a local government employee will now be dealt by the South Australian Employment Court, rather than the Industrial Relations Court or Commission. The provisions that apply to such dispute remain the same. Therefore, we do not see there being any great change brought about by the proposed amendments.

The processes and procedures that will apply appear to be no different to those that currently apply to the Industrial Relations Court and Commission. It is not known whether the current Commissioners will continue to hold a commission with the SAET. They may be transferred to the SAET as a supplementary panel member.

In its industrial relations jurisdiction under the SA FW Act, the SAET will have jurisdiction to adjudicate on all rights and liabilities arising out of employment, approve Enterprise Agreements, make Awards and determine industrial matters. It also has jurisdiction to settle and resolve industrial disputes and interpret Awards or Enterprise Agreements. In that regard, it will be no different to the current Industrial Relations Commission. The bulk of the proposed changes in Part 4 which amends the SA FW Act simply delete references to the Commission and the Industrial Relations Court and insert reference to the SAET.

There is however, **one major change** to the SA FW Act in the Bill. That relates to the insertion of sections 219A to 219D. Section 219A establishes the role of an Inspector appointed by the Minister under the SA FW Act.

The Inspectors will have the function of investigating complaints of non-compliance with the SA FW Act, Enterprise Agreements and Awards, to conduct audits and inspections regarding compliance with

the Act, Enterprise Agreements and Awards, to conduct promotional campaigns to improve awareness of people's rights within the workforce, and to do other things that will encourage compliance.

Under section 219C of the SA FW Act an Inspector has power to enter any workplace, inspect and view any work, process or thing in the place and question a person in the place on a subject relevant to employment or an industrial matter. An Inspector must produce his identity card for inspection by the occupier and can require the production of timebooks and pay sheets. The employer is obliged to facilitate, as far as practicable, the exercise by the Inspector of powers under the section. A person is not to hinder or obstruct an Inspector in the exercise of his or her powers, refuse an Inspector entrance, refuse or fail to truthfully answer a question put to them, or comply with the requirement of an Inspector acting under this section. There is a penalty for any a breach of the section.

Under section 219D of the SA FW Act, if the employer fails to comply with a provision of this Act or of an Award or Enterprise Agreement, the Inspector can issue a Compliance Notice requiring the employer to take specified action to remedy the non-compliance. An employer who fails to comply with that is guilty of an offence and there is a penalty applicable of $3,250.00. An employer can apply to the SAET for review of a notice issued under this section.

These provisions may have impact on employers where there are industrial issues arising at a particular site and an Inspector might be called in to investigate an alleged non-compliance with the SA FW Act or a particular Enterprise Agreement or Award. The Inspectors seem to be similar to a SafeWork SA inspector who has power to investigate a health and safety issue.

Additional civil jurisdictions

The SAET will also have additions to its civil jurisdiction. *It will have exclusive jurisdiction, sitting as the South Australian Employment Court, to determine common law claims under the RTW Act and any recovery claims under the said Act*. Currently those actions are brought at the District Court or Magistrates Court depending upon the monetary amount of damages being sought.

The South Australian Employment Court will also be able to apportion damages and contribution as between tortfeasors/wrongdoers. Therefore, if the employer is sued under a common law claim for negligence and another tortfeasor/wrongdoer is also sued, the Court will have the ability to assess and apportion liability as between more than one defendant. Previously the old Workers Compensation Tribunal could deal with a statutory recovery action, but did not have jurisdiction to deal with contribution as between tortfeasors/wrongdoers.

The South Australian Employment Court will also now exclusively deal with actions involving dust diseases. Currently, those actions are filed at the District Court, but Judges of the Industrial Relations Court are dealing with them if they hold joint commissions with the District Court. The Court will now have exclusive jurisdiction to deal with them, but that is really a cosmetic change at best.

There a number of other Acts which are amended by the proposed Bill. There are amendments to the *Long Service Leave Act 1987* which would vest jurisdiction regarding any dispute over long service leave in the SAET, as opposed to the Industrial Relations Commission.

Issues regarding training contracts will also be dealt with by SAET under the *Technical and Further Education Act 1975*. Currently, there is a specific Board that deals with issues that arise with apprentices and trainees. Therefore if an employer wishes to terminate the employment of a trainee/apprentice, it will now be dealt with by the SAET rather than the Board.

In essence, we do not see a lot of difference by the proposed amendments other than some rationalisation of a number of different jurisdictions into one body.

In conclusion, the only real major amendment that may be of concern out of all of the above is the appointment of Inspectors under the SA FW Act, and the powers that come with that. We suggest that if employers are concerned about that issue they should consider carefully sections 219A to 219D of the SA FW Act (contained in section 48 of the Bill) and whether any submissions need to be made in that regard via their appropriate representative body.