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The New Fair Work Regime

The head of Holding Redlich's national employment law practice, Stephen Trew, gives practical advice on how the screen production industry can prepare for Australia's new employment law regime.

Introduction

Just when employers were getting used to the current employment law regime it will be changing and they will now need to stop singing the "WorkChoices" tune and change to the "Fair Work" tune. On 4 December 2008 the Fair Work Bill 2008 (**Bill**) was passed by the House of Representatives and is currently before a Senate Committee. It is expected to be voted on by the Senate in March or April this year with key provisions to commence on 1 July 2009.

When the Bill is enacted it will introduce some significant changes to how employers in the screen production industry will need to conduct their employment arrangements.

New Modern Awards

While most screen producers will be familiar with the applicable SPAA agreements, many may not realize that there are federal awards which underpin many of these agreements including, for example, the Entertainment and Broadcasting Industry – Motion Picture Production Award 1998. This award forms the basis of SPAAs Motion Picture Production Agreement with which producers will be familiar.

The Australian Industrial Relations Commission is currently going through a process of modernizing the awards, including those relevant to screen producers. Exposure drafts of the new modern awards relevant to screen producers will be published by 22 May 2009 and will take effect from 1 January 2010. These awards will be revamped and updated and will apply to all employees and employers in the industry covered by the award.

These new awards are likely to mean that the current approach to using SPAA agreements will need to be revised and some changes as to how crew and talent are engaged will need to be introduced. Screen producers should be talking to SPAA about this and considering the anticipated content of the new awards.

Engaging employees

The new awards will all contain a right for the employer to enter into a flexibility arrangement with individual employees on terms described in the award. These are intended to facilitate the setting of individual arrangements for the carrying out of work while not causing the employee to be worse off overall in respect of any entitlements under an award. Subject to the comments above concerning the approach of SPAA, producers will need to consider the particular requirements of each production and determine whether individual flexibility arrangements will be needed. If so, they should enter into these at the commencement of employment although it is important to understand that such arrangements cannot be required as a condition of employment and the employee will have the right to terminate the arrangement.

Employees who are high income employees can contract out of any applicable new award. A high income employee is defined as earning $100,000 per year (which will be indexed from 27 August 2007). Unlike the flexibility agreements referred to above, entry into this form of agreement can be made a condition of an offer of employment.

National Employment Standards

The Bill also proposes to introduce, with effect from 1 January 2010, a set of minimum employment standards that apply to all employees, called the National Employment Standards (**NES**). They contain the existing entitlements to annual leave and the like but also include a right to redundancy compensation based on years of service. In addition, the NES will provide express rights for employees to request flexible working arrangements until children reach school age and an extension of the period of unpaid parental leave for up to a further 12 months.

These are all changes that producers will need to understand and have processes in place to adequately deal with when they commence.

Unfair dismissal

There are some significant changes proposed to the unfair dismissal regime, also commencing on 1 July 2009. Importantly, the scope of who can bring an unfair dismissal claim is changed to a simpler but potentially more expansive test. Many of the exclusions, for example, for employees subject to a probationary period, will be removed as well as the exemptions for small businesses and dismissals for genuine operational requirements.

Instead, the right will be based on employees satisfying the “minimum employment period” which is 12 months for a small business employer (less than 15 employees) or 6 months for all other employees. In some circumstances, the period of service as a casual will count towards this test.

For small businesses there will be an exemption if they comply with the Small Business Fair Dismissal Code. Also, while the “genuine operational requirements” exemption has been removed, it has been replaced with an exemption where the dismissal is a case of genuine redundancy. However, before the exemption will apply, it must first be established that it was not reasonable in all the circumstances for the employee to be redeployed in another role.

Finally, while the procedures that will apply have not been published, producers will need to be ready for a process that is much quicker and less formal, with many binding determinations being made on unfair dismissal claims at informal conferences rather than formal hearings.

Conclusion

The changes made by the Bill will affect all employers in the screen production industry and early assessment will help producers plan and avoid unwanted surprises.