

## Employment & Safety Alert November 2010

### Salary sacrifice in the world of modern awards

In the recent case of *Casey Grammar School v Independent Education Union of Australia* [2010] FWA 8218 (25 October 2010), Fair Work Australia (**FWA**) determined that it is lawful for a salary sacrifice arrangement to reduce an employee's pay to a level below the award minimum rate.

In that case, Casey Grammar School (**Casey**) objected to a teacher's request to salary sacrifice half of her salary (being \$40,265.64 per annum) into superannuation, because this would have resulted in the teacher receiving a gross annual salary below the minimum rate of pay under the Education Services (Teachers) Award 2010 (being \$54,850.00 per annum).

Casey also objected to the arrangement on the basis that it would be in breach of section 323 of the *Fair Work Act 2009* (Cth) (**FW Act**), which requires an employer to pay an employee for work performed in full, subject only to permitted deductions identified in section 324 FW Act.

Section 324 of the FW Act provides that a deduction is permitted if the deduction is authorised:

- in writing by the employee and is principally for the employee's benefit;
- by the employee in accordance with an enterprise agreement;
- by or under a modern award or a FWA order; or
- by or under a law or order of a court.

On considering this case, FWA held that Casey could agree to the teacher's request provided that it:

- was satisfied that the deduction was a permitted deduction in accordance with section 324 of the FW Act;

- complied with section 325 of the FW Act, which prohibits an employer from making unreasonable deductions; and
- complied with section 326 of the FW Act, which prohibits awards, agreements and employment contracts from requiring deductions which are for the employer's benefit and are unreasonable in the circumstances.

FWA found that, provided the teacher entered into a written agreement for the salary sacrifice arrangement, the conditions of section 323 of the FW Act would be met. When making this finding, it considered that salary sacrifice arrangements are usually for the benefit of an employee. FWA also referred to the Explanatory Memorandum to the *Fair Work Bill*, which confirmed this intention.

The decision confirms that employers and employees have the flexibility to salary sacrifice to the maximum extent possible to optimise any taxation benefits.

An earlier ruling by the Australian Taxation Office (**ATO**) had confirmed that a salary sacrificed superannuation contribution can be treated, for taxation purposes, as an employer contribution rather than 'salary or wages' even though it comes out of the employee's remuneration package. However, in order to avoid the benefits being classified as 'salary or wages' and thus subject to income tax, the arrangement between the employer and

employee must be made before the employee earns the income. Once income is earned, it becomes 'salary' and is subject to withholding tax.

To be tax effective for both the employer and the employee, the benefit would also have to be of a kind that is not subject to fringe benefits tax. Most employer superannuation contributions are not subject to fringe

benefits tax. Some types of employers (eg public hospitals) can offer tax effective salary sacrifice arrangements for broader types of fringe benefits.

Employers should take advice on the process of properly documenting and implementing salary sacrifice arrangements.

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