

# Employment NewsFlash

July 2010

## “Genuine Redundancy” clarified by FWA

The Full Bench of Fair Work Australia (*FWA*) recently clarified the definition of a “genuine redundancy” under section 389 of the *Fair Work Act 2009* (Cth) (*Act*) and held that a genuine redundancy can exist where tasks and duties of a particular employee continue to be performed by other employees but the ‘job’ of that employee no longer exists [1].

### The facts

After an internal review of the operations of Ulan Coal Mines Ltd (*Company*) in 2009 the Company decided that ancillary and intermittent functions (such as diesel servicing, bathhouse cleaning and stores and yard functions) would be outsourced to reduce internal headcount. As a result, 119 positions were made redundant (14 of which were non-trades-qualified mineworkers and 10 of whom applied to FWA for a remedy for unfair dismissal).

### First instance judgement

At first instance, Commissioner Rafaelli held that it was not a case of ‘genuine’ redundancy under the Act and the dismissals were unfair as the Company still required the work to be performed. The Company argued that the decision to make redundant positions held by workers with no trades qualifications was justified as those new out-sourced workers (who were able to conduct machinery repairs or maintenance) would reduce downtime and overall enhance operations. This, according to the Company, was a change in ‘operational requirements,’ as required under the Act. However, this argument was not accepted by the Commissioner who stated that this premise “does not meaningfully diminish the fact that the work performed by mineworkers (including by the applicants) remains essentially the same” and as such the requirement that the employer “no longer wished the jobs to be performed by anyone” was not met. This interpretation of the Act made it difficult for employers to establish genuine redundancy.

The Company sought permission to appeal Commissioner Rafaelli’s decision under section 604 of the Act which permits appeals on the basis of public interest. Permission was granted and the Full Bench of FWA heard the appeal on 10 May 2010.

### The appeal

The Full Bench found that:

- Commissioner Rafaelli had not drawn an “appropriate distinction in his reasoning between the ‘jobs’ of mineworkers who were retrenched and the functions performed by those mineworkers.”
- Proper weight had not been given to the changes in the composition of the workforce and that there was a surplus in the number of jobs the Company required.
- A genuine redundancy can exist “where tasks and duties of a particular employee continue to be performed by other employees but nevertheless the ‘job’ of that employee no longer exists.”

### Implications for employers

- This decision clarifies the meaning of ‘genuine redundancy’ under the Act and assists employers when making a decision to make a position redundant.
- Employers must remain particularly careful when considering redundancy and prudently adhere to the other requirements of the Act such as the requirement to consult with relevant employees, redeployment opportunities, anti-discrimination considerations and the Act’s general protections provisions.



Carol Mazzella - Senior Associate  
Sydney  
Phone: (02) 9228 9252

Carol\_Mazzella@tresscox.com.au



Edward Cregan - Graduate in Law  
Sydney  
Phone: (02) 9228 9357

Edward\_Cregan@tresscox.com.au

### TressCox Team Contacts

**Peta Tumpey**  
Partner  
Phone 61 2 9228 9363  
Peta\_Tumpey@tresscox.com.au

**Carol Mazzella**  
Senior Associate  
Phone 61 2 9228 9252  
Carol\_Mazzella@tresscox.com.au

**Nicholas Duggal**  
Special Counsel  
Phone 61 3 9602 9744  
Nicholas\_Duggal@tresscox.com.au

**Edward Cregan**  
Graduate in Law  
Phone 61 2 9228 9357  
Edward\_Cregan@tresscox.com.au

### www.tresscox.com.au

**Sydney**  
Level 20 135 King Street  
Sydney NSW 2000  
Phone 61 2 9221 2744  
Fax 61 2 9221 4988

**Melbourne**  
Level 9 469 La Trobe Street  
Melbourne VIC 3000  
Phone 61 3 9602 9444  
Fax 61 3 9642 0382

**Brisbane**  
Level 40 Central Plaza 1  
345 Queen Street  
Brisbane QLD 4000  
Phone 61 7 3004 3500  
Fax 61 7 3004 3599

### Global Affiliations - ALFA International

In order to provide legal services around the globe, TressCox maintains strong international affiliations with other law firms through our membership of ALFA International. Founded in the USA in 1980, ALFA International is the premier association of law firms in the world and is currently comprised of 120 independent member firms throughout North America, Latin America, Asia / Australasia and Europe. There is only one ALFA International member firm in each major jurisdiction in Australia, with TressCox being the member firm for New South Wales and Queensland. ALFA International’s basic objective, through its member firms, is to improve the quality and efficiency of legal services and to provide those services to clients at a reasonable cost.

Liability limited by a scheme approved under Professional Standards Legislation.

[1] *Ulan Coal Mines Limited v Henry John Howarth and others* [2010] FWA 3488 (10 May 2010)