



## The Gas Shortage: the Effect on Employees - July 2008

The recent explosion on Varanus Island has cut Western Australian Gas supply by 30% and either raised the prospect of, or has resulted in, Western Australian businesses being unable to carry out their normal operations. This in turn has caused several businesses to consider what can be done where, through no fault of their own, there is no useful work for employees to perform.

Several options have been discussed in the press and it is useful to consider the legality of these options. [Note: The following summary applies only to employers that are "constitutional corporations" and are therefore covered by the Workplace Relation Act 1996 (Cth) (the 'Act'). Employers who operate other than through a corporate structure need to consider the provisions of State legislation, which are not discussed below.]

### Standing down employees

Traditionally, employers were only entitled to stand down an employee (by which term is meant the practice of instructing an employee not to report for work on the basis that the period of absence will be unpaid) where this was permitted by an agreement (whether a contract of employment or more formal workplace agreement) and / or under a relevant award.

The *Workplace Relation Act 1996 (Cth) (the 'Act')* now provides employers with the right to stand down employees who can not be usefully employed during a period of time because of any cause for which the employer cannot reasonably be held responsible. This right only arises if there is no right of stand down under an agreement or award or, where there is a right to stand down, that right is subject to the approval of one of the industrial commissions.

Employers do not have to pay employees during the period they are stood down.

The period for which the employee is stood down does not break continuity of service and the employee continues to all accrue leave entitlements.

### Requiring an employee to take annual or long service leave

Employers can ask an employee to take accumulated annual leave but can not direct them to do so against their wishes (except where the employee has accumulated an excessive amount of leave).

What is an excessive amount? If an employee has credited to him or her more than 1/13 of the number of nominal hours worked by the employee at the end of a 2 year period (this is usually about 8 weeks of accrued leave) the employer can direct the employee to take up to 25% of the employees credited leave. An employer can make more than one direction to an employee to take up to 25% of the employees credited annual leave.

If an employee is entitled to long service leave there must be an agreement between the employer and the employee as to when the long service leave is taken. An employer can not direct an employee to take long service leave.

An employee may be granted long service leave prior to the employee accruing the entitlement. In such a situation the employee is not entitled to any further leave in advance until the expiration of the period of employment which is represented by the leave in advance already given. If an employee is subsequently terminated before the entitlement to leave has already accrued, the employer may deduct from whatever remuneration is payable on termination, the amount which was paid for the period of leave not accrued.- 2  
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### **Termination of employment – operational reasons or frustration**

An employer may terminate an employee employment due to genuine operational reasons. Operational reasons are defined as “reasons of economic, technological structure or similar nature relating to the employers undertaking, establishments, service or business”.

If an employee is terminated due to genuine operational reasons they must be given the required notice of their termination or payment in lieu thereof and must be paid out any accrued entitlements.

An employment contract is frustrated where it can not be carried out as a result of the intervention of unforeseen circumstances through no fault of either party. The parties are relieved from carrying out their obligations under the contract and it is treated as coming to an end. Frustration applies in circumstances where the employees cannot be usefully employed in other areas of the employers’ businesses and that situation is likely to prevail for a substantial period of time.

If you would like more information please contact:

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