

Industrial Relations and Employment Alert

November 2005

The New National Workplace Relations System

Workplace Relations Amendment (WorkChoices) Bill 2005

The essential features of the new national workplace relations system were outlined in our [October 2005 Industrial Relations and Employment Alert](#).

We dealt there with the main features of the new system which included a new safety net of wages and conditions of employment established by the Australian Fair Pay Commission and to be embodied in the Australian Fair Pay and Conditions Standard, the new range of workplace agreements to be available to employers and employees, new rules surrounding transmission of business, the scope for protected action and the involvement of secret ballots, the role of the Australian Industrial Relations Commission, freedom of association, union rights of entry, transitional arrangements involving the movement of current State participants into the federal system, and termination of employment.

The *WorkChoices Bill*, tabled in Parliament on 2 November 2005, is consistent with the commentary in our October Alert. The difference is there is now a lot more detail available. Indeed, there is about 685 pages of detail in the Bill and another 565 pages in the accompanying Explanatory Memorandum.

The purpose of this commentary is to highlight just a few areas about which employers need to be thinking in the short term. Some other things – for example, the precise mechanics of obtaining secret ballot orders or how employees will be counted in an enterprise to establish whether unfair dismissal laws will be available – can be left until later when the Parliamentary process has concluded and the revised *Workplace Relations Act* is ready to operate.

Awards and the Australian Fair Pay and Conditions Standard

Awards will continue to operate under the new system subject to further simplification and rationalisation. But, in truth, their role is to be marginalised and they are on the way out.

Current award provisions relating to long service leave, superannuation, jury service and notice of termination will be preserved and continue to apply, but will not be able to be varied. Various matters are now

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established as non-allowable award matters. These include some restrictions on the capacity for unions to participate in award dispute settling procedures, prohibitions or restrictions on the use of particular types of employment, minimum or maximum hours for regular part time employees, restrictions on the engagement of independent contractors or labour hire operators and requirements relating to their conditions of engagement, trade union training leave, and others.

Other than via the award rationalisation process, there will be no capacity in the Industrial Relations Commission to make a new award. Indeed, the Commission's power to make awards in settlement of industrial disputes by the exercise of powers of conciliation and arbitration will be removed.

Awards are also disappearing as a practical reference point because of their interaction with workplace agreements. While a workplace agreement operates the award will cease to have any application at all; and the award will not recommence to apply to an employee covered by a workplace agreement after the termination of that workplace agreement.

In summary, therefore, awards are to be reduced, rationalised and grandfathered in their operation. Their replacement as the backdrop to workplace agreements will be the Australian Fair Pay and Conditions Standard.

The legislation will set out minimum conditions which, together with the minimum wages set by the Australian Fair Pay Commission, will form part of the Australian Fair Pay and Conditions Standard. This Standard will consist of minimum wage levels,

four weeks annual leave (two weeks able to be cashed out by agreement), an additional one week's leave for continuous shift workers, 10 days of paid personal leave each year (with two days additional unpaid carer's leave where this is exhausted), two days unpaid carer's leave for casuals, and two days paid compassionate leave per occasion.

Interestingly, there will be a new provision applicable to all employees to the effect that it is unlawful to require an employee to work more than 38 hours per week plus reasonable additional hours.

Approach to agreement making

Employers must approach workplace agreement making, after the *WorkChoices Bill* becomes law, in a new way.

Workplace agreements, of whichever type, become operative upon lodgement with the Office of the Employment Advocate. There is no equivalent of the present arrangements under which most workplace agreements only become operative after their approval in a formal Industrial Relations Commission process conducted in public. The content of workplace agreements will now be, in some respects, more circumscribed than was previously the case. And there will be, in the future, a penal regime applicable to employers and others who lodge workplace agreements which do not comply with the new rules.

The role of the Industrial Relations Commission in dispute settlement during the life of a certified agreement has been reduced in recent years. This will continue to be the case under the *WorkChoices Bill*. Indeed, the only role the Commission

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will have in dispute settlement about matters arising under an agreement is that established for it by the parties. If the Commission is to have a power to summon witnesses, require production of documents or give directions, it will be because the parties have given it that authority via the workplace agreement. If the Commission is going to decide substantive issues which arise, it will be guided in its decision making process by whatever principles or rules are made applicable in the workplace agreement and the relevant dispute settlement procedure.

Employers should not assume that longstanding approaches to resolution of disputes followed by the Industrial Relations Commission – for example, not interfering with managerial decisions except where they impose an unfair burden upon employees – will apply into the future. This needs to be dealt with in the workplace agreement when establishing the Commission's (or other arbitrator's) role.

These things mean that employers must be careful and disciplined in the way they go about drafting agreements. Things to watch include:

- not including prohibited content because there will otherwise be an exposure to substantial penalties;
- not including, even in a general way, statements about OH&S or environmental or anti-discrimination legislation unless rulings by the Commission (or other arbitrator) on those issues under a dispute settlement procedure will be welcomed;
- including in the agreement, either in the dispute settlement procedure or elsewhere, some principles which will guide the Commission (or other arbitrator) in resolving disputes which arise over the

application of the agreement. These principles should include the proposition that it is management's responsibility to manage the enterprise and that legitimate managerial decisions should not be interfered with except where they impose an unfair or unreasonable burden upon employees; and

- rules or principles for the procedural aspects of any dispute resolution process.

Dealing with industrial action and Ministerial declarations

It will still be possible for unions to mount protected industrial action in support of enterprise bargaining claims but the scope for this will be much reduced. Those not able to participate will include persons under any form of in-term workplace agreement, whether collective or individual, or persons under a workplace determination made following the termination of a bargaining period. There will be a lot of new rules to be observed by unions if they are to pursue industrial action. There are also strategic possibilities opening up for an employer in the way it manages its workforce in order to minimise or even eliminate the practical viability of protected action being taken against it – for example, by introducing, over time, Australian workplace agreements with variable expiry dates.

Other matters for employers to watch are the new definitions of *industrial action* and *lockout*. The definition of *industrial action* has been altered so that the only form of employer conduct able to come within it is a

lockout. *Lockout* is defined to mean preventing employees from performing work under their contracts of employment without terminating those contracts.

These provisions then interact with the equivalent of the current section 127 of the *Workplace Relations Act 1996*. The Commission is given a power, amongst other things, to issue an order directing that industrial action by an employer, other than protected industrial action, must stop and not occur. There is a risk that unions may seek to use this provision against employers who direct employees not to undertake *some aspect* of their employment – for example, perform certain work which they customarily performed but which is now to be contracted out to another entity. This is an area which needs to be watched. It is another area which needs attention when drafting workplace agreements and contracts of employment – it is desirable that those instruments are clear in giving an employee a duty to work as reasonably directed.

A new national system, legal challenges and employee concerns

The change involved in the *WorkChoices Bill* is huge. It is intended to bring to an end, over time, the various State industrial relations systems and substitute one national system. It will drive currently State registered unions into the federal system. It will encourage presently unincorporated employers not otherwise caught by the system to become incorporated in order to access the system. It will enable the current federal Government, and future ones of different political

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persuasion, to regulate wages and conditions of employment in a direct way for the first time outside wartime conditions.

It seems likely that there will be a substantial challenge to the validity of some key elements of the legislation mounted by State governments and the ACTU. The novelty of the legislative approaches being taken is such that the possibility of some success in a legal challenge cannot be dismissed. No challenge can commence until the legislative process is completed. Any challenge which is made is likely to involve a reasonably lengthy case and consideration by the High Court. Its outcome may not be known until some time late in 2006, at the earliest. As a result of this, there will be uncertainty about the status of these new laws for quite some period.

Additionally, the scope of the changes, and their impact upon the way unions have historically gone about their business, will add to confusion. Indeed, the corporate status at law of unions (and employer organisations) under the revised Act will be open to doubt. And unions will be telling their members that employees are under unprecedented threat.

Employers should be careful to act in a measured way while all these uncertainties are resolved. It will be important that employees know where they stand, do not feel stampeded into new and uncomfortable positions, and consider they are being dealt with fairly. Fair-minded and considered behaviour by employers is likely to be more important, in the long run, than adopting one approach or another in the early period under the new *WorkChoices Bill*.

The implications of the revised *Workplace Relations Act* will be different for each employer. It is important to start thinking about that soon and to take advice where appropriate.

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