

Industrial Relations and Employment Alert

October 2005

Overview – A New National Workplace Relations System

Prime Minister John Howard and Employment and Workplace Relations Minister Kevin Andrews have announced more details of the new national workplace relations system, styled *WorkChoices*.

These announcements follow the Prime Minister's Statement of 26 May 2005 – see the June 2005 *Industrial Relations and Employment Client Alert*, available on our website, bdw.com under publications. The Government has now given more detail, but still there is no Bill. Our current understanding is that the Bill is likely to be tabled in the Parliament in the week commencing 31 October 2005.

The new system is to be based broadly on the power of the Australian Parliament to make laws in respect of trading, financial and foreign corporations (constitutional corporations). This power will be supplemented in certain respects by other constitutional powers. Use of the traditional power to make laws with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State will be greatly curtailed.

It is intended that the new system will operate on an across the board national basis. Employers who are constitutional corporations will come directly under the system whether or not individual states cooperate. Other employers may opt into the national system by incorporating or will come under that system if and when State Parliaments refer relevant powers (as has already occurred in Victoria).

There will be many other important changes in the way industrial relations are conducted in Australia

resulting from the new laws. The capacity of an employer to deal with both protected and unprotected industrial action will be significantly enhanced. Awards will be greatly reduced in significance. In many respects their work will be overtaken by an Australian Fair Pay and Conditions Standard to be established and maintained by a new body known as the Australian Fair Pay Commission.

Access to agreement-making either on a collective or individual basis will be made simpler for many employers. The role of unions will tend to be limited more to direct representation of members rather than extending to persons eligible to be members.

The opportunity of an employee to bring an action complaining about an unfair dismissal will be reduced. Only employees in firms with more than 100 employees will be eligible to bring such an application. Even then, the circumstances and grounds for the application will be reduced. There will still be a general capacity to bring applications in respect of terminations made specifically unlawful by the industrial legislation, and some limited legal aid for this purpose will be available to employees.

We deal below with some of the main features of the new national *WorkChoices* system.

Safety net of wages and conditions of employment

The Australian Fair Pay Commission will be responsible for setting and adjusting the federal minimum and award classification wages and casual loadings. The Fair Pay Commission will determine the timing, scope, frequency and manner of these wage reviews. Rather than the current claim-based system, the Fair Pay Commission will adopt a more consultative approach to wage reviews. The first decision of the Fair Pay Commission is expected by Spring 2006.

The legislation will set out minimum conditions of employment which, together with the minimum wages set by the Fair Pay Commission, will form part of the Australian Fair Pay and Conditions Standard. This Standard will consist of four weeks paid annual leave each year (two weeks able to be cashed out), an additional one week's leave for continuous shift workers, 10 days of paid personal leave per annum (with two days of 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. The maximum weekly ordinary hours of work will be 38 but an employer may require an employee to work reasonable additional hours where necessary.

Awards will continue to operate under the new system, subject to further simplification and rationalisation.

From the commencement of the legislation, a number of current allowable award matters will become

unenforceable. Current award provisions relating to long service leave, superannuation, jury service and notice of termination will continue to apply. They will not be able to be included, however, in new awards. Where current award provisions are more generous than the minimum conditions set by the Fair Pay and Conditions Standard, they will continue to apply to existing and new employees covered by that award. The legislation will set out a model dispute settlement procedure which will replace all current award dispute procedures.

The current federal award system will be reviewed by an Award Review Taskforce. The Taskforce will recommend to the Minister for Employment and Workplace Relations by the end of January 2006 an approach to reduce the number of awards applicable in a single industry.

Agreements

Agreement making is to be simpler, with agreements taking effect from the date of lodgement with the Office of Employment Advocate. The no disadvantage test will be replaced by a requirement that the agreement meet the Fair Pay and Conditions Standard, as amended from time to time, throughout its life.

The maximum term of agreements will be extended to five years.

There will be six types of agreement available:

- a) **A collective agreement directly with employees.** This is similar to the current section 170LK

agreement but the ability for a union to apply to the Commission to become bound by such an agreement will be removed.

- b) **A collective agreement with one or more unions.** Although not clear, it may be that this agreement will only apply to those employees on whose behalf the union is negotiating – perhaps only its members. This is an area to be checked carefully when the Bill emerges.
- c) **An Australian workplace agreement.** It appears these will operate broadly as they presently do.
- d) **A union greenfields agreement.** This is similar to the current section 170LL agreement except that greenfields agreements will have a nominal expiry date of 12 months.
- e) **An employer greenfields agreement.** This is a new type of greenfields agreement. It is not yet clear how this agreement will be made given that it is to be processed prior to the employment of any person. Again, the agreement will have a nominal expiry date of 12 months.
- f) **A multiple business agreement.** This will be available where a number of separate businesses wish to offer employees the same working conditions. A multiple business agreement needs to be authorised by the Office of the Employment Advocate as not being contrary to the public interest. The Employment Advocate will consider the reasons for the agreement and guard against pattern bargaining.

A minimum consideration period of seven days is required to be provided by an employer prior to seeking employees' approval of an agreement. Prior to this period the employer must provide the employee with access to the agreement and an information statement made available by the Office of the Employment Advocate.

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Collective agreements other than greenfields agreements will still require the approval of a valid majority of employees as a pre-condition for their valid application.

Transmission of business

Awards and agreements under the new system will only bind a new employer which is a successor, transmittee or assignee of the previous employer if employees transfer from the old employer to the new employer. In this case, the awards or agreements made applicable will only apply to the transferred employees at the new business, not other existing or future employees of the new employer.

Agreements which become applicable to a new employer following a transmission of business:

- will have application for a maximum period of 12 months – after that the employees will be covered by the new employer's existing industrial instruments or, if none applies, the Fair Pay and Conditions Standard; and
- can also be overridden by a new agreement negotiated between the new employer and the transferring employees.

Protected industrial action when bargaining for agreements

A critical question in dealing with industrial action will continue to be whether the industrial action is protected.

Protected action will still be available to employers and employees in the context of bargaining for agreements under the new system. There will be some additional limits, however, upon the capacity of employees to take protected industrial action and there will be some additional things which employers can do to deal with protected industrial action.

Secret ballots

Protected industrial action by employees will only be available if the intended industrial action has been approved in a secret ballot which follows an order issued for the purpose by the Australian Industrial Relations Commission. If a union applies for a secret ballot order, those voting in the ballot will be union members who are employees and who would be covered by the proposed agreement. If a non-union agreement is intended, all employees whose employment would be covered by the proposed agreement will be eligible to vote in the ballot. In either event, the industrial action will require at least 50% of those eligible to vote to participate and more than 50% of them to be in favour of the proposed industrial action.

Secret ballots

Protected industrial action by employees will only be available if the intended industrial action has been approved in a secret ballot.

An application for a secret ballot order will only be able to be made:

- after the expiry of the existing agreement;
- if a bargaining period has been notified to the Commission; and
- where claims being pursued do not include prohibited content.

Terminating or suspending bargaining periods and essential services

An employer will still be able to ask the Commission to suspend or terminate a bargaining period, thereby eliminating the opportunity for a union to continue protected action, in most of the circumstances which currently permit that course under section 170MW of the *Workplace Relations Act 1996*. (The current historical paid rates award circumstance, however, will be removed. This will have particular significance in government employment.)

Three additional grounds for seeking the suspension or termination of a bargaining period will be available. These are:

- if pattern bargaining is taking place;
- if the imposition of a cooling-off suspension would assist the parties to resolve the matters at issue; and
- where third parties are threatened with significant harm from industrial action.

Additionally, the Minister for Employment and Workplace Relations will have a new power to issue a Declaration where protected industrial action threatens life, personal safety, health or welfare of the population, or is likely to cause significant damage to the economy. This Declaration is intended to operate in a manner similar to State essential services legislation. Where such a Declaration is made, the Minister will be able to issue directions to ameliorate the threat to essential services including by terminating relevant bargaining periods, requiring employees to lift work bans or return to work, and requiring the employer to allow

employees back on to the worksite in the case of a lock-out.

Where a bargaining period is terminated by the Commission's action (or by a Declaration made by the Minister) in a situation which threatens life, personal safety, health or welfare of the population, or which is likely to cause significant damage to the economy, the Commission will have a capacity (similar to that which it presently has under section 170MX of the *Workplace Relations Act 1996*) to make a Workplace Determination to resolve the issues in dispute in a binding way. There will now be an enhanced opportunity to overtake the Workplace Determination with an agreement negotiated at the workplace, but no protected action will be able to be taken to support claims for such an agreement.

Other industrial action

Industrial action which is not protected will continue to be amenable to an order of the Australian Industrial Relations Commission similar to that which it can presently make under section 127 of the *Workplace Relations Act 1996*.

The Commission will be required to deal with applications to stop unprotected industrial action within a maximum of 48 hours. If the Commission cannot determine the application in that time, it will be required to issue an interim order unless that would be contrary to the public interest.

Industrial action during the life of an agreement covered by the new system will be prohibited.

There will be some fine tuning of the applicable definition of industrial action. Importantly, the legislation will clarify that industrial action by employers is limited to lock-outs and does not include such matters as redundancies or termination of employment. This means that the order to stop industrial action will not be able to be used against employers in situations beyond that truly intended by the Parliament.

Section 166A of the *Workplace Relations Act 1996*, which is presently a prerequisite to bringing any action in tort in the ordinary courts in relation to industrial action, will be repealed.

Role of the Australian Industrial Relations Commission

The powers of the Australian Industrial Relations Commission to deal with industrial action generally, and with disputes over union rights of entry, will be strengthened. In other important respects, the Commission's role and powers will be significantly diminished. The Commission's general and historic powers of compulsory conciliation and arbitration will be removed.

The Commission's power to settle disputes over the application of an agreement will remain but will require the parties to the agreement expressly to confer those functions on the Commission.

Unless expressly provided for by the agreement, the Commission will not be able to make binding recommendations or issue binding directions. As much as possible, its powers will mirror those exercisable by a private alternative dispute resolution provider.

Unions / registered organisations

The present system of registration for unions and employer organisations, thereby giving corporate status to and regulatory oversight of those bodies, will continue broadly as it presently operates. State registered organisations – that is, unions or employer associations presently registered under State industrial legislation – will be able to apply to the Australian Industrial Registrar for a transitional status as a registered federal organisation provided that they meet certain minimum criteria. The *conveniently belong* rule which presently makes it more difficult for registered organisations to become registered or expand into areas already covered by

another organisation will continue, but will not apply so as to hold out a State registered organisation transferring into the federal system.

There will be an enhanced opportunity for enterprise associations to be registered. An enterprise association is an association of employees who perform work in the same enterprise. The number required to form an enterprise association will be 20 employees.

The grounds for deregistration of a registered organisation will be expanded in important ways. The grounds for deregistration will now include non-compliance with any court order relating to contravention of the freedom of association provisions or various prohibitions relating to intra and inter-organisational matters.

Freedom of Association

The provisions of the *Workplace Relations Act 1996* dealing with freedom of association will be expanded and clarified in various important respects. Conduct presently made unlawful by those provisions – for example, being or not being a member or officer of an organisation – will continue to be grounds upon which it is unlawful to discriminate against an employee in his or her employment or against an independent contractor in relation to work.

Four additional types of prohibited conduct will be added. These are:

- coercing a person to become, not become, remain or cease to be a member or officer of a union;
- making false and misleading statements about membership of associations – it is said that a “no ticket, no start” notice will be caught;
- taking industrial action because another person is or is not a member of a union; and
- discriminating against another person on the ground that the employment of the second person’s

employees are covered or are not covered by a particular kind of industrial instrument or an industrial instrument made with a particular person.

These laws will continue to apply not only in current employment situations but also where there is a *refusal to employ*. The concept of a refusal to employ, however, will be narrowed so that it only applies where an employer is positively considering employing someone in its business and has a relevant present vacancy.

The change to the *refusal to employ* concept overcomes a particular problem which emerged under the provisions of the *Workplace Relations Act 1996*. Another area which proved problematic under those provisions concerned decision-making around continuation in employment of persons who might be entitled to the benefit of an industrial instrument where it could be done more cheaply under different commercial arrangements. There is at present no indication of a change to deal with this problem.

There will be some changes in the application of reverse onus of proof provisions. These provisions presently operate where an allegation is made about a person’s conduct on certain prohibited grounds. The person against whom the allegation is made is required to prove what was the relevant motivation. These reverse onus of proof provisions will no longer operate when an interim injunction is in issue.

Union rights of entry

Union rights of entry to workplaces to investigate suspected breaches of industrial laws or instruments or to hold discussions with employees will remain, but with some important modifications. The modifications include the following points:

- Employers operating under the new system will not need to deal with State industrial right of entry regimes. Only the federal system will apply.

- There will be no rights of entry for discussion purposes where all employees are engaged under Australian workplace agreements; and rights of entry to investigate a breach of an Australian workplace agreement will only be available where the employee party requests it.
- A union official exercising a right of entry about a suspected breach will need to give particulars of the breach and will have a more limited investigative right in connection with that breach.
- A union official will be required to comply with a reasonable request by an employer that he or she conduct meetings or interviews in a particular room or area set aside for the purpose, and that a specified route should be taken to that venue. He or she will be able to be prevented from roaming about or conducting a “walk-through”.

The Australian Industrial Relations Commission’s role in policing union rights of entry will be retained and enhanced. There will be a stiffened “fit and proper person” test for officers being granted an entry permit. The Commission will have a greater power to revoke or suspend entry permits granted to particular individuals where they have misbehaved in the course of exercising rights of entry, including rights exercised under State occupational health and safety laws.

State to federal transitional arrangements

Constitutional corporations in the State systems will have a three year transitional period in which to transfer to the federal system. Current state awards and agreements will have status as transitional federal agreements.

Current *State and federal agreements* will continue to operate in their present form until terminated or replaced, and will not be affected by the Fair Pay and Conditions Standard. However, content which is prohibited in an agreement under the new federal system (such as union

preference clauses) will be unenforceable. Transitional agreements will not be able to be extended or varied after the new system takes effect. New agreements can be made to replace them, but neither party will be able to take protected action in support of the new agreement if the transitional agreement is in its nominal term.

Except for prohibited content, terms and conditions in current *State awards* will be preserved, unless the Fair Pay and Conditions Standard makes a more generous provision. In that case, employees will receive the benefit of the Fair Pay and Conditions Standard provision. After three years, the Award Review Taskforce will recommend the most appropriate federal award to apply, if no agreement has been made.

There will be a five year transitional period during which current awards and agreements will be preserved for *employers other than constitutional corporations* presently under the federal system. The unincorporated employer will have no ability to make a new agreement in the federal system, or to amend an existing one, but can make a State agreement or apply to the Australian Industrial Relations Commission for release from the federal system before the five year period expires. The Commission will have no power to make a new award binding on these employers during the transitional period, but will be able to vary wage rates and other monetary entitlements.

At the end of the transitional period, if the State governments have not referred their powers to the Commonwealth, unincorporated

employers will move to State regulation and their federal awards and agreements will stop operating.

Victoria

As the Victorian government has already referred its industrial relations powers to the federal government, employees in Victoria will continue to be regulated under the federal system, regardless of whether they are employed by a constitutional corporation or not. The minimum conditions in Schedule 1A of the *Workplace Relations Act 1996* will be replaced by the Fair Pay and Conditions Standard.

Termination of employment

An employee of a constitutional corporation which employs up to and including 100 employees (full time employees, part time employees and casual employees engaged on a regular and systematic basis for a period of 12 months at the time of the dismissal) will be excluded from unfair dismissal laws.

An employee of a constitutional corporation which employs more than 100 employees will be able to commence an *unfair* dismissal claim unless one of the following circumstances applies:

- the employee's employment has been terminated within the first six months;

- the employee's employment has been terminated on the ground of, or on grounds which include, operational requirements (such as redundancy); or
- the employee is employed on a seasonal basis.

All employees will be able to commence *unlawful* termination claims and may, in some circumstances, be eligible for Government assistance of up to \$4,000 to pursue those claims. These are complaints based on matters such as unlawful discrimination, termination due to being absent from work due to illness, etc. The onus of proof will be on the employer to establish that the reason for termination was not an unlawful one.

The termination of employment laws will exclude the operation of State termination of employment laws, including unfair contract laws. This will have particular impact in New South Wales where unfair contract claims are a major feature of that State's industrial laws.

The Commission will have the power to hear certain jurisdictional objections "on the papers" so that unfair dismissal applications which are clearly excluded can be dealt with expeditiously and at minimum cost.

The onus of proof for constructive dismissal claims will be reversed – an employee's argument that he or she has been constructively dismissed must be proven by the employee.

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