



# EMPLOYMENT RELATIONS IN BRIEF

MACGILLIVRAYS

S O L I C I T O R S



## Partner Gary Woodman discusses the proposed Federal changes to EMPLOYMENT LAWS - THE NEW WORKCHOICES LEGISLATION.

### AT A GLANCE

#### WHAT'S THE PURPOSE OF THE CHANGE?

**The Federal Government intends to end the various State industrial relations systems and substitute one national system. It will drive State registered unions into the Federal system.**

#### HOW FAR OFF ARE THE CHANGES?

The Workchoices Bill was introduced into Federal Parliament on 2 November 2005.

Initially, the Government thought the Bill would be passed mid November but it's now more likely to be passed in the last sitting of Parliament this year - the week ending 9 December.

#### HOW CAN THE FEDERAL GOVERNMENT FORCE A CHANGE ON THE STATES?

The Federal Government is relying on its corporations power under the Constitution.

Only employers that are incorporated will be subject to the changes. As there are distinct benefits to employers under the proposed reforms, the Government anticipates many employers will incorporate in order to access the system.

The State Governments and the ACTU intend to challenge the validity of some key elements of the legislation. Any challenge which is made is likely to involve a lengthy case before the High Court. Any such challenge may not be known for a considerable period of time, possibly late in 2006 at the earliest. As a result, there will be uncertainty about the status of the new laws for some period.

#### WHAT IS THE IMPACT ON UNIONS?

The scope of the changes are wide and impact upon how unions historically go about their business. The status at law of unions under the revised legislation will be open to doubt. Unions will be telling their members that employees are under unprecedented threat.

## THE KEY CHANGES

### WAGES AND CONDITIONS

The legislation will set out the minimum conditions of employment. These include:

- a 38 hour working week,
- 10 days personal leave each year,
- a further two days unpaid carer's leave,
- four weeks annual leave,
- two weeks home paid parental leave,
- two days paid compassionate leave per occasion.

Although the maximum weekly working hours will be 38, an employer may require an employee to work reasonable additional hours when necessary.

A new body, the Australian Fair Pay Commission (AFPC) will set, and periodically adjust, the adult minimum wage, minimum wages for award classification levels and casual loadings.

The minimum conditions of employment set out in the legislation, together with the wage reviews determined by the AFPC will form the Australian Fair Paying Conditions Standard.

### Continuing current award provisions

Any current award provisions relating to:

- long service leave,
- superannuation,
- jury service, and
- notice of termination, will continue to apply.

Where current award provisions are more generous than the minimum conditions set by the Australian Fair Paying Conditions Standard, the current award will apply to existing and new employees covered by that award.

CONTINUED OVERLEAF

### In This Issue

CHANGE TO EMPLOYMENT LAWS  
- THE NEW WORKCHOICES  
LEGISLATION - AT A GLANCE

Page 1

THE KEY CHANGES

Page 1

WORKPLACE AGREEMENTS

Page 2

SALE OF BUSINESS - TRANSFER  
OF EMPLOYEES

Page 2

Level 2, 200 Adelaide Street Brisbane Qld 4001  
Phone 07 3221 4550 Facsimile 07 3221 8500

Level 7, 4 O'Connell Street Sydney NSW 2000  
Phone 02 9239 9400 Facsimile 02 9239 9499

Level 9, 190 Queen Street Melbourne VIC 3000  
Phone 03 8622 2700 Facsimile 03 8622 2722

Level 5, 50 Cavill Avenue Surfers Paradise Qld 4217  
Phone 07 5630 9500 Facsimile 07 5630 9599

1 Ocean Street Maroochydore Qld 4558  
Phone 07 5451 1455 Facsimile 07 5451 0744

E-mail us at [macgill@macgillivrays.com.au](mailto:macgill@macgillivrays.com.au)  
Phone us on 1300 369 581



## THE NEW WORKCHOICES LEGISLATION THE KEY CHANGES



### Annual leave

Currently, it is possible for employees to cash out all of their annual leave. Under the proposed legislation, employees may cash up to two weeks of their accrued annual leave entitlement every 12 months. This can only occur where it is explicitly provided for in a workplace agreement that covers the employee.

It will be unlawful for employers to pressure or force employees to cash out their annual leave and it will also be unlawful to make employment conditional on cashing out annual leave.

### UNFAIR DISMISSAL

Employers with up to 100 employees will no longer have to comply with the unfair dismissal laws.

Where there are over 100 employees, an employee can only pursue an unfair dismissal remedy if they have been employed for over six months. (Currently there is only a three month qualifying period.)

In determining the number of employees, all full-time, part-time and casual employees employed in the business at the time the employment was terminated are to be counted. Casual employees are those who are employed on a regular and systematic basis for a period of at least 12 months at the time of the dismissal (all other casuals are excluded, i.e. short term and irregular casuals).

Employment terminated on the ground of operational requirements (i.e. redundancy) will be excluded from the unfair dismissal regime but not from the unlawful termination regime.

### CONSTRUCTIVE DISMISSAL

A constructive dismissal is where the employee did not resign voluntarily, but the conduct of the employer left the employee with no choice but to resign.

The onus of proof for a claim of constructive dismissal in the unfair dismissal jurisdiction will be reversed so that the argument for constructive dismissal must now be made out by the employee i.e. the employee must prove that he/she did not resign voluntarily, but the conduct of the employer left the employee with no choice but to resign.

### UNLAWFUL TERMINATION

#### Unchanged

It will continue to be unlawful to terminate an employee because of:

- temporary absence from work due to illness or injury,
- trade union membership,
- non membership of trade union,
- seeking office to act or having acted in the capacity of a representative of employees,
- filing of a complaint or the participation in proceedings against an employer, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin,
- refusing to negotiate, make, sign, extend, vary or terminate an Australian Workplace Agreement (AWA),
- absence from work during maternity leave or other parental leave, or
- temporary absence from work because of the carrying out of a voluntary emergency management authority.

#### Changed

It will be unlawful for anyone to apply duress to an employee in relation to negotiating and signing an AWA.

Employees who believe they have been unlawfully terminated will be eligible to apply for up to \$4,000 worth of independent legal advice on the merits of their claim.

Terminated employees can make an application to the Office of Workplace Services after the Australian Industrial Relations Commission (AIRC) has exhausted conciliation options and issued a certificate as it is currently required to do.

Eligibility of application for legal advice will be assessed against a "financial need" criteria. To be eligible, an applicant must receive a certificate from the AIRC indicating the case has merit and could not be resolved through conciliation.

## SALE OF BUSINESS - TRANSFER OF EMPLOYEES

**For transferring employees, awards and agreements under the new system will only bind a new employer which is a successor, transferee or assignee of the previous employer. In this case, the applicable awards or agreements 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 apply, the Australian Fair Pay and Conditions Standard, and
- can also be overwritten by a new agreement negotiated between the new employer and the transferring employees.

# WORKPLACE AGREEMENTS

**Making workplace agreements will be easier for both employers and employees. A "lodgement only" system for all agreements will be introduced. A statutory declaration that the agreement complies with the law must be lodged with the agreement. This will replace the current complex time consuming and legalistic certification and approval processes.**

All agreements will be lodged with the Office of Employment Advocate (OEA).

Agreements will commence on lodgement and will need to meet fair pay and conditions standards throughout the life of the agreement. The OEA's role will include providing advice to both employers and employees on agreement making. Employees will be able to have access to their union representatives and the right to appoint and consult with a bargaining agent who can act on their behalf when negotiating an agreement.

The OEA will provide employers with an information statement that employers must give employees when seeking the approval of an agreement. The statement will include employer rights and responsibilities in agreement making and services available to employees during the agreement making process.

The information statement will include prohibited content in agreements. Clauses that cannot be included in agreements are those:

- prohibiting workplace agreements,
- restricting the use of independent contractors or on-hire arrangements,
- allowing for industrial action during the term of an agreement,
- that provide for trade union training leave, bargaining fees to train unions or paid union meetings,
- providing that any future agreement must be a union collective agreement,
- mandating union involvement and dispute resolution, and
- providing a remedy for unfair dismissal.

If an agreement includes prohibited content, the content will be unenforceable but the agreement will remain valid. The OEA will be able to remove invalid clauses from agreements.

Employers face penalties of up to \$33,000 for seeking to include prohibited content in an agreement or lodging an agreement containing prohibited content. It will be a defence if the employer has obtained advice from the OEA prior to lodging the agreement that the content is not prohibited content.

A minimum consideration period of seven days must be provided by an employer prior to seeking employees' approval of an agreement.

All workplace agreements will need to include:

- wages that are no less than the relevant award classification wage set by the Australian Fair Pay Commission,
- a nominal expiry date (up to maximum five years), and
- a dispute settling procedure (DSP).

A model DSP will be included in the new legislation.

S U C C E S S F U L

This newsletter is not legal advice and our comments are of a general nature only. This document is not to be relied on as substitution for proper detailed advice. If you would like to be removed from, or added to our mailing or e-mailing list, contact Anna Zoeller on (07) 3228 5205 or [annaz@macgillivrays.com.au](mailto:annaz@macgillivrays.com.au)

