

March 2006 – Update to HOT TOPICS 37: Employment & the Law

This is an update to issue 37 in the series *Hot Topics: legal issues in plain language*, published by the Legal Information Access Centre (LIAC). *Hot Topics* aims to give an accessible introduction to an area of law that is the subject of change or public debate.

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This paper is intended as a guide to the new Commonwealth employment law. It should be read in conjunction with *Hot Topics 37: Employment & the Law* which remains relevant in relation to employment law as far as it applies to people still in the NSW industrial relations system and to the areas of NSW workplace regulation not replaced by the new Commonwealth regime. The entire edition of Hot Topics will be updated later this year.

Overview

For most people, employment law has been an area of which they have been blissfully ignorant. Until recently, most workers would have had little interest in the laws that govern workplace protection and entitlements, such as: to have a safe place of work, to undertake reasonable hours of work, to be paid correctly for that work and to not be unfairly dismissed. It would not be until an individual experienced an abuse of those entitlements that there would be an appreciation of the existence of such laws.

This changed throughout 2005 in the lead up to the introduction of the Federal Government's *Workplace Relations Amendment (Work Choices) Act 2005* (which will hereafter be referred to as the 'Work Choices regime'). The high profile 'your rights at work' campaign by the union movement attacking the new regime and the Federal Government's advertising blitz promoting the changes put employment law in the

spotlight. It has since been shown, however, that much confusion remains as to how, and to whom, the Work Choices regime applies.

The changes brought about by the Work Choices regime, which partly came into force in December 2005 while the remainder came into force on 27 March 2006, will be discussed as far as they are relevant to employees, particularly those new to the workforce. It is important to keep in mind that, while the Federal Government has made clear its intention to cover as many of Australia's workers as possible under the new regime, it will not apply to everyone and it will be important to check which system applies in your workplace.

In New South Wales, there is an industrial relations system, with its own laws and tribunal, that has been in place for more than 100 years. This has operated alongside the Federal regime and, until the recent changes, the majority of NSW employees would have been regulated by the State system.

The importance of regulations for the workplace can be quickly appreciated when one considers how much of our lives are determined by our jobs: how we live, the people we meet and often how we see ourselves. At the same time, employment brings us into a relationship over which, for many employees, there is little control. This is particularly the case for young people entering the workforce for the first time. The development of employment law has been characterised by a concern over the inequality of the employment relationship between employers and employees, and the need to protect employees from financial or other exploitation.

The law has also evolved to reflect the drastic changes to the make up of the workforce over the past century, particularly in relation to the number of women working and the increasing move from permanent full time to casual and part time jobs. In Australia more than one quarter of workers are casual and we have one of the highest proportions of part time and casual workers in the industrialised world.

Another significant change has been the move away from the job for life. Workers may change employers or even professions several times in their working life.

With those changes there has come an increasing recognition of the need for regulatory protection, concerning discrimination, family leave and termination of employment.

THE EMPLOYMENT RELATIONSHIP

This is a term for the arrangement between an employer and employee: whereby the employee agrees to undertake a job offered by the employer in return for monetary and other reward. This agreement is in fact an employment contract, whether or not it is verbal or written, and is legally enforceable like any other contract. Promises are made by each party to the contract and, if these promises are breached, then legal remedies are available to enforce the contract.

Beyond the promises contained within the contract, the relationship gives rise to rights and obligations for both the employer and employee. These have been developed by decisions of courts and commissions concerning employment as well as by Acts of Parliament.

In Australia, many of the rights and obligations have been agreed as a result of 'collective bargaining' whereby union officials acted on behalf of a group of workers to achieve such entitlements as minimum rates of pay, maximum hours of work, penalty rates for overtime, allowances for workplace expenses and reasonable breaks from work. These have become enshrined in what is known as 'awards' which can be agreed conditions relating to an entire industry, for example hairdressers or spray painters, or to particular workplaces that are named as parties to the award.

There are state and federal awards and in the past these partly determined whether a worker came under the state or federal industrial relations system. There are also enterprise or 'collective' agreements which apply to individual workplaces. Then there are individual agreements – known as Australian Workplace Agreements ('AWAs') – in

which the terms and conditions are negotiated and agreed to as between an individual employee and their employer. Whether or not an employee was specifically employed under an award, these remained important as setting the minimum standards accepted within a particular industry. This changes under the Work Choices regime, with a move away from awards as well as a reduction in the terms and conditions that can be included in any such agreement.

A marked change is expected to occur under Work Choices with an increased emphasis on individual agreements, 'AWAs', with the assumption that employees will be able to negotiate their own terms and conditions of employment.

While there will be a move away from awards and enterprise agreements, certain protections remain in place for all employees. In NSW, all workers are protected in relation to their health, safety and welfare under the *Occupational Health and Safety Act* 2000. There is also protection against discrimination and harassment and statutory protection of certain entitlements such as long service leave. Readers should look to the ***Hot Topics 37: Employment & the Law*** in relation to these issues.

The changes are not only momentous for their content but for the way in which the Federal Government has used its constitutional power to enact laws. The Australian Constitution gives the Federal Government some powers in relation to employment law and, up until the Work Choices regime, this comprised a combination of the 'conciliation and arbitration' power and the 'corporations' power. The Federal Government has now asserted that it only needs the 'corporations' power to legislate in this field, which allows it to considerably expand its reach into areas previously covered by the States. This is being challenged by the State Governments in the High Court and the case will be heard in May 2006. In the meantime, however, the new regime is in force. This means that, if the High Court challenge is successful, the law will have to change again.

For now, employees in NSW are subject to the State system and the new Federal system. While the intention of the new regime is to provide a simplified approach by moving as

many employees as possible under the one system, there is likely to be a great deal of uncertainty and confusion as the changes come into effect.

Who Is Covered By The New Employment System?

The intention of the Work Choices regime is to bring as many people as possible within the Federal system by applying to:

- trading, financial and foreign corporations (constitutional corporations);
- employers and employees in territories (the ACT and NT) and Christmas and Cocos Islands;
- the Commonwealth, including its authorities;
- waterside, maritime and flight crew employers; and
- all employers and employees in Victoria.

Before the changes, employees of corporations in NSW would have been under the State system unless they were also subject to a Federal award. The Work Choices regime significantly extends the Commonwealth's coverage because it now applies to everyone who works for a 'constitutional corporation', even if employed under a state award.

The Federal Government has asserted that up to 85% of all employees will be covered by the new system but this is debatable. Queensland, for example, has stated that it will only cover around 65% of that state's workers.

As there are some dramatic implications for those people covered by Work Choices it is of course extremely important to first determine whether it applies. If a workplace was previously under the NSW industrial relations system it will only change over if the employer is classified as a constitutional (trading or financial) corporation, which means it is a trading, financial or foreign corporation within the meaning of s 51(20) of the Australian Constitution.

What does this mean?

Your employer is **not** a corporation (that is, it is not incorporated) if it is a partnership, an unincorporated association or a sole trader.

To be a constitutional corporation, the employer must be incorporated under an Australian law and carry out some commercial activities for which it obtains revenue. This can include incorporated associations and cooperatives.

It may be:

- a body incorporated under the Corporations Law that may be classified as either a **trading** or **financial** corporation (because of its business activities);
- a foreign corporation; or
- a body that is prescribed as a body corporate under legislation and is engaged in trading or financial activities. For example, local councils are classified as ‘body corporates’ under the *Local Government Act 1993* (NSW).

To be a financial corporation, the employer will be substantially involved in financial advice and management or activities such as borrowing and lending.

Trading activities can include buying, selling or exchanging goods and services. It is not clear how great a part this should play in the business for it to be classified as a trading corporation but it should form a substantial element. It is described as being a “question of fact and degree”. Even not-for-profit organisations such as charities and sporting clubs may be trading corporations as the aim of the business is not significant (except where trading is a forbidden activity).

The changes to the employment landscape brought about by Work Choices are of most significance to employees in the following way:

- the greatly reduced role of awards in regulating the workplace – their content is now restricted and they can be completely displaced by an AWA or collective agreement;
- the establishment of a national minimum standard for pay and conditions;
- the loss of redundancy and unfair dismissal protection in many workplaces;
- for new employees: the increase in probation – the qualifying period has doubled from three to six months.

Conditions at Work

As briefly discussed in the overview, awards have been the underpinning of terms and conditions of employment in Australia for many years. Federal awards would be made by the Australian Industrial Relations Commission in settlement of a dispute in which union representatives would appear on behalf of people working for specified employers.

While enterprise agreements and AWAs could replace an Award in the workplace, they would still be open to evaluation against the relevant award and be subject to the ‘no disadvantage test’. That is, there could be a flexible approach with some trade off between terms and conditions as long as workers were not left at a disadvantage in comparison to their position if they were still regulated by the award.

Under Work Choices, the terms in existing awards will only provide a minimum safety net to ‘award-reliant’ employees, that is those workers who are not subject to an AWA or enterprise agreement. Some protection may still apply but this can be excluded in workplace agreements, as discussed below.

Instead of the ‘no disadvantage’ test, Work Choices aims to provide a minimum national standard. The ‘Australian Fair Pay and Conditions Standard’ (AFPCS) will comprise: minimum wages and award classifications; minimum requirements for annual leave, personal/carers leave (which includes sick leave) and parental leave and maximum ordinary hours of work.

The new Australian Fair Pay Commission will be responsible for setting the minimum wage and classifications including:

- the federal minimum wage (set at \$12.75/hr),
- federal minimum wages for juniors,
- trainees and employees with disabilities,
- minimum award classification rates of pay and
- casual loadings.

The primary objective of the Australian Fair Pay Commission in its wage setting responsibilities will be the promotion of “...the economic prosperity of the people of Australia”. This will be guided by the following considerations:

- the capacity of the unemployed and low paid to obtain and remain in employment;
- employment and competitiveness across the economy;
- providing a safety net for the low paid; and,
- providing minimum wages for juniors, disabled employees and employees involved in training arrangements, that ensure that all such employees are competitive in the market place.

The Australian Fair Pay and Conditions Standard will apply to all new agreements. If a workplace is currently covered by an award, then the new standard will prevail to the extent that it offers better conditions. Otherwise the award conditions continue to apply.

If a workplace is subject to existing AWAs or a collective agreement then their conditions remain in place until the expiry of that agreement even if they are below those in the AFPCS.

Work Choices also sets out what is termed ‘prohibited content’ for workplace agreements. This includes provisions relating to: unfair dismissal; union involvement in and access to workplaces; maximum and minimum hours for regular part-time

employees, restrictions relating to engagement of labour hire and independent contractors; and matters ‘that do not pertain to the employment relationship’. Prohibited content will be removed from awards.

‘PROTECTED’ CONDITIONS

While it is generally the case that an AWA or collective agreement will exclude the application of an award to that workplace, Work Choices does have a category of ‘protected award conditions’. These are certain matters that will be taken to form part of any workplace agreement unless the agreement has expressly excluded them.

The protected conditions comprise:

- rest breaks
- public holidays
- penalty rates/ shift and overtime loading
- annual leave loading
- incentive based payment
- special allowances
- outworker conditions

This means that, if there is no reference to these conditions in a workplace agreement, they continue to apply as provided in the relevant award. The conditions can, however, be changed or removed by express reference in the agreement. So, an employer can put a new agreement before current employees that excludes these conditions.

An existing employee has the right to refuse to sign such an agreement and it is unlawful to dismiss an employee if they do so (see ‘Termination of Employment’ below). In reality, though, it may be difficult for an employee to refuse to sign a new agreement depending on their individual bargaining power. There are concerns that most employees will not be able to assert their rights in these circumstances. Because job applicants can be required to work under an AWA as a condition of employment there is some concern that employees could be dismissed then offered new positions subject to an AWA. It

would then be a matter for the individual to decide whether they should bring proceedings for unlawful termination if they could show that their refusal to sign the AWA was the reason for dismissal.

HOURS OF WORK

Ordinary hours of work are set out in awards and agreements and are the hours worked before penalty rates will apply. Whether or not you are employed under an award or a collective or individual agreement, 'ordinary hours' means 38 hours per week.

There may be a reasonable requirement to work extra hours, if appropriate notice is given. When those 38 hours are worked may depend on the agreement and it may be calculated as an average over a longer period of time.

What is a reasonable requirement? This must be considered with reference to the effect on the employee's health and safety, personal circumstances, the notice given by the employer and notice by an employee to refuse the additional hours as well as the needs of the business.

Under Work Choices the 38 hours can be averaged out over a longer period, up to 12 months, although employees will still have to be paid for the 38 hours per week. Unless an agreement expressly provides a shorter period over which ordinary hours are averaged out, then the 12 month period applies.

Calculation of entitlement to penalty rates will not be possible until an employee has worked beyond the 12 month limit of ordinary hours.

Any payment of penalty rates for work in excess of the 38 hours will be a matter of negotiation in agreements or as provided in awards.

LEAVE

While Long Service Leave remains under the State system, the AFPCS applies to annual leave, personal/carers leave and parental leave. The minimum annual leave is four weeks per year but up to two weeks can be ‘cashed out’ if the employee agrees. The minimum personal/ carers leave is 10 days per year which includes sick leave. Parental leave is up to 12 months unpaid which is a single amount shared between the parents.

Sick leave

Employers can now require medical certificates for even one day of sick leave. Previously workplace agreements generally provided that certificates were only needed for sick leave of three or more days. This will now be a matter for individual employers.

The Work Choices regulations state that certificates can only be issued by registered health practitioners within their area or professional expertise or the terms of their registration under the relevant state or territory law. This provision is thought to be in response to initial concerns that the term ‘registered health practitioner’ was so widely drawn that it could include a vet.

Termination of Work

When a worker is terminated by the employer they can apply to the Australian Industrial Relations Commission for a remedy – including compensation and/or reinstatement – if it is believed that the termination was unlawful or unfair. There are still remedies available for termination of employment for those under Work Choices but these are now much narrower. **For those people not covered by Work Choices, that is, they do not work for a corporation or come within one of the other definitions set out above, then the NSW unfair dismissal laws apply as before and readers should refer to the current issue of Hot Topics for more information.**

UNFAIR DISMISSAL

Many employees who are now under Work Choices have lost their access to remedies for unfair dismissal. The major exclusion is that employees in workplaces of 100 or fewer employees can no longer make a claim for unfair dismissal in the Australian Industrial Relations Commission. This means an employer in these workplaces can dismiss staff without warning and without reason.

The number of employees is based on permanent staff (both full time and part time) plus casuals who have worked on a regular basis for more than 12 months. The 'head count' includes the dismissed employee.

There are also further restrictions to unfair dismissal even for workplaces of more than 100 employees.

Probation

All new employees are excluded from unfair dismissal remedies for six months. This equates to a six month 'qualifying' or probation period. Prior to Work Choices, employees on probation were also excluded from claiming unfair dismissal but the accepted probation period was three months. If an individual employer imposed a longer probation period then this was open to challenge if the employee had been in the workplace for more than three months but was dismissed while still subject to a more extensive probation period.

Casuals

People working as a casual will not have access to unfair dismissal remedies unless they have worked on a regular and systematic basis for at least 12 months. Whether or not a person is a casual or permanent employee can be open to challenge. Casual workers are expected to be only short term employees but in reality casual arrangements can continue for many years. If there is some doubt about an employee's work status then legal advice should be sought as it will depend on the individual's work arrangements.

Redundancy

Employees who have been made redundant, (that is, they lost their job because the position no longer existed) will be excluded from bringing an unfair dismissal action, whether or not their employer has over 100 employees.

Work Choices provides that the exclusion applies to employees terminated for, or for reasons including, genuine “operational reasons”. Therefore, the operational reasons only need form some part of the reasons for dismissal to exclude the remedy.

“Operational reasons” are defined in Work Choices as being reasons of an economic, technological, structural or similar nature relating to the employer’s undertaking, establishment, service or business.

Prior to Work Choices, if an employee had been made redundant, s/he could still make a claim for unfair dismissal if it were not a real redundancy or it had been had been carried out in a procedurally unfair way. For example, the worker had not been given sufficient warning of what was going to happen.

Under the new system, a procedural fairness claim will be dismissed as long as the employer can point to ‘operational reasons’ as forming any part of the decision to terminate. There will only be a remedy if the employee can show that there were no operational reasons, that it was a ‘sham’ redundancy to get rid of them. In reality this will be difficult for employees to establish.

Another potential impact will be the loss of redundancy or ‘severance’ payments as these have been established by the award system. As awards are progressively replaced by AWAs and collective agreements then the entitlement to severance payment may be lost.

Work Choices has already removed severance payments in awards where they applied to workplaces with fewer than 15 employees.

Unlawful Dismissal

This remedy remains the same as it was prior to Work Choices. It is thought that it may become more popular with the loss of unfair dismissal remedies for so many people. Unlawful dismissal relates to termination for what is termed a 'prohibited factor', and includes where the employee has been terminated:

- because of their race, sex, religion, disability, family responsibility or pregnancy;
- for refusing to sign, vary or terminate an AWA;
- because of union membership, non-membership or union activities;
- because s/he has filed a complaint against the employer or participated in proceedings against the employer, for example because of alleged discrimination or alleged breaches of occupational health and safety provisions;
- for other reasons, including temporary absence due to illness or injury and absence due to parental leave.

All employees, no matter what the size of the employer, can make a claim for unlawful dismissal, even if the employer also points to 'operational reasons' for the termination. These matters are lodged with the Australian Industrial Relations Commission for conciliation but if the matter is not settled between the parties then it may proceed to the Federal Court or Federal Magistrates Court for arbitration. This is distinct from unfair dismissal matters which remain within the Commission.

Unlawful dismissal actions have not been popular in the past because applicants were unwilling to bring proceedings in the Federal Court as opposed to the relatively more relaxed surroundings of the Industrial Relations Commission. Where the case concerns alleged discrimination, it may be preferable to go the Anti-Discrimination Board or Human Rights and Equal Opportunity Commission.

In summary, employees under Work Choices will be able to seek a remedy for dismissal only if:

- It was an unlawful dismissal (applies to all employees);
- It was an unfair dismissal AND there are more than 100 employees in the workplace AND the employee had been in the workplace for more than six months (or 12 months as a regular casual) AND the employer cannot point to ‘operational reasons’ for the termination.

Other Remedies?

As noted in the overview, all employment relationships are based on a contract and so the termination of employment may provide grounds for an employee to bring proceedings for breach of contract. It is advisable to seek legal assistance to determine whether this is possible.

Concluding Comments

The impact of Work Choices will largely depend on how those employers under the new system respond to the provisions, for example, whether they decide to displace existing awards with individual and workplace agreements and the extent to which they use their new scope to dismiss employees without fear of unfair dismissal proceedings.

There are complex arrangements for the transition of workplaces currently under awards with the general expectation that awards will become increasingly irrelevant as they are displaced by collective and individual agreements. The role of unions is also significantly diminished, both through the reduction in reliance on awards and the prohibitions for agreements relating to union involvement and activities in the workplace.

The reach of Work Choices will also depend on how many unincorporated workplaces decide to incorporate because they would prefer to operate under the new system. The professed hope of the Federal Government is to establish a single industrial relations system for Australia but this would require the states to hand over their powers in this

area (as Victoria did in 1996). For now, the dual state and federal systems will continue albeit with an increased Federal reach because of the extension of the federal laws to trading and financial corporations.

It will take some time (and the outcome of the High Court challenge to Work Choices) before the impact of the amendments can be determined. The above description of the new regime is intended as a preliminary guide to those changes most relevant to employees' conditions in their workplace.

For more information see the following websites:

The New South Wales Office of industrial Relations
<http://www.industrialrelations.nsw.gov.au>

Australian Industrial Relations Commission
<http://www.airc.gov.au>

Fair Go Advisory Service
<http://www.fairgo.nsw.gov.au/index.html>

Australian Fair Pay Commission
<http://www.fairpay.gov.au/fairpay/>

Work Choices
<https://www.workchoices.gov.au/>