

# **WORKPLACE RELATIONS**

## **The reforms and what they will mean to business**

**Presentation by Truman Hoyle Lawyers**

**7 September 2005**

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### **THE PROPOSED REFORMS**

Without the opportunity to analyse draft legislation, it is difficult to speculate with precision the impact of the reforms and who they will mainly benefit in the economy. Once draft legislation has been prepared, the scope will be more apparent and it will be easier to assess the impact of the reforms.

#### **Minimum Conditions of Employment**

For the first time a number of key minimum conditions of employment will be set in legislation. These minimum conditions will apply to annual leave, personal/carers' leave, parental leave (including maternity leave) and the maximum ordinary hours of work. It is likely that these particular provisions will no longer appear in industrial awards, on the basis they will be contained within new Industrial Relations Legislation.

#### **Minimum Wage**

A new body called the Australian Fair Pay Commission ("AFPC") will be established to set minimum wage rates. The AFPC will also adjust minimum junior wages, training and disability wages, award classification wages and casual loadings.

#### **The New Australian Industrial Relations Commission**

It is proposed that the role of the Australian Industrial Relations Commission ("AIRC") will change so that there will be greater emphasis on dispute resolution as opposed to arbitration. For this purpose, it is proposed that a greater emphasis will be placed on mediation of disputes, with access to free mediation for employers and employees.

### **A Continuing Role for Federal Awards**

The number of allowable matters in Federal Awards will be further reduced.

It is proposed that references to jury service, notice of termination, long service leave and superannuation will be removed from awards, with the justification that these matters are already governed by legislation (being a mixture of State and Commonwealth legislation).

Existing classification structures will be reviewed, as will existing award wages. A task group will be established to review existing awards with a view to rationalising the number and complexity of current Federal Awards.

### **The 'No-disadvantage' test for Approving Enterprise Agreements**

At present, if an employer wishes to put in place a Certified Agreement or an Australian Workplace Agreement, the agreement must pass a 'no-disadvantage test'. The employer must be able to show that on balance, the overall terms and conditions of employment are no less favourable to the employee than the applicable Award. The Government proposes to completely eliminate the 'no disadvantage test'. However, in its place, employers will be required to show that the agreement meets the key minimum conditions and the minimum wage as set by the AFPC.

The current complex, adversarial process of approving Enterprise Agreements will cease. Currently, parties are required to appear before the AIRC and make submissions as to why the agreement should be approved. This process will be replaced with a much less complicated procedure of lodging all types of agreements, including both certified and individual Australian Workplace Agreements, with the Office of the Employment Advocate (which currently is in place) who will have the responsibility of approving Enterprise Agreements.

### **Unfair Dismissals**

All employers (who are corporations) and who have fewer than 100 employees will be exempt from the sections of the *Workplace Relations Act 1996* dealing with harsh, unreasonable or unjust termination, i.e. Division 3, in particular s.170CE.

It is expected that a remuneration cap will continue to apply (which, since 1 July 2005, is \$94,900) and that the filing fee will increase to approximately \$100 (currently \$52.40).

### **Changes to the Maximum Probationary Period**

The new changes will mean that employees may be employed on a period of probation of six (6) months as opposed to the current three (3) months maximum period.

The current unlawful termination provisions on discriminatory grounds and for reasons such as temporary absence from work due to illness will remain, as will the freedom of association provisions of s.298 of the Act.

### **Establishment of a National Workplace Relations System**

The Government has indicated that it will work towards a single, national industrial relations system which relies on the Corporations Power in the Constitution. The Government estimates that a national workplace relations system will then cover approximately 85% of all Australian workers.

## **THE IMPACT**

### **Who will be affected?**

#### *Persons employed by Corporations*

Any person employed by a corporation (irrespective of the number of the employees which that corporation has) will be affected by:

- The Australian Fair Pay and Conditions Standard; and
- The unfair dismissal exemptions if that corporation has less than 100 employees.

The High Court has held in the past that a “corporation” can include local councils and universities so the legislation will not be limited to employees of corporations in private enterprises.

#### *Persons covered by Federal Awards*

Any person currently covered by a Federal Award will see the number of allowable matters contained in that Award reduced.

Persons covered by a Federal Award, may also be exempt from bringing unfair dismissal applications irrespective of whether or not they are employed by a corporation, if there are more than 100 employees.

## **Who won't be affected by the Reforms?**

### ***Persons employed by sole traders, partnerships, etc***

Initially, any persons who are not employed by corporations (e.g. partnerships or sole traders or trusts) will not be covered by the reforms and will continue to be subject to the State regimes (irrespective of the number of employees).

## **What courses of action will be unaffected?**

### **Federal**

#### ***Unlawful Termination***

All employees will continue to be entitled to bring an unlawful termination application, i.e. if dismissal is for an unlawful reason as per s.170CK of the *Workplace Relations Act 1996* which includes dismissal on discriminatory grounds such as race, colour, sex, union membership, pregnancy, etc.

#### ***Trade Practices***

There are no disclosed proposals to restrict the rights of employees to bring claims under the *Trade Practices Act 1974*, e.g. actions brought for misleading or deceptive conduct under s.52 or misleading conduct in relation to employment under s.53B.

### **State**

#### ***Unfair Dismissal and Unfair contract Claims***

NSW employees who are not employed by corporations will continue to be entitled to bring unfair dismissal applications under Division 6 of the *Industrial Relations Act 1996*.

As the government's current proposed changes stand, it will also be possible for employees to commence unfair contract claims in NSW, regardless of whether the employer is a constitutional corporation or not.

### **Other Proposes Changes**

It is proposed that legislation will be introduced to:

- protect the status of independent contractors and support the right of people to make a choice about their working arrangements;
- ensure the rule of law is restored to the building and construction industry;
- establish the Australian Safety and Compensation Council to oversee implementation of national occupational health and safety standards and pursue a national approach to workers' compensation throughout Australia;
- exempt small business from making redundancy payments;
- remove 'industrial' barriers to the take up of school based new apprenticeships and part-time new apprenticeships; and
- introduce tougher laws in relation to industrial action, secret ballots before industrial action, establish a single right of entry regime and stamp out pattern bargaining.

### **Other Potential Impacts of the Proposed Changes**

- As the emphasis on the new reforms is to encourage employers and employees to enter into enterprise agreements, the union movement may respond by being better organised and more militant as they attempt to buy back lost membership and at the same time, demonstrate the value they can add as a representative of employees on a collective basis.
- With the proposed changes to unfair dismissal laws no longer being applicable to corporations with less than 100 employees, it is likely that unions will attempt to insert unfair dismissal provisions into enterprise agreements where there are less than 100 employees in the workplace. This will create a legislative obligation upon the employer not to dismiss an employee unfairly. Where such dismissals occur, the commission will have power to arbitrate an unfair dismissal matter as an industrial dispute on the basis of an alleged breach of the enterprise agreement.

- There is also likely to be an increase in litigation in the area of unlawful discrimination. Employees will attempt to shape their claim on the basis that they were treated in a discriminatory manner as opposed to being unfairly dismissed in order to invoke the jurisdiction of existing tribunals and courts.
- The proposed changes will also likely result in further limitations being placed on the right of unions to enter the workplace. However, until such time as a national approach is taken to occupational health and safety, broad right of entry powers enjoyed by union officials remain in place under occupational health and safety legislation in most Australian states.
- A further possibility will be that employees may elect to make more claims at common law against their employers with respect to matters such as a breach of an implied term of trust and confidence with respect to dismissals and general breach of contract claims where termination has arisen due to inadequate notice. There may be a surge in such claims in situations where businesses become exempt from a requirement to make severance pay to an employee made redundant where insufficient notice has been given.