

NEWSLETTER

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Industrial Relations Reforms How will they affect your business?

Recently there has been a great deal of media coverage and debate about the Industrial Relations (IR) reforms contained in the Federal Government's new legislation - the *Workplace Relations Amendment (Work Choices) Act 2005* (the new Act).

Although the new Act has been passed by the parliament in Canberra, it will not become fully operational until a date yet to be proclaimed. With the commencement date imminent, businesses are advised to ensure that they are fully aware of the changes which the legislation will make.

Commonwealth and State

The new Act is intended to narrow the scope for the operation of individual State legislation and to "cover the field" in the area of IR. Significantly, not only does the Act aim to displace State "industrial" legislation dealing with wages and conditions, it is also intended to prevent provisions such as the "unfair contract" legislation contained in section 106 of the *Industrial Relations Act 1996 (NSW)* being operative.

Who does the new Act apply to?

The new Act will apply to all foreign corporations as well as to all trading and financial corporations (called "constitutional corporations" in the new Act) and their employees. However, non-incorporated employers, partnerships and other entities are **also** covered by the new Act **if** they employ people in one of Australia's territories (eg the ACT) or Victoria or if their employees are Commonwealth public sector employees or waterside, maritime or flight crew employees.

Fair Pay Commission

The new Act establishes the Australian Fair Pay

Commission and gives it responsibility for setting minimum wages for employees regulated by the Federal IR system. Previously, this was the responsibility of the Australian Industrial Relations Commission ("AIRC"). The Government claims it wants to implement this change because, it says, until now wage setting cases have been "legalistic and adversarial".

Role of Awards

"Allowable matters" in Awards will be more limited under the new Act. This will permit greater scope for employers to negotiate with employees and to tailor arrangements to suit their businesses. It will also give employers greater flexibility in negotiating terms and conditions subject to certain minimum standards. These provisions should also give employers greater opportunity to engage contractors and to outsource work.

Workplace Agreements

The scope of AIRC's jurisdiction is further curtailed by the new Act providing that the process of agreement making is to be administered by the Office of the Employment Advocate. Six types of workplace agreements are established by the new Act which also includes a model dispute settling procedure. Interestingly, the model procedure does not include the option of referring a dispute to AIRC for mediation, conciliation or assisted negotiation. Under the new Act, a workplace agreement may be extended, varied or terminated by the parties, without the need to obtain the approval of AIRC.

Unfair Dismissal

The new Act prevents the following categories of employees from bringing unfair dismissal actions:

- (a) employees who are employed by an employer covered by the new Act and whose employees number **100 or less**. If an employee falls into this category, he or she cannot bring an unfair dismissal claim. The head count of 100 includes the employee in question, all part-time and casual employees (engaged on a regular basis for at least 12 months) as well as all full time employees;
- (b) employees whose employment has been terminated for, or for reasons including, genuine “operational reasons”. These are defined by the new Act as reasons of an economic, technological, structural or similar nature relating to the employer’s undertaking, establishment or business; and
- (c) employees who have been employed for no more than six months.

An important change also relates to the consequences of a termination being based in part on an employee’s misconduct. Even if the termination is found to be unfair, AIRC must reduce the amount of compensation it awards to the unfairly dismissed employee to take the misconduct into account.

Additionally, AIRC can no longer award an amount by way of compensation for shock, distress, humiliation or analogous hurt caused by the manner of termination of the employment.

Unlawful Termination

The power of AIRC to make awards for unlawful termination remains largely unchanged except that no amount is to be awarded as compensation for shock, distress, humiliation or other analogous hurt caused to an employee by the manner of termination. Further, any award for compensation is to be capped at six months’ remuneration; similar to the cap for unfair dismissal actions.

Alternative Remedies still Open to Employees

As a matter of law, every employment relationship is based on a contract, whether written, verbal or implied at law. Thus, employers should be aware that employees retain the right at **common law** to commence an action for breach of contract (regardless of the new Act), and common law

courts are not restricted in the amount of damages they can award. At common law, however, reinstatement is not available as a remedy. Furthermore, as an alternative, an employee may make a claim for alleged breach(es) of the Trade Practices Act or may claim discrimination.

Constitutional Challenge

Employers should be aware that currently a number of State governments including NSW have commenced proceedings in the High Court challenging the constitutionality of the new Act. If successful, the new Act may cease to have effect altogether. However, if the States are unsuccessful and the new Act is upheld, it will represent a significant change in the law and a move towards unification of the current IR legislation throughout Australia.

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YOUR FEEDBACK

If you have any comments about this newsletter, suggestions for improvement or would like to see any particular areas of law which interests you covered, please drop us a line at:

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