

NEWSLETTER

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“Unfair Dismissal” Effect of Work Choices Legislation on Australian Subsidiaries of Overseas Corporations

As you may know, the new Industrial Relations regime in Australia introduced by the Work Choices legislation prevents certain employees from bringing unfair dismissal actions. In essence, employees who are employed by a corporation with **100 or less** employees cannot bring an unfair dismissal claim. The head-count of 100 includes the employee in question, all full-time employees, all part-time and all casual employees engaged on a regular basis for at least 12 months.

If your company employs 100 or less people then those employees may well be prohibited from bringing unfair dismissal proceedings. However, if your company is the subsidiary of another company, including a foreign corporation, then the employees may well still be entitled to commence unfair dismissal proceedings.

Following the introduction of the new legislation, section 643(11) of the Workplace Relations Act now provides that the employees of “related bodies corporate” are to be taken into account for the purpose of determining the number of employees in an entity. A “related body corporate” is defined in the Corporations Act to include subsidiaries of a holding company and/or its parent company. These include overseas or foreign holding companies or parent entities.

As a result, when considering the number of employees employed by a subsidiary of a holding company, including a foreign company, effectively all the employees of both the subsidiary and the holding company must be taken into account. This also applies in the case of a company which is a member of a group of companies including overseas companies. All the employees of all the companies in the group, more or less, must be taken into account in determining whether the 100 employees or less threshold is met or exceeded.

Since it is necessary to include all relevant employees of all “related bodies corporate”, even small subsidiaries of overseas corporations will not only have to take the number of their local employees into account, but also the number of employees of their foreign holding company as well as any overseas subsidiaries of their foreign holding company. Again, if the local subsidiary is part of a local and/or overseas group of companies, the total number of all the relevant employees in the group will have to be included.

Moreover, it is not just full-time employees who have to be included. In determining the number of employees of a company and its related bodies corporate, both part-time employees and casual employees who had been regularly employed over the preceding 12 months, must also be included.

Many local subsidiaries of foreign corporations on a stand-alone basis would have less than 100 employees. However, after

taking into account all the relevant employees of all the subsidiary’s related companies, this number may well be exceeded. In that case, the local Australian employees are not prohibited from bringing unfair dismissal proceedings.

Interestingly, if your local company’s parent entity is a limited or unlimited partnership (e.g. a KG or OHG in Germany) then, even if the partners or one of the partners is itself a corporation, the partnership will not be regarded as a “related body corporate” and the employee of the partnership as well as of the individual partners may be excluded from the employee count.

Another point to note is that, in a situation where the parent company has:

- (a) **more than** 100 employees including short-term casual employees (employed on a regular basis for less than 12 months); but
- (b) **less than** 100 employees (including all full-time, part-time and casuals employed on a regular basis for 12 months),

the onus will be on the company to prove that it is not subject to the unfair dismissal provisions. This is likely to be a costly, time-consuming and potentially difficult exercise.

If your company is a local subsidiary of an overseas company and an unfair dismissal claim is lodged, we suggest that you liaise with the parent company in having a list of all employees (full-time, part-time and regular casuals) prepared for use in determining whether in fact there is jurisdiction for the matter to proceed or not.

If you have any queries concerning the Work Choices legislation, please contact Michael Kobras on mkobras@schweizer.com.au or Alison Drayton on adrayton@schweizer.com.au.

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YOUR FEEDBACK

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