

Employment Update

"Do State Awards and Agreements still Operate under the WorkChoices Legislation?"

November 2005

Introduction

One of the most significant features of the Federal Government's WorkChoices legislation is to have all constitutional corporations in Australia covered by a single Industrial Relations Statute rather than at present where awards and agreements are made pursuant to Federal and State Industrial Relations Legislation by the Australian Industrial Relations Commission and Industrial Relations Commissions of all states except Victoria.

From the commencement of the WorkChoices legislation (date not yet determined), State Industrial Tribunals will cease to have jurisdiction with respect to industrial matters concerning "constitutional corporations". How then does this affect the continued operation of State awards and agreements covering employees and employers who fall into the definition of a constitutional corporation?

"Constitutional Corporation"

Broadly speaking a constitutional corporation is a foreign corporation or a trading or financial corporation formed in Australia. It includes all types of companies e.g. those with shareholders, companies limited by guarantee and also bodies given corporate status by special legislation such as by an Act of Parliament establishing a university as a corporation. Most corporations will be "trading corporations".

However, whether or not a corporation is a trading corporation has to be determined according to the degree of trading that is part of the corporation's everyday operation. No doubt there will be extensive legal debate as to whether organisations operating in the "not for profit" welfare area (notwithstanding their current corporate identity) are "constitutional corporations" for the purposes of the WorkChoices legislation.

Will State Awards and Agreements Continue to Operate Upon Enactment of WorkChoices?

The simple answer to the above question is Yes but with distinct limitations. It seems very clear from the provisions of the WorkChoices Bill that the Government's desire is to have the majority of employees covered by Federal Workplace Agreements i.e. Collective Agreements (made between an employer and employees or Unions) or Australian Workplace Agreements (Individual Agreements).

In dealing with transitional arrangements for State Employment Agreements and State Awards, the legislation sets out as one of its objects, the following:

"To encourage employees and employers for whom those terms and conditions (of State Agreements and Awards) have been preserved to enter into Workplace Agreements during that time."

What then are the Terms of a State Industrial Instrument that are Preserved?

A further object of the legislation is to preserve for a time the terms and conditions of employment, as they were immediately before the reform commencement, for those employees who are currently covered by State Industrial Instruments.

The legislation proposes to achieve this object by preserving the current conditions of employment contained in a State Enterprise Agreement (subject to excluding certain matters prohibited by the legislation). Such an Instrument will be known as a "Preserved State Agreement".

In a similar way State Awards will be preserved, subject to limitation as to prohibited matters and are to be known as a "Notional Agreement Preserving State Awards" (i.e. preserved state award).

Many State Awards are Common Rule Awards i.e. they apply to employers and employees engaged in defined industries and callings rather than named respondents as is the case with Federal Awards. Examples of such State Awards are the Clerical and Administrative Employees Consolidated (State) Award (commonly known as the Clerks Award) and the Social and Community Services Employees (State) Award (SACS Award).

From the commencement of WorkChoices, employers with employees covered by such awards (and other state awards) will have the terms and conditions of those awards preserved as if the parties had entered into an agreement prescribing identical terms.

Term of Preserved Agreements and Awards

Preserved Agreements and Awards will continue for their nominal term, that is, the period prescribed in the respective instrument. However, the maximum period such instrument can operate is 3 years, notwithstanding that the original agreement or award might have had a nominal expiry date greater than 3 years.

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Once the 3 year period has expired the preserved state agreement or award ceases to operate and unless the parties have negotiated a new agreement or award, employees will only then be covered by the minimum entitlements of employment as listed below. Rates of pay and casual loadings will be determined by the Australian Fair Pay Commission; a new body (quite separate to the Australian Industrial Relations Commission) set up under WorkChoices. The remaining minimum entitlements will be as determined from time to time by the Government.

The minimum entitlements are as follows:

- (a) Basic rates of pay and casual loading;
- (b) Maximum ordinary hours of work;
- (c) Annual leave;
- (d) Personal leave; and
- (e) Parental leave and related entitlements.

In addition a Preserved Agreement or Award ceases to have effect if a new Workplace Agreement (either Collective or Individual) becomes operative or a new award binds the employer and employee.

Once the employer and employees become bound by a new agreement or award, the Preserved Agreement or Award can never operate again in relation to that employer and employees.

Variation of Preserved Agreements and Awards

A Preserved Agreement or Award can only be varied on the following very limited grounds:

- n To remove ambiguity or uncertainty;
- n To remove discriminatory provisions;
- n To remove prohibited content.

In so far as rates of pay are concerned, these will only be adjusted in line with determinations of the Australian Fair Pay Commission. The parties will not be able to lodge variations to vary an agreement or an award as currently is the case with State Agreements and Awards made by the Industrial Relations Commission of New South Wales.

Prohibited Content in Preserved Agreements and Awards

The legislation intends that regulations will provide a non-exhaustive list of matters which are prohibited from being included in a Workplace Agreement (including Preserved Agreements and Awards). While a list of prohibited content has not yet been promulgated in a regulation, it is anticipated that such regulation will include:

- n Matters that do not pertain to the employment relationship (as determined by the High Court in the Electrolux case); and
- n Terms which are objectionable (not yet defined) because they allow or require a breach of proposed freedom of association provisions e.g. promote trade union interests, or limit the use of contractors.

The Employment Advocate is empowered under the legislation to remove such prohibited content from all agreements and awards coming within the jurisdiction of the new legislation.

What Should Employers do if they are currently covered by a State Agreement or State Award?

Unless there is a pressing necessity to do so, we recommend that employers do not rush in to change their current industrial relations arrangements.

WorkChoices is a complex piece of legislation and will need time to settle in before any definitive decisions are made by employers. Already a Constitutional challenge to the legislation has been foreshadowed by the various State Governments and we will need to await the outcome of that challenge before proceeding with any certainty under the WorkChoices legislation. We would not expect the legislation, in any event, constitutional challenge aside, to commence operation before March 2006.

In the meantime, if any employer has a particular concern as to the effects of the legislation on their operation, our specialist industrial relations team headed by Partners, Peter Punch and Gerard Phillips and supported by our Industrial Relations Advisor, Mick Sheils, a former Commissioner of the Industrial Relations Commission of New South Wales, plus a highly skilled group of solicitors is available to provide advice at short notice. Please contact our Peter Punch in the first instance if you need such advice.

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