

□ WORKCHOICES UPDATE

High Court decision on WorkChoices

As our clients will be aware (see our Alert of 14 November 2006) the High Court has thrown out the legal challenge to WorkChoices. We do not have a crystal ball here at Ebsworth & Ebsworth but here are some conclusions and predictions which flow from this momentous decision.

- Australia will have one national system regulating employment within five years. The current system of overlapping State and Federal responsibilities will not survive.
- The Federal Government can now pass essentially any law it wishes as long as that law relates to corporations. The WorkChoices decision confirms that the expansion of the Corporations Power is profound.
- Barring a seismic political shift in Canberra, Australia now has a deregulated labour system. The days where industrial tribunals decided what employers (and employees) could and could not do, will not come again.
- The award system is now on life support. Awards will linger on as bare

minimum safety net documents (see article below on the Award Review Taskforce Report) but if the Howard Government remains politically ascendant then their next step will be to get rid of awards altogether.

One thing is certain. The WorkChoices case has established that we are living at the high point (since Federation) of the power of the Federal Government. With the Treasurer Peter Costello now subtly announcing that people are “unhappy and frustrated” with the way Federalism is operating, we ask is this the beginning of the downhill slope for State Governments? The next instalment will be a must watch.

Award Review Taskforce report

The second report from the Award Review Taskforce is now available. Clients will recall that the taskforce was looking at two things; how the new award system should be structured; and wage and classification structures in awards.

The first report was available some months ago and the second report has just been released. To help our clients, with what appears on its face to be a rather complex outcome, we have summarised both reports in this bulletin.

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in brief



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Living in interesting times

The month of November 2006 has seen some major developments in Workplace Relations. Our bulletin provides a summary of two of the most important developments: the High Court challenge to WorkChoices and the second of the Award Review Taskforce reports.

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□ AWARD REVIEW TASKFORCE REPORT

Award rationalisation

What the taskforce was doing

In his foreword to the taskforce report, the taskforce Chairman Matthew O'Callaghan sets the groundwork out very clearly. Mr O'Callaghan states that the passage of the WorkChoices legislative package "dictates a substantially changed role and basis for awards". He goes on to say that awards now have a new role as statutory documents which are designed to create minimum standards for employees who are not covered by workplace agreements. He also makes it clear that awards will reduce in number from the pre 27 March 2006 number of 4000 to a maximum number of awards likely to be between 100 and 150.

The purpose of the taskforce is to provide recommendations and directions to the Australian Industrial Relations Commission, which would result in the dramatic reduction of awards and the equally dramatic limitation of their content to reflect what is contained in the WorkChoices legislation. In other words the result of the award review taskforce report will be (through the actions of the Australian Industrial Relations Commission acting on that report) to reduce the awards system to a small rump containing a handful of safety net standards for employees who do not have a workplace agreement.

What will the new awards look like?

The handful of awards which will continue to exist will be very different from the awards that Australians have been used to seeing. It is clear from the taskforce report that awards will apply on an industry wide basis (as opposed to a single company basis). The system of defining industries will be the system contained within the Australian New Zealand Standard Industrial Classification (ANZSIC) system. The Australian Industrial Relations Commission will utilise this system to create groups or classes of industries to which awards will apply accordingly.

Obviously if companies have more than one business then (depending on the industry classification into which they fall under the ANZSIC system) they may be bound by more than one award.

The role of the Australian Industrial Relations Commission will be to ensure that the new awards (as well as applying to industries defined by the ANZSIC system) will use language that is "simple, plain and easy to understand". The new awards should reflect "widely used and applied award terms" within the particular group of awards to which the industry has been accustomed in the past. For example, the language should be one which the industry recognises and is able to be easily understood.

The new awards "must be expressed as minimum safety net entitlements". They will not be permitted to include any Leave Reserved matters (the notion of Leave Reserved was a way of putting matters in agreements or awards which had not been settled but which the parties could re-agitate during the life of the award or agreement).

Managerial and professional employees

The taskforce recommends that the new rationalised award system should provide entitlements for managerial classes of employees "...where those classes currently have access to award entitlements". This principle is also intended to cover entry level professionals and those professionals within a particular industry who have been covered by awards in the past.

This does not mean that managers who were previously award free are now covered by awards. It is only managers and certain professionals who were previously covered by awards who will continue to be covered by the standards of the new award system.

When will the award rationalisation process begin?

At one stage it was thought that the new award system would be implemented on a staged basis but the taskforce has made it clear that the establishment of the new award system should occur in one bite so that industries are not disadvantaged relative to other industries. This sounds like a huge task for the Australian Industrial Relations Commission and it will be interesting to see how the Commission manages that task.

The report states that it is recommending that any new award will come into effect six months after it is made by the AIRC. This will allow the parties time to adjust to the new document.

The report also recommends that the AIRC should develop some sample new awards based on each industry division (see note below on the ANZSIC code system) and then invite submissions from relevant parties who would be affected by the award. In this way the process should ensure that parties will be satisfied with the outcome. It is envisaged that the whole process should take three years.

What are the ANZSIC industry codes?

The ANZSIC system establishes the following industrial classifications:

- agriculture, forestry and fishing;
- mining;
- manufacturing;
- electricity, gas, water and waste services;
- construction;
- wholesale trade;
- retail trade;
- accommodation and food services;
- transport, postal and warehousing;
- information media and telecommunications;
- financial and insurance services;
- rental, hiring and real estate services;
- professional, scientific and technical services;

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□ AWARD REVIEW TASKFORCE REPORT

Rationalisation of wages and classification structures report

What was the taskforce doing here? The taskforce was directed to examine the wage and classification structures in pre-reform awards and rationalise these to a simplified structure of wages and classifications which can exist in the new award system.

The taskforce apparently found the going to be tough and indicates in its report that “further research is required...to develop a rationalisation strategy”. This means that the difficult task of unravelling the complex web of pay structures in Australia is going to take time.

What does the taskforce recommend?

The report makes it clear that the existing diversity of wage structures should not be lost. It recommends that the Australian Fair Pay Commission (which has the task of coming up with the finished structure) give further consideration to the whole issue of classifications before determining the new structure. It recommends that the AFPC and the AIRC should cooperate (now that should be interesting!) to work out which awards and which pay scales are no longer relevant.

The timetable for the elimination of interstate differentials is also to be extended to avoid “counterproductive effects”. Another major issue is pay scales which recognise competency as opposed to pay scales which recognise time. The taskforce recommends that the AFPC specify the capacity for competency-based scales but in the absence of agreement on this point, time based scales shall apply.

The taskforce then sets out a series of principles to guide the AFPC in its task of establishing the new pay scale and classification system. Many of these principles are of a general nature and we do not set them out here. The central point seems to be that the task is a large one, and the intended time limit of three years will be difficult to achieve. However the taskforce makes the point that to persist with the current system it “...simply preserves the deficiencies of the multiple workplace relations systems which have historically operated in Australia”. One can assume that the AFPC will not be retreading the current pay systems but making significant changes, although they will take time.

Implementation of the AIRC taskforce recommendations

The Australian Industrial Relations Commission and the Australian Fair Pay

Commission will certainly be fully engaged with implementing the taskforce recommendations over the ensuing months. What the AIRC will have to do is sort through provisions in various awards and work out which provisions will apply in the new industry classification system to reflect the ANZSIC code. The taskforce makes the point that the award rationalisation process must not result in “...an overall loss of generally relevant current award benefits for employees”. Likewise the AFPC will have to come up with a pay system that replaces what we have now and is somehow acceptable to employers and employees alike. How the Commission achieves this will be an interesting exercise. We are not certain how the new awards will look but it does seem that they will be fairly short documents providing bare minimum entitlements for employees and absolutely nothing as far as the trade union movement is concerned. The old awards which had a multitude of provisions dealing with union issues (e.g. trade union training leave, rights of entry, specific rights for union delegates etc) will be no more.

The main purpose of the new awards will be to provide the bargain basement below which workplace agreements may not venture. With Australia currently enjoying near full employment in most state capital and metropolitan areas (although the employment picture in some areas of regional Australia is much different) it is likely that the economic effect of the new award system will not be felt by very many Australians at all. Ultimately one imagines that the awards will apply to very few Australian workers. However should the economy turn down then we may see more workers placed on award rates and conditions.

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- administrative and support services;
- public administration and safety;
- education and training;
- health care and social assistance;
- arts and recreation services; and
- other services.

In addition to these principal divisions, there are of course sub divisions (e.g. food beverage and tobacco manufacturing, wood and paper product manufacturing etc). One can foresee some interesting arguments about the creation of the new award system based on the industry classifications contained in the ANZSIC code. The AIRC is tasked to engage in that argument and will make a decision as appropriate.

How will the new system affect the labour hire industry?

The taskforce comes to the conclusion that labour hire companies will be bound by the same award that applies to the direct employees of the business to which they are

supplying their labour. This conclusion might sound less than astounding to the average reader but it should be remembered that there was a submission made by the union movement that the labour hire industry itself should have a stand alone award (or a series of stand alone awards). The taskforce has rejected this approach and labour hire employers will simply be bound by the same award that applies to whatever customer they are servicing at a particular time. Given the relatively minimalist wages and conditions which will apply under the new award system it is unlikely that the labour hire business will suffer any disadvantage.

Will enterprise awards continue to exist?

The short answer is no, except in situations where the “most compelling argument” exists in the view of the AIRC. And even then if the Commission does decide to make an enterprise award it must have a shelf life of no more than three years from the date when the new award system commences.

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