



Advisers in Workplace Relations

Speech given by Siân Owen, Director, WorkSight Pty Ltd. to the
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Emerging Federal IR Trends

Introduction

Everyone is touched by the world of work – it affects all our lives, whether we have too much or too little of it. Not surprisingly, given its influence and effect, work is a highly regulated area of life. Regulation leads to complexity, complexity leads to frustration and the desire to wave a magic wand to make it simple. We do have a reasonably complex IR system or rather a range of systems and we have a Federal Government that both wants to make it simple and to introduce its own ideological slant to the system.

We also have a highly unusual alignment of stars at the moment – 6 state Labor Premiers – 5 of whom control their own IR systems (Victoria has handed theirs over to the Commonwealth and the two Territory Labor Chief Ministers do not control IR) and a Coalition Federal Government with control

over both houses from 1 July 2005. And ideology is an integral part of industrial relations.

What I plan to talk about today is:

1. briefly – what we have got at the moment; then
2. the major changes that the Government would like to make,
3. what some of the major employer groups are wanting,
4. how likely they are to achieve some of these changes;
5. what other developments there are from the AIRC and the High Court;
and
6. what impact all this will have on GTCs and businesses in general.

The current system

We currently have a Federal industrial relations system that primarily deals with interstate industrial disputes but also has sole control over industrial relations in Victoria, the ACT and NT.

The Australian Industrial Relations Commission (AIRC) currently has the power to:

1. create awards with 20 “allowable matters” where there is an interstate dispute (i.e. a dispute between states – it is necessary to have this, otherwise there was no reason in the past why you would not go to a state industrial relations commission);

2. make common rule awards for NT, ACT and Victoria – i.e. awards that apply across entire industries – an employer need not be aware of the award for it to cover them although they should be aware of the system they operate within, and are therefore responsible for knowing that an award should apply;
3. unfair dismissals for federal award and Common Rule Award employees
4. arbitration and conciliation of disputes
5. make certified agreements
6. determine test cases such as redundancy, family leave provisions
7. national wage cases

How the Commission gained control over Victorian workers is an interesting case study in political opportunism. The process was started by Liberal Premier Jeff Kennett who wanted to do away with the Victorian Industrial Relations Commission that provided for award coverage over all Victorian workers not covered by the Federal Commission. Suddenly these workers had no award coverage. So immediately unions across the Victoria served logs of claims aiming to bring them under the coverage of the federal jurisdiction and under award protection again. In order to do this they had to show that there was an interstate dispute so these logs of claims tended to be served on a wide range of Victorian employers and the odd one or two in other states. The awards that were created as a result of these awards were, to all intents and purposes, Victorian awards but in the federal jurisdiction.

However, this left many thousand Victorian employers not covered by any award – usually because no union was active in their business or even industry. The protection offered to these workers was minimal – the Australian Industrial Relations Commission established minimum wage orders for industry sectors that set the minimum wages. In addition the Workplace Relations Act was amended to provide a range of minimum employment conditions i.e.

- 4 weeks paid annual leave;
- Initially 5 days paid sick leave but recently extended to 8 days personal leave which included 3 days paid bereavement leave;
- 30 minute unpaid rest break;
- 12 months unpaid parental leave;
- Appropriate notice periods – dependent on length of service.

This system chugged along for a few years until the Kennett Government was unexpectedly turfed out of office. The incoming Labour Government established a taskforce to look into the operation of the state/federal system in Victoria. The taskforce concluded that too many Victorian workers were without the protection of reasonable employment conditions. The Government then devised a cunning plan to force the Federal Government to extend federal award protection to many thousands of Victorian workers. They did this by threatening to re-create, in effect, a state IR system via the Civil and Administrative Appeals Tribunal. Whilst the Federal Government did not really want to require thousands of small businesses to be obliged to employ staff according to federal awards, it certainly did not want Victoria to

re-establish a cumbersome state IR system when it had achieved the dismantling of one of the largest state IR jurisdictions. And so a system of common rule awards was created in Victoria

It won't be so easy to achieve this in the other states but I will go through why not in more detail later on.

This is the system that all Victorian employees operate within now, or at least should. Whilst Common Rule Awards came into effect on 1 Jan 2005 there are still some gaps (such as money lending organisations within the finance sector) and there are probably thousands of employers who are either blissfully or wilfully ignorant and are still sticking to the minimum wages and employment conditions that applied in Victoria pre 1 January 2005.

Once within the jurisdiction of the AIRC, businesses can operate under the appropriate federal award or chose to be covered by a certified agreement. Most GTCs will be familiar with the role of certified agreements either because they have made them with their staff or with a union or with a range of unions in partnership with a range of other GTCs (as in the "global agreement"). Certified Agreements do not have the same restrictions as awards in that they do not have to limit themselves to the 20 allowable matters and it allows an employer to devise a range of employment conditions which suit their business rather than an industry. Within the federal jurisdiction if you don't want to be covered by an award you need to make a certified agreement.

The only other option if you want to opt out of the coverage of an award is to make Australian Workplace Agreements (AWA) with your employees. These are individual contracts under the control of the Office of the Employment Advocate (OEA) – initially conceived as individual contracts but now they are basically template agreements to be churned out for however many employees you have. This seems to contradict the original intent of an individual agreement between an employer and an employee. However, it does recognise that it is not really feasible for an employer to negotiate individually with all employees and so we have essentially a system of pattern bargaining whereby an employer aims to achieve the same agreement for each employee.

Pattern bargaining is a term used by the Federal Government that refers to unions “misusing” their negotiating power within the certified agreement arena to force employers to accept consistent agreements across an entire industry sector. The classic case is the building and construction industry, but it happens to a reasonable extent in the health and higher education sector where similar outcomes are sought. The Federal Government has attempted to outlaw this but it turns a blind eye when an employer pressures individual employees to sign up to a standard AWA that all other employees also sign up to (and thus remove themselves from the award).

It is reported that there has been a big increase in the funding of the OEA to encourage a more significant take up of AWAs by small business. The OEA website shows that 40% of employers using AWAs have over 500 staff, only

8% have less than 20 staff. The main industry users are manufacturing, retail, property & business services and communications

The system in Tasmania

In Tasmania there is a dual system of state and federal industrial relations coverage. If a business has been “roped” into a federal award they are covered by the AIRC, otherwise the Tasmanian Industrial Commission (TIC) covers them.

The TIC has very similar powers to the AIRC within Tasmania i.e. it can:

1. settle disputes
2. make awards
3. determine unfair dismissals
4. judge award breaches
5. make industrial and enterprise agreements
6. register or deregister industrial organisations (i.e. unions and employer bodies)

As in the other states, because of the duality of the system, the TIC generally adopts the AIRC NWC decisions.

So what are the planned changes?

The legislation currently before Federal Parliament is:

1. Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004 – introduced 2 December 2004
2. Workplace Relations Amendment (Small Business Employment Protection) Bill 2004 – introduced 8 December 2004
3. Workplace Relations Amendment (Right of Entry) Bill 2004 – introduced 2 December 2004
4. Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005 – introduced 9 February 2005

Workplace Relations Amendment (Fair Dismissal Reform) Bill 2004

The Government's key priority is to remove small businesses from the jurisdiction of the unfair dismissal legislation. This is the legislation that has been rejected by the Senate over 40 times in the last few years. In this instance small business will be defined as a business with up to 20 employees. The Government believes that it will encourage small business to recruit staff if they know that they can dismiss them easily.

However it should be noted that they will not be exempt from unlawful dismissal (i.e. they will not be able to dismiss an employee on the grounds:

- that they are temporarily absent from work because of illness or injury;
- they are members of a trade union or have participated in trade union activities;
- they are not members of a trade union;
- they have acted as a representative of employees;

- they have filed a complaint against their employer alleging violation of laws or regulations;
- of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- they have refused to be covered by an AWA,
- they are absent from work during maternity or other parental leave;
- they are temporarily absent from work because they are involved in voluntary emergency management activity.

This is an attempt to simplify life for small businesses but these proposed changes throw up the following issues:

- Will businesses understand that they can dismiss an employee unjustly, unreasonably and even harshly (these are the grounds for the unfair dismissal legislation) but they can't dismiss an employee unlawfully?
- Will this change have the desired effect?
- Will it benefit small businesses?
- Are we really wanting to encourage small businesses to think that sacking employees is meant to be easy and that this is a positive way to staff their business?
- What about the cost of recruitment – advertising, interviewing, training etc?
- Will people want to work for a small business if they have no protection against an unfair dismissal? We are entering a period of reduced

unemployment when employees will have far greater opportunity to be choosey.

And what about those companies that have around 18 or 19 employees – they take an additional 2 staff on and they are over the limit and back under the jurisdiction of the AIRC!

What are the implications for GTCs? On the one hand maybe it will be easier for small business to employ staff directly; but GTCs can show how the recruit/dismiss/recruit cycle can be depressing and costly and so businesses should leave it up to GTCs.

Workplace Relations Amendment (Small Business Employment Protection) Bill 2004

This legislation intends to exempt small businesses from the redundancy provisions established in 2004 by the AIRC. This was one of the most dramatic pieces of social policy development in recent years. The Commission first established a general right to redundancy in awards in 1984 but chose at that stage to exempt small businesses.

Nearly 20 years later the ACTU decided that the levels of redundancy pay were no longer acceptable and so the Commission heard a test case over 2003-04. It concluded that it was no longer reasonable to conclude that small businesses could make employees redundant and pay them no severance pay.

The Federal Government was outraged – both at the imposition of such a provision on small business and on the boldness of the Commission’s decision. They immediately announced that they would legislate to obviate this decision.

The following charts show the difference in entitlements from the 1984 test case standards to those established in 2004:

1984:

Period of continuous service	Severance pay
1 year or less	Nil
1 year and up to the completion of 2 years	4 weeks’ pay
2 years and up to the completion of 3 years	6 weeks’ pay
3 years and up to the completion of 4 years	7 weeks’ pay
4 years and up to the completion of 5 years	8 weeks’ pay
5 years and up to the completion of 6 years	8 weeks’ pay
6 years and over	8 weeks’ pay

2004:

Period of continuous service	Severance pay
Less than 1 year	Nil

1 year and less than 2 years	4 weeks' pay*
2 years and less than 3 years	6 weeks' pay
3 years and less than 4 years	7 weeks' pay
4 years and less than 5 years	8 weeks' pay **
5 years and less than 6 years	10 weeks' pay
6 years and less than 7 years	11 weeks' pay
7 years and less than 8 years	13 weeks' pay
8 years and less than 9 years	14 weeks' pay
9 years and less than 10 years	16 weeks' pay
10 years and over	12 weeks' pay

* 'Weeks' pay' means ordinary time rate of pay for the employee concerned.

** Maximum payable by a small employer (i.e. less than 15 employees) & only service from 8 June 2004 to be counted.

As an aside, it should be noted that the definition of small business when it comes to the redundancy provisions is up to 15 employees, whereas, it is small businesses with up to 20 employees who will be able to sack them without risking unfair dismissal. So much for developing a more simplified system.

Now will this help employment? Redundancy provisions can be onerous on all businesses.

- Small businesses had been exempt for a long time – had this encouraged them to employ more staff?
- Will small business really not take people on in case a few years down the track they have to make people redundant?
- Why should employees under 1 employer be entitled to compensation but not under another?
- And finally is this going to make small business an attractive employer of choice for prospective employees?

My conclusion is that GTCs should promote themselves to employees as employers of choice because of the range of employee entitlements they offer.

I should note that the TIC has never followed the AIRC in this regard – not in 1984 and there are no signs that they are likely to change their position on this in 2005.

Workplace Relations Amendment (Right of Entry) Bill 2004

This legislation is basically aiming to restrict the right of union officials to enter businesses for the purpose of recruitment, consultation with members and checking up on wage records. Undoubtedly the Senate will pass it and it is likely to cause problems for union officials but will have little impact generally.

Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005

The Workplace Relations Amendment (Extended Prohibition of Compulsory Union Fees) Bill 2005 is using the Federal Government's rights in relation to constitutional corporations to overrule state employment agreements in relation to bargaining services fees. Here we have one of the first attempts to use the Government's power in relation to constitutional corporations to develop a national IR regulation. It will be interesting to see which is the first union to take this to the High Court – I'm sure there are some labour barristers licking their lips at the mere thought!

Other plans of the Federal Government

We have looked at the legislation that the Government has already introduced but they have a lot more than that planned.

Building and Construction Industry Improvement Bill

The Federal Government has stated that it intends to reintroduce the Building and Construction Industry Improvement Bill that was previously rejected by the Senate. This is an attempt by the Government to clean up the construction industry. In his 2nd reading speech the Minister for Employment and Workplace Relations, Kevin Andrews said:

“At the core of the Royal Commission’s findings about the building and construction industry is an entrenched culture of lawlessness, coupled with widespread inappropriate practices that act against choice, productivity and safety.” He went on to say that the “Royal Commission found that the commercial construction industry is characterized by illegal and improper payments, chronic failure to honour legally binding agreements, regular flouting of court and commission orders and a culture of coercion and intimidation.”

One of the most common aspects of carrying out industrial relations in the construction industry is the presentation of standard certified agreements to employers by a union and being told to sign the agreement – no opportunity for any negotiation – and frequently for an administrative fee to be paid in order to put the agreement through the Commission. Some of the GTCs here today may have signed up to these sorts of documents. The Government aims to stamp out this type of “pattern bargaining” in this legislation.

The Government is also aiming to try to change the culture of the industry and end the “no ticket no start” approach to employment. Again GTCs here are fully aware of the difficulties facing apprentices if they chose not to join a union.

This bill aims to:

1. Create a position of the Australian Building and Construction Commissioner who will lead an organisation “charged with monitoring,

investigating and prosecuting breaches of federal workplace relations laws in the industry”

2. Establish “A new regulatory framework for the ...industry ... through the use of a range of constitutional powers, including the corporations power, and a broad definition of ‘building work’”. This aims in part to prevent unions from blocking the supply chain of products within the building industry.
3. Stop pattern bargaining within the industry by requiring the Commission only to certify agreements if they are satisfied that pattern bargaining was not used.
4. Simplify the building and construction industry awards in relation to the payment of allowances in particular.
5. Require that secret ballots be held prior to any industrial action being taken and to introduce a 21-day cooling off period in relation to industrial action.
6. Unlawful industrial action will attract a greater range of penalties.
7. Provide for greater freedom of association.
8. Enhance “the regulatory framework for unions and employer organisations, with a particular focus on improving financial accountability and arrangements for union right of entry into the workplace.”
9. Create an Australian Government Building Code which will apply to constitutional corporations and “will promote best practice outcomes in workplace relations and workplace safety that will ‘raise the bar’ for the entire industry.”

This is an ambitious piece of legislation. It is to be expected that the Senate will pass it in 2005 and then we will see how successful the Government will be in effecting any change within the industry.

Independent Contractors Act

During the last federal election the Liberal Party put out a media release setting out its plans to introduce an Independent Contractors Act “to protect and enhance the freedom of contracting as a wholly legitimate form of work.” They asserted that the “courts have developed tests to uncover ‘sham’ independent contractor arrangements” but that “these tests have gone too far”. Essentially this is an attempt to remove contractors from the jurisdiction of the AIRC. Many eminent lawyers have attempted to put forward a clear definition of an independent contractor so that they can be clearly distinguished from an employee and they have all failed. It will be interesting to see what definition the Government comes up with.

The Government has been very quiet on this election promise since the election. However in December 2004 Kevin Andrews did announce an inquiry by the Standing Committee on Employment, Workplace Relations and Workforce Participation into independent contracting and labour hire arrangements across Australia.

The terms of reference specify the following areas are to be investigated:

- the status and range of independent contracting and labour hire arrangements;
- ways independent contracting can be pursued consistently across state and federal jurisdictions;
- the role of labour hire arrangements in the modern Australian economy; and
- strategies to ensure independent contract arrangements are legitimate.

It is interesting to note the 2nd point that may bring forth some suggestions relating to the use of the Corporations power again. It should also be noted that the NSW Industrial Relations Commission (IRC) has been looking into this area for some time with the “Secure Employment” case – as yet there has been no announcement of the conclusions of this case. This application by the NSW Labor Council “seeks rights for casual employees to convert to permanent employment (and) also seeks restrictions on the use of labour hire and the contracting out of work that results in job losses.”

This brings us to one of the most important trends for GTCs – the issue of who is the real employer? The host or the labour hire firm or the GTC? One of the main reasons for the Federal Government’s desire to introduce this legislation is because there is a clear move amongst Industrial Relations Commissions and courts around the country to look very carefully at cases that involve labour hire firms and GTCs. The Commissions and Courts are considering issues such as:

- Is the person an independent contractor or an employee?

- If they are an employee – who is the employer?
- Who was responsible for the decision (eg to dismiss)?

In relation to whether a person is an independent contractor or an employee the High Court established a range of factors to consider in the case of *Stevens v Brodribb Sawmilling* in 1986 and later in *Hollis v Vabu* in 2001.

These include:

- What does the contract say?
- Who controls what the person does?
- Who directs the work?
- Do they work for anyone else?
- How are they paid?
- Who provides the equipment or resources?
- What are their hours of work?
- Are they given holidays and who authorises such leave?
- Is income tax deducted?
- Is there an entitlement to dismiss?

There are a range of frequently apparently contradictory decisions relating to sexual harassment and discrimination, OHS and unfair dismissal. Some say the host employer is the legal employer and the labour hire company is merely an administrative agent of the host employer, others that it is the labour hire company or the GTC and sometimes even both. In fact the concept of “dual employment” seems to be becoming an accepted concept (it

is well established in the US) – so that both the host employer and the labour hire firm are held responsible (particularly so for OHS issues).

It is critical for all parties that the issue of who is the actual employer is resolved – it can determine whether a person is entitled to access the unfair dismissal jurisdiction, it can determine who has to pay compensation under OHS legislation

With the explosion of the labour hire industry, unions see that employers are using labour hire firms to provide employees without having to provide the employees with the entitlements they would have received had they been employees of the business. They are therefore aiming to have the labour hire firm obligated to pay the same conditions. It is interesting to note here that a recent attempt in WA to have an award made for labour hire companies failed.

A Unitary Industrial Relations System

Now onto the truly radical change proposed by the Federal Government - to have a unitary industrial relations system.

State IRCs (or in the case of Tasmania IC) are generally pretty pleased with how their systems operate (although in many important respects they follow the lead of the AIRC) and the state Governments are not at all comfortable with the IR agenda of the Federal Government. To put it crudely it is the labour movement lining up against the bosses.

But “generally pretty pleased” is not adequate to describe how NSW feels about its IR system. It is superior to any other system in their view and they will not let it die without a fight. So, we are faced with the largest state with the longest serving current state Labor premier up against the Federal Government.

Whilst I agree that it is desirable to have a unitary system, it isn't going to happen in a positive way without the states handing over the power willingly – as happened in Victoria. There is no evidence that any of the remaining states have the slightest intention to give up their control over industrial relations – particularly to a Federal Government that has an industrial relations agenda that is so contrary to the philosophy of the labour movement. Indeed the NSW Government is already referring to the Federal Government's “hostile takeover” of the NSW system.

"A national workplace relations system will mean employers have to spend time and money negotiating complex individual agreements with their workers, rather than being able to employ staff under a clearly defined award," Mr Della Bosca, the NSW Minister for Industrial Relations, said.

"This would be costly for small business, regional NSW and in particular women who rely on flexible work practices to enable them to combine working and child-care responsibilities."

"The NSW system is fair, efficient and inexpensive, with a strong independent umpire respected by all sides. It has contributed substantially to the high levels of industrial harmony and low rates of unemployment that we enjoy in this State."

This is going to be a classic States vs. Federal Government stoush!

Corporations Law

Given that they are not going to be handed the power to control all industrial relations, the Federal Government has had to consider other ways to achieve their ambitions. There are some significant blockages preventing this in that the constitution limits the Federal Parliament to making laws relating to the conciliation and arbitration of interstate industrial disputes – not disputes within one state. This is where the Corporations Law comes in. This gives the Federal Parliament the right to legislate in relation to employees of corporations. Estimates in the media suggest that this could cover up to 85% of all employees. If this is correct, then the state industrial relations commissions will not have much of a workload and may just concede defeat and hand over the rest of their powers to the Federal Government – we'll see. Employees who will not be covered are those working for unincorporated associations, partnerships and sole traders – it is not at all clear as to how they will be covered by a unitary system without a constitutional amendment.

This seems a complex way to achieve a dramatic change to the conduct of industrial relations in this country. It is far too early to be able to comment on how it may work and what consequent changes will be. No doubt there will be a fight about it though.

National Wage Cases & the Minimum Wage

Another of the Federal Government's ambitions is to control the Commission's tendency to award pay increases to all federal award employees via the annual national wage case decisions and to increase the minimum wage. Because of the interlocking nature of state and federal industrial relations, these decisions are followed by all states and so all federal award and state award employees get these pay increases (unless they are covered by certified agreements or AWAs).

The minimum wage was introduced by the Commission (then the Australian Conciliation and Arbitration Commission) in 1966 and was "designed to meet the circumstances of employees in the lowest classifications who are in receipt of award rates and no more."

Employers have opposed it for a long time – in the National Wage Case of 1974 the Full Bench of the Commission stated: "In our view the minimum wage is a most important concept and we cannot accept the view of the employers that it now has no place in the awards of the Commission. We see the minimum wage as a desirable floor below which the wage actually paid to any employee for ordinary time shall not fall."

The minimum wage is not a new concept.

This table shows the last 5 years minimum wage levels, the NWC increases and a comparison with increases awarded in the mid 1970's:

Year	Increase to award rates of pay	Minimum Wage
1975 (May)	3.6%	
1975 (September)	3.5%	
1976	6.4%	
1999	\$12.00 a week in award rates of pay up to and including \$510.00 a week; and \$10.00 a week in award rates of pay above \$510.00 a week.	\$385.40 a week \$20,105 a year
2000	\$15.00 a week in all award rates	\$400.40 a week \$20,888 a year
2001	\$13.00 a week in award rates of pay up to and including \$490.00 a week; and \$15.00 a week in award rates of pay above \$490.00 and up to and including \$590.00 a week;	\$413.40 a week \$21,566 a year

	and \$17.00 a week in rates of pay above \$590.00 a week.	
2002	\$18.00 a week in all award rates	\$431.40 a week \$22,505 a year
2003	\$17.00 a week in award rates of pay up to and including \$731.80 a week; and \$15.00 a week in award rates of pay above \$731.80 a week.	\$448.40 a week \$23,392 a year
2004	\$19.00 a week in all award rates	\$476.40 a week \$24,852 a year

One of the concerns of the Government and some of the employer organisations is that the minimum wage is pricing the unemployed out of the labour market. With unemployment reducing and a skills and labour shortage looming it is difficult to see how this argument stacks up. However it is interesting to note the minimum wage levels in the US and the UK as reference is often made to these in the current debate.

The US Federal Minimum Wage is currently at US\$5.15 an hour (Aus \$6.18). On a weekly basis this is US\$195.70 a week (38 hours) (Aus\$234.84) and annually US\$10,209 a year (Aus\$12,251)

This should be compared with the Kansas Minimum Wage – US\$2.65 an hour
= US\$100.70 = US\$5,253 a year

Source: US Department of Labor

The UK Minimum Wage is £4.85 an hour (\$11.64), £184.30 a week (\$442.32)
and £9,614 a year (\$23,074)

Source: Department of Trade and Industry

Depending on how the Government chooses to effect this control, it could mean that the days of across the board pay increases could be over. It could be that the Federal Government establishes the minimum wages by legislation which will mean that it will probably only increase the absolute minimum wages and probably only minimally. This approach would probably ensure that trade unions and low paid advocates would lose all influence.

Another option would be that they establish an expert panel that determines the level of the minimum wage or to require the Commission to give greater priority to economic forecasts – although the Commission already does have to give consideration to this. (s90 of the Workplace Relations Act requires the Commission to have regard to “the state of the national economy of any award or order that the Commission is considering, or is proposing to make, with special reference to likely effects on the level of employment and on inflation.” This amendment was inserted in March 1994.)

A report in The Age in early March suggested that the Government was starting to make conciliatory moves towards the Commission and may consider giving the power to determine the minimum wage and any other more general pay increases to an expert group within the Commission. However, I would have thought that the Commission feels that they generally do establish such a group with the careful selection of the Full Bench each year.

I would also think that the Government would be a bit nervous about allowing the Commission to still maintain this level of control over wage levels as the Commission is quite clearly a very independent beast and so one of the other options is likely to be the one they opt for.

Whilst it is difficult to see exactly what problems the Commission has caused, I am confident that some major change will occur in this regard and probably quite soon after 1 July 2005. This could mean that this year's national wage case may be the last for some time.

This will mean that unions will have to do a lot more work with individual employers to argue for pay increases which will also create more work for employers. They will have to negotiate with unions directly and those that don't have much union involvement will have to decide what pay increases to offer – as opposed to just accepting the National wage case increase.

Allowable Matters

Another major change is likely to be to the number of allowable matters in awards. These are the employment conditions that can be covered in awards. An earlier Howard Government introduced the current list of 20 allowable matters in 1997.

These are:

1. classifications of employees and skill based career paths;
2. hours of work, rest breaks, notice periods
3. rates of pay;
4. incentive based payments, piece rates and bonuses;
5. annual leave and leave loadings
6. long service leave;
7. personal/carer's leave including sick leave, family leave, bereavement leave, compassionate leave, cultural leave etc;
8. parental leave including maternity and adoption leave;
9. public holidays
10. allowances;
11. loadings for working overtime or for casual or shift work';
12. penalty rates;
13. redundancy pay;
14. notice of termination;
15. stand-down provisions;
16. dispute settling procedures;
17. jury service

18. the type of employment eg full time, casual, part time etc;

19. superannuation;

20. pay and conditions for outworkers.

The Business Council of Australia and the Australian Industry Group are both currently urging the Government to drastically reduce this to approximately 8 i.e. ordinary hours, rest breaks, public holidays, LSL, allowances, penalty rates, redundancy and superannuation. This is because their view is that business is overburdened with award regulation and needs to be freed up. This is a scenario that is familiar to Victorian GTCs who have just moved away from this approach. It may or may not be very tempting to Tasmanian GTCs to think that this maybe what faces them if they are forced into a single IR system. However it is not an approach which any state Labor Premier would want to sign up to.

It is likely that the Federal Government will be attracted to this sort of proposition and I would expect that we will soon see some sort of reduction in the number of issues covered by federal awards.

How will GTCs respond?

This may put pressure on GTCs to decide how they want to respond as the introduction of minimum employment conditions in Victoria led some companies to sign up to, what we colloquially call, the Global Agreement. This is essentially an agreement with key unions to commit to pay what the

unions consider are acceptable terms and conditions – previously federal awards or agreements were the appropriate measurements. If federal awards are to be stripped to the core then unions will require GTCs to sign up to a far greater range of certified agreements to safeguard existing employment conditions. This in turn will lead to the likelihood of greater differentiation within the GTC market with some companies paying Certified Agreement conditions and some sticking with basic awards.

AWAs or Certified Agreements?

One part of the agenda here is to encourage businesses to move away from awards that are basically controlled by unions (not that they necessarily need to be, but they are). The Government would prefer businesses to rely on AWAs which I have referred to earlier.

The other alternative for employers is a certified agreement (CA) which is a collective agreement with all employees. Many GTCs have CAs with their own staff as well as agreements with unions in relation to trainees and apprentices – particularly in the building industry. Certified agreements have been relatively trouble free until the High Court stepped up to the plate in 2004. The case that started this unfortunate ball rolling involved Electrolux – it's hard now to look at whitegoods in the same way!

The High Court was asked to decide whether it was legitimate for a union to take industrial action in support of their claim to require an employer to deduct

a “bargaining fee” from non-union members from their wages to pass on to the relevant union for the “service” of negotiating an agreement for them. Whilst this has been the Holy Grail for all trade unionists who consider it outrageous that non-unionists benefit from their actions, to most people this would be patently obviously not right. You don’t join a union, the union negotiates an agreement and you get charged for their negotiations.

The High Court, as expected, said no, you can’t do this. But instead of stopping there, in their wisdom, they ploughed on and decided that this was not acceptable because the bargaining fee did not “pertain” to the employment relationship and not only should this not be allowed but it meant that the whole agreement could not be allowed. This put the entire system of Certified Agreements at risk as there were many CA’s which had this clause in – along with other clauses that may not “pertain” to the employment relationship.

The Federal Government immediately put forward a bill, which miraculously was passed, which made legitimate all CAs that had been certified although they may have dodgy clauses in them – the dodgy clauses may not be enforceable but the rest of the agreement is.

However it has created huge problems for the Commission which now has to decide whether each clause in a certified agreement “pertains to the employment relationship” or not. There was the ridiculous situation late last year when an employer argued that salary packaging should be allowed in an

agreement but the Commission said no – and so rejected the whole agreement. A few days later another employer adopted the earlier employer's arguments as to why this should be allowed and it was accepted. So, if I am advising any of you that I'm not sure whether a clause in your agreement is OK or not – this is why!

Reduction in awards

The AIG is pushing the Federal Government to reduce the number of federal awards to a maximum of around 20. This will basically mean that there will be just one award for each industry.

This is roughly what Victoria had up until 1 January 2005 – around 20 industry sectors each with its own minimum wage order. Whilst this would be a major task as there are currently hundreds of awards, it is feasible and theoretically at least it would simplify the system. However within each award there would need to be, at least to start with, separate sections to deal with the peculiarities of on site and off site construction for instance.

This is another clear attempt to push employees and businesses down the path of AWAs and CAs and away from awards which will only be relevant for those businesses that haven't bothered to develop a set of conditions for themselves – basically small business.

I can imagine that the Government will be quite tempted by this and we may well find it in place before some of the Government's ideas, such as a unitary system.

More Flexible Employment Conditions

Just briefly we should balance what the Federal Government is aiming to achieve with other developments. The Victorian Government has just put out a consultation paper suggesting that employees gain an entitlement to Long Service Leave after 10 years instead of 15 (this will not increase their entitlement but just allow them to take it earlier). The State Government is selling this on the basis that it encourages employees to spend more time with their families and that maybe work is not everything!

There are increasing numbers of cases around the country where employers are being required to compensate employees (usually women) because they were not willing to provide them with part time work so that they can balance their work and family responsibilities. It is no longer enough to say "No, that job needs to be done on a full time basis." You now need to show that you made every effort to try to accommodate part time work or you will be deemed to have discriminated on the grounds of family responsibilities.

And finally the AIRC will soon be handing down its decision in the family provisions test case brought by the ACTU. The ACTU is seeking:

- an extension of unpaid maternity leave from 12 months to 2 years;

- the right to part time work until the child goes to school;
- the right to change hours of work because of family responsibilities;
- the right to take 6 weeks unpaid leave a year to cope with family responsibilities;
- the right for parents to take 8 weeks of unpaid parental leave simultaneously.

Whilst such claims are never granted in full there will inevitably be some movement towards increasing the flexibility employers are required to show employees who are trying to balance work and family.

Conclusion

With many of these changes we are faced with immense and contradictory conflict:

- between the states and the Commonwealth (which also means ALP vs. Coalition)
- between the unions and the Federal Government
- between the Federal Government and the AIRC.

But the most interesting conflict that I see is between a Federal Government that is intent on minimising the obligations on employers (keep the minimum wage down, allow small businesses to dismiss staff easily, allow small businesses to avoid redundancy pay, reduce the role of awards so that

businesses can chose their own employment conditions etc) and a labour market that is changing dramatically. The changes are in terms of:

- skill shortages,
- labour shortages,
- cultural change.

By cultural change I mean that a lot of people are no longer willing to work long hours with little or no flexibility. They want to be able to work part time or work long days but short weeks or have more holidays or sabbaticals. And the power to demand such employment conditions is slowly going to transfer over to employees because of the skills and labour shortages.

There seems little point in minimising employment conditions when employers are going to have to compete for labour. What employers really need to focus on is what they need to do to attract and retain good staff. Apart from the proposed changes to the building industry, none of the changes that are mooted at the federal level will do anything to assist you in sorting out that problem.

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