

WorkSight Focus International

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News, opinions, events and more from the WorkSight team

Industrial Relations Changes

“The government’s key priority is to remove small businesses from the jurisdiction of the unfair dismissal legislation.”

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The current Australian Industrial relations system is set to change. In the first edition of WorkSight International Focus this year we reflect on the pending matters and major developments that have and will impact upon industrial relations in Australia.

The following legislation is currently before Federal Parliament:

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.

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.

It should be noted that the definition of small business when it comes to the redundancy provisions is up to 15 employees – small business is up to 20 employees to be able to sack them without risking unfair dismissal. So much for developing a more simplified system.

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

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wage records. Undoubtedly it will be passed by the Senate 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!

AIRC full bench application of Electrolux

In an important application of the High Court's Electrolux ruling, a full bench of the Australian Industrial Relations Commission (AIRC) has confirmed a number of clauses relating to salary sacrificing, the

use of labour hire, trade union training leave, right of entry and union representation are able to be included in certified agreements.

However the full bench found not certifiable both a clause providing for the payroll deduction of union dues and a right of entry clause that was expressed in the broad terms of establishing a right of entry for the purposes of “legitimate union business”.

In Electrolux, the High Court concluded a matter must pertain to the relationship between an employer, in their capacity as such, and an employee, in their capacity as such, in a direct and not merely consequential manner in order to be meet the requirements of s 170LI. The High Court also held that every single clause of an agreement must pertain to this relationship in order for the agreement to be certified. This was a considerably narrower approach than that previously adopted by the AIRC and the Federal Court, which lead to a great deal of uncertainty and confusion over what provisions could be validly included in a certified agreement.

This recent decision of the AIRC may provide some comfort to parties to certified agreements as it clarifies what matters may or may not pertain to the employment relationship and the AIRC's reasoning for determining whether a provision complies with the requirements of the WR Act.

The matter involved three separate appeals concerning the refusal of the AIRC to certify three separate agreements. The full bench considered each of the provisions that the AIRC at first instance rejected as not pertaining to the requisite relationship.

Salary sacrifice provisions

The full bench held that the relevant salary sacrifice arrangements in the

particular agreements pertained to the relationship between an employer, in its capacity as an employer, and its employees, in their capacity as employees. The full bench noted salary packaging was a common feature of modern employment relationships, and concerned the mode of remuneration of an employee.

Payroll deductions

The full bench, however, differentiated between salary sacrifice arrangements and payroll deductions by holding that a clause providing for payroll deductions did not pertain to the requisite relationship. This was because it required the payment of dues out of earned wages - wages to which the employee was presently entitled. Therefore, payroll deductions rendered the capacity in which an employer would make such payments to be that of a debtor or a financial agent of the employee.

Employees of labour hire agencies

Clauses that limited the engagement of labour hire agency employees were held to pertain to the requisite relationship as the limitation of the number of agencies engaged by the employer would directly impact the amount of work available to the employer's employees.

The full bench also determined a clause that had the effect of obligating the employer to instruct the labour hire agencies with whom it contracted to increase their employees' wages by the same rate as that contained in the agreement also pertained to the requisite relationship as it directly concerned the security of employment of the employees covered by the agreement.



Trade union training leave

A clause that provided for paid leave of absence for trade union training leave was also held to pertain to the employment relationship as the full bench noted that there was no basis for distinguishing a provision for paid leave of absence for that particular purpose and any other of the many purposes for which paid leave could be provided.

Right of entry

In relation to right-of-entry clauses, the full bench concluded a clause that established a right of entry confined to entry for the purposes of investigating and securing compliance with any relevant award or applicable agreement pertained to the requisite relationship and could be included in an agreement.

However, the full bench also noted a provision that established a right of entry that was unconfined and capable of being exercised for purposes extraneous to the employment relationship - such as campaigning for union elections or raising political awareness of union members - did not comply.

Union representatives

A clause that recognised the role of a particular employee as a union steward and which established the right for that employee to paid leave to attend union business was found by the full bench to regulate the role of the employee and therefore pertained to the requisite relationship.

Principles to be applied The full bench articulated principles to be applied when considering an application to certify an agreement pursuant to Division 2 of Pt VIB of the Act:

Accordingly, the full bench determined that two of the agreements, those covering the La Trobe University's Children's Centre and the Murray Bridge Nursing Employees, met the requirements of s 170LI. The Schefenacker Visions Systems Agreement however did not comply due to the inclusion of a broad right of entry clause and a provision establishing payroll deductions for the payment of union dues.

Section 45 appeal against decision (PR952449) by Australian Nursing Federation, (PR956575) and (PR956638) AIRC (PR956575) (Giudice J, Lawler VP and Simmonds C) 18/3/05.



Transmission of business decision

The High Court of Australia handed down two significant decisions on 9 March 2005 regarding the rights and responsibilities of employers during the sale or restructure of a business. In the Gribbles and Amcor decisions, transmission of business provisions and questions of redundancy in corporate restructures were found in favour of the employer.

In Gribbles, the High Court has limited the circumstances where employers are bound by transmission of business provisions under the Workplace Relations Act. The Court ruled that a new employer was not a successor to a former employer where there was no sale or transfer of assets between the businesses, even if they conducted the same or similar business activities. The new employer was not bound by the industrial obligations of the former employer but by its own industrial obligations.

In Amcor, the High Court found the transfer of workers from Amcor to one of its subsidiaries did not entitle the workers to redundancy pay.

The Court ruled that employees, who were employed in the same jobs under the same conditions following a demerger, although they had different employers as a result of corporate

restructuring, were not entitled to redundancy pay because their positions had not been made redundant.

Minister for Employment and Workplace Relations v Gribbles Radiology Pty Ltd; Gribbles [2005] HCA 9 (9 March 2005) <http://www.austlii.edu.au/au/cases/cth/highct/2005/9.html>

Amcor Limited v Construction, Forestry, Mining and Energy Union; Minister for Employment [2005] HCA 10 (9 March 2005) <http://www.austlii.edu.au/au/cases/cth/highct/2005/10.html>



Average pay packets swell in November quarter: ABS

The average weekly pay packet nudged up slightly to hit \$768.30 in the November quarter, new figures released. The Australian Bureau of Statistics (ABS) figures show that average weekly total earnings of all private and public sector workers rose by 1.2 per cent or \$8.90 in the quarter. Full-time adult ordinary time earnings rose 1.5 per cent to \$976.20 while total earnings lifted 1.6 per cent to \$1,025.60, allowing for seasonal factors. The average pay packet of \$768.30 was three per cent or \$22.40 higher than the same time a year earlier. Men's pay packets were larger than those of

women, although women's pay rose slightly more.

The average total weekly earnings taken home by men rose 0.4 per cent to \$911.50 while women's pay packets rose 1.8 per cent to \$608.00. Miners were the highest paid workers, with a total average weekly pay packet of \$1,619.10, four per cent higher than the same period in the previous year. Utility workers were the second highest paid with \$1,271.90 (a 4.4 per cent rise) followed by finance and insurance sector employees with \$1,043.00 (a 3.4 per cent rise). The lowest paid workers were those employed in accommodation, cafes and restaurants with average weekly pay of \$403, 3.5 per cent more than the previous year. Workers in the ACT had the biggest pay packets, \$917 followed by NSW with \$803.80 and Victoria with \$783.80.

Pregnant worker's dismissal "case study for unfair dismissal laws": NSWIRC

In a case described by the NSW Industrial Relations Commission as "an archetypal case study for the protection provided by unfair dismissal laws", a childcare worker was awarded compensation of \$15,175.

Shortly after informing her employer that she was pregnant and intended to take maternity leave, the woman received a letter from the employer setting out 17 instances of unsatisfactory



job performance or conduct. The woman provided a written reply, refuting all 17 allegations, and at the same time submitted her application for maternity leave. Without further discussion, the employer dismissed her and claimed that it had done so because of the issues it had raised in the letter.

The Commission found the allegations relating to performance and conduct were mainly inconsequential or spurious and were not backed up by any documentary evidence, nor had the employee been made aware in the past of any issues that were likely to place her employment at risk. It held that she was dismissed on the basis of her pregnancy and because she attempted to make arrangements to take maternity leave.

The employer raised the work performance issues as an attempt to intimidate her into not returning to work after her maternity leave. There was no valid reason for her dismissal and the manner of it was harsh, unreasonable and unjust.

Reinstatement was inappropriate given that an acrimonious work environment was likely to occur, so compensation of \$15,175 was awarded.

International Focus looks at

The Fine Print

AWA doesn't preclude Commission intervention



A full bench of the NSWIRC, in court session, held that the existence of an AWA did not prevent it from dealing with a dispute between a union and a company employer.

In its decision, the full bench emphasised that the power in the Constitution s 51(xx) (corporations) is limited and cannot be used to make laws having the effect of extinguishing the commission's jurisdiction to deal with industrial disputes by conciliation and arbitration.

This matter concerned a dispute between a union and a company operating a gold mine. The company refused to discuss with the union a final written warning issued to one of the union's members employed at the mine. The company and employee were parties to an AWA and that agreement therefore governed the employee's terms and conditions of employment.

The union notified the NSWIRC of that dispute and the company responded by asserting that the NSWIRC had no power to deal with the matter.

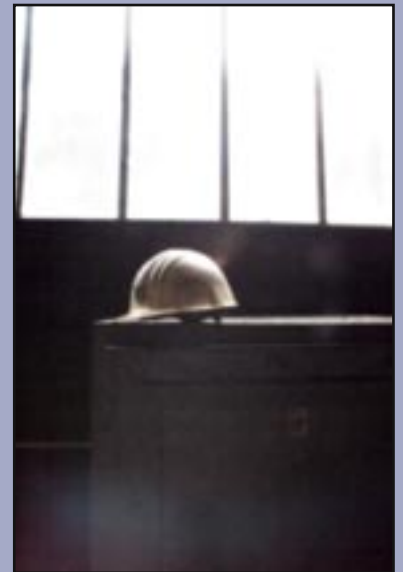
The full bench of the NSWIRC firmly rejected the proposition that it was precluded from exercising its conciliation and arbitration powers if an AWA applied to the employment relationship. It was noted that an AWA was not a law of the Commonwealth and in determining whether there was an inconsistency within the meaning of Constitution s 109, the relevant Commonwealth law to be considered was WR Act Pt VID which dealt with AWAs. Whilst the provisions of the WR Act Pt VID (s 170VQ) meant there was an inconsistency, such inconsistency was limited.

Further, as AWAs are made between an employer that is a constitutional corporation and an individual employee, WR Act Pt VID could not validly say anything about a dispute between a constitutional corporation and a union.

The NSWIRC therefore rejected the proposition that WR Act Pt VID was intended to cover "all matters pertaining to the relationship between an employer and an employee in circumstances where an AWA applies to the relationship".

This decision is very significant in the context of the Federal Government's plans to gain control over a large proportion of the state industrial relations commissions' jurisdictions by using the constitutional "corporations" power. This decision is a clear statement by the NSW IRC (the most powerful of the state commissions) that it does not accept that this is a legitimate use of this power.

CFMEU v Newcrest Mining Limited [2005] NSWIRComm 23, 21/2/05.



Striking the balance with work and family

A new project to examine the work/family balance titled Striking the Balance: Women, Men, Work and Family was announced by the Human Rights and Equal Opportunity Commission on 8 March 2005.

The project will be conducted by federal Sex Discrimination Commissioner Pru Goward who said it was time to bring all of the elements of this important discussion together to better understand the pressures facing women and men in their efforts to combine their paid work and family responsibilities.

In undertaking the project, the Commission aims to encourage institutional and cultural change to ensure families are properly supported in balancing their multiple responsibilities.

The Commission will consult widely with all relevant groups, including government, unions, employers and employer organisations, men's and women's community groups and Australian families themselves. Public submissions will be sought following the release of a discussion paper in the first half of 2005.

National wage test case begins in AIRC

The minimum wage case commenced hearings in the AIRC on 12 April 2005. The ACTU lodged its submission for a \$26.60 a week pay rise for Australia's 1.6 million

award workers on 18 February, 2005. The ACTU is seeking to increase the minimum wage from \$12.30 to \$13 an hour.

The decision is usually handed down in early May but it is likely to be slightly later this year as the Federal Government has requested that the Commission delay its decision until after the Federal Budget has been handed

down. This is intended to allow the Commission to consider the latest economic forecasts prior to determining the size of this year's increase.

Each of the state industrial relations commissions usually follow the decision of the Federal Commission and so increases in each state can be expected later in the year.



Workplace Relations Specialists

Practical and personal employee relations advice

If you need information or advice about any employee relations issues affecting you or your employees contact Siân Owen, Janet Nicolson or Rae-Anne Medforth at WorkSight.

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