

# FOCUS

## WORKPLACE RELATIONS



August 2006

## BALLOTS ON PROPOSED PROTECTED ACTION AND OTHER ARTICLES

In this issue: we report on the new *WorkChoices* rules requiring ballots before protected action, additional liabilities for workplace accidents, state industrial laws post-*WorkChoices* and occupational health & safety reforms.

A look at the testing of the new *WorkChoices* rules requiring ballots before protected action and other articles

### BALLOTS ON PROPOSED PROTECTED ACTION

A number of parties have tested the new *WorkChoices* rules requiring ballots before protected action. Partner Jamie Wells and Lawyer John Naughton report.

### BACKGROUND

*WorkChoices* introduced a number of reforms to the rules for taking protected action during enterprise bargaining. While the right to take protected industrial action was retained, the legislation now requires that a secret ballot be held beforehand. The aim is to ensure that the views of the affected employees are given full weight before action is authorised.

### NEW PROCESSES

The Australian Industrial Relations Commission (**AIRC**) is responsible for ensuring compliance with the new protected action regime. The AIRC retains the power to issue orders to prevent or stop industrial action that is not protected. Industrial action will not be protected unless supported by a positive ballot result. A ballot is to be taken only on the orders of the AIRC.

An application for a ballot order can be made only:

- after the expiry of an existing collective agreement;
- if the AIRC has been notified of a bargaining period for a new collective agreement; and
- if the proposed agreement does not contain prohibited content.

The AIRC must not grant the application unless it is satisfied that:

- during the bargaining period, the applicant genuinely tried to reach agreement with the employer of the relevant employees;



- the applicant is genuinely trying to reach agreement with the employer; and
- the applicant is not engaging in pattern bargaining.

## DESCRIPTION OF THE PROPOSED INDUSTRIAL ACTION

The *Workplace Relations Act 1996* (Cth) (the **Act**) requires that the question to be put to employees reflect the proposed action. However, in *AMWU v Amcor*,<sup>1</sup> the AIRC accepted that it was not necessary for the ballot question to set out every detail, date and time of the proposed action. In this case, the AMWU had asked employees to approve a question referring to ‘strikes, bans and rolling stoppages’, without identifying the proposed dates or duration of these. In response, Amcor argued that the question was insufficiently specific for employees to know what they were being asked to approve. The AIRC accepted that it was not necessary for the description of the proposed action to be set out in a highly prescriptive or detailed form, and ordered that the ballot proceed.

## ‘GENUINELY TRYING TO REACH AGREEMENT’

In *CEPU v Cadbury Schweppes Australia*,<sup>2</sup> the AIRC rejected an application by the CEPU and AMWU for a ballot order on the grounds that the unions had not genuinely tried to reach agreement with the employer.

In that case, the unions had simultaneously pursued:

- a union collective agreement (without prohibited content); and
- a common law deed (containing prohibited content).

1. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Amcor Packaging (Australasia) Pty Ltd (BP2006/2591), Commissioner Gay, Melbourne, 3 July 2006, PR973236.

2. Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Cadbury Schweppes Australia Ltd (BP2006/2859); Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Cadbury Schweppes Australia Pty Ltd (BP2006/2861), Senior Deputy President Acton, Melbourne, 11 July 2006, PR973290.

The AIRC accepted that ‘genuinely trying to reach agreement’ means ‘a preparedness to consider seriously the offers and proposals’ put by the other negotiating party.

However, in this case the AIRC accepted evidence that the unions had linked the two agreements as a joint claim.

While the AIRC recognised that a union was entitled to pursue common law deeds with prohibited content, linking that process with the WorkChoices agreement could indicate a failure to genuinely try to reach agreement.

A similar result was reached in *AMWU v Kempe Engineering Services*,<sup>3</sup> where the AMWU insisted on the inclusion of a clause in a collective agreement effectively prohibiting the use of Australian Workplace Agreements (**AWAs**).

The AIRC accepted that the AMWU had not genuinely tried to reach agreement because it had insisted on the inclusion of a clause which was ‘clearly prohibited content’.

The same approach was accepted in *National Union of Workers v Blue Circle Transport*,<sup>4</sup> but in that case the AIRC granted the ballot order, noting that the union had effectively withdrawn a previous claim for prohibited content.

## ‘PATTERN BARGAINING’

In *Australian Nursing Federation v Trinity Garden Aged Care Anzac Lodge Private Nursing Home*,<sup>5</sup> the AIRC accepted that the union had not engaged in pattern bargaining, and therefore allowed its application for a ballot order.

The union had sought wage increases of 12 per cent over the life of the agreement. The employer opposed the ANF’s application, asserting that the same claim had been made against others in the aged care industry and that this constituted pattern bargaining.

3. Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Kempe Engineering Services Pty Ltd t/as Kempe Installation and Maintenance Services (BP 2006/2979); Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v Kempe Engineering Services Pty Ltd t/as Kempe Manufacturing and Engineering Services (BP 2006/2979), Senior Deputy President Acton, Melbourne, 8 August 2006, PR973592.

4. National Union of Workers v Blue Circle Transport Pty Ltd (BP2006/3172), Vice President Watson, Melbourne, 4 August 2006, PR973654.



However, the AIRC accepted that pattern bargaining was limited to wage claims against multiple employers which were 'the same or identical'.

As the union had indicated a willingness to negotiate on the timing and extent of increments (even if not on the overall quantum claimed), the AIRC found it had not sought 'common' wage outcomes. On that basis, the AIRC granted the ballot order which the union sought.

The case demonstrates that it will be difficult for an employer to avoid a ballot order based on pattern bargaining. That the AIRC adopted such a narrow approach suggests that the restrictions on pattern bargaining are likely to be of lesser consequence than previously thought.

## WHEN MUST INDUSTRIAL ACTION OCCUR?

In *United Collieries Pty Ltd v CFMEU*,<sup>6</sup> the union obtained a ballot order and the employees voted in favour of various forms of action, including work stoppages, stop-work meetings, and bans on non-rostered overtime.

The Act requires approved industrial action to commence within 30 days from when the results of the ballot are declared. In this case, the ballot was declared on 15 May 2006, and action followed within 30 days. However, when the union proposed a 24-hour stoppage after the 30-day period had expired, United Collieries objected.

The union argued that, as some industrial action commenced within the 30-day period, all options approved in the ballot could be taken at any time during the bargaining period. United Collieries' position was that the proposed 24-hour stoppage was not protected as it was outside the 30-day period.

The AIRC adopted a middle ground, accepting the union's assertion that it was entitled to proceed with industrial action outside the 30-day period, but limiting protected action to those types of action commencing during the 30-day period.

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5. *Australian Nursing Federation v Trinity Garden Aged Care Anzac Lodge Private Nursing Home* (BP2006/2952), Vice President Lawler, Sydney, 26 July 2006, PR973415.

6. *United Collieries Pty Ltd v Construction, Forestry, Mining and Energy Union* [2006] FCA 904 (14 July 2006).

## CONCLUSION

The new requirements have introduced hurdles to taking protected action. However, decisions on these provisions by the AIRC and Federal Court have shown that, where unions have complied with the procedures, orders will be issued.

The observation by the Federal Court in *United Collieries* that the secret ballot provisions are not intended to alter the balance of power in favour of employers against employees suggests that the AIRC will be slow to reject an application absent inappropriate behaviour during negotiations.

## ADDITIONAL LIABILITIES FOR WORKPLACE INCIDENTS

The adult children of a worker killed as a result of an employer's occupational health and safety breaches have been awarded a total of \$85,000 in compensation by the Victorian Court of Appeal. Employers should be aware that they will not be indemnified for such awards, either by workers' compensation or liability insurance. Special Counsel Del Bobeff and Articled Clerk Jacqueline Goodall report.

## BACKGROUND

Following a workplace health and safety prosecution in the Victorian County Court, Energy Brix Australia Corporation Pty Ltd (*Energy Brix*) was fined \$135,000 – then the highest penalty ever imposed under the *Occupational Health and Safety Act 1985* (Vic).

The deceased worker's two adult children were also awarded compensation of \$20,000 and \$15,000 respectively under the Sentencing Act 1991 (Vic), for injuries they suffered as a result of their father's untimely death.

The Department of Public Prosecutions (*DPP*) appealed these awards, claiming they were manifestly inadequate.

In response, Energy Brix claimed that the DPP was not entitled to appeal the awards, and that allowing it to do so effectively subjected Energy Brix to a form of 'double jeopardy'.

## THE APPEAL DECISION

The Victorian Court of Appeal unanimously agreed that the compensation awards were inadequate.<sup>7</sup>

The court rejected the employer's claim that the DPP had no right to appeal the awards, accepting it had a broad discretion to appeal on public interest grounds. In particular, the court:

- accepted that making offenders financially liable to victims through the sentencing process was in the public interest; and
- found that the right to award compensation should be accompanied by the DPP having a right to appeal an award of compensation if that process miscarried.

The court found the awards were below the level that could be made in the exercise of sound discretionary judgment, and increased compensation to \$50,000 and \$35,000 for the respective children.

## CONCLUSION

The Sentencing Act allows victims of crime to obtain compensation more cheaply and expeditiously than through a civil claim. The court is not limited to ordering compensation according to rules applying to damages.

Consistent with the aim of providing a cheap and expeditious remedy, the victim has no right of appeal.

However, the present case removes earlier doubts about whether the DPP was entitled to appeal on public interest grounds.

While appellate courts are generally reluctant to upset compensation awards, employers should be aware that where criminal culpability for occupational health and safety breaches is established, the Sentencing Act creates the potential for substantial uninsured compensation awards.

# RETENTION OF DENIED CONTRACTUAL BENEFITS JURISDICTION

Claims for unpaid contractual entitlements can still be made under state law in spite of *WorkChoices*. Senior Associate Rowan Kelly reports on a claim made to the Western Australian Industrial Relations Commission.

The *Industrial Relations Act 1979* (WA) (the **State Act**) allows an employee to refer to the Western Australian Industrial Relations Commission (*WAIRC*) a claim for a contractual benefit 'not being a benefit under an award or order'. Section 16(1) of the *Workplace Relations Act 1996* (Cth) (the **Federal Act**) ousts the operation of state industrial laws to the extent they apply to corporate employers and their employees. Section 16 picks up the Constitutional rule that federal laws prevail over inconsistent state laws.

## BACKGROUND

Ms Leo made a claim for contractual entitlements against her former employer. However, before the matter was determined, the employer went into administration and the proceedings were stayed.

Ms Leo then commenced proceedings against a number of other parties, including the company which had purchased her former employer's business, claiming that the former employer had been placed into administration in order to avoid its obligations to pay her contractual benefits.

She claimed that the new respondents should be regarded as her employer or, alternatively, that the purchaser company was an agent of her former employer.

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7. *DPP v Energy Brix Australia Corporation Pty Ltd* [2006] VSCA 116.

## DECISION

The WAIRC<sup>8</sup> dismissed the application, as the purchaser of the business had no connection with the former employer.

However, the WAIRC did observe that s16 did not prevent the claim being heard were it otherwise to have merit. Also, the WAIRC commented that s16(1) of the Federal Act is not an exhaustive statement of the law regulating the employment relationship.

## IMPLICATIONS

The introduction of *WorkChoices* suggested strongly that industrial regulation was to be regulated nationally, to the exclusion of state industrial laws. However, signs have emerged from the state systems that they are not prepared to treat federal coverage as absolute.

Accordingly, careful consideration needs to be given to the continuing operation of state or territory industrial laws and, in particular, claims which might still be available to employees.

It may be that the upcoming decision of the High Court provides some guidance about the role of the state systems after *WorkChoices*.

## OCCUPATIONAL HEALTH & SAFETY REFORMS

Senior Associate Simon Dewberry and Lawyer Stacey Kelly report on the Federal Government's proposal to implement a raft of occupational health and safety reforms designed to reduce red tape for businesses.

## BACKGROUND

The Federal Government has released its final response to the *Report of the Taskforce on Reducing the Regulatory Burdens on Business – Rethinking Regulation*, in which the Taskforce made recommendations for alleviating the compliance burden on business from government regulation.

## PROPOSED REFORMS

In its final response, the Federal Government commits to addressing the regulatory burden across a wide range of sectors and business activities, including occupational health & safety (**OH&S**) legislation. The Federal Government has agreed to the following OH&S recommendations.

- Establishing a national regulator for mine safety.
- Implementing nationally consistent OH&S standards and requiring a net public benefit to be shown before a national OH&S standard or code can be varied to suit local conditions.
- Harmonising the duty-of-care provisions in principal OH&S legislation.
- Improving OH&S education of employers and employees.
- Improving advice from regulators regarding OH&S responsibilities.
- Aligning training and occupational licensing systems.

## WHEN CAN BUSINESS EXPECT CHANGE?

The Federal Government has not set any time frames for delivery of the reforms. It appears the proposed reforms will be implemented administratively, through cooperation between all three levels of government, under the umbrella of the Council of Australian Governments, rather than through federal legislation.

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8. *Leo v Community Choice Financial Services Pty Ltd & Ors* [2006] WAIRC 047209.

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