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## WORKPLACE RELATIONS



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## Howard announces workplace reforms

The Prime Minister recently announced a number of important workplace reforms and as a result, employers will confront a vastly different set of workplace laws if these reforms become legislation. Partner Peter Arthur and Lawyer Yaseen Shariff comment on the major developments.

### National workplace relations system

At the next meeting of the Council of Australian Governments to be held in June, Mr Howard will invite state governments to refer their workplace relations powers to the Federal Government in the same manner as the Victorian Government has done. If the states do not co-operate, the Federal Government will attempt to legislate for a national system of workplace relations, including a uniform unfair dismissal system.

There are a number of details concerning the national workplace relations system that have not been fully explained at this stage. It is not clear for example, what will happen to state awards and enterprise agreements, and also whether the national system will extend to areas such as discrimination and equal opportunity laws.

If the Federal Government succeeds in establishing a fully integrated national workplace relations system, the role of state governments in regulating the vast majority of workplaces may be limited to occupational health and safety matters and workers' compensation. If that is the case, unions may well take the opportunity to increase industrial activities in these areas, especially in states such as New South Wales where they have greater powers in respect of these matters.

### Unfair dismissal laws

In recent years the Federal Government has attempted to exclude businesses employing up to 20 employees from the application of unfair dismissal laws. These previous attempts were rejected by the Senate. However, with a majority in both Houses of

Parliament, the Federal Government will exclude businesses employing up to 100 employees from the application of unfair dismissal laws.

The Federal Government will also increase the statutory probationary period for new employees from three to six months.

## Limited role for the Australian Industrial Relations Commission

The role of the Australian Industrial Relations Commission (the **AIRC**) will be significantly diminished. The AIRC would no longer set wage rates, since this role would pass to a new body known as the Australian Fair Pay Commission (the **AFPC**).

Awards will be further simplified and matters already covered in other legislation such as jury service, notice of termination, long-service leave and superannuation, will be removed from awards.

Mr Howard has also announced that a special Task Group will be established to review all existing awards and award classification structures in order to provide for greater flexibility.

The role of the AIRC will be limited to resolving industrial disputes and further simplifying awards.

## Minimum wages and conditions

The AFPC will be established to set:

- a single adult minimum wage;
- award classification wages;
- casual loadings;
- minimum junior rates; and
- training and disability wages.

Standard minimum conditions will be set by legislation and will apply to all employees in the areas of:

- annual leave;
- personal leave;
- parental leave (including maternity leave); and
- maximum ordinary hours of work.

As a result, there will be only one set of minimum wages and conditions across all industries.

## Approval of Certified Agreements and AWAs

The approval process for certified agreements and Australian Workplace Agreements (**AWAs**) will be simplified.

Firstly, certified agreements (both union and non-union) will be approved by the Office of the Employment Advocate rather than the AIRC.

Secondly, the no-disadvantage test which currently applies to certified agreements and AWAs will be scrapped. In its place, certified agreements and AWAs will have to pass a test known as the Australian Fair Pay and Conditions Standard (the **Standard**). This Standard will be based on the minimum wage rate set by the AFPC and the other standard minimum conditions set by legislation.

## Other reforms

The Federal Government will introduce other reforms that were part of their election platform including:

- protecting the status of independent contractors;
- excluding small businesses from liability to make redundancy payments;
- establishing the Australian Safety and Compensation Council to oversee implementation of national occupational health and safety standards and a national approach to workers' compensation;
- providing stronger laws in relation to industrial action (including secret ballots);
- providing for a single, national right-of-entry regime; and
- discouraging pattern bargaining.

## Implications

As has been well publicised in the media, state governments and unions are likely to resist the workplace reforms announced by Mr Howard, and a challenge to the validity of at least some of the reforms is on the cards.

Despite this resistance, there is little doubt that in a very short period employers may face an entirely new set of workplace laws. The finer detail of these changes will become clear once draft legislation is released. We will continue to monitor the progress of the new reforms.

# Indemnity costs in unfair dismissal jurisdiction

It is rare for the Queensland Industrial Relations Commission to make a costs order against an applicant in an unfair dismissal matter, much less an indemnity costs order. However, in a recent case<sup>1</sup> the Commission showed it is willing to do so where the applicant's conduct warrants it. Lawyer John Naughton reports.

## Background

Ms Pender was terminated following allegations that she had misappropriated funds from her employer, Specialist Solutions Pty Ltd (**Specialist Solutions**). She made an application to the Queensland Industrial Relations Commission (**QIRC**) claiming that her termination was harsh, unjust or unreasonable.

The application could not be resolved by conciliation and was referred to arbitration. However, as the matter proceeded to trial, Ms Pender acted in a number of ways which drew the ire of the QIRC. Specifically, she:

- insisted (over objections from Specialist Solutions) that the application should proceed to trial rather than await the outcome of other possible litigation (including a police investigation of the matter);
- repeatedly failed to meet a number of adjusted deadlines for the lodgement of her witness statement;
- failed to inform her own legal representatives of her whereabouts so that they could advise the QIRC of the reasons she had sought an unquantified adjournment less than a week before the scheduled trial (resulting in the abandonment of a six-day trial);

- failed to comply with directions from the QIRC to provide her current address, consult a medical specialist and obtain a report about her fitness to attend the trial; and
- failed to appear at the final hearing of the matter when she was on notice that her application would be dismissed if she failed to appear.

## Decision

Commissioner Bloomfield was satisfied that Specialist Solutions had been put to great cost in preparing its defence of the application, and this was necessary once the matter had been set down for trial. He accepted that the extent of the defence evidence (which included 12 witness statements comprising approximately 300 pages of text, and with 2000 pages of annexures) was reasonably necessary, given the nature of the allegations.

Commissioner Bloomfield held that, while the costs incurred by Specialist Solutions in defence of the matter were substantial, he was satisfied that the schedule of costs prepared by their solicitors contained only matters associated with their defence and nothing more. He determined that it would be unfair if Specialist Solutions was not awarded its costs on an indemnity basis, and ordered Ms Pender to pay nearly \$110,000 in costs.

## Implications?

Indemnity costs will normally be ordered only if a party behaves in a manner which is frivolous, vexatious, or otherwise abnormal. In this case, the Commission concluded that Specialist Solutions had been required to incur substantial costs in preparing for a trial which Ms Pender had no intention of allowing to proceed.

It is unlikely that this case marks a sea change in the approach adopted toward unfair dismissal applicants by the QIRC and other Australian industrial tribunals. Given the beneficial nature of unfair dismissal legislation, and the informality of the jurisdiction, breaches of technical requirements will not normally invoke sanctions. What the case does show, however, is that those who plainly and deliberately disregard tribunal processes – resulting in costs and inconvenience to the other party and to the tribunal – can be subjected to punitive costs orders.



<sup>1</sup> *Nicole Pender v Specialist Solutions Pty Ltd* (No. B599 of 2004 per Commissioner Bloomfield, 17 May 2005).

# Union representation for non-union agreement

A Full Court of the Federal Court recently accepted the right of the Australian Industrial Relations Commission to direct an employer to allow a union representative to be present during negotiations for a non-union agreement. Senior Associate Rebecca Davern and Lawyer Maree Norton report.

## Background

Upon the expiration of its existing certified agreement, Sensis Pty Ltd (**Sensis**) sought to negotiate a further agreement with its employees under s170LK of the *Workplace Relations Act 1996* (the **Act**). To facilitate this process, Sensis established a Management Consultative Team (**MCT**) and a Staff Consultative Team (**SCT**) to represent Sensis and its employees respectively during the negotiations. Among the members of the MCT were Sensis' solicitor and human resources manager. During the negotiation, members of the SCT requested that a representative of the Community and Public Sector Union (**CPSU**) attend the negotiation, to assist them in matters requiring legal and technical expertise. The MCT refused this request.

In response, the CPSU brought an application requesting that the Australian Industrial Relations Commission (the **Commission**) direct Sensis to involve the CPSU.

## Decision

Initially, Commissioner Smith was motivated to make the direction on the basis of a duty to negotiate in good faith. Sensis appealed on the basis that the Commission did not have power to make the direction sought by the CPSU. In addition, Sensis argued that the CPSU was not a party to the negotiation, and its application sought to undermine the statutory scheme which permits an employer to determine whether it wishes to enter into an agreement with a registered organisation, or with its employees.

In reply, the CPSU argued that the Commission did have power to make the order. Further, the CPSU argued that the direction would not affect the status of the agreement between Sensis and its employees. The direction would merely ensure that a union representative could be present at the negotiations to assist the SCT. The SCT would, at all times, remain responsible for the actual negotiations with the MCT. The Federal Court accepted the CPSU's arguments.<sup>2</sup>

## Conclusion

Following this decision, employers will not be able to prevent union representatives from attending s170LK negotiations at the request of employees. In such circumstances, the presence of a union representative is a measure aimed at providing a level of technical assistance to employees, who at all times remain responsible for negotiating the terms of the agreement with their employer.

<sup>2</sup> *Sensis Pty Ltd v Members of the Full Bench of the Industrial Relations Commission* [2005] FCAFC 74 (12 May 2005).

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