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NEW COMMONWEALTH AND QUEENSLAND WORKPLACE RELATIONS LEGISLATION - AN OVERVIEW

Working Paper No.70

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A SOLICITOR WITH DUNHILL MADDEN BUTLER LAWYERS

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New Commonwealth And Queensland Workplace Relations Legislation - An Overview

I. INTRODUCTION

I seem to have heard a lot about thresholds lately. In fact, I sometimes feel as though I am standing at the edge of an abyss. Certainly the industrial relations systems we have come to know and love are in the process of metamorphosis but that process began a decade ago. So what is all the fuss about?

Since federation, Australia has had a centralised industrial relations system. Individual employers and employees have had little or no part to play in that system which has been the domain of registered organisations, collective bargains and the independent umpire (the Industrial Relations Commission). The bricks and mortar of the system have been the awards which have provided a rigid framework of industrial relations rights and obligations for a large portion of Australia's workforce. The system has served us well, but in recent decades its limitations have become increasingly obvious. After the 1993 election, Paul Keating made the statement that the only way ahead for high productivity was to simplify the system. In particular, to simplify the award system so that in future, awards would be seen as safety nets, so opening up the prospect of people at their workplace directly negotiating terms and conditions to suit the circumstance of their business.

However, for all the previous government's good intentions, the pace of change has been fairly slow. Since coming to power early in 1996, the current federal government has set about using its "mandate for change" to hasten the metamorphosis. Most importantly, the amendments passed in November last year to create the new Workplace Relations Act (Cth) have taken the change process over the hurdle of union involvement/scrutiny of dealings between employers and their employees. In his third reading speech, the Minister for Industrial Relations, Peter Reith summed up the revolutionary aspect of his new legislation as follows:-

> *"Subject only to the global test, employers and employees are now at liberty to strike genuinely innovative agreement without any contrivances or artificial restrictions. The system is no longer exclusively about registered organisations and collective bargaining; it is about workers and employers and their particular and local needs".*

The Workplace Relations Bill was passed by the Federal parliament on 25 November 1996. The Bill makes a number of significant amendments to the old Industrial Relations Act 1988 including changing the name of the act to the Workplace Relations Act 1996. Most of the new provisions commenced operation on 31 December 1996.

Not to be outdone, Queensland Minister for Training and Industrial Relations, Santo Santoro has undertaken a complete overhaul of Queensland's Industrial Relations System to keep it in line with the new federal system. Minister Santoro has completely replaced the old Industrial Relations Act 1990 with two new Acts namely the Workplace Relations Act 1996 and the Industrial Organisations Act 1996. Both Acts were passed by

state parliament on 30 January 1997. The Workplace Relations Act is to commence operation on 1 March 1997 and the Industrial Organisations Act on 1 May 1997. The Workplace Relations Act (Qld) ensures that Queensland's Industrial Relations system continues to compliment the federal system whilst at the same time maintaining a strong state industrial relations system protected from unwarranted federal intervention. The Industrial Organisations Act deals with the internal mechanics of industrial organisations and is beyond the scope of this paper.

To avoid confusion, and given the high proportion of employees in the not-for-profit sector covered by federal awards, this paper will concentrate on the federal legislation. However I have included a summary of the state legislation in Part 7.

2. THE HALLMARKS OF THE NEW ACT

2.1 A simplified award system

The principal object of the new Workplace Relations Act is to provide a framework of co-operative workplace relations by inter alia,

- *ensuring that the primary responsibility for determining matters affecting the relationship between employers and employees rests with the employers and employees at the workplace, and*

- *providing the means:*

i. *for wages and conditions of employment to be determined as far as possible by the agreement of employers and employees at the workplace or enterprise level, upon a foundation of minimum standards; and*

ii. *to ensure that there is an effective award safety net of minimum wages and conditions of employment." (WRA Section 3)*

These general objects are supported by the specific objects of Part VI which deals with the Australian Industrial Relations Commission's power to make awards in settlement of industrial disputes. Section 88A sets out those specific objects as follows:-

"*The objects of this Part are to ensure that*:

(a) wages and conditions of employment are protected by a system of enforceable awards established and maintained by the Commission; and

(b) awards act as a safety net of fair minimum wages and conditions of employment; and

(c) awards are simplified and suited to the efficient performance of work according to the needs of particular workplaces or enterprises; and

(d) the Commission's functions and powers in relation to making and varying awards are performed and exercised in a way that encourages the making of agreements between employers and employees at the workplace or enterprise level".

2.2 Enhanced opportunities for workplace/enterprise negotiations

According to Minister Reith this is the nub of what the government is attempting to do. In an address on 28 November he described the changes to the agreements stream in the following way:-

> *"We're trying to make the process simpler and encourage a more direct relationship between the parties. Under the new Act, you will have a pretty wide choice as to the nature of the agreement you enter into. It can be with a union or without a union. It can be collective or individual. In fact, you can have a mix of both and on top of that, you can have State Agreements - provided they meet certain minimum conditions"*[1].

[1] Peter Reith, address to the Workplace Relations Conference - The Must Knows for Compliance with the New Act, as quoted in A Definitive Guide to the New Workplace Relations Bill, an Industrial Relations & Management Publication issued by Huntley Pty Ltd.

2.3 A complete overhaul of the unfair dismissal law

Part VIA, Division 3 dealing with Termination of Employment has been completely overhauled in an effort to address numerous concerns raised by the business community in relation to the unfair dismissal law enacted by the former government. The principal object of the new division is still to provide appropriate remedies in circumstances where termination of employment is found to be harsh, unjust or unreasonable. However, the objects of the Division go on to provide that the procedures and remedies set out in the division and the manner of deciding on and working out such remedies, "are intended to ensure that, in the consideration of an application in respect of a termination of employment, a fair go all round is accorded to both the employer and employee concerned".(WRA s170CA(2))

3. THE AWARD SYSTEM

3.1 Award simplification

The main feature of the revamped award system is the emphasis upon the award system being, as much as possible, a true safety net of minimum wages and conditions. In that regard the role of the Commission is to maintain that safety net and to intervene as little as possible. In this way, the legislation permits and encourages (some would say compels) the parties in the employment relationship to negotiate the terms of their relationship.

For constitutional reasons, the Commission's jurisdiction to make awards has traditionally depended on the existence of an interstate industrial dispute. The Commission has only had power to make an award which regulates the relationship between the employers and employees in detail if the issues dealt with are within the ambit of the dispute. By serving "ambit" claims on employers, unions have ensured the Commission had the widest possible power to regulate the employment relationship. The new award system will generally not permit unions to serve the same wide ranging logs of claims, or allow the Commission to make a wide ranging regulatory award applying across the board. Minister Reith's original intention was to restrict the Commission's role to the creation of a defined set of minimum terms and conditions. Concessions negotiated by the Australian Democrats have ensured that the Commission will continue to have a slightly wider role, nevertheless, the Commission's jurisdiction has been substantially truncated.

3.2 Allowable award matters

Section 89 A of the new act provides that the Commission may only deal with certain specific matters when it is:

- dealing with an industrial dispute by arbitration,
- preventing or settling an industrial dispute by making an award or order; or
- maintaining the settlement of an industrial dispute by varying an award or order.

Those specific matters are listed in Section 89 A(2) and are as follows:

- classifications of employees and skill-based career paths;
- ordinary time hours of work and the times within which they are performed, rest breaks, notice periods and variations to working hours;

- rates of pay generally (such as hourly rates and annual salaries), rates of pay for juniors, trainees or apprentices, and rates of pay for employees under the supported wage system;
- piece rates, tallies and bonuses;
- annual leave and leave loading;

- long service leave;
- personal/carer's leave, including sick leave, family leave, bereavement leave, compassional leave, cultural leave and other like forms of leave;
- parental leave, including maternity and adoption leave;
- public holidays;
- allowances;
- loadings for working overtime or for casual or shift work;
- penalty rates;
- redundancy pay;
- notice of termination;
- stand - down provisions;
- dispute settling procedures;
- jury service;
- type of employment, such as full time employment, casual employment , regular part - time employment and shift work, provided that the Commission does not have power to limit the number or proportion of employees that an employer may employ in a particular type of employment. Neither does it have the power to set maximum or minimum hours for regular part-time employees;
- superannuation; and
- pay and conditions for outworkers, but only to the extent necessary to ensure that their overall pay and conditions of employment are fair and reasonable in comparison with the pay and conditions of employment specified in any relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.

In addition, the Commission will be able to include in an award provisions that are incidental to the allowable award matters and necessary for effective operation of that award.

A Full Bench of the Commission may establish what are effectively national wage case principles about making or varying awards in relation to each of the allowable award matters. In that way, the safety net can be maintained and updated.

The basic approach applied to award simplification will be retained, with the presumption that matters falling outside allowable award matters will no longer be enforceable through an award. It will be up to individual employers and employees to work out how matters not falling within allowable award matters are best dealt with in the future.

3.3 Arbitrating beyond allowable award matters

A major change that has arisen as a result of discussions between the Coalition and Democrats is that the Commission will be given capacity to arbitrate in "exceptional matters" to settle an industrial dispute in relation to non-allowable award matters if the Commission is satisfied of all of the following:-

- a party to the dispute has made a genuine attempt to reach agreement on the exceptional matter;

- there is no reasonable prospect of agreement being reached on the exceptional matter by conciliation, or further conciliation by the Commission;

- it is appropriate to settle the exceptional matter by arbitration;
- the issues involved in the exceptional matter are exceptional issues;
- a harsh or unjust outcome would apply if the industrial dispute were not to include the exceptional matter.

In such circumstances the Commission will be able to make what is known as an exceptional matters order. Such an order can only be made by a Full Bench, unless the order relates to a single business. These exceptional matter orders must only relate to a single matter. The Commission must not make an exceptional matters order unless the Commission is satisfied that making the order is in the public interest and consistent with the objects of the Act.

The Commission must not make an exceptional matters order that would apply to more than a single business unless the Commission is satisfied that such an order is an appropriate way to settle the dispute.

Exceptional matters orders effectively take the place of agreements and do not form part of the benchmark for the "no disadvantage" test.

An exceptional matters order ceases to be in force two years after it is made and cannot be extended.

The exceptional matter provisions effectively ensure that the Commission will still be able to intervene in a dispute such as the 1996 Weipa dispute. Some people may see this as being an undesirable result given that it is contrary to the general philosophy of the legislation of not permitting the Commission to either intervene or regulate the employment relationship beyond allowable award matters. On the other hand, those who consider that the Commission performs a useful role as a circuit breaker in some intractable disputes may consider it appropriate that the Commission can play a role in situations where the parties have reached a deadlock.

3.4 Paid rates awards

The original proposal put forward by the Coalition would have resulted in no new paid rates awards being made and all paid rates awards being ultimately converted into minimum rates awards. As a result of the agreement between the Coalition and the Democrats it will be possible for paid rates awards to continue in particular circumstances. Those circumstances are where a bargaining period has been initiated and an application is made to suspend or terminate the bargaining period. One of the bases upon which the bargaining period will now be able to be terminated or suspended is if parties have been customarily covered in the past by a paid rates award (including a State paid rates award) and the parties in question have not been able to reach agreement and there is no reasonable prospect of that occurring. In such circumstances the Commission could arbitrate beyond the allowable award matters and could provide for a paid rates award to continue.

3.5 Transitional provisions

Parties to current federal awards have 18 months within which to approach the commission to have the awards pared back so that they only deal with allowable award matters. In the absence of any application by the parties, each award which remains

unvaried after 18 months will cease to have effect to the extent that it provides for matters other than allowable matters.

These transitional provisions make it clear that any exceptional matters orders made by a Full Bench or any paid rates awards made in the circumstances referred to above will be treated as part of the allowable award matters.

3.6 Interrelationship between federal and state award systems

Where the Commission is satisfied that a state award or state employment agreement governs the wages and conditions of employment of particular employees whose wages and conditions of employment are the subject of an industrial dispute, the Commission must cease dealing with the industrial dispute in relation to those employees unless the Commission is satisfied that it would not be in the public interest to do so.

In determining the public interest for these purposes, the Commission must give primary consideration to the views of the employees in question and of the employer or employers of those employees.

This change in attitude towards state jurisdictions is also reflected in amendments to Section 128 of the Act. That Section used to allow the Commission to restrain State authorities from dealing with disputes which are the subject of either an award or order or proceeding before the Commission. The Commission is now prevented from making such a restraining order where a state industrial authority is either facilitating the negotiation of a state employment agreement or approving a state employment agreement.

However, the capacity of a state employment agreement to override a federal award is conditional upon the State Act under which the employment agreement was made providing that:-

- the agreement must be approved by a state industrial authority; and
- the state industrial authority, before approving the agreement, is required to be satisfied that, taking remuneration and employment conditions as a whole, employees will not be disadvantaged in comparison with the relevant award; and
- the agreement was genuinely made or was made in the absence of duress or coercion; and
- the agreement covers all employees who could reasonably be expected to be covered.

3.7 Award modernisation

In addition to the simplification process referred to above, the new Act charges the Commission to continue the award modernisation process. As part of that process, the Commission is required to make sure that awards:-

(a) do not include matters of detail or process that will be better dealt with by agreement at the enterprise or workplace level;

(b) do not prescribe work practices or procedures that restrict efficiency or productivity;

(c) contain facilitative provisions that allow for local agreements about how the award provisions are to apply;

(d) are in plain English, are easy to understand and do not contain obsolete and/or discriminatory provisions;

(e) provide for training wages and a supported wage system for people with disabilities.

4. CERTIFIED AGREEMENTS

4.1 Types of certified agreement

Part VIB of the old Act dealing with promoting bargaining and facilitating agreements has been repealed. In its place is a new Part VIB which is devoted entirely to certified agreements.

Certified agreements may be made in respect of a single business or part of a single business. A single business includes a business, project or undertaking carried on by a single employer. Part of a single business includes:-

- a geographically distinct part; or
- a distinct operational or organisational unit within the single business.

Part VIB provides for a number of different types of certified agreement, namely:-

- multiple business agreements;
- union/employer agreements (of which there are two types);
- employee/employer agreements;
- greenfields agreements.

4.2 Multiple business agreements

Multiple business agreements are certified agreements involving:-

- one or more businesses
- one or more parts of a single business carried on by one or more employers.

A multiple business agreement must only be certified by a Full Bench of the Commission if:-

(a) it is in the public interest, and

(b) matters in the agreement cannot be more appropriately dealt with by another form of agreement.

4.3 Union/employer agreements

The traditional form of certified agreement made in settlement of an industrial dispute may still be made between an employer and one or more unions pursuant to Section 170LO. In addition, an employer who is a constitutional corporation may make a certified agreement with a union without the need for an industrial dispute provided the union has at least one member employed in the business and is entitled to represent the industrial interests of that member.

Section 4 of the Act defines “constitutional corporation” as:-

> *“(a) a foreign corporation; or*
>
> *(b) a financial corporation; or*
>
> *(c) a trading corporation; or*
>
> *(d) a body corporate incorporated in a Territory; or*
>
> *(e) a Commonwealth authority.”*

The test for a financial corporation is not whether it is solvent but whether it deals in money by way of borrowing and lending, investment and so on, or provides advisory or management services relating to such financial matters. Thus not-for-profit organisations are very unlikely to be financial corporations.

The High Court has held that the expression "trading corporation" means a corporation whose trading activity is its substantial activity or is among its substantial activities and that trading activity which is merely incidental to a predominant or principal activity is prima facie insufficient to confer the character of a trading corporation.[2]

Thus, not-for-profit corporations such as incoporated assocations formed to promote and organise football competitions have been held to be trading corporations. On the other hand, it would appear that an organisation established primarily for a religious or educational purpose which happened to engage in some incidental trading activity might not be a trading corporation.

Given the amendments to Section 128 referred to at paragraph 3.6 above, and given that the new legislation governing certified agreements in Queensland will almost certainly satisfy the test contained in that section, it may be that not-for-profit organisations in Queensland would be wise to rely on the Queensland system and avoid the "constitutional corporation" issue entirely.

4.4 Employer/employee agreements

Provided the employer is a constitutional corporation it may enter into a certified agreement directly with its employees without any union involvement. However, if an employee appoints a union to represent it in negotiations with the employer, the employer must give the union a reasonable opportunity to meet and confer about the agreement before it is made.

4.5 Greenfields agreements

An employer can also make a "greenfields agreement" with a union or unions for a new business before any persons are employed in that business. The unions must be entitled to represent the industrial interests of one or more of the employees who will be employed in the business.

4.6 Certification process

4.6.1 No disadvantage test

Before certifying an agreement the Commission will be required to satisfy itself that the proposed agreement is no less favourable to the employees concerned, when considered as whole, than the relevant award. Where employees are not covered by an award, the Commission will be able to designate an appropriate award for the purposes of establishing a benchmark for the "no disadvantage" test.

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[2] Brennan J. in Federal Court of Australia; Ex Parte Western Australian National Football League (Inc.) (Adamson's case) (1979) 143CLR, 190.

Where the Commission forms the view that the proposed agreement is less favourable to employees than the relevant award, it can:-

- suggest that the parties amend the agreement; or
- make certification conditional on one of the parties giving an undertaking about the operation of the agreement (this provision will continue to be subject to the Commission's power to terminate the agreement if the undertaking is not satisfied);
- certify the agreement anyway, provided it is satisfied that this would not be contrary to the pubic interest, eg, where the agreement is part of a reasonable strategy to deal with a short term particular problem.

4.6.2 Other requirements for certification

In addition to the no disadvantage test, the Commission will be required to satisfy itself that:-

- a valid majority of the employees genuinely made or approved the agreement;
- employees have been provided with the proposed agreement, or ready access to it, at least 14 days before any approval was given, and that the agreement had been explained to employees. In this context, the Commission is required to consider whether relevant employees had had the agreement explained to them in ways which were appropriate to their particular circumstances and needs;
- in the case of agreements being made directly with employees, notice of the intention to make an agreement was accompanied by a statement that union members to be covered by the proposed agreement had the right to request their unions to meet and confer with the employer about the agreement, and that a reasonable opportunity had been provided to any unions complying with such requests;
- the agreement contains dispute settling procedures and a nominal expiry date and does not discriminate on any of the grounds specified in the legislation.

4.7 Persons bound by certified agreements

Certified agreements based on the Federal Government's constitutional power over corporations bind:-

- the employer (which must be a constitutional corporation); and
- all persons whose employment is subject to the agreement when it is operative.

Certified agreements relating to the prevention and/or settlement of industrial disputes bind:

- the employer and the union(s) involved in the dispute; and
- the union members only.

Unions can apply to the Commission to be made a party to an employer/employee agreement if :

- the union has at least one member employed in the business; and

- the union is entitled to represent the industrial interests of employees who work in the business; and
- a member or members employed in the business request the union to be a party to the agreement.

4.8 Term of agreement

Certified agreements must specify that they will expire within three years after certification. However parties to certified agreements may extend the agreement by up to three years after the initial certification.

Agreements will be able to be terminated after the nominal expiry date by agreement between the parties or as a result of being replaced by a new agreement. Failing joint agreement, and on the application of one of the parties, the Commission could terminate the agreement in the public interest.

4.9 Bargaining periods and protected action

The bargaining "in good faith" provision has been removed from the Act, however the Commission will still be able to assist the parties through its conciliation function.

Parties are able to take protected industrial action if:

- the agreement has passed the nominal expiry date; and
- a bargaining period has been initiated in accordance with the Act; and
- parties to the industrial action are negotiating parties; and
- notice of intended action has been given by one party to the other party; and
- the industrial action does not involve a secondary boycott; and
- the parties have genuinely tried to reach agreement.

Where protected industrial action is taking place or is about to take place the Commission can order a ballot in relation to the taking of industrial action by the employees.

The Commission can also terminate the bargaining period in certain circumstances. If it does so it must then conciliate and then if appropriate, arbitrate.

5. AUSTRALIAN WORKPLACE AGREEMENTS

5.1 Agreements with individual employees

A new Part VI D has been inserted in the Act to provide for a new form of agreement known as an Australian Workplace Agreement (AWA). An AWA is an agreement between a constitutional corporation and an individual employee about matters pertaining to the relationship between employer and employees.

An AWA operates to exclude any award that would apply to the employee's employment.

These agreements may be either individual or collective provided that every employee must sign the agreement.

5.2 Approval process

5.2.1 No disadvantage test

AWA's must be approved by the Employment Advocate. To approve an AWA the Employment Advocate will need to be satisfied that the proposed agreement is no less favourable to the employee concerned, when considered as a whole, than the relevant award. Where the employee is not covered by an award, the Employment Advocate can designate an appropriate award for the purpose of establishing a benchmark for the "no disadvantage" test.

If the Employment Advocate is not satisfied that the proposed agreement is not less favourable than the award, he or she may:

- suggest that the parties amend the agreement; or
- make approval conditional on one of the parties giving an undertaking which ensures that the agreement does not disadvantage the employee.

5.2.2 Public interest test

If the Employment Advocate forms the view that the proposed agreement is less favourable and neither amending the agreement nor giving an undertaking about its operation is practicable, the Employment Advocate must refer the AWA to the Commission for the application of the public interest test. In applying the public interest test, the Commission may require the parties to appear before it but there would be no right of intervention by any third party.

5.2.3. Other requirements for approval

The Employment Advocate will also need to be satisfied that;

- the employee had been provided with a copy of the proposed agreement at least fourteen days prior to the date of signing together with an information sheet prepared by the Employment Advocate setting out assistance available to employees through bargaining agents or from the Employment Advocate;
- the employee had had the agreement explained to him or her;
- the agreement contains a dispute resolution procedure;
- the agreement contains an anti-discrimination clause;
- the employee genuinely consented to the agreement.

The Employment Advocate could contact the parties if he or she considered this necessary and could arrange a meeting with the parties or their agents to discuss relevant facts. However, there is no right of intervention by any other third party.

5.2.4 Employees not to be excluded

An application for approval of an AWA must be accompanied by a brief statement from the employer declaring whether all the employees doing the same kind of work have been offered the same AWA. Where an employer indicates that there has been an exclusion, the agreement will not be approved unless the Employment Advocate is satisfied that the employer has not acted unfairly or unreasonably in excluding employees from the AWA. The legislation acknowledges that an employer may have a valid reason for excluding an employee from an AWA.

5.3 AWA's - generally

- AWA's start operating on the date they are approved by the Employment Advocate. However, in order to enable new employees to enter into employment expeditiously, single AWA's for new employees will take effect from the date of lodgement or any later date agreed in the AWA. Where such an AWA was subsequently refused approval, or modified in order to be accepted for approval, the employee would be eligible for compensation for the difference between his or her entitlements under the AWA, and his or her entitlements under any amended AWA or, in the absence of an agreement, the award.
- AWA's must be lodged with the Employment Advocate within 14 days of being signed.
- AWA's may be varied by written agreement between the parties.

- AWA's may be terminated by written agreement between the parties.
- AWA's must include a dispute settling procedure.
- AWA's must specify a date as a nominal expiry date and such date must not be more than three years after the AWA commences.
- AWA's bind the successors of the employer's business.
- Parties may take protected industrial action when negotiating AWA's if proper notice is given but may not take industrial action while an AWA is operative.
- Persons (whether the parties to the negotiations or not) may not use threats or intimidation with the intention of hindering negotiations for an AWA.
- An employer or employee may appoint a person as a bargaining agent to negotiate an AWA on their behalf.

5.4 Breach and enforcement of AWA's

A party who suffers loss or damage as a result of the breach of an AWA by the other party may institute court proceedings for damages against that other party.

A person who suffers loss as a result of making an AWA under duress or as a result of a false or misleading statement may sue the offending person for damages.

A court can set aside an AWA if it was made:

- under duress; or
- as a result of a false or misleading statement.

5.5 Confidentiality of agreements

AWA's are private documents and neither the Employment Advocate nor the Commission may publish details of any hearings or findings made in relation to an AWA. However, the Employment Advocate is able to make parts of agreements available for examination or analysis for research purposes. In so doing, the Employment Advocate is required to have regard to the right to privacy of the parties in accordance with established privacy principles.

On the other hand, the parties to an AWA are not required to keep it confidential as between themselves. In fact the Act specifically prevents an AWA from including provisions that prohibit or restrict one of the parties disclosing details of the AWA to another person.

5.6 Terminating agreements after expiry

The same arrangements for terminating agreements after their term expires apply to both AWA's and certified agreements. Agreements continue in force unless:-

(a) replaced by a new agreement;

(b) terminated by agreement between the parties or;

(c) on the application of one of the parties, terminated by the Commission where it is satisfied this is not against the public interest.

6. UNLAWFUL TERMINATION OF EMPLOYMENT

6.1 The Distinction Between Unfair Dismissals And Unlawful Termination Of Employment

The cause of action for unlawful termination of employment provided in Division 3 of Part VIA of the old Industrial Relations Act has been split into two separate causes of action in the new Act. They are dealt with in sub-divisions B & C of the new Division 3.

Sub-division B deals with applications for a remedy where it is claimed a termination of employment is "harsh, unjust and unreasonable". This paper will refer to harsh, unjust or unreasonable termination of employment as "unfair dismissal". The constitutional problems faced by the Brereton unfair dismissal laws are avoided in the new Act because an unfair dismissal application can now only be made by an employee covered by a federal award or employed in the Commonwealth public sector or in a territory.

The cause of action provided by the other sub-division, Sub-division C is entitled "unlawful termination of employment". This cause of action picks up the old law prohibiting termination on certain specified grounds (previously section 170DF). This cause of action faces no constitutional hurdles and is therefore available to all employees in Australia subject to the exclusions referred to below.

6.2 Excluded Employees

6.2.1 Salary limit

The salary limit for non-award employees has been retained and is currently $64,000 per annum.

6.2.2 Short Term Casual Employees

Short term casual employees continue to be excluded from bringing either an unfair dismissal or an unlawful termination application. Regulation 30B(3) now provides that a casual employee is taken to be engaged for a short period unless:

> *"A. The employee is engaged by a particular employer on a regular and systematic basis for a sequence of periods of employment during a period of at least 12 months; and*
>
> *B. The employee has, or but for a decision by the employer to terminate the employee's employment, would have had, a reasonable expectation of continuing employment by the employer".*

6.2.3 Employees Engaged for a Fixed Term or Specified Task

Employees engaged for a fixed term (regardless of the duration of the term) or for a specified task are excluded from bringing either an unfair dismissal or an unlawful termination application.

6.2.4 Probationary Employees

Probationary employees continue to be excluded although the definition of a probationary employee has been changed to the following:

"An employee serving a period of probation or a qualifying period of employment, if the duration of the period or the maximum duration of the period, as the case may be, is determined in advance and, either:

i. The period, or the maximum duration, is three months or less; or
ii. The period, or the maximum duration;
A. is more than three months; and
B. is reasonable, having regard to the nature and circumstances of the employment".

6.3 Unfair Dismissals

6.3.1 Procedure

Unfair dismissal applications must be filed in the Commission within 21 days after the termination takes effect.

The Commission must first exercise its conciliation powers. If it considers that all reasonable attempts at conciliation are likely to be unsuccessful, it must indicate to the parties its assessment of the merits of the case and, if it thinks fit, recommend that the matter be discontinued. This new process is clearly intended to put pressure on the applicant to settle or risk facing a costs order down the track. If the parties insist on proceeding beyond conciliation, the matter will then proceed to a full hearing before the Commission to determine whether termination was harsh, unjust or unreasonable.

6.3.2 A fair go all round

The Commission is specifically directed to ensure "a fair go all round is accorded to both employer and employee" (Section 170CA(2)). The explanatory memorandum published with the original Workplace Relations Bill explains the reference to "a fair go all round" in the following way:-

"The expression has been used to summarise the objective of unfair dismissal cases which is to provide industrial justice by giving due weight to:

- *the importance but not inviolability of the right of an employer to manage the employer's business;*
- *the nature and quality of the work in question;*
- *the circumstances surrounding the dismissal; and*
- *the likely practical outcome if an order is made". (Explanatory Memorandum to the Workplace Relations and other Legislation Amendment Bill 1996 Clause 7.19).*

6.3.3 Substantive and procedural fairness

The Commission will have to consider both substantive and procedural unfairness in relation to the termination. However, unlike the Brereton unfair dismissal laws, there are no absolute requirements to ensure a fair termination. Instead, the Commission is directed by Section 170CG(3) to have regard to the following matters in determining whether a termination was harsh, unjust or unreasonable:-

"(a) whether there was a valid reason for the termination related to the capacity or conduct of the employee or to the operational requirements of the employer's undertaking, establishment or service; and

(b) whether the employee was notified of the reason; and

(c) whether the employee was given an opportunity to respond to any reason related to the capacity or conduct of the employee; and

(d) if the termination related to unsatisfactory performance by the employee - whether the employee had been warned about that unsatisfactory performance before the termination; and

(e) any other matters that the Commission considers relevant".

The Act's new approach to procedural fairness is underscored in the Explanatory Memorandum as follows:-

> *"Affording employees procedural fairness in relation to a termination will be relevant in establishing whether or not a termination is harsh, unjust or unreasonable. However, as procedural fairness is to be only one factor to be considered along with other relevant factors, the intention is that undue weight will not be given to procedural defects in a termination".* (Explanatory Memorandum Clause 7.44).

6.3.4 Remedies for unfair dismissal

If the Commission decides that the dismissal was unfair, then it can reinstate the employee with or without ordering back pay. If reinstatement is inappropriate, the Commission may award compensation.

Section 170CH(2) provides that in awarding compensation, the Commission must be satisfied that the remedy ordered is appropriate having regard to all the circumstances of the case including:-

"(a) The effect of the order on the viability of the employer's undertaking, establishment or service; and

(b) the length of the employee's service with the employer; and

(c) the remuneration that the employee would have received, or would have been likely to receive, if the employee's employment had not been terminated; and

(d) the efforts of the employee (if any) to mitigate the loss suffered by the employee as a result of the termination; and

(e) any other matter that the Commission considers relevant".

As was the case under the Brereton laws, the maximum compensation will be, broadly speaking, 6 months pay. In fixing the amount, the Commission must not exceed the amount received by the employee in the previous six months prior to termination.

6.4 Unlawful Terminations

6.4.1 Proscribed grounds

Section 170CK prohibits termination of employment on certain grounds. All the proscribed grounds under the Brereton legislation have been retained and a new ground - refusing to negotiate in relation to an Australian Workplace Agreement - has been added.

6.4.2 Procedure

An unlawful termination application must be lodged with the Commission within 21 days after the day on which the termination took effect.

As with unfair dismissal applications, the Commission must first attempt to settle the dispute by conciliation. Again if conciliation is unsuccessful, the Commission must indicate its assessment of the merits of the application and may recommend that the applicant withdraw the application or elect not to pursue a ground or grounds of the application.

If the application solely relates to unlawful termination then the applicant may only proceed to have the matter dealt with by the Federal Court. On the other hand, if the applicant alleges both unfair dismissal and unlawful termination the applicant must elect to either have the matter arbitrated by the Commission or commence proceedings in the Federal Court.

6.4.3 Onus of proof

The onus of proof in unlawful termination proceedings is specifically dealt with by Section 170 CQ which provides that in any such proceedings:

> *"(a) It is not necessary for the employee to prove that the termination was for a proscribed reason; but*
>
> *(b) it is a defence in the proceedings if the employer proves that the termination was for a reason or reasons that do not include a proscribed reason".*

6.4.4 Remedies for unlawful termination

If the matter is arbitrated by the Commission the remedies available are the same as those referred to above in relation to unfair dismissal.

On the other hand, if the matter is dealt with by the Federal Court, the Court may make one or more of the following orders:

(a) an order imposing on the employer a penalty of not more than $10,000;

(b) an order requiring the employer to reinstate the employee;

(c) an order requiring the employer to pay to the employee compensation of such amount as the Court thinks appropriate;

(d) any other order that the Court thinks necessary to remedy the effect of such a termination;

(e) any other consequential orders.

6.5 Costs

The costs provisions in the new Act are far more extensive then they were under the previous legislation.

6.5.1 Before the Commission

In regard to arbitration proceedings before the Commission, the Commission may make an order for costs in three circumstances:

1. At any stage of the proceedings where it is satisfied the application is made vexatiously or without reasonable cause.

2. If the applicant continues the application after conciliation has failed, and the Commission is satisfied the application has acted unreasonably in failing to discontinue the application at an earlier time.

3. Once arbitration has begun, where the Commission is satisfied that a party has acted unreasonably in failing to discontinue the matter or to agree to terms of settlement that could lead to its discontinuance before the conclusion of the arbitration.

6.5.2 Before the Federal Court

In relation to proceedings before the Federal Court, a party may be ordered to pay costs where the Court is satisfied the party:

1. instituted proceedings vexatiously and without cause; or

2. caused the cost to be incurred by the other party by some unreasonable act or omission in connection with the conduct of the proceedings.

7. THE QUEENSLAND WORKPLACE RELATIONS ACT

7.1 Compatibility with federal industrial relations system

The Queensland government has enacted complimentary legislation to ensure reforms at the Commonwealth level are able to be fully implemented, particularly in regard to employers that are not constitutional corporations. The Workplace Relations Act (Qld) enables federal award employees of unincorporated enterprises to have access to federal AWAs and certified agreements and to federal unfair dismissal procedures.

However, the Queensland government remains committed to a strong state industrial relations system protected from unwarranted federal intervention. Currently approximately 55% of Queensland employees are covered by state awards.

7.2 Safety Net

7.2.1 General Conditions

The general conditions in part 12 of the old Queensland Industrial Relations Act 1990 that apply to employees covered by awards will be continued for 18 months. This will provide an opportunity for those provisions to be incorporated into awards on application by the parties in the instances where this has not already occurred. These conditions include provisions for sick leave, hours of work, overtime rates, annual leave and remuneration arrangements for public holidays. Other provisions in the old Act which have general application to all employees (eg. long service leave and parental leave),have been retained in the new Act.

7.2.2 Awards

- have been simplified to cover the same 20 core matters provided for in the federal legislation;
- must be non-discriminatory, but will continue to provide for junior rates;
- the Commission is able to determine the minimum number of hours that part-time workers and casual workers may work;
    - for part-time workers, the Commission is able to determine the minimum continuous hours of employment per day,
    - for casual workers, the Commission is able to determine the minimum number of hours for single continuous engagements.
- the Commission is able to make paid rates awards only in specific and exceptional situations, where negotiation and conciliation processes have been thoroughly exhausted, and only in an area where paid rates awards have traditionally operated;
- if all negotiation and conciliation efforts have been exhausted and failed, the Commission will be able to arbitrate and make orders in respect of industrial disputes of a significant nature. If industrial action is taken during a bargaining period before a certified agreement threatens serious harm to the community or the economy, the Commission may terminate the bargaining period, arbitrate and make appropriate orders. The outcome of arbitration will not, however, be included in an award.

7.3 Certified Agreements

- may be made by employers with unions or directly with employees without union involvement regardless of whether or not the employer is a corporation;
- will prevail over an award to the extent of any inconsistency;
- must be certified by the Queensland Industrial Relations Commission if it is satisfied employees are not disadvantaged by the agreement in comparison with their award conditions considered as a whole;
- must contain a dispute settlement process;
- cannot contain discriminatory provisions;
- must be endorsed by a valid majority of employees;
- can operate for a maximum term of three years;
- may be terminated, amended or extended only if the employer and the majority of employees agree;

- continue in force after their term expires until replaced by a subsequent agreement or terminated by either party on the giving of one month's notice;
- unions may appear in relation to certification of agreement only if they are a party to the agreement or are requested to do so by a member;
- no industrial action during the period of operation of a certified agreement;
- multi-employer agreements only in special circumstances.

Note
As a result of the Democrat amendments to the federal bill the state and federal certified agreement provisions are now almost identical.

7.4 Queensland Workplace Agreements

- may be made between an employer and an individual employee or a group of employees
- must be signed by each individual employee;
- cannot contain discriminatory provisions;
- must be approved by the Enterprise Commissioner (a new office within the Qld Industrial Relations Commission) if he or she is satisfied employees understand the agreements and are not disadvantaged by the agreements in comparison with their award conditions taken as a whole;
- are not public documents;
- operate for a maximum term of three years;
- may be terminated, amended or extended only by agreement between employer and employee;
- continue in force after their term expires until replaced by a subsequent agreement or terminated by either party on the giving of one month's notice;
- unions may not intervene in the approval of QWAs although they may assist their members to negotiate agreements;
- both employers and employees will be able to appoint bargaining agents;
- no industrial action during the period of operation of a QWA;
- employees covered by the agreement must be given the Employment Advocate's information statement about QWAs;
- must contain a dispute settlement process.

Note
Prior to the Democrat amendments, federal AWAs did not require approval. Post amendment, AWAs are benchmarked against awards and subject to a vetting process potentially involving both the Employment Advocate and the AIRC. As a result, the proposed Queensland approval process is now simpler then the federal one.

7.5 Unlawful Dismissal

The Workplace Relations Act (Qld) provisions dealing with termination of employment:-

- revoke the current “code” and replace it with a requirement that the Commission have regard to all the circumstances of the case;
- provide a balance between the merits of the case and questions of procedural fairness;
- encourage the timely conciliation of disputes by requiring the Commission to make an assessments of the merits of the case during conciliation and advise the parties of its assessment;
- discourage the improper use of Commission proceedings by expanding the grounds on which costs may be awarded;
- minimise the impact on small business by allowing the Commission (if the employer raises the matter) to take into account the effect of the remedy on the viability of the employer’s business;
- provide that an application which is not resolved by conciliation will automatically lapse six months following conciliation if the applicant has not taken any further action in the matter;
- do not include a salary limit on the Commission’s jurisdiction, ie. any employee dismissed in Queensland may file an application.

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