LexisNexis™ Butterworths

Volume 13 Number 8

employment LAW BULLETIN

Print Post Approved 243459/00130

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Information contained in this newsletter is current as at November 2007

employment
LAW BULLETIN

Crimes at work: the consequences for employment

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Employees are occasionally dismissed from their employment by their employers for conduct which might constitute a crime. Employers usually do not need to prove the commission of a crime, but rather they need to prove serious misconduct, which justifies termination of employment. What is significant in most of these cases where the employee's conduct might also constitute a crime, therefore, is that the employer generally does not identify the conduct as a particular crime, but rather describes the nature of the conduct as amounting to 'serious misconduct', thereby justifying dismissal.

In *Harvey v Qantas Australia Ltd*,[1] for example, the basis of dismissal was serious misconduct by an employee who had breached three employer policies — Standard of Reasonable Behaviour Policy, Qantas Drug and Alcohol Policy, and Qantas IT Usage — in purchasing drugs over the internet. The complaint by the employer about the employee's conduct was not so much that it was in breach of the criminal law, although in all likelihood this did occur, but rather that the conduct contravened the employment policies. This contravention provided valid reason for termination and the decision to dismiss was made after thorough and fair processes.

Similarly, in *Sabeto v Waterloo Car Centre Pty Ltd (t/as Red Hot Rentals)*,[2] the full bench of the Australian Industrial Relations Commission (the Commission) found that the valid reason for terminating employment was the failure of the employee, without any reasonable excuse, to bank moneys received in the course of employment. The Commission was clear that in so finding it made 'no suggestion that [the employee's] failure was associated with dishonesty' (at [16]).

Crimes and serious misconduct

Some examples of expressions used to describe conduct which forms the reason for the dismissal as 'serious misconduct':

- unauthorised taking of money or goods from the employer;

- fighting at work;
- using intimidatory language; or
- breaching company policy.

The alternative language of the criminal law to describe some of this conduct would be:

- theft (intentionally depriving a person of goods or property) for 'unauthorised taking money or goods from the employer';
- assault for 'fighting'.

The use of the first style of language is not insignificant. If the employer had to prove the actual commission of a crime by waiting until formal criminal charges were laid and the crime proved in a court of law, the resolution of the employment issue — whether the employee should remain in employment or not — would be delayed. Moreover, the standard of proof in the courts would be that of the criminal law — beyond reasonable doubt — that is, the elements of the crime would need to be established beyond reasonable doubt via this court process. The burden in a criminal case would be on the prosecution to establish beyond reasonable doubt that the crime had been committed.

By adhering to 'non-criminal law' language to describe the misconduct, the employer may immediately embark on an inquiry to establish whether the particular conduct had been committed. The employer may also exercise discretion about whether to put the matter in the hands of the police and to pursue criminal charges. Where the employer rests the grounds for dismissal on findings of fact, such as breach of policy or serious misconduct, without naming the commission of a crime, the outcome of any criminal proceedings usually do not affect the employment decision. The employer would investigate the matter and would need to be satisfied that there was serious misconduct justifying dismissal in order to avoid a successful claim of unfair dismissal under the *Workplace Relations Act 1996* (Cth) (where that Act applied) or a claim for wrongful dismissal in breach of contract.

This article considers a recent Commission case where theft and unauthorised use of employer's property were alleged. The article then analyses, in the context of unfair dismissal, the problem of employees using employers' property that is waste and would later be disposed of, and discusses the required onus and standard of proof in unfair dismissal cases where the reason for dismissal is conduct which might constitute a crime. The article concludes by looking at the responsibilities of employers in relation to dismissing for conduct which might constitute a crime in order to avoid an unfair dismissal claim (where applicable) and breach of the employment contract.

Theft and breach of employer policy in relation to conduct

This issue of criminal conduct at work arose recently in *Woodward-Brown v Qantas Airways Ltd*,[3] where a Qantas long-haul flight attendant was dismissed after security checks found him to be in possession of items from Qantas' aircraft. In this case, by way of contrast to many cases, the language of the criminal law was used to describe the misconduct; and the Commission examined the matter to determine whether 'theft' was committed (that is, whether there was an intention to take the items from the employer). It also explored considerations relevant to 'theft' as opposed to 'unintentional but unauthorised use of the employer's property'.

Facts of Woodward-Brown v Qantas

In this case, Mr Woodward-Brown applied to the Australian Industrial Relations Commission for compensation and reinstatement in his position with Qantas as a customer service supervisor. He had been a long-term employee of Qantas — for 32 years. His employment was terminated following processes instituted by Qantas after he was found in possession of items he removed from the plane. A security check found him in possession of items including chocolates, biscuits, sugar sachets, coffee stirrer and Qantas pens.[4] He was stood down on pay while an investigation took place. Several meetings were held and correspondence exchanged.

He was told of the allegations and given an opportunity to explain. The main allegations were that he had contravened company policy, the Qantas Standard of Conduct Policy, Standards of Personal Behaviour. The policy essentially prohibited the removal of company property without permission or payment (with receipts). The policy indicated that such unauthorised removal was an act of serious misconduct. Further, it provided in clause 3.10.3 ('Dealing with Breaches'):

> When employees breach any of the standards regarding theft, attempted theft or removal of property, counselling and disciplinary action will occur which may include termination of employment.[5]

Following investigations and determination of the breach of policy by the employee, an appeal internally to Qantas was made by the employee. Further meetings were held and opportunity to provide formal responses was given to the employee, including the opportunity to address why his employment should not be terminated.

Qantas decided that:

- the employee had removed Qantas' property and that was serious misconduct;
- the conduct breached the Qantas Standards of Conduct Policy, Qantas Policy Manual;
- taking into account the employee's position as well as the seriousness of the misconduct, the employee's employment should be terminated; and
- the employment termination should take immediate effect.

Further, Drake DP noted in the findings of fact that the employee was aware of:

- the standards expected of him;
- Qantas policy and, in particular, policy in relation to food remaining on board; and
- his responsibilities to ensure that employment policies were properly administered.

In relation to the chocolates and biscuits left on crew trays (as opposed to on passengers' trays), these could be removed from the flight — and later eaten — without breaching quarantine

regulations or employer policy. The crew may eat as many 'leftover' chocolates from passengers' trays as they wish.

Proceedings in the Australian Industrial Relations Commission

What was the basis for dismissal — theft or unauthorised use of property?

In the unfair dismissal proceedings before the Commission, the dismissed employee argued that he had not intended to commit theft. He stated:

> The allegation of theft is completely false, there is no intention of theft, it was inadvertent possession of some waste items.[6]

Senior Deputy President Drake noted that it was unclear whether it was the unauthorised removal or the theft of items which was relied on by the employer to form the basis of the decision to dismiss. Drake SDP decided to deal with these as though they were alternatives in the application.

In addition, in the Commission hearing, Qantas relied on other conduct of the employee — namely, the purchase by him of a small wine bottle in excess of the permitted number in the employment policy, which provided that two small wine bottles only could be purchased.

Theft in employment and dismissal: legal framework

The Commission examined the legal framework relating to dismissal for misconduct or criminal conduct. Drake SDP cited the full bench of the Australian Industrial Relations Commission decision in *Reyn v Qantas Airways Ltd*[7] as the appropriate approach of the Commission where conduct alleged as misconduct is criminal in nature.

In summary, *Reyn v Qantas* decided that:

- the applicant must establish that the dismissal was harsh, unjust or unreasonable;
- the standard of proof in relation to proving harsh, unjust or unreasonable dismissal is the civil standard — that is, proof on the balance of probabilities; and
- the High Court decision of *Neret Holdings Pty Ltd v Karajan Holdings Pty Ltd*[8] relevantly provided that:

  > … the strength of the evidence necessary to establish a fact or facts on the balance of probabilities may vary according to the nature of what it is sought to prove … As Dixon J commented in *Briginshaw v Briginshaw*, 'the seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must attract the answer to the question whether the issue has been proved' …[9]

Theft or inadvertent possession?

The Commission examined the evidence, including the evidence of various flight attendants. It did not doubt the veracity of Mr Woodward-Brown's evidence. The evidence of the dismissed employee that he removed the biscuits and chocolates from the trays of passengers and placed them in his pockets was accepted.

The Commission found (at [42]) that the employee did not intend to steal from his employer, and that the items were inadvertently in his possession. The employee regarded the items as 'waste' and did not make a conscious decision to retain them, or to not return them to the galley for disposal as garbage.

Therefore, in the Commission's view, the dismissed employee's conduct did not amount to 'theft'. However, the conduct was in breach of Qantas' policy as there was unauthorised removal of the property.

Breach of employment policy

Not only did the employee breach the employment policy by the unauthorised retention of employer's property (chocolates and biscuits), but the employee also contravened policy by purchasing the additional bottle of wine. The Commission could not determine whether this purchase was an intentional breach of policy. This issue was not investigated by Qantas and was relied on only at the hearing.

Valid reasons for employment termination and fair processes

The Commission held that there were valid reasons for termination. The Deputy President stated (at [56]):

> These reasons are the breach of Qantas policy by Mr Woodward-Brown in removing chocolates and biscuits from the aeroplane in his jacket and/or apron pockets; the purchase of a bottle of wine in excess of the duty-free allowance for flight attendants on any one flight; the attitude of Mr Woodward-Brown as a CSS [Customer Service Supervisor] with management responsibilities to the application of those two policies and the involvement of a junior officer in the breach of the duty-free policy. All of these matters separately provide valid reasons for the termination of employment of Mr Woodward-Brown. Together they are indicative of an attitude to the application of Qantas policy which was also a valid reason for the termination of the employment of Mr Woodward-Brown.

Thus there were valid reasons for termination of employment under s 652(3)(a) of the *Workplace Relations Act*.

The employee was notified, in accordance with s 652(3)(b), of the reason for dismissal and given an opportunity to respond. The processes of investigation were fair.

Was the dismissal harsh, unjust or unreasonable?

The Senior Deputy President proceeded to examine other matters relevant to considering whether the dismissal was harsh, unjust or unreasonable. Where the removal of the property was intentional, and therefore theft, dismissal would be an appropriate course of action to consider taking.

However, where there is no theft, the Commission stated (at [77]):

> Different considerations apply and a discretion has to be again exercised by Qantas in considering what might be the appropriate employment outcome. The policy indicates counselling and disciplinary action will occur which may include termination of employment. The word 'may' is used because the policy contemplates that a discretion will be exercised.

Further, the Commission stated (at [77]) that:

> Any termination of employment for breach of this policy, not involving theft, where no discretion was exercised and no consideration given to factors affecting the removal of the property is likely to be harsh, unjust or unreasonable.

In the Commission's view, Qantas did exercise a discretion. It overlooked the removal of all items other than chocolates and biscuits. This was reasonable.

Mr Woodward-Brown knew of the policy, but also knew that staff treated it with indifference as the food was ultimately to be thrown out.

Taking into account a number of factors, including the dismissed employee's age, his lengthy period of employment without blemish, 'the personal, social and financial consequences of termination of employment' (at [122]), the evidence of his good character and his loyalty to Qantas, the Commission concluded that dismissal was harsh in relation to what would follow for his personal and economic situation. Further, it was not proportionate to the 'gravity of the misconduct in respect of which Qantas acted' (at [123]).

In any event, the Commission stated that even if there had been theft, dismissal would remain harsh.

Remedy of reinstatement

The appropriate remedy was reinstatement. The Commission noted that, in view of his age, the employee would have difficulty finding alternative employment. His continuity in employment should be maintained.

Implications of the decision

In this instance, there was no question that the policy applied to the workplace and that the employees knew of the policy. The full inquiry and the investigation process were fair, and opportunities were given to the employee to explain and meet the allegations. There were valid reasons for the dismissal. However, even where there is a valid reason made out to terminate employment, it is affirmed in this case that the outcome — dismissal — may be:

- harsh — in terms of the consequences for the employee, both personal and economic; and
- unjust — in terms of being disproportionate to the gravity of the conduct (in other words, the 'punishment' of dismissal may be too severe for the 'crime' of the misconduct).

The case confirms that it is not sufficient to focus on proof of the conduct and therefore finding a valid reason for dismissal. The end result of the action taken (the dismissal) must also be fair.

There was some significance in resting the misconduct on unauthorised conduct rather than theft. The Commission took the view that if theft had been committed some different considerations would apply. In this instance, however, it was clear that had there been theft, the outcome would be the same. In cases of unauthorised removal of property with

no intention to steal but a breach of policy, all options should be considered by the employer. While the Commission did not lay down the different considerations that may apply to where there was theft rather than unauthorised removal of property, it seems that the mitigating factors may have less room to operate in the case of theft. It is appropriate to quote the words of the Commission (at [120]):

> Qantas management concluded Mr Woodward-Brown stole the snacks and therefore they considered that there was no room for consideration of mitigating factors excluding extreme mitigating issues such as drug addiction, alcohol addiction or a medical condition — perhaps a chocolate addiction. However, as I have concluded that the removal of property was not theft, I consider that only a very small dose of compassion should have caused the decision makers to give serious consideration to mitigating factors and outcomes other than termination of employment.

The problem of unauthorised use of employer's 'waste'

The Graincorp case

Woodward-Brown v Qantas poses the question what happens when employees use products that the employer ultimately regards as waste. The employer had a policy concerning what would happen to those goods which were destined for disposal as garbage.

A similar issue arose in *Friend v Graincorp Operations Pty Ltd.*[10] Here, the long-term employee of Graincorp Operations Pty Ltd was dismissed for giving the waste grain to a farmer. Grain that was below standard was disposed of by the employer and not sold. Over the years, this waste grain had been passed on to farmers for feeding pigs — the waste feed being suitable for that use. The giving to the farmer of waste grain on one particular occasion in breach of employment policy was the basis of the decision to dismiss the employee with 31 years' service. The policies of the employer relating to waste grain had changed in the last year-and-a-half and set out procedures for removing that grain. Prior to that, a more liberal approach seemed to prevail in relation to passing on waste grain to farmers.

In the unfair dismissal application brought by the dismissed employee, the Commission held that while the policies existed, it was not satisfied that the managers and employees sufficiently understood them. The applicant did not consciously and deliberately breach policy, but the policy breach was a valid reason for dismissal by the employer. In the words of the Commission: 'Viewed from Graincorp's perspective, the reason was sound, defensible and well-founded' (at [56]).

However, as in *Woodward-Brown v Qantas*, the Commission concluded that termination was harsh. The factors relevant to this conclusion were:

- the applicant's 31 years of service;
- his good record;
- the lack of effective action to instil in the employees the importance of the policy with respect to the waste grain;
- the applicant derived no personal benefit from his actions; and
- 'the substantial hardship that [the dismissed employee] is likely to face given the poor employment prospects for a man of his age who has spent his whole working life doing relatively specialist work for a single employer' (at [61]).

The Commission also concluded that in all the circumstances, the misconduct was not proportionate to the consequences — dismissal — and granted reinstatement as the remedy.

Parallels to Woodward-Brown v Qantas

This case has several parallels to *Woodward-Brown v Qantas*. Both involved:

- the employee using items or products which were ultimately waste products of no use to the employer and which were to be disposed of;
- contravention of employer policy;
- the Commission deciding that there was valid reason for dismissal;
- the conclusion that termination of employment was harsh in the

factual circumstances, particularly with the employees' very long unblemished records of service;
- the finding that dismissal was not proportionate to the nature and seriousness of the misconduct; and
- an order of reinstatement of the dismissed employee.

The main difference between the two cases goes to the degree of understanding by the employee of the employer policy. In *Woodward-Brown v Qantas*, the employee was found to have understood the policy, while in the *Graincorp* case it was found that there was not full understanding of the policies. This difference in understanding ultimately did not affect the outcome of the case as in each decision it was clear that the policy had been breached. Another difference relates to the fact that the employer did not put the dismissal on the basis of *theft* of grain, but rather a contravention of out-loading procedures.

Overall, *Woodward-Brown v Qantas* is consistent with the very similar previous Commission decision in the *Graincorp* case.

Standard of proof in unfair dismissal applications where there are 'crimes' at work

The Commission in *Woodward-Brown v Qantas* was clear that the standard of proof in the unfair dismissal application is the balance of probabilities. The question of the standard of proof was considered earlier in the appeal to the full bench of the Commission in *Antonuvic v Australian Commercial Catering Pty Ltd*.[11]

In that case, it had been decided at first instance that the dismissal of an employee for theft discovered after 'auditing' of the process for cash register reconciliation was unreasonable and the Commission ordered compensation.[12] In dismissing the grounds for appeal, the full bench considered the argument that a higher standard of proof than the civil standard should be applied in the unfair dismissal proceedings. The Commission rejected that argument, stating (at [35]):

> We note in conclusion that it was put to the Senior Deputy President that because an allegation of dishonesty was involved he should apply a higher standard of proof than the balance of probabilities. That submission was wrong. There is nothing to suggest, however, that the Senior Deputy President applied any standard other than the balance of probabilities.

The Commission simply cited *Brinks Australia Pty Ltd v Transport Workers' Union of Australia*[13] as authority for the proposition that the standard of proof is the balance of probabilities. The full bench in that case was very clear (at [7]):

> It seems to us beyond doubt that the standard of proof to be applied in Commission proceedings is proof on the balance of probabilities. While it is true that the strength of the evidence necessary to establish a fact on the balance of probabilities may vary according to the nature of what it is sought to prove, the standard of proof never changes. The Commissioner indicated that he thought it appropriate to apply a higher level of satisfaction in relation to findings of fact involved than the bare civil onus of the balance of probabilities. That was an error of law.

In the *Brinks* case, as the Commissioner had applied the wrong standard of proof in coming to the conclusions, the error of law justified the upholding of the appeal and quashing the Commissioner's decision in that case. Thus it is clear that the standard of proof does not vary when acts constituting crimes are the basis of dismissal.

Terminating the contract of employment for misconduct

Where there is no eligibility for the employee to unfair dismissal protection under the *Workplace Relations Act* (for example, the employer's staff may number 100 or less), the issue is governed by the contract of employment. In these circumstances, there are two options available for the employer. First, it may terminate the contract by providing the requisite notice, without giving reasons. Second, the employer may establish that serious misconduct has been committed which strikes at the heart of the continuance of the contract and justifies summary dismissal.

In the first option, the employer need not be satisfied of the commission of a crime or misconduct because the contract has been lawfully terminated. The only way the common law of contract may provide some protection against termination in such circumstances is where the employee may argue that the employer has breached an implied duty of trust and confidence (for example, not to terminate employment on mere suspicion of misconduct), or where employment policy and procedures about investigations are incorporated into the contract of employment and have not been followed.

In the second instance, the employer must be sure that the employee has committed serious misconduct, otherwise the employee may successfully argue that there has been a wrongful dismissal in breach of contract.

Unfair dismissal under the Workplace Relations Act

Where the employer is covered by the *Workplace Relations Act*, however, the employer must comply with requirements not to dismiss harshly, unjustly or unreasonably, even where the contract is lawfully terminated. As we have seen in the cases discussed, in order to avoid a successful unfair dismissal claim, the relevant conduct of the employee needs to be established appropriately as a ground for dismissal.

The conduct needs to be established in substance — that it was indeed committed by the employee and that it provides a valid reason for termination of employment. Additionally procedural formalities must be complied with by providing an opportunity for fair hearing process, giving the employee an opportunity to meet the allegations and so on. To bring a successful unfair dismissal claim under the *Workplace Relations Act*, the applicant must establish on the balance of probabilities that the dismissal was harsh, unjust or unreasonable. The applicant bears the burden of proof in the proceedings. These principles apply whether the conduct might constitute criminal conduct or simply be a breach of employment standards, such as failing to perform satisfactorily at work.

Concluding comments

It is clear that where an employer is investigating conduct which may indicate that a crime has been committed (for example, theft or fraud), the employer is not compelled to prove that a crime has indeed been committed to justify dismissal. The conduct may constitute 'serious misconduct' in that:

- it may be a breach of clear employment policies imposing standards of behaviour on employees;
- it may breach standards expressed or implied in the contract of employment; or
- it might be conduct which contravenes orders relating to the essence of the job itself, such as bank tellers not following key procedures about the handling of money.

The conduct may justify summary termination of the contract of employment or the bringing to an end of the employment relationship in a way which does not breach the unfair dismissal provisions of the *Workplace Relations Act*.

Where a dismissed employee alleges breach of the unfair dismissal provisions in the *Workplace Relations Act*, the applicant must establish on the balance of probabilities that the dismissal was unfair. The Commission is clear that a higher standard of proof is not required even though the conduct may also amount to a crime. The applicant still has to establish the unfair dismissal using the civil onus of proof.

Further, even where the employee is found to be 'guilty' of the serious misconduct, the dismissal may still be unfair in a number of circumstances, for example, where:

- dismissal was not the appropriate form of action — that is, the 'punishment does not fit the crime' or is disproportionate to the seriousness of the misconduct; or
- the dismissal is harsh in the circumstances surrounding the employee's long record of good service and the likely economic or social consequences of the employment termination. ●

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This article has been peer reviewed.

Endnotes

1. PR926844, Hodder C, 20 January 2003.
2. PR930816, Full Bench of the Australian Industrial Relations Commission (Acton SDP, O'Callaghan SDP and Foggo C), 20 May 2003.
3. [2007] AIRC 360 (25 July 2007, Drake SDP).
4. Most of the items were collected as 'left overs' from passengers' trays.
5. See *Woodward-Brown v Qantas* at [71].
6. Above at [19].
7. PR904809.
8. (1992) 67 ALJR 170.
9. Quoted in the *Reyn v Qantas* decision at [29]; the comment from Dixon CJ is from *Briginshaw v Briginshaw* (1938) 60 CLR 336.
10. PR963731, Harrison C, 13 October 2005.
11. PR956958, Giudice P, Ives DP and Eames C, 4 April 2005.
12. PR953816, Lloyd DP, 9 December 2004.
13. PR922612, full bench (Giudice P, Acton SDP and Hingley C), 18 September 2002.

Misinformation: can it invalidate a workplace agreement?

Bruce Moore MADDOCKS

In *Shop Distributive and Allied Employees' Assoc v Karellas Investments Pty Ltd*,[1] the Federal Court found that the distribution of misinformation by an employer in the retail sector about a proposed employee collective agreement (ECA), in connection with its consideration by employees, constituted an infringement of the requirements of the *Workplace Relations Act 1996* (Cth) (the Act) for approval of a workplace agreement.[2] In particular, the case raised the question of what activity will satisfy the obligation placed by the Act on the employer to give employees a reasonable opportunity to decide whether to approve an ECA, or other collective agreement.

The case also concerned the operation of the civil remedy provisions of the Act. In a somewhat pyrrhic victory for the SDAEA, the union which pursued the claim, the court declined to provide any remedy other than a declaration that the Act's provisions had been contravened.

Although the judgment has been reported to be subject to appeal by the SDAEA, pending any further elucidation by the appeal court the reasons for judgment contain some helpful observations on the operation of the provisions for approval of workplace agreements. The judgment highlights:

- the importance of the voting process in obtaining a valid approval;
- the need for industrial parties to take care in statements made in connection with attempts to persuade employees to approve (or, for that matter, to not approve) a workplace agreement; and
- the limited efficacy of the remedy provisions of the Act, where there has been a failure to comply with the Act's procedural requirements in connection with the making of a workplace agreement.

How did these issues arise?

The employer had sought an ECA with employees, to replace a pre-reform certified agreement with the relevant union, the SDAEA. A few days prior to an employee vote in favour of the ECA (by majority), the employer had distributed information to employees concerning the benefits of the new agreement. The information related to penalty rates, wage increases and other matters. The ECA was lodged with the Office of the Employment Advocate (OEA) (as the Workplace Authority was then called) immediately after completion of the vote.

The SDAEA claimed that the information distributed by the employer was false or misleading. In launching the case against the employer, the SDAEA claimed contraventions of:

- s 341 — by a breach by the employer, as the agreement lodged with the OEA had 'not been approved' in accordance with s 340; and
- s 401 — false or misleading statements made by employer which caused employees to approve the agreement.

Consequently, the SDAEA sought an order declaring that the ECA was void.[3] No penalty for contravention was sought.

The legislation

The Act contains some general provisions concerning the process by which a workplace agreement (including an ECA) is to be approved, prior to its lodgment. In particular, an ECA is approved if (among other conditions):

> (a) the employer has given all of the persons employed at the time whose employment will be subject to the agreement a reasonable opportunity to decide whether they want to approve the agreement; …[4]

Section 341, a civil remedy provision, provides that an employer must not lodge an ECA (or other workplace agreement, other than a greenfields agreement) which has not been approved in accordance with the applicable conditions, including, in the case of an ECA, the 'reasonable opportunity' requirement.[5]

Perhaps recognising that approval of a proposed workplace agreement can on occasion be hotly contested, the Act prohibits any person from making false or misleading statements in relation to workplace agreements. In particular, s 401 provides:

> *False or misleading statements*
>
> (1) A person contravenes this section if:
>
> (a) the person makes a false or misleading statement to another person; and
>
> (b) the person is reckless as to whether the statement is false or misleading; and
>
> (c) the making of that statement causes the other person:
>
> (i) to make, approve, lodge, vary or terminate a workplace agreement; or
>
> (ii) not to make, approve, lodge, vary or terminate a workplace agreement.
>
> (2) Subsection (1) is a civil remedy provision.
>
> Note: See Division 11 for provisions on enforcement.

The enforcement provisions[6] set out a number of different remedies for breach of civil remedy provisions (such as ss 341(1) and 401(1)), including the following:

- the imposition of a pecuniary penalty;
- an order declaring the workplace agreement void;
- an order varying the agreement;
- compensation; and
- an injunction to cease the contravention (or to not contravene) the provision.

Reasons for judgment

Misinformation and 'approval'

Justice Graham found that, in some (but not all) respects, the information distributed by the employer was misleading. The court took the view that misinformation about the ECA and its effects could 'contaminate' the minds of the employees. Furthermore, the absence of evidence about the actual effects of the distribution of

inaccurate material enabled the court to consider the likely effects of the distribution.

While the court made it clear that the misinformation must be more than trivial, it further emphasised that s 340(2) does not require evidence that misinformation caused a vote in favour, when otherwise an employee would not have so voted. Similarly, the consequence of the misinformation is not the issue.

In the light of those principles, the court considered that misinformation from the employer which is more than trivial can deny employees a 'reasonable opportunity to decide' whether they wished to approve ECA. The requirement that an ECA may be approved if the employer has given the employees 'a reasonable opportunity to decide whether they want to approve the agreement' is not to do with timeliness of information or access to the ECA — these matters are dealt with in s 337. The court noted that no guidance as to the operation of this requirement was provided by the Explanatory Memorandum for the amending legislation which inserted these provisions or by the Minister's Second Reading speech.

The court did not set out a detailed consideration of what will constitute 'a reasonable opportunity to decide'. But rather, by considering that distribution of misinformation by the employer can deprive employees of that opportunity, the court appears to have considered that the section deals with reality of the opportunity for employees to decide without the possibility that they may be influenced by misinformation from the employer, being the entity which under the Act has the obligation to ensure that employees have a reasonable opportunity to decide.

The court therefore found that the employer had breached s 341 by lodging the ECA when it had not been approved.

Did provision of misinformation 'cause' the approval?

As to the alleged s 401 breach, the court concluded that there was no evidence that any employee was 'caused to approve' the ECA by misinformation. It was a 'fair interference of fact' that such evidence would not be available. The claim of breach was rejected.

Remedies

Despite the claim by the SDAEA that the ECA be declared void if the court determined that it had been lodged in breach of s 341, the court declined to so order.

Graham J noted that declaration of ECA as void would not 'breathe new life' into the old pre-reform agreement. The transitionary provisions of the Act in relation to pre-reform certified agreements are clear; in particular once a workplace agreement comes into operation (as in this case the ECA had upon lodgment), the pre-reform agreement 'ceases to be in operation' and 'it can never operate again'.[7] It was not to the point that there had been a failure to comply with the requirements of the Act in respect of the lodging of the ECA (that is, that it had not been approved, as the court had found).

Furthermore, the court considered that the power to order that an ECA is void is only prospective. It cannot, the court said, be void from when it is lodged because of the terminology of s 412, which requires that such an order takes effect from the date of the order or later.

The court is provided with some statutory restrictions which control when it may declare an agreement void.[8] It may only so declare if it would be appropriate to remedy loss or damage 'resulting from the contravention', or to reduce or prevent that loss or damage. In this instance, there was no evidence that any loss or damage had been actually suffered which was caused by the vote in favour which in turn was an outcome of the misinformation. Consequently, the court was restricted to making a declaration that the ECA was not approved in accordance with s 340(2).

How useful are the civil remedy provisions?

Even if there had been evidence about the loss or damage suffered by employees, the question for the court would then be whether declaring the agreement void would have any beneficial outcome so as to remedy the loss or damage, since the ECA would not operate (at least in the future) yet the pre-reform certified agreement would not revive for the reasons referred to earlier.

That being the case, and subject to the specific contract terms applicable to the employees, the minimum statutory conditions would come into play. At least in that respect, it is most unlikely that the employees' legal minimum conditions in the future would be as favourable as they had been prior to the declaration that the ECA was void. It is therefore difficult to identify clear circumstances in which a court would consider it was both empowered to make a declaration that the agreement is void and that it would be an appropriate exercise of discretion to do so.

Conclusion

If the aspects of the reasoning in the judgment, discussed in this note, are not disturbed by any judgment on appeal, then the case emphasises the need for industrial parties — and particularly employers — to take great care to ensure that information circulated by them in connection with a workplace agreement (especially prior to a vote) is accurate. If there is a failure to do so, the civil remedy provisions could be utilised against any person who provides misinformation in connection with the making of or other steps in relation to a workplace agreement.

In addition, an employer's failure to ensure that information which is circulated is not false or misleading could raise doubts about the legal status of the agreement and opportunities to challenge its future operation, with uncertain consequences for both employer and employees. ●

Bruce Moore,
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Endnotes

1. *Shop Distributive and Allied Employees' Assoc v Karellas Investments Pty Ltd (No 2)* [2007] FCA 1425; BC200707780.
2. See s 340(2).
3. Sections 409 and 412.
4. Section 340(2).
5. Section 341.
6. Division 11 of Pt 8.
7. Clause 3(1) and (5) of Sch 7.
8. Section 412(2).

employment
LAW BULLETIN

2007 federal election — comparative analysis of the industrial relations positions of the Coalition and Labor parties

Jamie Robinson and **Kristin Duff** HARMERS WORKPLACE LAWYERS

Industrial relations reform has been a key and controversial issue in the Coalition Government's term of office and will be one of the key issues when Australian voters make their decision at the polling booths on 24 November 2007.

Regardless of the result of the federal election, employers and human resources practitioners can be assured that the industrial relations legislative landscape will continue to change rapidly over the next three years. If the Coalition is returned to government, the transitional arrangements implementing Work Choices will continue to evolve. If the Opposition is elected, the workplace relations system will face significant change (the degree of this change also being dependent on the results of the Senate elections).

While it is not essential for employers to change anything leading into the election, best practice organisations have already considered and taken into account the possible changes and how their organisations can best achieve their goals within the potentially differing legislative environments. While it is not possible to conclusively define from a policy document, this article seeks to provide some guidance to assist employers understand the key differences that Labor's 'Fork in the Road' represent.

The following table sets out a comparison between the industrial relations policies of the Coalition and Labor Parties.

COALITION POSITION	LABOR POSITION
Types of employers covered: • Commonwealth Government; • Commonwealth Government authorities; • employers of flight crew; • employers of maritime employees; • employers of waterside workers; • territory employers; • constitutional corporations; • state government bodies remain covered by state industrial systems; and • coverage of local governments dependant on whether they are determined to be trading corporations and therefore constitutional corporations.	Types of employers covered: • Commonwealth Government; • Commonwealth Government authorities; • employers of flight crew; • employers of maritime employees; • employers of waterside workers; and • territory employers; • all other private sector employers including sole traders, partnerships and corporations; • state government bodies remain covered by state industrial systems; and • local governments will be confirmed as being covered by the state industrial systems.
Minimum conditions *Standards* • Australian Fair Pay and Conditions Standard (AFPCS): establishes five legislative minimum conditions for all employees. • Minimum rates of pay. • AFPCS or federal minimum wage.	**Minimum conditions** *Standards* • National Employment Standards: establishes 10 legislative minimum conditions for all employees. • Minimum rates of pay • Pay scales contemplated.
Hours of work • Standard working week of 38 hours. • Employees can be requested to work reasonable additional hours.	*Hours of work* • Standard working week of 38 hours. • Employees not to be required to work 'unreasonable additional hours'.
Parental leave • Up to 12 months unpaid parental leave shared between two parents.	*Parental leave* • Up to 24 months unpaid parental leave shared between 2 parents. • Employer right of refusal only on 'reasonable business grounds'.
Annual leave • Four weeks annual leave (five weeks for shift workers). • Ability to 'cash out' up to half of the entitlement through a workplace agreement.	*Annual leave* • Apparently unchanged. • Suggestion in the policy that 'cashing out' may still be allowed.
Personal, carer's and compassionate leave • 10 days paid personal/carer's leave. • Ability to 'cash out' some of this entitlement through a workplace agreement. • 2 days unpaid carer's leave. • 2 days compassionate leave.	*Personal, carer's and compassionate leave* • Apparently unchanged. • Suggestion in the policy that 'cashing out' may still be allowed.

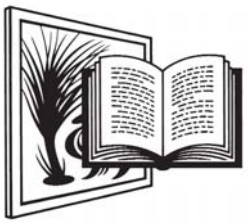
COALITION POSITION	LABOR POSITION
Community service leave No mandatory minimum prescription.	*Community service leave* Includes unpaid leave for jury duty and emergency services duties.
Public holidays Employees are currently entitled to a day off on public holidays but can be asked to work.	*Public holidays* Includes appropriate penalties for working prescribed public holidays.
Flexible work for parents —	*Flexible work for parents* Right to request flexible working arrangements until children reach school age. Employer right of refusal only on 'reasonable business grounds'.
Information in the workplace Employees currently provided with a statement about their rights, but this does not include reference to union membership.	*Information in the workplace* Employees to be provided with a statement about their rights including their right to be a union member.
Notice of termination and redundancy Statutory minimum notice of termination between one and five weeks depending on age and length of service. No mandatory severance prescription.	*Notice of termination and redundancy* Notice unchanged. The 2004 Redundancy Test case severance prescription for employers with 15 or more employees.
Long service leave Currently set by state legislation, but may be overridden by a workplace agreement.	*Long service leave* Transition to a national standard.
Award safety net Reduced role and application of awards.	**Award safety net** Continuing important role for awards.
	Awards also to include 'industry-relevant detail' about the 10 National Employment Standards.
Award simplification process ongoing with the aim of being substantially completed by 27 March 2009.	Award simplification process to be substantially completed by 1 January 2010 with a focus on: • family friendly work arrangements; • providing minimum entitlements which are simple to understand; and • ensuring efficient work performance.
State awards (NAPSAs) 'expire' on 27 March 2009.	Award simplification will focus first on industries where AWAs and state awards are prevalent.
Protected award conditions together with AFPCS conditions will continue to provide baseline against which AWA and collective agreement negotiations are assessed for the Fairness Test.	All award conditions and the 10 National Employment Standards will provide the base line against which collective agreements are assessed on an overall 'no disadvantage' basis.
	Award coverage will not be extended to those that are historically award-free — that is, managerial employees.
15 allowable award matters which can be bargained away, including: • incentive-based payments and bonuses; • hours of work and rest breaks; • annual leave loading; • ceremonial leave; • leave for the purposes of seeking other employment (when been given notice of termination); • public holidays and payment for public holidays; • days to be substituted for public holidays; • monetary allowances (including reimbursement of expenses); • loadings for shift work and overtime; • penalty rates; • redundancy pay; • stand down provisions; • types of employment; • dispute settling procedures; and • conditions for outworkers.	10 further basic industry-based award conditions which can be bargained away, including: • hours of work, rostering, rest and meal breaks; • leave, leave loading and the arrangements for taking leave; • allowances, including higher duties and disability payments; • overtime rates; • penalty rates for unsociable hours; • type of work performed (permanent, part time or casual); • consultation, representation and dispute settlement procedures; • minimum wages — including skill-based career paths, incentive payments and bonuses; • provisions for annualised salaries; and • superannuation.
	Awards to include a model flexibility clauses with a strong safety net to allow 'upward' (above award) flexible working arrangements including: • rostering and hours of work; • all up rates of pay; • provisions that provide that some award provisions do not apply if employees are paid above a certain rate; and

COALITION POSITION	LABOR POSITION
	• arrangements to allow parents to start and finish work early to collect children from school without the employer paying penalty rates.
Australian Workplace Agreements AWAs a central and increasing component of Australia's industrial relations system.	**Australian Workplace Agreements** Existing AWAs will remain in force and will be able to be terminated in accordance with the current termination provisions.
Employers will continue to be able to vary any employee's award conditions subject to 'fairness test' assessment against protected award conditions.	AWA minimum wages must continue to reflect minimum wage adjustments.
	• Common law agreements for employees earning guaranteed ordinary earnings of over $100,000 (including guaranteed overtime, allowances and so on) will not be subject to award compliance but will continue to need to comply with the 10 National Employment Standards — only available after 1 January 2010. • Award covered employees earning over $100,000 will continue to be award covered unless they 'opt off'. • AWAs to be phased out. • No new AWAs after transitional legislation is passed. • Employers may enter into Individual Transitional Employment Agreements (ITEAs), which will: — only be able to be offered by employers that have previously used AWAs; — only be able to be offered to new employees and employees that have previously been on an AWA; — have a latest possible expiry date of 31 December 2009; and — be subject to an overall 'no disadvantage' assessment against either an applicable collective agreement or award and AFPCS.
Collective agreements • Will remain a secondary industrial instrument to AWAs.	**Collective agreements** • Will be the core industrial instrument through which enterprise flexibility can be achieved.
• Will continue to allow the following types of collective agreement: — employer/union collective agreement; — employer/employee collective agreement; — employer/union greenfields agreement; — employer only greenfields agreement; and — multiple business agreement in limited circumstances.	• Will continue to allow the following types of collective agreement: — employer/union collective; — Employer/employee collective; — employer/union greenfield; — employer-only greenfields agreements will be discontinued; and — multiple business agreements likely to continue in substantially similar form.
No requirement for employer to notify a union that a non-union agreement is being negotiated.	No requirement for employer to notify a union that a non-union agreement is being negotiated.
Limited restrictions on bargaining process.	Implementation of requirements for good faith bargaining (on all parties), including: • disclosing relevant information in a timely manner, subject to appropriate protection of commercial interest; • responding to proposals in a timely manner; • providing reasons for responses to proposals; • refraining from capricious or unfair conduct.
Detailed rules in relation to agreement content will continue, in particular what is prohibited content, including: • provisions that contravene the freedom of association provisions of the *Workplace Relations Act 1996* (Cth); • provisions that require or permit the payment of a bargaining services fee; • union dues deductions; • union training leave; • provisions relating to the re-negotiation of workplace agreements; • right of entry provisions; • restrictions on the engagement of independent contractors; and • restrictions on labour hire workers.	Restrictions on agreement content (potentially including provisions that, for example, restrict use of contractors or casual employees) will be removed.
	Will have individual flexibility clauses allowing employees, subject to a 'no disadvantage test' to opt for alternative individual arrangements.
Agreements only required to satisfy the Fairness Test against protected award conditions.	Agreement will be required to 'not disadvantage' employees overall against the underlying award.
Agreements will continue to be 'approved' by lodgment, subject to later 'disapproval' if the agreement is found not to satisfy the Fairness Test.	Unions will not have an entitlement to be heard at the time of approval of an employer/employee only collective agreement.

COALITION POSITION	LABOR POSITION
Termination of employment Employees of the employers within the federal system have access to unfair dismissal remedies, excluding, among others, the following employees: • employees of employers with less than 101 employees; • employees who have been employed for six months or less; • employees serving a probationary period; • casual employees; • seasonal employees; • employees employed for a fixed period or specified task; • employees terminated for genuine operation reasons; and • non-award or workplace agreement employees earning more than $101,300.	**Termination of employment** All private sector employees to have access to unfair dismissal remedies subject to the following exclusions: • employees of organisations with less than 15 employees will not be able to claim unfair dismissal unless they have completed a one-year qualifying period; and • employees of businesses with 15 or more employees will be able to claim unfair dismissal if they have completed a six-month qualifying period.
State government employees will remain able to access their respective state systems.	State government employees will remain able to access their respective state systems.
Local government employees will continue to potentially fall into either the state or federal systems depending on whether their council is a constitutional corporation.	Local government employees will revert to their respective state system.
• An employee has 21 days to lodge an application with the Australian Industrial Relations Commission (AIRC). • The application is followed by a conciliation conference and then a hearing if necessary.	• Employees will only have seven days to lodge an application with Fair Work Australia (FWA). • FWA to determine unfair dismissal claims without formality and hearing.
While reinstatement is the primary remedy, in practice it is rarely ordered because of the breakdown in the relationship between the employer and the employee.	Reinstatement not ordered where it is not in the interests of the employee or the employer's business.
	Small business to be covered by a fair dismissal code, which if complied with will protect the business against unfair dismissal claims.
Employees will continue to have access to remedies for unlawful termination — termination for a prohibited reason.	Unlawful termination remedies appear likely to be unchanged although these will be determined by a judicial segments of FWA rather than the Federal Magistrates Court.
Regulatory authorities The legislation will continue to be administered by: • the AIRC: — regulation of industrial action; — award simplification; — unfair/unlawful dismissal hearings; — some dispute resolution responsibility; • the Workplace Authority: — administration of agreement making; • the Workplace Ombudsman; — compliance and enforcement; • the AFPC: — minimum wage setting.	**Regulatory authorities** • A new body, Fair Work Australia, will be established from 1 January 2010 to administer all of the functions of: — the AIRC; — the Workplace Authority; — the Workplace Ombudsman; and — the AFPC.
	Appointments to FWA to be through a bipartisan system.
Industrial action and right of entry Protected action only allowed during bargaining period and not during the term of a collective agreement.	**Industrial action and right of entry** Protected action only allowed during bargaining period and not during the term of a collective agreement.
Protected action will only be allowed after a secret ballot endorses the action.	Protected action will only be allowed after a secret ballot endorses the action.
AIRC has power to end industrial action and settle dispute.	FWA will have the power to end industrial action and determine a settlement between the parties. Current remedies to deal with unprotected industrial action will remain.
Industrial action not to be allowed in pursuit of pattern bargaining.	Industrial action not to be allowed in pursuit of pattern bargaining.
Secondary boycotts prohibited under the provisions of the Trade Practices Act 1974 (Cth).	Current secondary boycott arrangements to be retained.
Right of entry allowed only in restricted circumstances.	Current right of entry provisions will be retained, but it is to be anticipated that unions will seek expanded rights through collective agreement negotiations.

Jamie Robinson and Kristin Duff,
Harmers Workplace Lawyers.

on the books



EMPLOYMENT LAW NEWS

NATIONAL

Report on agreement making under Work Choices

October 2007. A report has identified at least 15 ways in which the legal framework under Work Choices has shifted the balance of bargaining power away from employees. The report, *Agreement-Making Under Work Choices: The Impact of the Legal Framework on Bargaining Practices and Outcomes*, was prepared by Carolyn Sutherland of the Work and Employment Rights Research Centre and Department of Business Law and Taxation at Monash University, and was commissioned by the Victorian Office of Workplace Rights Advocate.

According to the report, while the 'new legal framework does not require employers to reduce employee conditions, or to move to individual arrangements which exclude unions, or to engage in practices which pressure employees to accept the employer's preferred terms … it does provide increased opportunities for employers to make agreements which operate to the disadvantage of employees overall.'

Key report conclusions include the following.

- Data on employer greenfield agreements strongly suggests that substantial numbers of employees have received no compensation for the removal of protected award conditions via these agreements. A combination of statistical and anecdotal evidence led to similar conclusions in relation to Australian Workplace Agreements (AWAs).
- In the case of collective agreements, a number of templates are being used to set the terms and conditions of employment and conditions of employment for retail and hospitality workers.
- The legal framework appears to legitimate certain unfair employer bargaining practices by removing any positive requirement for employers to explain the effect of workplace agreements to employees, or to obtain genuine approval for these agreements, and by providing only weak protections against false or misleading conduct or duress.

Copies of the report are available at <www.business.vic.gov.au/busvicwr/_assets/main/lib60148/4880%20agreement%20making_web.pdf>. ●

Federal Magistrates Court: 2006/07Annual Report

Industrial law disputes represented the greatest growth in matters before the Federal Magistrates Court of Australia, according to the court's recently released *2006/07 Annual Report.*

The results reflect an extension of this relatively new jurisdiction for the court. The court's industrial law jurisdiction commenced on 27 March 2006, with amendments made to the *Workplace Relations Act 1996* (Cth) as a result of the Work Choices legislation. During 2006/07, this jurisdiction was extended following commencement of the *Independent Contractors Act 2006* (Cth).

A total 119 industrial law applications were filed in the court in 2006/07. The report notes that '[w]hile the volume of the work is relatively small, the decisions of the court have been of some significance in light of the new legislative regime'.

Unlawful discrimination matters also comprise a portion of the court's general federal law work and applications in this area had increased nationally by 15 per cent over 2006/07. The unlawful discrimination decisions made by the court during 2006/07 included cases alleging sex discrimination, racial discrimination and disability discrimination, with very few applications filed alleging the more recent age discrimination.

Copies of the Annual Report are available at <www.fmc.gov.au/pubs/docs/06-07pt3.pdf>. ●

Study looks at relationship between employee entitlements and psychological wellbeing during pregnancy

12 November 2007. Lack of access to maternity leave and workplace discrimination is contributing to poor mental health in pregnant women, according to a paper from the Key Centre for Women's Health in Society at the University of Melbourne. The paper reports on surveys conducted with 165 pregnant Australian women.

Of those surveyed:

- 60 per cent had access to unpaid maternity leave, despite current legislation requiring all Australian employees to have access to this entitlement after 12 months' of continuous employment;
- 46 per cent had access to paid maternity leave while others were forced to rely on sick leave, annual leave or go without income following childbirth;
- almost one-in-five women reported pregnancy-related discrimination from their employer in the form of negative or offensive comments or being excluded from promotion or training;
- women who were more highly educated and employed in managerial or professional jobs were more likely to have access to maternity leave than those in low-skilled, low paid occupations.

The paper, 'Employee entitlements during pregnancy and maternal psychological wellbeing', was written by Amanda Cooklin, Heather Rowe and Jane Fisher, and was published in the *Australian and New Zealand Journal of Obstetrics and Gynaecology*. ●

ACT

OH&S amendments commence

25 October 2007. The *Occupational Health and Safety Amendment Act 2007* (ACT) commenced on 25 October 2007 (with ss 1 and 2 commencing on 24 October).

The Act amends the provisions relating to the Occupational Health and Safety Council and makes some changes to the construction of the safety duty offences. In relation to the latter, the Act introduces a new s 48(3) into the *Occupational Health and Safety Act 1989*, which attaches strict liability to the element of the safety duty offences in s 48(1)(b). Similar subsections have been introduced for ss 49, as well as ss 43, 44, 45 and 46 of the *Dangerous Substances Act 2004*.

The Occupational Health and Safety (Regulatory Services) Legislation Amendment Bill 2007 remains before Parliament.

Source: Explanatory Memorandum.●

NEW SOUTH WALES

Discrimination on the grounds of breastfeeding

1 November 2007. The *Anti-Discrimination Amendment (Breastfeeding) Act 2007* (NSW) commenced on 1 November 2007.

The Act amends the NSW *Anti-Discimination Act 1977* to remove doubt that discrimination on the ground of breastfeeding constitutes unlawful discrimination on the ground of sex. The *Anti-Discrimination Act* provides that discrimination on the basis of a characteristic that appertains generally to persons of a particular sex is discrimination on the ground of sex. The amending Act provides that breastfeeding is a characteristic that appertains generally to women.

The amendment Act also defines 'breastfeeding' as including the act of expressing breast milk.

Source: Explanatory Notes to the Bill. ●

NORTHERN TERRITORY

New OH&S regulatory framework proposed

18 October 2007. Two Bills have been tabled before NT Parliament with the aim of providing 'a more modern, appropriate legislative framework for the regulation of occupational health and safety in the Northern Territory'.

The Workplace Health and Safety Bill 2007 will replace the existing Pt 4 of the *Work Health Act 1986* to provide a comprehensive OH&S legislative framework covering all workplaces in the NT.

The Law Reform (Work Health) Amendment Bill 2007 would deal with consequential amendments to the *Mining Management Act 2001*, the *Petroleum Act 1984*, the *Dangerous Goods Act 1998* and other affected legislation. It would also amend the title of the current *Work Health Act* to the *Workers Rehabilitation and Compensation Act* to accurately reflect the purposes of that Act.

Source: Second Reading speech. ●

SOUTH AUSTRALIA

IR Commission reports on Work Choices

25 October 2007. The SA Industrial Relations Commission has released its report on the federal Work Choices scheme. The report is part of an inquiry commenced on 11 April 2007 under the direction of the SA Minister for Industrial Relations. The Commission was asked to inquire into and report to the Minister on the impact of Work Choices and federal legislation relating to independent contractors on SA workplaces, employees and employers.

In its conclusion, the report comments that 'although promoted as a simplified system [Work Choices] in fact involves a high degree of regulation and complexity'. The report noted that up to 105,000 employees previously covered by the state industrial relations system in SA have now been brought within the Work Choices system.

Copies of the report are available at <www.industrialcourt.sa.gov.au>. ●

TASMANIA

Parliamentary committee reports on Work Choices

October 2007. The House of Assembly Select Committee on Work Choices Legislation has released its *Report on the Operation of Work Choices Legislation in Tasmania*.

The report was critical of the federal Work Choices regime, recommending, among other things, that the *Workplace Relations Amendment (Work Choice) Act 2005* (Cth) be repealed.

The Committee reports it received evidence that 'clearly demonstrated that employers are offering AWAs on a take-it or leave-it basis'. Further, 'the Committee was informed that it is common practice for employers to use template documents that simply list the minimum allowable employee entitlements. These agreements show no variation in content as would be expected if the negotiations between individual employees and employers were authentic'.

Other recommendations made by the Committee in the report include:

- legislative change to ensure that no new AWAs can be entered into;
- legislative change to ensure that no individual agreements can undermine collective agreements or awards can be entered into;
- restoring the pre-Work Choices powers of the Australian Industrial Relations Commission; and
- the immediate provision of universal access to unfair dismissal laws, under the same conditions as were available prior to the introduction of Work Choices.

Copies of the report are available at <www.parliament.tas.gov.au/ctee/WorkChoices.htm>. ●

PUBLISHING EDITOR: Darren Smith PUBLISHER: Susan Robinson PRODUCTION: Christian Harimanow
SUBSCRIPTION INCLUDES: 10 issues per year plus binder SYDNEY OFFICE: Locked Bag 2222, Chatswood Delivery Centre NSW 2067 Australia
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ISSN 1440-4532 Print Post Approved PP 243459/00130 This newsletter may be cited as (2007) 13(8) *ELB*