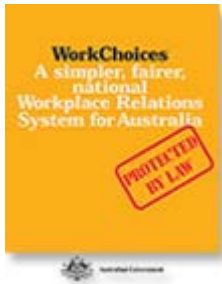




# KAMCORP INDUSTRIAL RELATIONS EMPLOYEE RELATIONS UPDATE

## Workchoices changes in brief

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***The Workchoices legislation represents the most radical change to Australian Industrial Relations in over 100 years.***

The impact of the changes has the potential to be wide and far-reaching; subject to the manner in which employers implement these changes. Of course, while the response from the Union movement is unknown – it is however highly likely strategies to minimise the impact of the legislation will be implemented by the Unions.

This Employee Relations Update provides a summary of the most important changes, in addition to a summary of the likely implications of the changes (such as expected union action, strategies or focus on alternative remedies)

in addition to suggested action for clients to consider how the changes may impact upon and potentially assist their business.

Kamcorp has completed an in-depth review and report, on each element of the summary section, which is available upon request. The summary is as follows:

### **Workchoices summary**

#### **Who is covered by the legislation?**

The legislation will apply to the following:

- (i) Employees of constitutional corporations
- (ii) Employees in Australia's territories
- (iii) All Commonwealth public service employees
- (iv) Waterside, maritime and flight crew employees; and
- (v) Victorian workers.

All other employees will not be covered by the legislation and essentially nothing will change for these employees; State legislation, Awards and

agreements will continue to apply.

This will alter, of course, if the employer incorporates or the State hands across its IR powers to the Federal government (which is probably unlikely).

#### **Workplace Agreements**

- The legislation encourages employers to move to agreements and agreements are simpler to make as they become operational upon agreement (certification not required).
- Agreements must meet a new minimum standard (the Australian Fair Pay and Conditions Standard) which addresses minimum rates, maximum ordinary hours, annual leave, parental leave, casual loading, personal leave, carer's leave and compassionate leave.
- The 'no disadvantage test' is removed
- Certain clauses are not to be included in agreements (primarily related to union

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matters or matters restrictive to employers)

#### Unfair Dismissals

- No unfair dismissal jurisdiction to employees of employers with less than 100 employees
- No unfair dismissal jurisdiction for employees of employers with greater than 100 employees if the employee employed for less than 6 months
- No unfair dismissal jurisdiction where termination based upon redundancy and determined to be a genuine redundancy
- Unlawful dismissal unaffected

#### Right of Entry

- Union officials must pass a fit and proper test
- Greater powers to suspend for breach
- Employer may dictate where meeting held upon entry to company site
- Union must specify reasons for entry

#### Transmission of business

- Transmitted award / agreement applicable for a maximum of 12 months (currently indefinite)
- Only applicable in relation to transmitted employees

- A new workplace agreement struck in the 12 month period may override the transmitted award / agreement
- Application can be made to prevent transmission of the industrial instrument

#### Awards

- Number of awards to be rationalised
- Allowable award matters reduced to 13 (from 20)
- Some current award conditions to be 'preserved'
- Agreements may modify (be less than) award conditions – including those conditions 'preserved' – however cannot be less than the 'Australian Fair Pay Commission Standard' conditions

#### The Australian Fair Pay Commission

- Responsible for setting and adjusting minimum rates
- Takes over this function from the AIRC

#### The Australian Fair Pay Commission Standard

- 4 weeks annual leave, extra week for shift worker, can cash-out 2 weeks by agreement

- 10 days personal/carer's leave
- One year unpaid parental leave
- Maximum 38 ordinary hours, reasonable additional hours subject to 'reasonableness' test
- Minimum rates

#### Industrial Action/Bargaining

- More difficult to take protected industrial action – secret ballot required
- Industrial action re pattern bargaining is unlawful
- Penalties for unprotected industrial action incorporated
- Greater requirement to suspend bargaining period/grant injunction
- Third parties affected by industrial action can take action

#### Transitional provisions (process of transitioning to Workchoices)

- Small business redundancy exemption and establishment of Fair Pay Commission have commenced
- Remainder will commence on proclamation, expected March / April 2006
- In respect to Corporations, depending upon current industrial instrument, three years to transition to Workchoices;

- *Federal Awards* will continue subject to Workchoices changes (i.e. Prohibited content, allowable matters) unless new agreement struck; which would override award
- *Federal agreements* continue to apply subject to Workchoices changes (prohibited content); new agreement under workchoices will override.
- *State Awards* will continue to apply on same basis as federal awards.
- *State Agreements* continue until expiry or until replaced by agreement under Workchoices
- In respect to non-constitutional corporations / unincorporated businesses, depending upon current industrial instrument, five years to transition to Workchoices;
- *Federal Award*: will continue until expiry, upon expiry will revert to state system - can make a state agreement at any time and if so will revert to state system at that time
- *Federal agreements*: same as awards

- *State Awards*: no change
- *State Agreements*: no change
- *Non-award/registered agreement employees in corporations and unincorporated/non constitutional businesses*: These employees will continue under the common law system and relevant state and federal legislation.

#### Additional Matters

- Wages will need to be paid fortnightly unless an alternative arrangement is agreed between the parties
- Employers can request employees to work on public holidays – employees can only refuse on reasonable grounds
- An employer can require proof of illness on every instance of sick leave, however the employee can provide a statutory declaration where obtaining a medical certificate is not practicable
- A *new* employee can be required to sign an AWA, or not have the job – this does not constitute duress
- Unfair dismissal and contracts jurisdiction of states will not apply to employees covered by the legislation however the

following state employment laws are preserved; OH&S, anti-discrimination, workers compensation, apprentices and long service leave.

#### **Likely Implications & Suggested Actions**

##### Workplace Agreements:

- Unions likely to put 'prohibited content' (i.e. content not allowed in certified agreements or AWA's) into deeds of agreement (unregistered agreements); as such if you are in an enterprise bargaining round expect to be provided with both a draft certified agreement and a draft deed for negotiation.

##### Unfair Dismissals:

- You may wish to review policies and procedures concerning disciplinary action and termination, particularly if an employer of less than 100 employees. An employer may still be bound by such documents, despite removal of the unfair dismissal jurisdiction.
- There will be a greater focus upon and use of the unlawful termination provisions of the Workplace Relations Act. Employers should review

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anti-discrimination policies, procedures and practices. Additionally training and preventative strategies should be determined.

- It will remain unlawful to discriminate on the grounds of an entitlement to an industrial instrument. Unions are highly likely to focus on this ground to prevent a move to an AWA, non union certified agreement or termination of an agreement
- Appropriate documentation re 'genuineness' of redundancy should be maintained where a termination occurs for this reason as this is the only reviewable element of such a termination

#### Right of Entry:

- Determine most appropriate meeting place in the organisation and direct all such entry to that point
- Determine the best route (i.e. where minimal or no contact with employees may occur) and direct that route to be taken (perhaps provide a map if believed to be important)
- Ask for reasons for entry and consider legitimacy

#### Transmission of business:

- If involved in a transmission where transmitting agreement/award is unacceptable – request vendor to make application that agreement not be transmitted; consider financial benefit.
- In the alternative prepare an agreement immediately and negotiate to limit impact of transmitted agreement

#### Awards:

- Consider which award clauses may be negotiated (i.e. non-Australian Fair Pay Commission Standard clauses) in accordance with the requirements of your business and consider negotiating a workplace agreement to increase flexibility

#### The Australian Fair Pay Commission Standard:

- Ensure awareness of and compliance with the standard in all agreements

#### Industrial Action/Bargaining:

- It will be much more difficult for unions to take protected industrial action. Despite fines for unprotected industrial action it is possible unions will revert to more unprotected industrial

action. Prepare strategy to obtain injunction if believe unprotected industrial action may occur – easier to achieve under Workchoices.

- Due to the delay in being able to take protected industrial action, prepare strategies prior to EBA round for stockpiling product/obtaining alternative labour – there should be time to implement.

#### Transitioning to Workchoices:

- Based upon current industrial instrument (Federal or State Award or Agreement) consider options regarding more flexible and beneficial workplace agreement; determine strategy to achieve and implement.
- If on common law contracts consider potential for AWA's to prevent union intervention.
- Where involved in EBA the expectation from the union will be no change, all terms and conditions to remain (perhaps in a deed instead of a certified agreement) – consider bargaining strategy as referred to above.

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### Conclusion

As can be seen the changes have potentially enormous implications for your business.

Contact Kamcorp to discuss and prepare strategies to address these implications in the most effective manner possible for your business.

This preparation should occur prior to implementation of the legislation.

**Contact Kamcorp should you require further advice and assistance in determining both options for change and required changes resulting from the legislation.**

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