

No freedom of choice

On October 10th the Federal Government released further detail of the much anticipated industrial relations changes first raised in Parliament by John Howard on 26 May this year. The detail of the legislative changes is still not available, however, the scope of what is intended is clearer following the *WorkChoices* release. **Josh Cullinan** provides a snapshot of some of these proposed changes.

Minimum Wages

As previously reported, the Australian Industrial Relations Commission (AIRC) will be stripped of its powers to set minimum wages and this will be passed to the Fair Pay Commission (FPC). The FPC will have very different terms of reference from those of the past. The new items to take account of will be:

- The capacity for low paid and unemployed to gain employment.
- Employment and competitiveness across the economy.
- In respect of juniors, workers with disabilities and trainees, their competitiveness within the labour market.
- Providing a safety net for the low paid.

No longer will there be regard to the needs of the low paid, nor a requirement to maintain a fair and effective safety net of minimum wages and conditions that takes account of living standards in the community.

The minimum wage floor will be that determined by the AIRC in this year's living wage increase, however, there will be no safeguards against future decreases to that level, that is, \$10 increases over the next 3 years may be undone in a single \$30 decrease in the fourth year.

Minimum Terms & Conditions

The Government has also revealed it will establish 5 minimum terms and conditions known as the Fair Pay & Conditions Standard (FPCS). These will form the no disadvantage test. Awards remain enforceable if they are superior to the FPCS.

The minimum conditions will be:

- 4 weeks annual leave but 2 weeks able to be cashed out.
- 12 months unpaid parental leave between the parents.

- Personal leave of 10 days per annum, accumulating for personal sickness, capped at 10 days per annum for caring purposes.
- 2 days paid compassionate leave.
- 38 hour week, which can be averaged over 12 months, but no overtime penalty.

Agreements

Agreements will be extended up to 5 years. A model disputes clause will apply by default where an agreement does not include one, which refers the matter to either the AIRC or an alternative ADR provider. The model disputes clause does not provide for arbitration. Parties wishing to provide for arbitration of a dispute will need to expressly do so.

It appears that the parties may not be able to rely on inherent powers of the AIRC that accompany dispute settlement (compelling attendance at meetings, production of documents, appearance of witnesses etc.) unless they expressly do so.

There are new restrictions on the matters that can be included in agreements. In addition to matters that do not pertain to the employment relationship, agreements will be unable to include:

- Certain clauses that assist unions in the workplace: ie. agreements for union leave, paid union meetings or disputes clauses that mandate a role for the union.
- Certain matters that promote collective bargaining: ie. agreement that future agreements will be collective, and agreements that prohibit or restrict the making of AWAs.
- Restrictions on use of labour hire, protec-

tion for unfair dismissal, and allowing for industrial action during the life of an agreement.

Any party seeking to include these matters or lodged an agreement containing these matters for approval may be fined \$33,000 for organi-



An image from the ACTU's television campaign opposing the Government's WorkChoice changes

IMAGE:ACTU

sations and \$6000 for individuals. The Office of the Employment Advocate (OEA) can also remove such clauses from agreements.

AWAs will exclude both awards and collective agreements. Collective agreements exclude awards, but not AWAs.

All forms of agreement will be lodged with the OEA and are operative from lodgement. Employees must have been given 7 days to consider the agreement, although they may agree in writing to waive some or all of this time (apparently including where an offer of a job is contingent on signing an AWA.) Employees under 18 must have approval of parent or guardian to enter an AWA.

Agreements made under the new regime may be terminated by any party once they have passed their expiry date and by giving 90

days notice. Once the 90 days has passed if no new agreement is reached the minimum conditions are the FPCS. Thus an agreement of short duration may be made, terminated, and the workplace will become award-free.

Current agreements continue in force until replaced or terminated (but not varied or extended) using current rules (although some prohibited matters will be considered unenforceable.) New agreements may be made before the nominal expiry date, and they will automatically override old agreements, but without access to protected action.

There can be no protected action unless a secret ballot has been held. If the union makes the application, only union members vote, and approval requires 50% turnout, plus 50% of those voting. 20% of the cost of the ballot will be paid by the union.

A new ground of engaging in pattern bargaining will be added to the list of grounds upon which a bargaining period may be suspended or terminated. The new laws will remove the AIRC's discretion whether to take action to terminate or suspend bargaining period. It will no longer be able to refuse to act, or make other orders.

Its only decision will be to decide between suspension of the bargaining period and termination of the bargaining period if it is presented with evidence including that pattern bargaining is occurring. Third parties may apply for suspension for up to 3 months on grounds of threat of significant harm.

Disputes settling procedures in awards will be replaced with a model disputes procedure, which will provide workplace level resolution, followed by conciliation or mediation or assisted negotiation but no arbitration or determination unless agreed by the parties. Disputes may be referred to an alternative dispute mediator/resolver to the AIRC. Parties cannot veto the other parties' representatives.

Awards

The non-allowable award matters will be expanded to include:

- Skill based career paths
- Restrictions of trainees/apprentices
- Enterprise Flexibility provisions
- Independent contractors
- Labour Hire workers
- Union picnic days
- Tallies
- Trade Union Training Leave

Some currently allowable matters will

be modified. These largely but not entirely reflect previously rejected legislation. The changes are that:

- All award conditions must be basic minimum entitlements.
 - Part time provisions must be in all awards.
 - Facilitative provisions that require majority agreement will be unallowable.
 - Only public holidays declared by a State or Territory government, not industry holidays/union picnic days.
 - Redundancy pay is only allowable in event of genuine redundancy – potentially excluding lower paid redeployment or alternative work.
 - Outworkers conditions retained, but pay to be removed from awards and set by AFPC.
 - Allowances must be related to expenses incurred in course of employment, this is presumably designed to prevent conversion of non-allowable matters to monetary equivalent.
- The Award Review Taskforce will review awards to:
- Reduce overlap.
 - Align, merge or broadband.
 - Rationalise piecework rates and casual loadings.
 - Establish the framework to rationalise current federal awards with a view to industry common rule coverage.
 - Establish the framework for both the simplification of awards and the rationalisation of awards.

Unfair dismissal and unlawful termination

WorkChoices confirms the 26 May decision to exclude workers employed in firms of less than 100 employees from making an unfair dismissal application. Probation will be extended to 6 months.

The new announcements go further than previously announced in that:

- Irregular casuals and those with less than 12 months service are excluded from the head count. The head count takes place at the time of the dismissal.
- All seasonal employees are excluded from unfair dismissal laws (not just from the head count).

- The grounds for unfair dismissal will be narrowed, so that applications on grounds of redundancy is unfair will be excluded.
- The onus of proof in constructive dismissal claims will shift to the employee who will have to prove they did not voluntarily resign.

Unlawful termination provisions appear to be unchanged. The AIRC will continue to conciliate at first instance. Following conciliation and prior to making an application to the Court, employees may apply for up to \$4,000 worth of legal advice, which will be assessed on hardship grounds.

WorkChoices confirms that the government will pursue the changes to right of entry currently before the parliament, including:

- Requiring particulars of suspected breaches in writing.
- Limiting access to records to members only (thus breaching members confidentiality).
- Giving employer power to direct which areas of workplace in which the permit holder can meet with workers.

The new laws will define any threat to an employee or employer in respect to the FOA provisions to include direct and indirect express or implied threats.

Transmission of business

New transmission arrangements will come into effect, which provide that awards and agreements only transfer to the new business if a current employee accepts employment with the new employer. This will allow any employer to opt out of award or agreement coverage by simply restructuring and spilling all jobs (accrued entitlements would need to be paid).

If employees do transfer the Awards and agreements only apply to transmitted employees, and only for 12 months, after which time they will be covered by whichever instrument can cover them. In the absence of an applicable instrument the FPCS will apply.

NTEU: Howard's wider IR Agenda

www.nteu.org.au/campaigns/ir

ACTU: Your Rights At Work

www.actu.asn.au/work_rights

Federal Government: WorkChoices

www.workchoices.gov.au

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