INDUSTRIAL LEGISLATION IN 2004

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The federal government finally secured passage of some of its workplace relations amendments in 2004—the transmission of business provisions for certified agreements, introduction of interim section 127 orders and some increased penalties for bad behaviour—and it dealt promptly with the Electrolux crisis created by the High Court in September. More amendments are clearly on the way. This report notes bills remaining on the agenda at the close of Parliamentary business in December. We also review the new Age Discrimination Act 2004 (Cwlth), and note some state developments.

THE CALM BEFORE THE STORM?

The year 2004 will be remembered as the year in which the Howard Coalition government won its fourth term in office, with a majority in both houses. Once the newly elected Senators take their seats in the middle of 2005, the Government will have a free hand to introduce any or all of the many Workplace Relations Bills which have been bouncing between the houses for the past 5 years. Tumultuous times may well be ahead this year, depending on whether the government truly has the stomach for the kinds of draconian 'reforms' it proposed when there was little risk of enactment. (For a brief digest of those reforms, see Riley 2004.) Three Workplace Relations Bills were before the new Parliament when it rose before the end of December 2004. Given the likelihood that these will pass later this year, this report provides some analysis of these bills.

In 2004, very few federal workplace relations amendments made it past a hostile Senate. Perhaps the most significant federal enactment for 2004 was the *Age Discrimination Act*, and we provide a guide to that legislation here. And around the States, legislative activity was modest—with some mainly procedural changes in the anti-discrimination law, and fine-tuning of the occupational health and safety and workers' compensation laws. The South Australian government tabled its Industrial Law Reform (Fair Work) Bill 2004, and the Australian Capital Territory Parliament will be considering the introduction of an unfair contracts review regime for independent contractors. However, at the time of writing, this legislation had not been passed.

NEW WORKPLACE RELATIONS PROVISIONS

Transmission of business

Transmission of certified agreements following business sale or restructure has created some practical difficulties. In large and complex business mergers, for example, an employer entity, can find itself bound by different certified agreements

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THE JOURNAL OF INDUSTRIAL RELATIONS, VOL. 47, NO. 2, JUNE 2005, 171–185

in respect of staff who are doing the same work. Transmission of industrial awards following a merger has always been subject to any contrary order made by the Australian Industrial Relations Commission exercising discretion under section 149 of the *Workplace Relations Act 1996* (Cwlth). Following the enactment of section 170MBA with the *Workplace Relations Amendment (Transmission of Business) Act* No. 10 of 2004, the Commission enjoys similar discretion with respect to certified agreements, albeit one carefully circumscribed by lengthy provisions. Section 170MBA outlines the constraints on the Commission's exercise of this discretion to declare that a certified agreement is not binding. Unless the parties to the agreement and the incoming employer agree to the order, the Commission may not make an order unless it is satisfied of at least one of the three things:

- That majority of the employees covered by the agreement and affected by the proposed order agree to it (this would allow an order to be made in the face of opposition from a union, so long as a majority of the individual employees affected agreed);
- That the proposed order would not disadvantage employees in relation to their terms and conditions of employment (tested on the same basis as the no-disadvantage test in Part IVE of the Act); or
- That the proposed order is part of 'a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the transmitted business': section 170MBA(2A)(c)(ii).

Persons, including unions, who are parties to the agreement are entitled to be heard before the Commission makes an order: see section 170MBA(9)–(13). In the case of section 170LK agreements (those collective agreements made directly between employers and employees), a union will be entitled to make a submission only if at least one of its members who will be bound by the proposed order requests its intervention.

An amendment to section 494(3) introduces the same scope for varying or avoiding transmitted agreements in the case of Victorian agreements made under Part XV of the Act.

The Commission's new discretion under section 170MBA to declare that a particular certified agreement should not be transmitted with a business goes some way in solving the problems of parties to complex restructures; however, it remains to be seen whether the detailed provisos for exercising this discretion will simply encourage more disputes.

The Electrolux amendment

The High Court of Australia's decision in *Electrolux Home Products Pty Ltd v Australian Workers Union* [2004] HCA 40 (2 September 2004) threatened chaos for collective agreements which had been certified despite the inclusion of some matters which may not have strictly conformed to the requirement in section 170LI of the Act that a matter be one pertaining to the relationship between the employer as an employer, and employees. (For a discussion of the background of the *Electrolux* problem, see Catanzariti & Sharif 2002: 213–16 and 2003: 174–9. For a note on the High Court decision, see Johns 2004.) As soon as a majority of the court handed down its decision (Justice Kirby dissenting for reasons of

industrial common sense), the government pushed through the *Workplace Relations (Agreement Validation) Act 2004* to, retrospectively, validate agreements which had been certified on the basis of the Full Federal Court's decision (see [2002] FCAFC 199). Without the passage of this legislation, bargaining over several hundred agreements may have reopened. Both employers and unions were vulnerable: unions might have lost the gains that were hard fought for, and employers might have faced renewed protected industrial action, as unions initiated new bargaining periods. The Act does not—by any means—remedy all of the harm of the *Electrolux* decision. It does not clarify what matters are and are not matters pertaining to the employment relationship. This continues to be a question for determination by the courts.

Getting tougher on industrial action

Two Acts were passed which focused on the control of industrial action. The *Workplace Relations Amendment (Improved Remedies for Unprotected Action) Act* No. 11 of 2004, assented to on 11 March 2004, was aimed at strengthening the orders that the Australian Industrial Relations Commission can make under section 127 of the *Workplace Relations Act 1996* (Cwlth) in relation to industrial action that was 'happening, or is threatened, impending or probable'. The most significant aspect of this amendment was the insertion of section 127(3A) which grants the Commission power to award *interim* orders until an application is determined. As noted by Justice Munro in *Transfield Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union* [Print 908202], there is great difficulty in 'producing in the limited time available an adequately considered decision' for any application brought under section 127. By providing Commissioners with the ability to grant an interim order, illegitimate industrial action can be minimised while also safeguarding against the erosion of adequately reasoned decisions.

A number of contentious provisions in the original bill placed administrative constraints on the way in which the Commission should determine section 127 applications. In particular, the original bill proposed that the Commission would be required to make an interim order within 48 hours if it could not provide a reasoned decision due to the perceived economic costs associated with short periods of industrial action. The inclusion of such a rigorous time constraint suggested the federal government had little regard for the concern raised by those such as Justice Munro that it was important to provide a well-reasoned decision before issuing an order to cease industrial action. The original bill also advocated the inclusion of a list of factors that the Commission must consider when determining whether to grant an interim order for the cessation of industrial action. Some of the main factors included the level of damage occurring to the business involved and whether the level of industrial action had increased since the application for the interim order had been made. Although the proposed amendment was *not* an exhaustive list, the Democrats raised concerns that such an inclusion could encroach upon the discretionary powers of the Commission. In particular, it could limit the range of factors that could be taken into consideration when determining whether the conduct engaged in by a party constituted industrial action within the meaning of section 127. As a result, the Democrats moved an amendment removing both of

these proposals to ensure that members of the Commission were able to adopt a more expansive approach to the determination of section 127 applications. This reflected the Full Bench view in *CEPU v AG Coombs Fire Protection* [Print Q1727 (1998) 87 IR 110 at 111] that 'all of the relevant circumstances' be considered in determining section 127 applications. The federal government conceded this amendment.

The *Workplace Relations Amendment (Codifying Contempt Offences) Act* No. 112 of 2004 received assent on 13 July 2004. The main objectives of this amendment were to provide certainty about the application of criminal law in relation to proceedings before the Commission as well as enhancing the powers of the recently created Building Industry Taskforce whose main purpose is to investigate allegations of corruption within the building industry. Two new offences have now been included in section 303 of the *Workplace Relations Act*. These include giving false evidence and inducing or coercing others to give false evidence. Committing either of these offences attracts a maximum penalty of 12 months' imprisonment. There was also a significant increase in the penalties for non-compliance with various provisions of the Act that covers a range of issues such as requests to present documents to an authorised industrial officer under section 83, orders made by the Commission for parties to attend compulsory conferences under section 119 and failing to comply with previous penalty orders handed down. It would seem that the main purpose of these reforms is to compel individuals to provide information required by industrial officers and to safeguard against the Commission being treated with contempt.

Whistleblower provisions were inserted in a new Part 4A into Chapter 11 of Schedule 1B which governs the registration and accountability of industrial organisations. Sections 337A and 333B provide that any officer, member or employee of a registered organisation that discloses information relating to an offence under this Act will be protected from any civil or criminal liability that results from any disclosure. Again, the main purpose of these provisions is to encourage individuals to speak out against breaches of the Act committed by fellow members as well as discouraging unions from showing disrespect towards the Commission. However, there seems to be little evidence to suggest that blatant disregard for the Commission and its industrial officers actually exists. These amendments may be characterised as an over-reaction to the findings of the Cole Royal Commission inquiry into the building and construction industry.

The Act inserted a new Part VA, Sections 88AA–88AI which provide building industry taskforce officers with the power to compel individuals to provide information relating to any current investigation. Failure to comply with a request can result in significant penalties ranging from large fines or imprisonment of up to 6 months. Section 88AI states that the Ombudsman must review the exercise of these powers each year and table a report before both houses of Parliament. There is also a 3-year limit on the use of such powers. The passing of these amendments represents a trend towards ensuring that the Commission is able to exercise similar investigative powers to those of other administrative bodies such as the Australian Competition and Consumer Commission to ensure compliance with orders as well as eradicating corrupt practices within the workplace.

Whether these are the true objectives of the legislation, rather than simply providing the means to further scrutinise the actions of industrial organisations remains to be seen.

COMING UP ON THE 2005 AGENDA . . .

Small business 'reforms'

The Workplace Relations Amendment (Fair Dismissal Reform) Bill and the Workplace Relations Amendment (Small Business Employment Protection) Bill both re-agitate the government's proposal to create a two-tiered system of employment protection in Australia—under which big business employees would continue to enjoy protection against arbitrary dismissal and the security of redundancy entitlements, whereas those employed by enterprises with less than 20 employees would have no protection from capricious treatment, and those in businesses with less than 15 employees would enjoy no entitlement to award redundancy pay.

The Fair Dismissal Bill, if passed in the form in which it was presented to the House of Representatives on 2 December 2004, would prevent the Australian Industrial Relations Commission from hearing an unfair dismissal application from a person employed by an enterprise with less than 20 employees. The head count for the purpose of determining eligibility would include the dismissed employee, all other permanent staff, and casual employees engaged on a regular and systematic basis for at least 12 months, but not other casual employees: proposed section 170CE(5C). This exclusion would apply only to applications based on an allegation under section 170CE(1)(a) that the dismissal was 'harsh, unjust or unreasonable'. It would apply only in respect of employment relationships entered into after the enactment of the amending legislation: see section 6 of the bill.

Dismissals in breach of the unlawful dismissal provisions—that is dismissals for one of the discriminatory reasons listed in section 170CK(2) of the Act, or dismissals without at least the minimum notice period stipulated in section 170CM—could still be subject to applications by small business employees. So where an employee can allege an unlawful reason for dismissal—such as sex, family responsibilities, temporary illness, disability and whistle-blowing—an application may proceed. Where the allegation is that the dismissal was for no reason at all—for example, following a false accusation of misconduct or incompetence—a small business employee will have no federal statutory remedy at all. (It is difficult to imagine that small business employees would have the resources to pursue common law contract claims either. Whether any State remedies remain will depend on the fate of other proposals for federal law to cover the field, yet to be re-tabled: see discussion of the Fair Termination Bill in Riley 2004.)

Some of the folly in creating artificial distinctions between classes of employees is evidenced in the confusing provision for 'trainees'. Trainees and apprentices are specifically excluded from this exclusion (meaning that a trainee or apprentice may bring an unfair dismissal claim despite being engaged in a small business): see proposed section 170CE(5D). However, trainees and apprentices might still be excluded on other grounds by the Regulations, for example, because they fall

within the class of employees on fixed-term contracts. It will depend on the terms of their individual training agreement.

A proposed section 170CEB would provide that the Commission may determine that an application is disallowed under these small business provisions, without holding any hearing on the matter. The cost to the small business employer of attending the hearing is a matter which the Commission must take into account in deciding whether a hearing is necessary. Sections 170JD(3) and 170JF(2) would provide that there was no right to appeal a determination under section 170CEB that the application was invalid.

Redundancy pay for small business employees

The Small Business Employment Protection Bill purports to undo the effect of the Australian Industrial Relations Commission's decision in its test case (PR032004) of 26 March 2004, which removed the exemption from redundancy pay in awards for businesses employing fewer than 15 persons. The bill would sterilise the effect of this decision by removing redundancy pay for small businesses from the list of allowable award matters in section 89A of the *Workplace Relations Act*, so that the Commission would no longer have power to exercise its award-making powers in respect of any claim for redundancy pay against a business employing fewer than 15 staff. The bill would also insert a new Part VIAA in the Act which would also defeat any state law, award or agreement which sought to impose redundancy pay obligations on small businesses. These provisions would, if enacted, commence on 26 March 2004, the date on which the Full Bench decision took effect.

Union rights of entry

Union rights of entry continue to be targeted for reform in 2005. The Workplace Relations Amendment (Right of Entry) Bill 2004 is aimed at reducing the rights of entry of industrial officers. The proposed amendments are a reaction to the decision handed down in *BGC Contracting v CFMEU* [2004] FCA 981 where it was held that industrial officers could gain entry to a workplace under state laws even though all employees at the enterprise were working under a Commonwealth law denying industrial officers a right of entry. This decision evidenced the difficulties associated with having inconsistent state and federal legislation regulating the same subject matter. As a result, the federal government proposes to cover the field by passing this amendment.

Apart from clarifying the Commonwealth's ability to override state laws relating to union rights of entry, this amendment also attempts to limit the circumstances where entry permits are granted in order to minimise the 'disruptive' nature of such entry, and to narrow the scope of immunity that union representatives may call upon to fend off charges for civil wrongs, such as trespass. One of the more notable procedural and substantive amendments can be found in sections 280P and 280V of the bill. Section 280P indicates that in most cases, permit holders must provide the employer with at least 24 hours' notice before entry and state the particulars of the alleged breach rather than simply indicating the section of the Act that has allegedly been breached. Section 280V states that the permit holder must also be able to show 'reasonable grounds' for suspecting a breach.

This is aimed at reducing unions' ability to engage in 'fishing expeditions' for the purposes of gathering information relating to employees.

The proposed amendment also places limits on the times at which union representatives can enter the workplace. Section 280X states that permit holders can only enter the workplace during working hours and hold discussion with employees during their break periods. In order to address alleged union intimidation and harassment of non-union members, section 280Z places further limitations on union attempts to organise employees. This provision states that entry does not have to be granted in circumstances where the union has already entered the workplace in the proceeding 6 months with the intention of recruiting members.

The proposed amendment also provides employers with more ability to constrain the impact that union entry has on the workplace by indicating what discretion employers can exercise in determining the location of any meeting or activities undertaken by union representatives. Section 281B(3) states that union representatives are not authorised to stay on the premises if the employer asks that discussions be held in particular locations or that the representative take a particular route to each meeting in order to minimise disruption. These types of amendments seem to stand in stark contrast to the view on union rights of entry held by Commissioner Smith in deciding a recent dispute between the *ANZ Banking Group Ltd and FSU* [PR946294]. This decision held that a union representative walking up to an employee at their workstation was not an example of conduct that would warrant the removal of a union representative, but rather represented a process of investigation and interview that was a 'natural consequence' of having a right of entry. However, the amendment does provide some limitation on the exercise of such employer discretion. If passed, section 281K would allow the Commission to make any order that it 'considers appropriate' if it believed any request made by an employer was unreasonable. Such orders include granting union representatives access to particular areas or premises for a limited amount of time. No doubt, if these amendments are passed, it will signal a significant reduction in the type of investigations and organising activities undertaken by unions.

DEVELOPMENTS IN DISCRIMINATION LAW

Age Discrimination Act 2004

When the *Age Discrimination Act 2004* (Cwlth) (*Age Act*) finally came into effect in June 2004, there was little fanfare and no surprises. It had been a long time coming, emerging from almost a decade of promises from both sides of politics, a 2000 Human Rights and Equal Opportunity Commission (HREOC) report (*Age Matters: a report on age discrimination*) and government consultations in 2002 and 2003 through a Core Consultative Group and *Information Paper: Proposals for Commonwealth Age Discrimination Legislation*. The bill then took 18 months, a Senate Committee inquiry, and much debate to work its way through parliament before Australia ultimately got an enforceable federal prohibition on age discrimination. Although almost universally welcomed, for the many who had been advocating for something stronger, it was simply a case of accepting that some legislation is better than none. It is the first expansion of enforceable discrimination protection

since the enactment of the *Disability Discrimination Act 1992* (Cwlth) (*DDA*), but with the unique and onerous requirement on complainants to establish that age is the 'dominant reason' for their treatment and the breadth of its exemptions, the *Age Act* arguably has greater symbolic than practical significance.

At the time of enactment of the *Age Act*, age discrimination was already prohibited in various forms in every State and Territory, as well as being a ground of complaint under the *Human Rights and Equal Opportunity Commission Act 1986* (Cwlth) (*HREOC Act*) (which provides for investigation but no enforceable rights). Age is also a proscribed reason for termination under s. 170CK(2)(f) of the *Workplace Relations Act*. The *Age Act* fills some gaps and provides a national dimension.

The prohibitions

To a large extent, the *Age Act* reflects a regulatory model found in the other federal discrimination Acts, with a central, civil prohibition on discrimination and a claims procedure that starts with investigation and conciliation by HREOC and can progress to the Federal Court or Federal Magistrates Court for a hearing and enforceable remedies. Discrimination is defined to include both direct (s. 14) and indirect (s. 15) forms, as discussed further below. The prohibition covers work and other areas, with work defined broadly to include employment (s. 18), contract workers (s. 20), commission agents (s. 19), partnerships (of 6 or more) (s. 21), qualifying bodies (s. 22), registered organisations under the *Workplace Relations Act* (s. 23) and employment agencies (s. 24). The protection extends to those seeking to enter work as well as existing workers, as the prohibition covers offers of work, terms and conditions of engagement, access to promotion and training, and termination. In this way, it is wider than some state legislation and certainly expands on the *Workplace Relations Act's* unlawful termination provisions.

It is worth noting that the *Age Act* also prohibits the requesting of information in connection with or for the purposes of unlawfully discriminating on the ground of age, where persons of a different age but in otherwise similar circumstances are not required to provide the same information (s. 32).

As is the case in the other federal discrimination statutes, the *Age Act* makes it an offence to publish or advertise with the intention of unlawfully discriminating under the Act (s. 50) or to victimise someone for making or supporting a complaint of discrimination (s. 51). Criminal sanctions are applicable to these offences.

Proving discrimination

The most significant criticism of the *Age Act* arises in relation to the requirements in proving direct discrimination. Although direct discrimination is defined in Section 14 in a familiar way, the Act departs from all other Australian anti-discrimination statutes by requiring the complainant to prove that age is not merely one of the many number of reasons for their less favourable treatment, but the 'dominant reason' (s. 16). The *Racial Discrimination Act* (1975) (Cwlth) (*RDA*), *Sex Discrimination Act* 1984 (Cwlth) (*SDA*) and *DDA* all provide that if an act is done for two or more reasons and a discriminatory ground is one of those reasons, the act is taken to be done for the discriminatory reason *whether or not* it is the dominant or substantial reason. This means that under the other federal

Acts, a discriminatory ground cannot be used for differential treatment and the existence of additional reasons for the treatment is irrelevant.

This particular provision of the *Age Act* was criticised strongly by many commentators, including HREOC. The federal opposition also criticised the provision, but ultimately did not support a proposed amendment by the Democrats, dooming it to failure. HREOC noted in its submission to the Senate Legal and Constitutional Legislation Committee inquiry into the bill that this provision would make it harder for complainants to prove their claims and it was inconsistent with the other federal Acts, possibly suggesting that age discrimination is of less concern than sex, race or disability discrimination. It also noted that such a provision had been removed from the *RDA* in 1990 because of the difficulties it imposed and in order to bring about uniformity in the federal tests.

In contrast, the government has acknowledged some of the difficulties of proving *indirect* discrimination claims by using a definition similar to that in the *SDA*, whereby 'the burden of proving that the condition, requirement or practice is reasonable in the circumstances lies on the' respondent, not the complainant (s. 15(2)). The Act does not, however, contain any equivalent of the *SDA*'s section 7B(2) which sets out matters to be taken into account in determining reasonableness, leaving the courts to look to the general caselaw on this term.

Exemptions

Other central concerns about the bill that were not addressed before enactment were the number and breadth of the exemptions. To begin with, each prohibition—in respect of employment, contractor workers etc.—provides that it is not unlawful to deny someone a position or dismiss a person if they are unable to carry out the 'inherent requirements' of the particular position because of their age (see, e.g. s. 18(4)). Such exemptions are common in discrimination legislation and, as we saw in *Qantas Airways v Christie* (1998) 152 ALR 365, these can be defined quite widely and to a large extent protect management prerogative to establish and define positions to meet their organisation's needs.

Two other exemptions that have aroused comment are for youth wages and compliance with legislation and industrial instruments. Section 25 specifically exempts youth wages, thereby permitting employers to provide lower rates of pay for those under 21 years of age and to choose to employ someone under 21 years in order to pay youth wages. This specific exemption is in addition to section 39 which provides that the Act does not make unlawful anything that is done in direct compliance with specified Acts, an agreement made under the *Workplace Relations Act* or an industrial award. HREOC has argued that the specific youth wages exemption is too wide and unnecessary given the permission to comply with junior rates requirements in industrial awards and agreements. Although the Australian Industrial Relation Commission's (AIRC) inquiry into junior rates recommended their retention out of concern for lack of a non-discriminatory alternative that did not affect youth employment, HREOC has argued that the evidence that their retention is justified is equivocal and should be reviewed further by the AIRC.

The Act provides a wide exemption under the heading of positive discrimination (s. 33). This covers the usual definition of special measures that are 'intended to reduce a disadvantage experienced by people of a particular age'. But it also extends beyond this to include measures that provide 'a bona fide benefit to persons of a particular age' or are 'intended to meet a need that arises out of the age of persons of a particular age'. Only through litigation will we see whether concerns raised about the breadth of this exemption are justified.

Educational and symbolic role?

In addition to handling complaints in respect of the prohibition, the *Age Act* gives HREOC the usual raft of powers to 'promote an understanding and acceptance of the Act', 'undertake research and educational programs' and prepare and publish guidelines for avoiding age discrimination (s. 53). As for the other federally protected grounds, this legislation might be most successful in changing attitudes and bringing about change through these roles of HREOC, leveraging off the limited prohibition.

The Act does not establish a separate position of Age Discrimination Commissioner and currently the Sex Discrimination Commissioner, Pru Goward has been appointed as the 'Commissioner responsible for Age Discrimination'. Although the bill was criticised for this omission, it is consistent with the government's attempt—through the Australian Human Rights Commission Legislation Bill 2003—to rename and restructure HREOC, abolishing the five specific commissioners and replacing them with three generic Human Rights Commissioners. This bill has a long history but has failed to pass in the Senate and has currently lapsed. This omission of a special Age Discrimination Commissioner and the current cross-appointments of acting commissioners suggest that the bill is likely to be reintroduced in 2005 to bring about these changes. Other changes proposed in the lapsed form of the bill include requiring the Attorney General's consent for HREOC to intervene in court proceedings; enabling government appointment of external, contract Complaints Commissioners and removing HREOC's power to recommend monetary compensation in respect of discrimination inquiries under the *HREOC Act*. We have yet to hear what the government intends to do with its free reign in the Senate.

NSW Anti-Discrimination Act reforms

Other legislation that has been a long time coming is the NSW *Anti-Discrimination Amendment (Miscellaneous Provisions) Act* 2004, which was passed in late October 2004. It is not a fully revised *Anti-Discrimination Act* 1977 (NSW) (*ADA*), which has been promised at various times by this government in response to the NSW Law Reform Commission's 1999 review of the Act (Report No. 92), but it apparently does implement 60 of the 161 recommendations. It was presented to parliament as 'a major step' in the government's response to the review, with the remaining recommendations still under consideration (Second Reading Speech). Meanwhile, there is further waiting—this 2004 Act will not take effect until it is proclaimed, and at the time of writing, the Attorney-General's office would not provide any specific date for this.

The 2004 Act introduces an array of changes primarily relating to the Anti-Discrimination Board's (ADB) complaint-handling procedures, but also some possibly significant changes to the scope and enforcement of remedies available under the *ADA*. First, the Act changes the time limit for bringing claims from 6 to 12 months and allows complaints to be made by an agent, parent or guardian (s. 87A). The President is also given a new specific power to assist a person to make a complaint (s. 88A), a provision that could be interpreted very widely, but will be limited by political pressures and budgetary constraints. The President is also empowered to decline a complaint in part (s. 89B) or after an investigation has commenced (s. 92); and a complainant may now amend their complaint, provided the President has not already declined or resolved it (s. 91C). The President is required to report regularly to the parties on the progress of investigations.

Two important developments in relation to resolving complaints and enforcing conciliation settlements have been introduced. The President will now have the power to compel a party (or third party) to provide information or documents relevant to a complaint about alleged discriminatory conduct, generally within 28 days. Failure to comply is an offence and the matter can be referred to the Administrative Decisions Tribunal (the Tribunal). If a matter settles after a successful conciliation, the Act will now provide for registration and enforcement of the settlement agreement (s. 91A). The parties are to prepare a written record of any agreement following conciliation. Then, if a party to the agreement believes that the other party has not complied with the agreement, an application can be made to the Tribunal for registration. The application must be made within 6 months of the date of the agreement. A registered agreement is then taken to be an order of the Tribunal and can be enforced accordingly.

If a matter is not resolved by the ADB by conciliation, it may progress to a hearing before the Tribunal. Most of the other amendments contained in this 2004 Act relate to the handling of matters by the Tribunal and its powers to issue orders. Either party is permitted to request the President to refer a complaint to the Tribunal, if it has not been declined, terminated or otherwise resolved within 18 months, and the Act guides the President's decision-making on this (s. 93B). Leave to be represented before the Tribunal by a legal practitioner or agent is still required, but section 98 now outlines relevant factors in this decision, including the complexity of the matter and whether both parties are able to obtain representation.

The Tribunal's powers to make orders have been expanded, taking it a little closer to being able to address systemic discrimination. Most significantly, a Tribunal order may extend to conduct of the respondent that affects persons other than the complainant (s. 108(3)). Although this might not enable the Tribunal to exercise the power it has in relation to vilification findings—being able to 'order a respondent to develop and implement a program or policy aimed at eliminating unlawful discrimination'—it might at least enable the Tribunal to order the change of an existing discriminatory policy, even where the individual claimant has already left the employment, but the policy would affect the remaining employees. Furthermore, the Tribunal's power to order the publication of an apology is no longer limited to vilification complaints and, if the Tribunal makes a

non-monetary order, it may now also order that damages (up to $40 000) are payable for non-compliance (s. 108(7)). Non-compliance is also an offence (s. 111). The power to make interim orders, preserving the status quo pending determination, has also been clarified (s. 105).

One of the clearest weaknesses of Australian anti-discrimination laws is that enforcement is generally left up to individual victims of discrimination, a group that is by definition traditionally disempowered. One amendment of significance in the 2004 Act is that the President is given power to enforce Tribunal orders if the President believes it is in the public interest to do so (s. 113). The Second Reading Speech provides the example of 'where a complaint demonstrates systemic discrimination by a particular respondent and the complainant lacks the necessary resources to initiate enforcement proceedings', but the power is not limited to such situations.

Finally, miscellaneous amendments are included. The ADB's power to develop and issue codes of practice is formalised, making clear that such codes are not legally binding, but evidence of compliance or contravention may be taken into account by the ADB or Tribunal during investigations or hearings (s. 120A). The Act inserts new secrecy provisions aimed at protecting information gathered in the course of investigations by imposing clear and strict duties of secrecy on persons exercising functions under the Act (s. 124A). It also modifies the disability discrimination provisions to bring them in line with federal protection by including the use of disability devices and assistants as a characteristic generally appertaining to a person with a disability.

STATE DEVELOPMENTS

The Industrial Law Reform (Fair Work) Bill (SA)

The South Australian Parliament was still debating the bill introduced in response to the Stevens Report when Parliament rose before Christmas. The latest version of the bill (introduced on 13 October 2004) removes some of the more controversial elements of the draft bill: unfair contracts review provisions; powers for the Commission to fix rates for contractors; and deeming provisions, similar to section 275 of Queensland's *Industrial Relations Act* 1999. If enacted, the current bill will, nevertheless, introduce substantial reforms. Some of the more significant proposals include the introduction of a 'best endeavours' (read: good faith) bargaining obligation, the fixing of minimum wages, establishment of a code of practice governing the engagement of outworkers and family-friendly improvements to the safety net of wages and conditions of work. (For a digest of the draft bill see Stewart 2004.)

Fair work contracts in the ACT

The Australian Capital Territory government has tabled a Fair Work Contracts Bill 2004 which, if enacted, would provide a mechanism for unfair contracts review, similar to the jurisdiction exercised by the New South Wales Industrial Relations Commission under section 106 of the *Industrial Relations Act* 1996 (NSW). An important difference between the ACT Bill and the NSW legislation is that the ACT Bill proposes to regulate only contracts for services (so-called 'independent'

contracts) and expressly excludes employment contracts ('contracts of service'). The New South Wales legislation notoriously applies to a wide range of contracts under which work is carried out, including employment contracts. The ACT Bill would authorise the Consumer and Trader Tribunal (established by the *Consumer and Trader Tribunal Act* 2003) to review work contracts which were either made or carried out in the ACT. The proposed legislation would provide for review of work contracts on the grounds of unfairness (see clause 11). What is 'unfair' is at large, however, examples of what might constitute unfairness are identified in clause 17: the remuneration paid to the worker is less than what would have been earned had the worker enjoyed the status of an employee; the contract purported to avoid the provisions of an industrial award or agreement and the contract appears to be contrary to the public interest. The bill adopts measures which were enacted in New South Wales in 2002 to close the unfair contracts jurisdiction to the so-called 'high-flyers' and to shorten the tail of claims. The bill would prohibit claims by workers who earned more than $200 000 from the contract in the previous 12 months. This amount would be indexed to the Consumer Price Index (CPI). The initial limit is the same as the remuneration threshold enacted by section 108A of the *Industrial Relations Act* 1996 (NSW). In addition, applications for review must be made within 12 months of the termination of the contract.

With the passing of the *Human Rights Act* 2004 (ACT)—heralded as Australia's first bill of rights—a *Fair Works Contracts Act*, like all other ACT legislation, must be interpreted and applied, as far as possible in a way that is consistent with the civil and political human rights in the Act. In this way, the *Human Rights Act* merely introduces a new rule of statutory interpretation and provides for limited administrative law remedies.

More reviews and reforms?

A review of the Western Australian *Labour Relations Reform Act* 2002 (the Ford Review) was tabled in November, signalling the prospect of more reforms in Western Australia: see Gaffney 2004. The Tasmanian government has also announced plans to review its industrial laws.

WORK SAFETY

A number of amendments were made to federal and state occupational health and safety and workers' compensation laws during 2004. Those with a special interest in this area should consult the following enactments.

Federal

Occupational Health and Safety (Commonwealth Employment) Amendment (Employee Involvement and Compliance) Act No. 122 of 2004 assented to on 16 August 2004. (Controversial provisions in the original bill which excluded union involvement in occupational health and safety matters were excised by the Senate before this Act was passed.)

New South Wales

Workers Compensation and Other Legislation Amendment Act 2004, Act No. 111 of 2004.

Workers Compensation Legislation Amendment Act 2004, Act No. 56 of 2004.

Victoria
Occupational Health and Safety Act 2004, Act No. 107 of 2004.

Western Australia
Occupational Safety and Health Legislation Amendment and Repeal Act 2004, Act No. 51 of 2004.
Workers' Compensation and Rehabilitation Amendment (Cross Border) Act 2004, Act No. 36 of 2004.
Workers' Compensation Reform Act 2004, Act No. 42 of 2004.
Workers' Compensation (Common Law Proceedings) Act 2004, Act No. 35 of 2004.

Queensland
Workers' Compensation and Rehabilitation and Other Acts Amendment Act 2004, Act No. 45 of 2004.

Tasmania
Workers Rehabilitation and Compensation Amendment Act, Act No. 16 of 2004.

Northern Territory
Work Health Amendment Act 2004, Act No. 63 of 2004.

ACT
Occupational Health and Safety Amendment Act 2004, Act No. 29 of 2004.
Workers Rehabilitation and Compensation Amendment Act 2004, Act No. 16 of 2004.
Workers Rehabilitation and Compensation Amendment (Miscellaneous) Act 2004, Act No. 65 of 2004.

THE APPROACHING TEMPEST

At the time that we were putting the final touches to these observations, battle lines were already being drawn between the supporters and detractors of the Howard government's workplace relations reform plans. Queensland's Labor Premier, Peter Beattie, foreshadowed a constitutional challenge to any attempt by the federal government to enact legislation which would override all state industrial laws. The Australian Council of Trade Unions' submission to the Senate Enquiry into the Rights of Entry Bill argued that if enacted, this legislation would breach international law obligations under the ILO Convention 87 on Freedom of Association. The debates generated in the first months of the Howard government's fourth term foretell challenging times—especially for the unions and for the state governments, as they seek to maintain a meaningful, influential role in industrial relations regulation in Australia.

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