

MAY 2006

Implications of WorkChoices for Insolvency Practitioners

Introductory Remarks

This newsletter provides a brief overview of the implications of the *Workplace Relations Amendment (WorkChoices) Act 2005 (WorkChoices)*. WorkChoices is newly introduced Federal legislation, which represents a comprehensive change to the *Workplace Relations Act 1996 (Cth)*, insofar as it is relevant to insolvency practitioners. The newsletter contains an overview of the major elements of WorkChoices, deals with the types of employers which are subject to it (including how it applies to their State award, Federal award and award free employees) and reviews the stages in an insolvency administration when an insolvency practitioner must have regard to the application of WorkChoices. The main implications for insolvency practitioners arise in the following circumstances:

- on appointment
- on termination of employees
- calculating entitlements
- transmission of business.

WorkChoices came into effect in two stages:

- From 14 December 2005 when it received Royal Assent, the Australian Fair Pay Commission was established and an exemption from the obligation to make redundancy payments for small business employers was effective.
- The remaining parts of the legislation, including the Regulations, commenced with effect from 27 March 2006 (the proclamation date).

Elements of WorkChoices

The major elements of WorkChoices are identified as follows:

- The adoption of the "corporations power" in section 51(xx) of the Constitution to establish a national industrial relations framework.
- The exclusion of the state industrial systems.

- A significantly altered role for the Australian Industrial Relations Commission.
- A new system involving the nature, content and process of workplace agreements.
- The establishment of the Australian Fair Pay Commission and the Australian Fair Pay and Conditions Standard (**AFPCS**).
- New rules for unfair dismissal for employers with 100 or less employees.
- New rules in relation to employee entitlements on transfer of business.
- The exclusion of the requirement to make redundancy payments for a small business employer with less than 15 employees.
- Reduced opportunity for industrial action and right of entry for unions to the workplace.
- The expansion of the superannuation fund choice system to employees who were previously excluded.
- New record keeping obligations.

Application of WorkChoices to Employers

What employers are covered?

The primary issue to be considered is whether or not the employer meets the definition of "employer" in section 6 of WorkChoices, which effectively is concerned with whether or not the employer is a "constitutional corporation". In addition, other employers which are subject to WorkChoices include unincorporated entities in connection with constitutional trade or commerce which employ specified workers being flight crew officers, maritime employees or waterside workers. In addition, Victorian employees not otherwise covered in a definition of "employer" are also subject to WorkChoices. A complementary definition of "employee" is found in section 5 which relates to an individual who is employed or usually employed by an "employer". The practical effect of defining "employer" and "employee" in this way is that other than for

Implications of WorkChoices for Insolvency Practitioners (cont)

particular provisions, WorkChoices only has application (and only overrides State and Territory law) to the extent that it applies to the employment of an employee by constitutional corporation.

It follows that businesses which do not meet the definition of "employer", such as partnerships and sole traders, are not subject to WorkChoices unless they have employees who are subject to Federal awards or industrial agreements. In this case those awards will continue for five years after the proclamation date unless the employer becomes an employer within the meaning of section 6 prior to that date or unless an existing agreement expires prior to that date or is replaced by State agreement. The AFPCS which stipulates minimum wage and annual, personal and parental leave entitlements does not apply to Federal awards and industrial agreements which continue to apply to such employers during this period.

Some of the most important issues are set out as follows:

Transitional arrangements

There are complex transitional arrangements which apply where an employer is subject to WorkChoices and the extent of application depends on whether the employees of the employer are subject to State or Federal awards or industrial agreements or are award free.

In relation to employees who are subject to State awards or industrial agreements, these instruments continue but are Federal instruments known as "notional agreements" and "State preserved agreements" respectively. Such instruments will continue to apply for three years from the proclamation date but can cease to apply earlier if replaced with a Federal workplace agreement. Whilst notional awards are subject to the AFPCS, if the preserved notional terms are more generous, this is not the case with State preserved agreements. Such instruments continue to operate in respect of preserved notional terms which are described in the legislation until the expiry date of the instrument.

In relation to employees subject to Federal awards, these awards will continue to apply subject to being limited to allowable award matters for a five year period unless they are replaced earlier by a workplace agreement and preserved award terms will be retained and are not subject to the minimum standards in the AFPCS. Existing Federal agreements, such as Australian Workplace Agreements and Certified Agreements, will continue in effect until terminated and are also not subject to the AFPCS during the transitional period.

As far as award free employees are concerned, their contracts of employment will continue unaffected subject to the application of the AFPCS in circumstances where they are more favourable. This means that in addition to basic rates of pay and casual loadings, the AFPCS standards in relation to the maximum ordinary hours of

work, annual leave, personal leave and parental leave, will apply to contracts of employment for such employees where they are more favourable and it is not possible to contract out of the application of the AFPCS.

Unfair dismissal changes

Another important feature of WorkChoices is that employees of employers which are subject to WorkChoices with 100 or less employees will no longer be able to make a claim for unfair dismissal to either a State or the Australian Industrial Relations Commission. Also, employees of employers with more than 100 employees will be entitled to bring an unfair dismissal application to the Australian Industrial Relations Commission if they earn less than the applicable threshold, which is currently \$94,900.00 per annum unless the employee has been employed for less than six months and/or the employee's employment was terminated for genuine operational reasons or for reasons that include genuine operational reasons. "Operational reasons" are defined as being reasons of an economic, technological, structural or similar nature.

Unlawful dismissal

Nevertheless, claims for unlawful dismissal (such as on the grounds of race, sex, pregnancy, membership of a union, etc) will continue to be available to all employees irrespective of the size of the employer's business.

Redundancy

As far as redundancy is concerned, where an employer which is subject to WorkChoices has less than 15 employees (calculated at the earlier of the time when the notice of redundancy is given or when the redundancy occurs), such employers are no longer bound by any requirement in any State or Federal law to make severance payments in the event of redundancy.

Implications for Insolvency Practitioners

It is apparent that at various stages in an insolvency administration, irrespective of whether it is a voluntary administration, receivership or liquidation, the insolvency practitioner must have regard to the implications of WorkChoices. These are which are briefly summarised as follows:

On appointment

The insolvency practitioner is required to not only conduct an analysis to verify the extent of the application of WorkChoices (ie whether the entity to which the insolvency practitioner is appointed is an employer for the purposes of WorkChoices), but also must verify the extent of the application of WorkChoices by conducting an analysis of whether or not the employees are subject to

Implications of WorkChoices for Insolvency Practitioners (cont)

State awards or agreements, Federal awards or agreements or are award free.

Thereafter, the insolvency practitioner must for all employees examine compliance on and from the appointment date of the entity with the AFPCS particularly having regard to leave provisions and also must have regard to the comprehensive record keeping obligations, which employers are obliged to maintain pursuant to Part 19 of Chapter 2 of the WorkChoices Regulations. The obligations in relation to records are relatively onerous and require an employer subject to WorkChoices irrespective of the number of employees to contain written records in relation to various matters including personal details, the instrument under which the employee is employed, matters dealt within the AFPCS, and payslips. There are significant penalties which can apply on a strict liability basis if the records are not maintained properly and prosecution may be commenced by a workplace inspector. In this regard, a six month moratorium has been imposed from the proclamation date in respect of the issuing of the infringement notices for breaches of the record keeping requirements.

Termination of employees

In the event that the insolvency practitioner determines to terminate employees during the course of the administration then there are various issues which must be reviewed including:

- Whether there is an unfair dismissal exemption applicable to the employees? This requires an analysis of the number of employees of the entity including full-time, part-time and casuals engaged on a regular and systematic basis for at least 12 months including the employees whose employment is to be terminated. In this regard, the insolvency practitioner must also have regard to the grouping provisions which require the numbers of employees of both the employer and any related bodies corporate to be taken into account.
- Whether there is any unfair contracts relief available to the employees? Such relief has generally been eliminated by virtue of the specific provisions in WorkChoices which override any State and Territory industrial laws providing for such relief to employees (including the unfair contracts provisions of the *Industrial Relations Act 1996* (NSW)) which means the employees no longer have rights to such remedies unless they commenced proceedings prior to the proclamation date. Nevertheless, independent contractors may still have rights to such relief and the insolvency practitioner must be mindful in determining whether or not a particular provider of services to the entity is an independent contractor or an employee.
- Whether there is a severance pay exemption? This will only apply if a small business exemption is relevant whereas in other circumstances, such as for employees under notional agreements or preserved State agreements continuing on a transitional basis, redundancy entitlements will be a preserved term until

such time as the transitional period ends for the relevant award or the expiry date of the agreement occurs. Similarly redundancy entitlements will continue for employees on existing Federal awards and agreements.

- Unlawful dismissal remedies remain applicable and are unchanged and therefore, careful consideration needs to be given to terminations based on any grounds which could come within the criteria for unlawful dismissal.

Calculation of employee entitlements

The calculation of employee entitlements occurs either in the event of termination of employees of the entity to which the insolvency practitioner has been appointed or in circumstances of transmission of business. In such cases insolvency practitioners must be mindful of various issues including the appropriate calculation of payment in lieu of notice the relevant scale for which continues unchanged for employees earning less than \$94,900.00 per annum in accordance with the *Workplace Relations Act 1996* and to the Federal Minimum Wage established by the Australian Fair Pay Commission in relation to calculation of the remuneration base for such entitlements.

In relation to the calculation of accrued annual leave and annual leave loading, the accruals which arose under existing legislation prior to the proclamation date are recognised but the calculation of accrued but untaken annual leave is required to be made under the AFPCS having regard the basic periodic rate of pay. This is effectively the taxable earnings of the employee for a 38 hour week. An important issue which arises is that the basic periodic rate of pay does not recognise bonus or incentive entitlements which were previously recognised in certain State instruments (such as the *Annual Holidays Act 1944* [NSW]) other than for employees who are subject to notional awards or State preserved agreements. Therefore it will be necessary for the insolvency practitioner to carefully examine the remuneration base for calculation of accrued leave entitlements applicable from the proclamation date.

It should also be noted that because long service leave is not affected by WorkChoices legislation then absent circumstances where it may be dealt with in a Federal workplace agreement, accrued but untaken long service leave must be determined in accordance with the relevant State legislation which means that it must be paid to an employee when an employee's employment is terminated except where there is a transmission of business.

Transmission of business

There are complex new rules in relation to transmission of business which apply both to industrial instruments which were in existence prior to the proclamation date (Pre-Reform instruments) and to instruments coming into effect after the proclamation date (WorkChoices instruments).

In relation to the transmission of Pre-Reform instruments, these include a pre-reform Australian Workplace

Implications of WorkChoices for Insolvency Practitioners (cont)

Agreement, a pre-reform Certified Agreement or transitional instruments such as a preserved State agreement or notional agreement. Such instruments will bind a new employer in respect of a transferring employee on a sale of business for a maximum period of 12 months but can cease to apply earlier if the Pre-Reform instrument ceases by virtue of either expiry or being replaced by a new workplace agreement. In relation to transmission of WorkChoices instruments (which includes Australian Workplace Agreements, the various types of collective agreements and Federal awards), the maximum transmission period remains 12 months. As for Pre-Reform instruments the transmission period for these can be less than this in certain circumstances.

An important feature in relation to the transmission of both Pre-Reform instruments and WorkChoices instruments is that applications can be made to the Australian Industrial Relations Commission at various times (including in some circumstances before the transmission date) by a new employer or by an old employer to seek orders that an incoming employer will not be bound by an existing instrument.

A major variation under the new régime in relation to transmission of business is that as far as the employee entitlements are concerned, there are specific provisions dealing with transmission of the AFPCS being in relation to leave entitlements. For parental leave, a new employer is liable for transferring employees' entitlements to parental leave to which the AFPCS applies and for which the old employer was liable immediately prior to transmission and service with the old employer counts as service with the new employer. There are also specific notice requirements in relation to this particular obligation whereby the old employer must notify the new employer, within 14 days of transmission, of any transferring employee who is on parental leave at transmission.

In relation to other AFPCS leave entitlements, the assumption of liability for an entitlement by the new employer only occurs if the new employer agrees in writing before the transmission with the old employer to assume liability for or to recognise continuous service in relation to transferring employees in relation to the particular entitlement. If such an agreement exists (for example, in

a sale of business agreement) at the time of transmission, the new employer is liable for the transferring employees' entitlements accrued under the AFPCS before transmission which are not parental leave entitlements for which the old employer was liable immediately before transmission and the old employer ceases to be liable for those accrued entitlements.

This means that there is scope for an old employer to pay out accrued but untaken entitlements on transmission such as annual leave if no agreement is made with the new employer in respect of same. This also applies to personal leave (including sick leave) which provides an opportunity for a new employer to agree only to recognise continuity of service for parental leave and not for any other type of leave. Of course, as far as long service leave is concerned, the existing State legislation applies which in most States precludes the payment of long service leave by an old employer to a transferring employee in the circumstances of transmission of business.

Another major issue in relation to transmission of business concerns notice requirements which are described in the Regulations and require new employers to provide detailed notice to transferring employees in relation to various matters concerning their employment status such as the identity of the transmitted instrument, the date on which the transmission period will end, advice on what kind of instrument can replace the transmitted instrument and various other matters. This requirement applies in relation to all transmitted instruments other than awards (ie Federal awards) or in circumstances where the transferring employee becomes bound by a new workplace agreement within 14 days after the time of transmission. The relevant notices must be not only provided by the new employer to the employees within 14 days of the date of transmission, but must also be lodged with the Office of the Employment Advocate within that period.

Concluding Remarks

It follows that there is a range of complex issues which need to be considered by insolvency practitioners as a result of the application of WorkChoices, given that the vast majority of administrations in which they will be involved will relate to constitutional corporations which are subject to WorkChoices.

Kemp Strang **INSOLVENCY & RECONSTRUCTION BRIEF** is intended to keep readers abreast of current legal and firm developments. It is not to be used or relied upon as a substitute for professional advice. Before acting on any matter, readers should consult with their advisors.

Contact: Stephen Godding, P. +612 9225 2512, E. goddings@kempstrang.com.au

If you do not wish to receive further mailouts please email us at info@kempstrang.com.au or telephone Natasha Meuli on +61 2 9225 2578 or Marianne Slocombe on 9225 2711.

KEMP STRANG

MEMBER OF THE KENNEDY STRANG LEGAL GROUP

LEVEL 16, 55 HUNTER STREET SYDNEY NSW 2000 PO BOX 475 SYDNEY NSW 2001 DX 605 SYDNEY
P. +61 2 225 2500 F. +61 2 225 2599 www.kempstrang.com.au