

December 2006

**Important Changes to the Workplace Relations Act**
**Detail of New Record-Keeping Requirements Announced**
**Genuine Operational Reasons - Developments**
**Legislation Alert - Independent Contractors Act passed**
**AIRC wages and allowances review 2006**
**Qualifying Period v Probation Period - Do you need both?**

# Employment Matters

PIPER ALDERMAN'S EMPLOYMENT RELATIONS SECTION SPECIALISES IN ASSISTING EMPLOYERS TO DEAL WITH EMPLOYMENT AND INDUSTRIAL ISSUES. WE HOPE THAT YOU WILL FIND THE ARTICLES IN EMPLOYMENT MATTERS RELEVANT TO YOUR BUSINESS.

## Important Changes to the Workplace Relations Act

The Federal Parliament has passed significant changes to the Workplace Relations Act as part of the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006. The changes reflect recent announcements by the Minister intended to clarify certain aspects or to rectify a number of unintended consequences. The Act also contains brand new provision in relation to stand-downs and preservation of redundancy entitlements after the termination of an agreement.

The Bill received royal assent on 12 December 2006 and therefore became effective on that date. However, some amendments are stated to apply as from 27 March 2006. It is important that all employers consider these amendments against any changes introduced since 27 March 2006 or any planned strategies for 2007.

Dealing with each issue separately the major changes are:

### 1. Protection of Redundancy Entitlements

**The amendments provide that where a workplace agreement (either a collective agreement or an AWA) is terminated at the initiative of the employer then any redundancy entitlements continue to operate for a period of 12 months after the date of termination of the agreement.**

The amendments operate to preserve not only redundancy pay entitlements but provisions which are incidental to the provision of redundancy pay. Therefore, it is possible that obligations to consult with employees or with unions representing those employees will be preserved.

The preserved entitlements also transfer to a new employer (if there is a transmission of business within the 12 month period) in respect of any transferring employees and continue to operate until the full 12 month period has run.

It is important for any employers who are considering terminating an agreement, or acquiring a business with a terminated agreement, to be aware of these provisions as there are also special notification requirements in respect of employees and the Office of the Employment Advocate (**OEA**).

Equally, the provisions also apply to any pre-reform AWA, pre-reform certified agreement or preserved state agreement terminated in accordance with the Act.

### 2. Stand-downs

**The amendments insert a default right on the part of an employer to stand down employees where they cannot be usefully employed because of a strike (including industrial action taken by a third party), a break-down of machinery or any other stoppage of work for which the employer cannot reasonably be held responsible.**

This default stand-down right only applies where there is no other source of a stand-down provision (such as in a workplace agreement or contract of employment) or where an existing stand-down provision requires the employer to obtain authorisation from another party before the stand-down can occur.

While many employers (particularly in the manufacturing industry) already have stand-down provisions included in workplace agreements, this will be a significant change for other industries. We will have to wait to see whether a body of case law develops as to the interpretation of

“usefully employed”. It is easy to envisage a situation where a group of employees or a union on their behalf are able to argue that there are at least some tasks which the employees could be performing rather than being stood down without pay.

3. *Amendments to the Australian Fair Pay and Conditions Standard (the Standard)*

There are a number of changes made to the Standard which are stated in the Explanatory Memorandum to be for the purpose of rectifying unintended consequences and clarifying the operation of the minimum entitlements. The changes to the Standard are:

- > Employers and employees are able to agree to payment by the month (rather than previous requirement of payment on a fortnightly basis) if it is contained in a contract of employment or a workplace agreement.
- > Annual leave and sick leave will accrue based on a maximum of 38 hours per week. This is to rectify the unintended consequence of the original provisions which meant that regularly performed or compulsory overtime may be taken into consideration in calculating the rate of accrual for annual and personal leave.
- > **Employees will also be able to apply to cash out accrued sick leave so long as a minimum balance of 15 days (pro rata for part-time employees) is maintained. However, in order to do this there must be a clause in either an AWA or a collective agreement on the subject and any election by the employee must be made in writing and have the approval of the employer.**
- > There are various clauses to continue the operation of any Section 170MX awards – made after the termination of a bargaining period in certain circumstances under the pre-reform Act.
- > Importantly, employees are now also able to waive the seven day consideration period for access to the standard Information Statement

when deciding whether or not to sign on to an AWA or vote to approve a collective agreement.

Previously, the interpretation of the legislation by the OEA and the OWS was that while employees could waive ready access to the agreement the same could not be done for the Information Statement.

**This means that it is now possible to fast track the implementation of a collective agreement or an AWA. However, it still needs to be considered that in the case of a collective agreement every single person who would be covered by the agreement must waive the consideration period in writing and in most situations that will be impracticable.**

4. *Relationship between the Standard and Pre-reform Instruments*

**Perhaps the most important change is to insert new provisions governing the relationship between the Standard and pre-reform agreements.**

Prior to these amendments, the Act stated that the Standard did not apply to employees who were subject to a pre-reform certified agreement, a pre-reform AWA or a preserved state agreement.

This meant that the Standard was excluded even where the pre-reform instrument did not deal with certain aspects of the Standard or indeed may have dealt only with a single issue such as redundancy.

The Act now provides that the Standard does not apply to an employee in relation to a **matter** if the employee’s employment is subject to a pre-reform certified agreement, a pre-reform AWA or a preserved state agreement that deals with that **matter**.

“Matter” is defined as being a matter which is referred to in sub-section 171(2). That section lists the following matters:

- > Basic rates of pay and casual loadings;
- > Maximum ordinary hours of work;
- > Annual leave;
- > Personal leave;
- > Parental leave and related entitlements.

Importantly, the Standard is taken to have applied from the reform commencement, being 27 March 2006.

Therefore, all employers who have been operating on the basis the Standard does not apply due to the existence of a pre-reform instrument, must re-assess their pre-reform instrument to ensure that it does deal with each of the matters in section 171(2). If not, the provisions of the Standard in respect of the particular matter need to be applied to the employees and backdated to 27 March 2006.

**What is not clear is the level of detail with which the pre-reform instrument needs to deal with the particular matter in order to exclude the Standard. Any employers who have any concerns in this regard should seek advice as soon as possible.**

## Detail of New Record-Keeping Requirements Announced

In November 2006 the Federal Government revealed that it would be revamping the much criticised record-keeping provisions in the *Workplace Relations Regulations 2006* (the **Regulations**). Details of those changes have now been announced.

As from 27 March 2007, there will be a new Part 19 to Chapter 2 of the Regulations. That is the date on which the moratorium from prosecutions for breaching the existing record-keeping rules was due to end.

The major change, as foreshadowed, is to the recording of hours of work. The original Regulations would have required federal system employers to keep such records for all employees. Following an outcry from employer groups, they were amended to exempt certain employees, notably those earning a “base annual salary” of at least \$55,000 and with no entitlement to overtime pay.

**The new version will only require total hours worked to be recorded in the case of a casual or an “irregular part-time employee” (a term that is not defined) who is entitled to be paid at a basic rate per hours worked.**

A further obligation applies where an employee is entitled to “a penalty rate or loading (however described)” for any overtime hours they work, which is a common feature of many awards and agreements. The employer in this instance must record either the number of overtime hours worked each day or the times at which the employee started and stopped working overtime. There is no need in this case to keep a record of ordinary hours worked.

Aside from the provisions relating to hours of work, an employer’s record-keeping obligations will be simplified in other ways as well. For instance, there will no longer be any need to record:

- > the name of each “instrument” under which the employee derives any entitlements;
- > their classification under such an instrument;
- > a specification of the number of hours they are to work each week; or
- > their gross rate of pay expressed as an hourly rate (it is enough to record their “rate of remuneration”).

Similar changes are made in relation to pay slips, which will no longer need to specify a particular instrument or classification. For employees engaged on an annual salary rather than an hourly rate, it will be enough to show that salary. The new Regulations also clarify that a payslip may be issued in electronic form rather than hard copy.

### Other Changes to the Regulations

Aside from the changes to the record-keeping rules that have been discussed above, numerous other amendments to the Regulations have been made.

Many are technical changes or correction of errors, while others are consequential to the amendments recently made to the Workplace Relations Act 1996 on matters such as the cashing out of personal leave or the calculation of annual leave entitlements.

The changes include:

- > an attempt to clarify that State or Territory training authorities may still deal with matters concerning the termination of a training contract, even when that contract is made by a federal system employer;
- > making it clear that an employment contract or workplace agreement can validly allow an employee to take extra sick leave or carer's leave for less pay (eg, 20 days' leave per year at half pay) - this will not be considered to be less favourable than the employee's entitlement under the Australian Fair Pay and Conditions Standard; and
- > new provisions that regulate the powers of a workplace inspector to pursue breaches of any "civil remedy provision" in the Regulations.

## Genuine Operational Reasons - Developments

Although the Workplace Relations Act contains an exemption from the unfair dismissal jurisdiction when a termination is due to genuine operational requirements, the AIRC has confined the scope of this exemption through its most recent decisions. It has applied the legislation in such a way that an employer must not only satisfy the AIRC that there were genuine operational reasons for the employee's position to be made redundant, but must also show that genuine operational reasons necessitated the termination of the employee's employment.

In the recent case of *Nicholson v Riviera Marine*, the employer was able to demonstrate that due to a downturn in business, the employee's position was genuinely redundant. However, the employer could not demonstrate that it had examined redeployment opportunities in other parts of the employer's business. As it turned out, shortly after the termination of the employee's employment, the employer advertised jobs in another separate part of its business, such jobs requiring similar skills to those of the employee terminated.

This cast doubt over the genuineness of the need to terminate the individual, and consequently the AIRC refused to strike out the application and referred it for conciliation.

**Therefore employers must be aware that it may not be sufficient to prove that an employee's position is genuinely redundant to invoke the unfair dismissal exemption. The employer may also have to demonstrate that it explored all other options to avoid the termination and that, ultimately, the employer had no reasonable option but to terminate the employment.**

Whether this is a correct interpretation of the new legislation is a matter that has recently been argued before a Full Bench of the AIRC in a case involving Village Roadshow. The decision in that case will be eagerly awaited.

## Legislation Alert - Independent Contractors Act passed

The Federal Parliament has passed the Independent Contractors Act 2006 and the Workplace Relations Legislation Amendment (Independent Contractors) Act 2006 as part of its final round of legislative activity for 2006.

We reported in the September/ October edition of *Employment Matters* that these measures had been introduced into Federal Parliament, and reviewed key aspects of the proposed changes. Their progress through Federal Parliament has been considerably slower than the Work Choices reforms. They also accomplish significantly less change.

**There are however important implications of the reforms which entities engaging independent contractors need to take into account.**

The bulk of the amendments came into effect on 12 December 2006.

### Sham arrangements

Substantial financial penalties can now be imposed upon employers who engage workers under "sham" independent contractor arrangements or who dismiss or threaten to dismiss employees with an intention of re-hiring them as independent

contractors. Up to \$33 000 may be awarded against corporations, and \$6 600 against individuals, for such conduct under the new Act.

As amended, the new provisions create an exemption from liability for misrepresenting an employment relationship as involving an independent contracting arrangement, where the person concerned did not know that, and was not “reckless” as to whether, the contract would really be one of employment.

### **Unfair contracts**

The Independent Contractors Act now encompasses the federal unfair contracts regime, vesting jurisdiction in the Federal Court and the Federal Magistrates Court over such matters. This replaces the scheme in sections 892–894 (and before that sections 127A–127C) of the Workplace Relations Act 1996 (Cth). The courts are given broad powers to review contracts for services, and to order variations to contracts which are found to be “unfair” or “harsh”.

### **Exclusion of State laws**

The main thrust of the Independent Contractors Act remains to prevent State (or Territories) from deeming contractors to be employees for certain “industrial” purposes. After considerable debate, the exemptions for NSW and Victorian laws on transport workers was retained in the final version of the Act.

Another exemption was less controversial. The new Act will not affect State or Territory laws that deem outworkers to be employees. One change from the Bill though was to delete the proposals in Part 4 to impose minimum pay rates for services contracts involving outworkers in the textile, clothing or footwear industry. These were seen as being unnecessary given existing State protections.

## **AIRC wages and allowances review 2006**

On 8 December 2006, the Australian Industrial Relations Commission (**AIRC**) handed down its decision in relation to the application of the recent decision of the Australian Fair

Pay Commission (**AFPC**) (see our Newsletter dated 26 October 2006) to awards of the AIRC.

The AIRC had to consider the effect of the AFPC decision on wage rates and monetary allowances in transitional awards (which only apply to employers that are not constitutional corporations), and on monetary allowances in both transitional and pre-reform awards (which apply to constitutional corporations).

Several unions filed over 500 applications to vary transitional and pre-reform awards. This formed the basis of the AIRC review.

The AIRC decided:

1. For those transitional awards for which applications to vary were filed before the AIRC hearing, wage rates and monetary allowances were varied from the first pay period commencing on or after 1 December 2006.
2. For those pre-reform awards for which applications were filed before the AIRC hearing, the monetary allowances were varied from the first pay period commencing on or after 1 December 2006. (Remember – pre-reform awards no longer contain wage rates as the wage rates have become part of the Australian Pay and Classification Scales of the Australian Fair Pay and Conditions Standard.)
3. For those awards for which applications to vary are filed after the AIRC hearing, the operative date will be the date on which any variation order is made.
4. The increase for minimum rates in transitional awards should be \$27.40 per week (rounded up from the AFPC’s \$27.36) for rates up to \$700.00 per week, and \$22.00 per week for rates above \$700.00 per week.
5. Monetary allowances are to be varied as they have in the past by expressing the dollar figure as a percentage of the rate for the key classification that is (or was) in the award and applying that percentage to the allowance.

6. Supported wage provisions and school based apprenticeship and trainee provisions should be inserted into transitional awards at the time of variation of the wage rates and allowances.
7. Expense related allowances, which generally move in line with the relevant component of the CPI, could be included in orders reflecting the above decision.

If you are concerned as to whether or not an award binding on your organisation has been varied or may be varied as a result of this decision, please contact one of the members of the Piper Alderman Employment Relations team listed in this newsletter.

## Qualifying Period v Probation Period - Do you need both?

A probation period is usually used to determine a job applicant's suitability for a position. It is a period that must be agreed between the parties. A qualifying period is an administrative boundary limiting access to the Federal unfair dismissal jurisdiction.

The Workplace Relations Act refers to both a 6 month qualifying period (s643(6)) and a 3 month probationary period (s638(1)(c)). Both the qualifying period and the probation period act as exclusions to the unfair dismissal provisions.

The parties may in each case agree on a shorter or longer period, though any longer period must be "reasonable" in light of the nature and circumstances of the employment.

Prior to Work Choices the qualifying period and probation period in most cases were the same, with relatively few employees having a probation period greater than three months. The mirrored time frames contributed to the misconception that the two periods were one and the same thing.

As part of the Work Choices reforms the qualifying period was increased to 6 months, but the provisions regarding probation remained the same. Consequently during their first months of employment an employee may be concurrently subject to a probation period and a qualifying period, raising the question 'does the qualifying period cancel out the probation period?'

The advantage a probation period holds over a qualifying period relates to the provision of notice on termination. When terminating an employee and the end of a probation period, there may be no requirement to give or pay notice. This is not true in relation to a qualifying period.

There is a concern that at some future point an employee may argue that an agreed 3 month probation period constitutes an express reduction of the qualifying period, thereby removing the additional protection from unfair dismissal proceedings afforded by the longer qualifying period. It would therefore be wise to ensure there is no confusion about the existence and length of each period in relation to your employees.

One method of preventing the qualifying period being inadvertently shortened would be to cease use of a probation period, unless the ability to terminate without notice at the end of probation is a feature your business would like to maintain. Feedback processes during the first months of employment to assist employees with their integration and skills development can still take place during the six month qualifying period just as they might during probation.

Alternatively in order to keep a probation period, offers of employment, policies and procedures should refer to the requirement to complete a three month probation concurrently with the six month qualifying period contained in the Workplace Relations Act. Additionally, in very few occupations such as very senior or complex roles it may be possible to increase the probation period to match the six month qualifying period.

**Important Disclaimer:** The material contained in this publication is comment of a general nature only and is not and nor is it intended to be advice on any specific professional matter. In that the effectiveness or accuracy of any professional advice depends upon the particular circumstances of each case, neither the firm nor any individual author accepts any responsibility whatsoever for any acts or omissions resulting from reliance upon the content of any articles. Before acting on the basis of any material contained in this publication, we recommend that you consult your professional adviser.

### Piper Alderman Lawyers

#### Sydney

Level 23  
Governor Macquarie Tower  
1 Farrer Place  
Sydney NSW 2000  
DX 10216, Sydney Stock Exchange  
Phone: + 612 9253 9999  
Facsimile: + 612 9253 9900

#### Melbourne

Level 24  
385 Bourke Street  
Melbourne VIC 3000  
DX 30829, Collins Street  
Phone: + 613 8665 5555  
Facsimile: + 613 8665 5500

#### Brisbane

Level 9  
239 George Street  
Brisbane QLD 4000  
GPO Box 3134  
Brisbane QLD 4001  
DX 105, Brisbane  
Phone: + 617 3220 7777  
Facsimile: + 617 3220 7700

#### Adelaide

167 Flinders Street  
Adelaide SA 5000  
GPO Box 65  
Adelaide SA 5001  
DX 102, Adelaide  
Phone: + 618 8205 3333  
Facsimile: + 618 8205 3300

Email: [enquiries@piper-alderman.com.au](mailto:enquiries@piper-alderman.com.au)

[www.piper-alderman.com.au](http://www.piper-alderman.com.au)

For further information contact:

#### David Ey

Partner  
[dey@piper-alderman.com.au](mailto:dey@piper-alderman.com.au)

#### David McLaughlin

Partner  
[dmclaughlin@piper-alderman.com.au](mailto:dmclaughlin@piper-alderman.com.au)

#### Stephanie Vass

Partner  
[svass@piper-alderman.com.au](mailto:svass@piper-alderman.com.au)

If you would prefer to receive Employment Matters by email or if you are not on the mailing list and would like to be included please contact [publications@piper-alderman.com.au](mailto:publications@piper-alderman.com.au)