

EMPLOYMENT LAW FOR YOUNG PEOPLE

**Impacts of
Industrial
Relations Reforms
on Young People &
what you can do as
an advocate.**

Presented by Illawarra Legal Centre Inc.
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2. ACTU Facts Sheet – AWA Individual Contracts";
3. "Juice bar faces court action over teens' 'pay cut" ABC Monday 22 May 2006;
4. "Sick deal: female miner to sue" SMH 9/11/2006;
5. "WorkChoices and junior rates" – facts sheet from Australian government "WorkChoices" web site.

1. INTRODUCTION

The Federal Howard government introduced in 2006 controversial reforms to the *Workplace Relations Act 1996 (Cth)*. These reforms were contained in the *Workplace Relations Amendment (WorkChoices) Act 2005*, or simply "WorkChoices".

The reforms commenced on **27 March 2006**.

The most significant change to the *Workplace Relations Act 1996* is in the area of unfair dismissal laws.

The reforms are of particular concern for young people who are more likely to be in lower paid jobs, employed on a casual or part time basis, have little experience in the workforce, face difficulty in negotiating terms of employment and are vulnerable to heavy handed tactics by employers.

2. What is Unfair Dismissal?

A dismissal is unfair when it is harsh, unjust or unreasonable.

In determining whether the dismissal is unfair you must consider whether or not there were reasons given for the dismissal, and whether or not that reason is a good reason, whether or not warnings had been issued in respect to performance, whether or not the employee was given an opportunity to respond.

It may not be unfair dismissal if you are unable to do your job, or you fail to exercise due care and skill in performing the job, or fail to follow instructions.

In NSW an application can be made to either the NSW Industrial Relations Commission (State) or to the Australian Industrial Relations Commission (Federal).

There is a strict time limit of 21 days from the date of the dismissal so it is of great importance that the application is lodged promptly. Applications can be made outside the 21 day time limit where reasons can be shown but it is at the discretion of the Commission to accept such applications.

3. Effect of "WorkChoices" on Unfair Dismissal Laws

The major change introduced by WorkChoices is that the Federal government through the "corporations" power under the Constitution has extended the number of people to which the federal regime applies. The Workplace Relations Act now applies to:-

- trading, financial and foreign corporations (constitutional corporations);
- employers and employees in territories (the ACT and NT) and Christmas and Cocos Islands;
- the Commonwealth, including its authorities;
- waterside, maritime and flight crew employers; and
- all employers and employees in Victoria (this is because Victoria has referred almost all its industrial relations powers to the Commonwealth).

The significance of this is that previously the majority of employees of corporations in NSW would have been employed under a State award and thus entitled to access the State unfair dismissal laws. WorkChoices extended the Federal unfair dismissal laws to everyone who works for **"a constitutional corporation"**.

Thus even where an employee is employed under a State award they are subject to the Federal unfair dismissal laws if the employer is a "constitutional corporation".

WorkChoices has restricted workers access to unfair dismissal remedies by excluding those rights if the employee is employed in a workplace of 100 or fewer employees.

The number of employees is based on permanent staff (both full time and part time) plus casuals who have worked on a regular basis for more than 12 months. The "head count" includes the dismissed employee.

A claim cannot be made for unfair dismissal in the Australian Industrial Relations Commission. This means an employer in these workplaces can dismiss staff without warning and without reason. The employee has no recourse to the NSW Industrial Relations Commission.

There are also further restrictions to unfair dismissal even for workplaces of more than 100 employees (see p. 7).

The Federal Government has asserted that up to 85% of all employees will be covered by the new system but this is debatable. Queensland, for example, has stated that it will only cover around 65% of that state's workers.

4. What is a "Constitutional Corporation"?

The new Federal industrial relations laws apply to anyone working for a constitutional corporation: a body incorporated under Australian law and substantially engaged in trading or financial activities.

As a guide, most proprietary limited (Pty Ltd) businesses that carry out commercial activities with a view to earning money are affected. Some corporations, such as not-for-profit organisations, are not affected.

The state system covers most unincorporated businesses in NSW (such as sole traders and partnerships) as well as some incorporated businesses operating in NSW (e.g. some charities and not-for-profit organisations).

5. Probationary Employees

All new employees are excluded from unfair dismissal remedies for six months. This equates to a six month 'qualifying' or probation period.

Prior to WorkChoices, employees on probation were also excluded from claiming unfair dismissal but the accepted probation period was only three months.

If an individual employer imposed a longer probation period then this was open to challenge if the employee had been in the workplace for more than three months but was dismissed while subject to a more extensive probation period.

Now an employee who has been employed for less than the six month probationary period may be dismissed by the employer for no reason. However, it is important to remember that if the dismissal was due to any reason that is unlawful eg. Race, marital status etc then the dismissal remains unlawful.

6. Casual employees

People working as a casual will not have access to unfair dismissal remedies unless they have worked on a regular and systematic basis for at least 12 months. Whether or not a person is a casual or a permanent employee can be open to challenge.

Casual workers are expected only to be short term employees but in reality casual arrangements can continue for many years. If there is some doubt about an employee's work status then legal advice should be sought, as it will depend upon the individual's work arrangements.

All seasonal workers are denied access to the unfair dismissal laws.

It is important to note the difference between a casual employee and a part time employee – this may affect many young people who are employed on this basis. The unfair dismissal laws are only excluded to casuals employed less than 12 months and not part time permanent employees.

7. Redundancy

Whilst employees of corporations with more than 100 employees retain their rights to claim for unfair dismissal this right is not safe either.

WorkChoices provides that employees who have been made redundant will be excluded from bringing an unfair dismissal action, whether or not their employer has over 100 employees, if the employee is terminated for, or for reasons including, genuine "operational reasons". The operational reasons only need form some part of the reasons for dismissal to exclude the remedy.

Operational reasons may include reasons of an economic, technological, structural or similar nature relating to the employer's business.

Employees will face practical difficulty in providing evidence to refute an employer's claim that the dismissal was for operational reasons.

However, the Australian Industrial Relations Commission has stated the employer has the onus of proving that genuine operational reasons in fact

existed and contributed to the decision to dismiss the employee – see *Azwar Koya v Port Phillip City Council AIRC PR973045 (13 June 2006)*.

8. Unlawful Termination

It is important to be aware of the difference between an "unfair" dismissal and an "unlawful" termination.

Unlawful termination relates to dismissal for what is termed a "prohibited factor" and includes where the employee has been terminated:-

- because of their race, sex, religion, disability, family responsibility or pregnancy;
- for refusing to sign, vary or terminate an AWA;
- because of union membership; non-membership or union activities;
- because s/he has filed a complaint against the employer or participated in proceedings against the employer, for example because of alleged discrimination or alleged breaches of occupational health and safety provisions;
- for other reasons, including temporary absence due to illness or injury and absence due to parental leave.

All employees no matter what the size of the employer, can make a claim for unlawful dismissal even if the employer also points to "operational reasons" for the termination.

These matters are lodged with the Australian Industrial Relations Commission for conciliation but if the matter is not settled between the parties then it may proceed to the Federal Court or Federal Magistrates Court for arbitration. This is distinct from unfair dismissal matters which remain with the Commission.

The problem with proceeding in either the Federal Court or Federal Magistrates Court is that if the worker is unsuccessful s/he may face an order to pay the employer's legal costs which could be substantial.

If the dismissal was due to any discriminatory reason such as sex, age, race, marital status etc the employee will also have a choice of lodging a complaint

with either the Federal Human Rights & Equal Employment Opportunity Commission (HREOC) or the NSW Anti Discrimination Board. The time limit for filing the complaint is 12 months.

In summary, employees under WorkChoices will be able to seek a remedy for dismissal only if:-

- it was an unlawful termination (applies to all employees);
- - it was an unfair dismissal AND there are more than 100 employees in the workplace AND the employee had been in the workplace for more than six months (or 12 months as a regular casual) AND the employer cannot point to "operational reasons" for the termination.

9. Australian Fair Pay Commission

The WorkChoices legislation established the Australian Fair Pay Commission (AFPC).

The Commission is intended to take over the role of the Industrial Relations Commissions (Federal and State) whose role historically has been to determine rates and conditions of wages.

WorkChoices established the Australian Fair Pay & Conditions Standard which sets out key minimum entitlements of employees and the standard prevails over a workplace agreement or contract of employment.

WorkChoices also established the Employment Advocate whose job is to promote the making of workplace agreements.

The Commission sets the Australian Fair Pay and Conditions Standard (AFPCS) which comprises minimum wages and award classifications, minimum requirements for annual leave, personal/carer's leave (which includes sick leave) and parental leave and maximum ordinary hours of work.

The Standard will apply to all new agreements.

On 26 October 2006 the AFPC handed down its first minimum wage decision under WorkChoices. The decision was an increase of \$27.36 a week to all Australian Pay and Classification Scales up to and including \$700 a week. The decision increased the Standard Federal Minimum Wage (FMW) from

\$12.75 per hour to \$13.47, or \$511.86 a week from \$484.50. (The ACTU had sought a wage rise of \$30.00 a week). Workers earning more than \$700 per week were awarded a smaller increase of \$22.04 per week.

The increases should flow on to junior employees, those under traineeships, those with a disability and basic piece rates of pay. The decision takes effect from 1 December 2006.

10. What is an Australian Workplace Agreement (AWA)?

- An AWA is an individual written agreement between an employer and an employee that sets out the terms and conditions of employment. The document is lodged with the Office of the Employment Advocate.

- An AWA replaces any award or workplace agreement that would normally otherwise apply to an employee. If you sign an AWA you are no longer covered by an Enterprise Agreement.

- Once signed an AWA can last for up to 5 years;

- An employee may appoint a bargaining agent to act on his/her behalf in negotiating the AWA. The agent may be a union, lawyer or any other appropriate adult. The bargaining agent must be appointed in writing. It will be interesting to see to what extent this will occur, particularly for young people with little experience in the workforce.

- The AWA must meet the minimum standards in the Australian Fair Pay and Conditions Standard but it may still contain conditions which are below those set in an Enterprise Agreement or Award.

- The AWA must contain a dispute settlement procedure;

- An employer is obliged to provide employees with an "Information Statement" which provides details to the employees on the process of making, varying and terminating an agreement. The statement must be provided seven days before the agreement is reached. This seven day period cannot be waived.

- The AWA is made when the agreement is approved which is when it is signed and dated by the employer and employee. Each signature must be witnessed.

- Where the employee is under 18 years the AWA must be signed by an appropriate adult (such as a parent or guardian).

- An AWA may not contain any provision for a pay rise. Check the document carefully for this as you will not be entitled to any other pay rise except for what is listed in the AWA;

- An AWA is a secret document and this could possibly lead to a situation where employees who each have individual AWA's with the employer but who are performing the same job and working side by side are on different pay.

IT IS IMPORTANT TO NOTE THE FOLLOWING:-

1. An employee CANNOT be forced to sign an AWA.

2. Contact a Union or a Solicitor for advice.

3. If you are asked to sign an AWA then you must be given time to consider it – at least 5 days if you are going for a new job and 2 weeks if you are a current employee;

4. You are entitled to have a union or some other person represent you in negotiations over the AWA.

5. Before you sign an AWA you should read it carefully and check that it provides for conditions such as meal breaks, overtime rates, weekend, late night, public holiday and other penalty rates, uniform, vehicle, travel and other allowances, rest breaks, bonuses and annual leave loading. There is a real concern that many AWA's strip employees of their penalties for shift work, overtime, paid public holidays, provision for jury service, bereavement leave, annual leave loading and meal and travel allowances.

REMEMBER – every employee has a legal right to payment of certain benefits – including annual leave, sick leave etc.

The NSW Office of Industrial Relations has set up a new online tool to assist in determining whether or not an employee is better off under an individual contract (AWA) or a current award. The Compare What's Fair comparison calculator is free and available at www.industrialrelations.nsw.gov.au/awards/compare

Official figures from the Office of the Employment Advocate reveal that 598 AWA individual contracts were signed by children under the age of 15 from July last year until May 2006, including many under the new Work Choices laws. Another 7,779 individual contracts were signed by children between 15 and 18 years old and a further 13,269 individual contracts were signed by young workers aged 18 to 21 over the same period.

11. The Office of Workplace Services

As part of its Work Choices scheme the Federal government set up the "independent" Office of Workplace Services (OWS) as from 27 March 2006.

The role of the OWS is to investigate complaints by employees in relation to breaches of pay and in some instances to commence court action.

There have been some fairly well publicized matters involving the OWS – incl. the case where a young worker at a juice bar was told two days after the new laws were introduced that she had been made redundant and then "rehired".

The 16 year old was offered an AWA which dropped her pay from \$9.52 to \$8.57 per hour and abolished her penalty rates. 15 – 20 staff at the Pulp Juice franchises had been given workplace agreements and were told that if they did not want to sign then they could leave.

12. UTAS and ADRAS Schemes

As part of the introduction of the WorkChoices legislation, the Federal government announced the Unlawful Termination Assistance Scheme (UTAS) scheme to provide workers who may have been unlawfully dismissed with financial assistance to a maximum amount of \$4,000 to obtain legal advice.

The assistance is only available if the worker's weekly earnings are below \$47,745 or \$915.70 per week.

The financial assistance is very limited considering that legal costs in the Australian Industrial Relations Commission for an unfair dismissal claim could be in excess of \$30,000.

The Alternative Dispute Resolution Assistance Scheme (ADRAS) will provide a maximum amount of \$1,500 to access Alternative Dispute Resolution services, such as mediation or conciliation.

13. Case Studies

a) Lorissa Stevens

The recent case of a young female worker at a Hunter Valley mine is a case in point.

The employer (Mining and Earth Moving Services) handed the 21 year old worker, Lorissa Stevens, an AWA to sign and was told that she had three days to sign the agreement.

The AWA contained clauses that she had to give 12 hours notice if she was sick or face a fine of \$200 and be docked a day's pay, further she had to give the company seven days notice of she wanted to leave the company, however, the AWA provided that the company could dismiss her with only an hour's notice.

The Construction, Forestry, Mining and Energy Union (CFMEU) was funding proceedings in the Federal Court on behalf of the worker for unlawful dismissal.

b) A young part time hospitality employee is told that his employer is undertaking a 'restructure' and he is to be offered 3 days per week (rather than previously 4 days) at a lower grade, effective immediately. There are less than 100 employees in the company. What can he do?

14. Useful Contacts

South Coast Labor Council

Information on which union covers a workplace or what awards/conditions/agreements apply.
Please note that Unions will provide free legal advice to their members.
Telephone: 4229 2888

Australian Industrial Relations Commission

<http://www.airc.gov.au>

Office of Industrial Relations

Fair Go Advisory Service

Information about work conditions, pay rates, NSW State awards and comparisons with agreements and

AWAs

131 628

www.industrialrelations.nsw.gov.au

Office of Workplace Services

www.ows.gov.au

GPO Box 9887 in your Capital City

1300 724 200

Youth Action and Policy Association NSW

Information on the interests of young people and youth services in NSW

www.yapa.org.au

Telephone: 9319 1100

Tollfree: 1800 627 323

Facsimile: 9319 1144

146 Devonshire Street

SURRY HILLS NSW 2010

Anti Discrimination Board of NSW

Information about discrimination and unlawful dismissal

1800 670 812

www.lawlink.nsw.gov.au/adb

Unions NSW

Information about unions

02 9264 1691

www.unionsnsw.org.au

Human Rights and Equal Opportunity Commission

Information about discrimination and unlawful dismissal.

1300 656 419
www.hreoc.gov.au

WorkCover NSW

Information about occupational health and safety issues in the workplace and workers compensation.

13 10 50
www.workcover.nsw.gov.au

Law Access

Information about free legal assistance

1300 888 529
www.lawaccess.nsw.gov.au

NSW Legal Aid

Free legal Advice
Telephone: 4228 8299

Department of Employment and Workplace Relations

Information about federal wages and work conditions:

1300 363 264
www.wagenet.gov.au