

# Mixed up confusion in the new work-place laws

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**Hardly anyone can claim to have a complete or clear understanding of the tangled labyrinth, which constitutes the multiple amendments to the current industrial relations statute and the regulations made thereunder. It is not only a question of volume (although that is important), but also ambiguity, the scope for legal debate.**

## **Clarity and simplicity are lost in detail.**

In seeking to further de-regulate the labour market an answer has been sought in higher levels of prescription, in the substitution of legislative dictation for broad discretion, in the limitation of “choice” by restriction, in the opening up of further channels of formal litigation.

Thus, unfair dismissal remedies are not only restricted to corporations with more than 100 employees – with the associated possibility of larger enterprises being split up into corporations small enough to meet this exclusionary barrier. There is, additionally, the broader escape hatch of dismissal criteria which include “operational reasons” – a term of indeterminate reference.<sup>1</sup>

It is therefore unsurprising that examples have already surfaced of building workers being terminated, and offered casual engagement on lower hourly rates, presumably for operational reasons, whether real or illusory.<sup>2</sup>

Similarly, the dismissal of 29 meatworkers from the Cowra abattoir, with 20 being offered fresh contracts on substantially lower rates of pay illustrates how problematic is the “operational test”. One does not have to be excessively cynical to see the government prompted reversal of this decision as being a face-saver for the new regime.<sup>3</sup>

As a consequence, the Federal Minister has urged employers to take a deep breath and not rush into using the new workplace laws – the alternative is a tangible political risk.<sup>4</sup> Because of the pragmatic accommodation, it seems the Cowra dispute will not go to court. In these circumstances, the Minister has declined to proffer a view as to whether the company’s actions were lawful or otherwise under the new Act. But it is inevitable that other like situations will emerge.

It seems that the Commonwealth Workplace Relations Department is unsure whether the new law requires a doctor’s certificate for a day’s sick leave absence.<sup>5</sup>

And small business has called for “leniency” in the implementation of the WorkChoices regulations, arguing that the time and resources were unavailable to absorb the detail prior to the implementation date.<sup>6</sup>

More recently we have a ministerial announcement that the far-reaching requirements to keep hours of work records for executives will be diluted.<sup>7</sup> In fact we now learn that prosecutions under the new law will be dropped. For how long is quite unclear. It is difficult to envisage a law of the Commonwealth being un-enforced in perpetuity.<sup>8</sup>

In short, confusion and doubt reign.

The more sophisticated and effective changes to employment laws was the evolution to enterprise bargaining, under-pinned by a minimum award structure and given added fairness by a “no disadvantage” test against which the devolved enterprise bargain (with its potential for flexibility and productivity improvement) could be assessed.<sup>9</sup>

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<sup>1</sup> “No one safe from the sack”, Daily Telegraph, 23 March 2006

<sup>2</sup> “Builder cuts his labour costs casually”, Australian Financial Review, 28 March 2006

<sup>3</sup> “Red-faced Minister forces abattoir to reinstate workers”, The Australian, 5 April 2006

<sup>4</sup> “Political sting in laws’ tail: employers”, The Australian, 5 April 2006

<sup>5</sup> “Even workplace department is unsure about laws”, Sydney Morning Herald, 7 April 2006

<sup>6</sup> “SMEs plead for grace period on IR changes”, Australian Financial Review, 23 March 2006

<sup>7</sup> “Minister to ease rules on time records”, Australian Financial Review, 11 April 2006

<sup>8</sup> “red faces averted”, The Australian, 12 April 2006

<sup>9</sup> P. Keating, “WorkChoices the enemy of productivity”, Australian Financial Review, 28 March 2006