WHAT IS PROHIBITED CONTENT?

Prohibited content is content that cannot be included in a workplace agreement. A term of an agreement that contains prohibited content is void and cannot be enforced if it is included in a workplace agreement.

WHAT ABOUT TRANSITIONAL INSTRUMENTS UNDER WORKCHOICES?

Prohibited content that is included in certain transitional instruments operating under WorkChoices will also be void and unenforceable. Prohibited content for these instruments is limited to terms that prevent the making of Australian workplace agreements. Specifically, constitutional corporations currently covered by the following transitional instruments will not be able to enforce any terms that prevent an employer from making Australian workplace agreements:

- preserved collective or individual state agreements,
- notional agreements preserving state awards,
- pre-reform certified agreements.

In addition, clauses of notional agreements preserving state awards that restrict the range or duration of training arrangements is also prohibited content.

WHAT KIND OF CONTENT IS PROHIBITED?

Prohibited content includes terms of a workplace agreement that:

(1) deal with pay deductions and payroll deduction facilities for trade union membership subscriptions or dues;

(2) allow employees to receive leave to attend union training sessions or paid leave to attend union meetings;

(3) deal with the rights of trade unions or employer associations to be involved in dispute resolution (unless the organisation is the representative of the employer or employee's choice);

(4) deal with right of entry by unions and employer associations;

(5) deal with the renegotiation of a workplace agreement;

(6) restrict an employer from using independent contractors or labour-hire arrangements;

(7) deal with the forgoing of annual leave credited to an employee bound by the agreement (otherwise than in accordance with the *Workplace Relations Act 1996*);

(8) require the provision of employee information to trade unions unless required by law;

(9) directly or indirectly encourage other persons bound by the agreement to become or remain a member of an industrial association;

(10) directly or indirectly discourage other persons bound by the agreement to not become or not remain a member of an industrial association;

(11) require a person bound by the agreement to indicate support, or lack of support for persons bound by the agreement being members of an industrial association;

(12) allow persons bound by the workplace agreement to engage in or organise industrial action;

(13) prohibit or restrict disclosure of a workplace agreement's details by parties to the agreement;

(14) provide a remedy for dismissal for a reason that is harsh, unjust or unreasonable;

(15) is discriminatory in that it discriminates against an employee bound by the agreement because of or for reasons including race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin. A provision is not discriminatory merely because it provides for rates in accordance with the relevant Australian Pay and Classification scale or Federal Minimum Wage; or discriminates on the basis of the inherent requirements of the employment; or it is in respect of employment in an institution conducted in accordance with particular teachings/beliefs of a particular religion or creed and discriminates on the basis of those teachings/beliefs and is done in good faith;

(16) is objectionable in that it is a provision that requires or permits any conduct that would contravene the freedom of association provisions of the *Workplace Relations Act 1996* including a provision that requires payment of a bargaining services fee to an industrial organisation;

(17) deal with a matter that does not pertain to the employment relationship (unless it is ancillary/incidental/a machinery matter/or is trivial);

(18) directly or indirectly restrict the ability of Australian workplace agreements to be offered, negotiated or entered into.

WHAT HAPPENS IF A WORKPLACE AGREEMENT LODGED WITH THE OFFICE OF THE EMPLOYMENT ADVOCATE CONTAINS PROHIBITED CONTENT?

Following the commencement of the WorkChoices reforms on 27 March 2006, if an employer lodges a workplace agreement containing prohibited content, they may have a court action taken against them for a civil penalty (a fine) of up to $6,600 (for individuals) or $33,000 (for corporations) if they were reckless as to whether the agreement contained prohibited content.

Further, a term of a workplace agreement that contains prohibited content is void and unenforceable.

The Employment Advocate has the power to vary a workplace agreement lodged with it to remove prohibited content.

NOTICE OF INTENTION TO VARY A WORKPLACE AGREEMENT

If the Employment Advocate intends to vary an agreement containing prohibited content, the Employment Advocate will issue the employer with a notice informing them about the variations that are proposed to ensure that the workplace agreement complies with the law.

If the Employment Advocate intends to vary an Australian workplace agreement, a copy of this notice will also be provided to the employee.

If the Employment Advocate intends to vary a union collective agreement or a union greenfields agreement, the union will be provided with a copy of the notice.

Where variations are proposed to a collective agreement, an employer must also take reasonable steps to ensure that all the affected employees are given a copy of the Employment Advocate's notice. If the employer does not do this, they may be liable for a civil penalty of up to $3,300 (for individuals) or $16,500 (for corporations).

WRITTEN SUBMISSIONS

Once an employer has received the Employment Advocate's notice, they, and the other parties to the workplace agreement, have 28 days to make written submissions about whether the Employment Advocate should make the proposed variation.

The Employment Advocate then considers all the submissions made and makes a decision as to whether the agreement should be varied. The Employment Advocate will provide the relevant parties with a copy of the notice advising of the variation.

If a collective agreement is varied in this way, the employer must take reasonable steps to make sure that the employees covered by the agreement are provided a copy of the agreement within 21 days of receiving the notice. If the employer does not do this, they may be liable for a civil penalty of up to $3,300 (for individuals) and $16,500 (for corporations).

If a collective agreement is varied, the Employment Advocate will publish a notice in the Gazette stating that the variation has been made and will provide details of how the agreement was varied.

WHAT CAN AN EMPLOYER DO SO AS TO NOT LODGE AN AGREEMENT WITH PROHIBITED CONTENT?

Carefully consider all clauses in the workplace agreement to see if they fall into one of the categories of prohibited content.

An employer can request that the Employment Advocate review the workplace agreement before it is lodged and obtain a notice from the Employment Advocate that the agreement does not contain prohibited content.

If you decide to seek such advice you should do so before you have your workplace agreement approved by your employee(s) (as once an agreement is approved, you must lodge that agreement within 14 days).

WORKPLACE AGREEMENT NEGOTIATION AND PROHIBITED CONTENT

A person (i.e. an employer, employee or another person) may be subject to a civil penalty (fined) up to $6,600 (for individuals) and $33,000 (for corporations), if, when negotiating a workplace agreement (or a variation to a workplace agreement) they:

- try to include a term in that workplace agreement (or a variation to a workplace agreement) that includes prohibited content; and
- were reckless as to whether the term contained prohibited content.

MISREPRESENTATIONS ABOUT PROHIBITED CONTENT

A person (i.e. an employer, employee, union or another person) may be subject to a civil penalty (fined) up to $6,600 (for individuals) and $33,000 (for corporations) if they:

- make a misrepresentation that a particular term of a workplace agreement (or a variation to a workplace agreement) does not contain prohibited content; and
- were reckless as to whether the term contains prohibited content.