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## WorkChoices Update

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The Howard Government's *WorkChoices* bill signifies the most dramatic change to Australian industrial relations in over 100 years. When passed, the new legislation will impact on all Australian workplaces to varying degrees.

Of most interest is the Government's attempt to take over responsibility for industrial relations from the states and form a single Australian industrial relations system. But that is not the only major change. Access to unfair dismissal laws is being restricted, the ability to enter into agreements directly with employees on both a collective and individual basis enhanced, and the role of the Australian Industrial Relations Commission ("AIRC") diminished. Rather than one large change, *WorkChoices* is essentially a blueprint for on-going change over the next five or more years.

### Background

The new system envisages bargaining against a backdrop of national standard provisions. The proposed legislation will encourage bargaining but much of the current award system, and its standards, remains and can continue to apply unless the negotiating parties opt for it not to.

### Awards and Agreements

Currently federal awards and agreements can only contain matters pertaining to the relationship between an employer and employees ("employment matters") and this will continue. As well, other matters will be prohibited content, such as:

- restrictions on contractors and labour hire;
- requiring that future agreements must be with the union
- prohibiting AWAs being offered;
- mandatory union involvement in dispute resolution; and
- providing remedies for unfair dismissal.

Prohibited content will not be enforceable in new agreements or subject to protected industrial action.

State awards and agreements can contain provisions which do not deal with employment matters. During the transitional phase both state agreements and awards will be regarded as notional, or preserved state, agreements but any provisions dealing with prohibited content will not be enforceable. Federal awards will be simplified and made more facilitative (see tables below).

Jury service, long service leave, notice of termination and superannuation provisions cannot be inserted into new awards, but will continue to apply in their current form in existing awards (except superannuation provisions which will cease to apply after 30 June 2008). The AIRC will not be able to vary these provisions except under the process

of simplification or to remove ambiguity or discriminatory content.

### The Australian Fair Pay Commission

Minimum wages will be set by a new body, the Australian Fair Pay Commission ("AFPC") and will apply throughout the federal award system and form part of the Australian Fair Pay and Conditions Standard ("AFP&CS"). The AFP&CS will underpin the new federal bargaining system. The AFP&CS will comprise:

- classifications and rates (including a default 20% casual loading);
- a 38 hour week (averaged over a period of up to 1 year) and a requirement to work reasonable overtime;
- annual leave (4 weeks p.a. and 5 weeks for 7 day continuous shift workers; a capacity for employee to request in writing to cash out up to 2 weeks p.a. where allowed under an agreement but cannot cash out current accrued leave);
- personal/carer's leave (10 days p.a. cumulative with up to 10 days p.a. available for carer's leave; access to an additional 2 unpaid days per occasion for unexpected emergency if personal leave exhausted; 2 paid days compassionate leave per occasion); and
- parental leave (up to 52 weeks unpaid leave).

More generous award hours provisions (such as a 35 hour week) will continue to apply to people covered by relevant awards.

Where current award entitlements are more generous than the legislated minimum standards of annual, personal/carer's and parental leave, they will remain as under the award (but the award standard will be able to be bargained in agreement making). The more generous award standard will be frozen.

Certain other award conditions will continue to apply unless explicitly altered in an agreement. These are:

- public holidays
- rest breaks, including meal breaks
- incentive payments and bonuses (but not tallies)
- annual leave loading
- penalty rates
- overtime and shift loadings.

In addition, an agreement can refer to and save specified award provisions should the parties wish.

Collective and individual agreements will be easier to make. Agreements will need to comply with the minimum conditions set by the AFP&CS. The AFP&CS continues to apply as a moving minimum floor during the operation of the agreement. For example, if the AFPC increases wages above those applying in an operating agreement, the new AFPC wage levels will apply.

## Agreement Making

Both individual and collective agreements will be lodged with the Office of the Employment Advocate ("OEA") and commence from the time of lodgement. This removes the delay between finalising the agreement and its commencement and also the requirement for collective agreements to be lodged with the AIRC and subjected to a hearing before certification.

Where an employer wishes to enter an agreement with one or more employees, the employer must:

- give the employee(s) a copy of the agreement and a copy of an information sheet issued by the OEA;
- allow the employee(s) a minimum of 7 days to consider the agreement unless the 7 days is waived in writing by all employees to be covered by the agreement;
- obtain the agreement of the employee or a majority of employees to be covered by the agreement (there are penalties for unlawful coercion, misrepresentation or lodging an agreement without employee agreement);
- lodge the agreement accompanied by a standard declaration issued by the OEA within 14 days of agreement.

Agreements can have a nominal term of up to 5 years.

Collective agreements may be made with one or more unions for a group of employees or with the employees themselves. Individual agreements (AWAs) will be made between the employer and an individual employee. It will also be possible to have a "greenfields" agreement (an agreement made for a new operation before there are any employees engaged for it) made with or without a union but their nominal life is confined to 12 months.

It will still be possible to enter multiple-business agreements but only with the OEA's prior approval that the agreement will not offend the public interest.

Employees may choose to have an agent represent them in the Agreement making process. The agent can be a variety of people, including a union.

## Industrial Action

Unless industrial action is "protected" it will be unlawful. The AIRC will continue to hear applications for orders to stop or prevent unlawful industrial action and will have to issue an order within 48 hours, or if it cannot, it must issue an interim order unless the interim order is against the public interest.

Third parties affected by industrial action will be able to apply for an order.

The new legislation will clarify when industrial action is "protected". Any existing agreement must have passed its nominal term. There must be a proper bargaining period in place (as at present). For protected industrial action:

- the relevant employees or union(s) must apply to the AIRC for a secret ballot order; and
- at least 50% of the union members, or employees affected, must vote and at least 50% + 1 of voters must approve the action.

It will be easier to suspend a bargaining period. The existing grounds for suspending a bargaining period will be retained together with three new grounds:

- the claim is part of a wider pattern bargaining claim;

- the AIRC decides that a "cooling off" period would assist resolution of the dispute;
- third parties are threatened with significant harm.

An incorporated employer suffering damage from industrial action taken by parties to industrial action in a state system will also be able to apply to the AIRC for an order to stop or prevent the industrial action.

## Termination of Employment

Commonwealth employees, employees working in territories or Victoria and those working for incorporated employers will be subject to the federal unfair dismissal system. These employees will not be able to bring unfair dismissal claims under state law although they will still be able to bring claims under state anti-discrimination laws. State unfair contract claims have been abolished for employees covered by WorkChoices.

Employees of businesses with 100 or fewer employees will not be able to bring unfair dismissal claims. They will be able to bring claims alleging termination for a prohibited reason ("unlawful termination"). Where an employee claims termination was unlawful the employer must demonstrate that the termination was not for a prohibited reason.

Prohibited reasons for termination are:

- temporary absence from work because of illness, injury or voluntary emergency management activity or absence during maternity leave or other parental leave;
- trade union membership, non-membership, or participation in trade union activities;
- seeking office or acting as a employee representative;
- filing a complaint, participating in proceedings against an employer or going to an administrative authority;
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin;
- refusing to negotiate about an AWA.

Employees of businesses with more than 100 employees can bring unfair dismissal claims. At this stage related companies are not to be treated as a single corporation. The current exemptions for fixed term and task contracts, casuals etc, will apply and the AIRC will have a greater ability to dismiss claims outside its jurisdiction without requiring the employer to attend.

The current 3 months qualifying period will be extended to 6 months.

Employees who are made redundant will be excluded from the unfair dismissal system.

## Union Right of Entry

Union officials right of entry will be limited in a number of ways, including:

- there will be a "fit and proper person" test which a union official must pass in order to obtain a right of entry permit. Also there will be an increased range of sanctions in relation to the maintenance of permits beyond simply allowing the official to retain the permit or revoke it;
- if all employees are on AWAs, the official will have no right of entry for discussion purposes;
- right of entry to investigate a breach of an AWA will only be able to take place with the consent of a party to the AWA;

- if union officials wish to enter to investigate a suspected breach, they will now need to provide particulars of their suspicion;
- unless the AIRC determines otherwise, union officials will only be able to access records of union members;
- employers will be able to direct union officials as to where meetings or interviews are to be conducted, providing the request is reasonable; and
- union officials will only be able to exercise right of entry powers under OH&S laws if they hold a federal right of entry permit and give 24 hours' notice.

### Transmission of Business

The laws in relation to transmission of business will be clarified and simplified. In a transmission situation,

awards and agreements will only transmit with the business if employees also transfer. Further, those transferring awards and agreements will only apply to transferring employees and only for a maximum period of 12 months. After 12 months, the transferring employees will have their conditions covered by the appropriate award or agreement of their new employer or, if there is no appropriate award or agreement, the AFP&CS.

The laws in relation to the AIRC determining whether an award or agreement should apply to a new employer, at all, will continue.

## Effect of WorkChoice on Awards/Agreements for Incorporated Employers

Award/Agreement Coverage - Current	Effect of New Legislation	Employer entering into new Agreement	Employer doesn't respond
State award (common rule or single enterprise)	Deemed a notional agreement preserving state award <ul style="list-style-type: none"> <li>• terms except those below AFP&amp;CS and <b>prohibited content</b> federally enforceable</li> <li>• 3 year nominal expiry date</li> </ul>	Can be replaced by new federal agreement before expiry date. Notional agreement cannot be varied or extended.	Move to most appropriate federal award after expiry date of notional agreement. AIRC to determine appropriate federal award coverage.
State agreement (eg NSW enterprise agreement)	Deemed a preserved state agreement <ul style="list-style-type: none"> <li>• terms except <b>prohibited content</b> federally enforceable</li> <li>• retain nominal expiry date</li> </ul>	Existing preserved state agreement cannot be varied or extended. Can be replaced by new federal agreement before expiry date subject to AFP&CS.	Continue in effect until replaced or terminated.
Federal award	Continues to apply. 4 allowable matters (jury service; superannuation; notice of termination and long service leave) not able to be put into new awards or varied. <ul style="list-style-type: none"> <li>• superannuation continues until 30/06/08 only</li> <li>• wages set by AFPC</li> <li>• annual, personal carers, parental, long service leave, notice of termination, superannuation (until 30/06/08) removed unless more generous than AFP&amp;CS</li> </ul>	May enter collective or individual agreement subject to AFP&CS <ul style="list-style-type: none"> <li>• some award conditions (ie rest breaks, incentive-based payments/bonuses, annual leave loadings, public holidays, allowances, overtime and shiftwork loadings and penalty rates) continue to apply unless explicitly excluded by agreement</li> <li>• agreement lodged with OEA</li> <li>• agreement commences when lodged</li> </ul>	Award continues to apply

Award/Agreement Coverage - Current	Effect of New Legislation	Employer entering into new Agreement	Employer doesn't respond
Federal agreement (Div 2 or 3 Certified Agreement; AWA)	Continues to apply and retains current nominal expiry date. Current terms apply.	May enter new collective or individual agreement, subject to AFP&CS to over-ride pre-reform certified agreements. May enter new AWA, subject to AFP&CS to over-ride pre-reform AWA <ul style="list-style-type: none"> <li>• some award conditions continue to apply unless explicitly excluded by agreement</li> <li>• agreement lodged with OEA</li> <li>• agreement commences when lodged</li> </ul>	Agreement continues to apply after nominal expiry date unless replaced or terminated <ul style="list-style-type: none"> <li>• relevant conditions subject to AFP&amp;CS minimum</li> </ul>
Award free	AFP&CS applies to employment conditions. May seek federal award coverage.	May enter agreement subject to AFP&CS <ul style="list-style-type: none"> <li>• agreement lodged with OEA</li> <li>• agreement commences when lodged</li> </ul>	Contract of employment continues to apply <ul style="list-style-type: none"> <li>• state and federal legislation continue to apply</li> </ul>

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