

## Why WorkChoices

### Why WorkChoices?

WorkChoices is the nation's comprehensive new industrial relations legislation.

Work Choices builds and expands on the ideals of the *Workplace Relations Act 1996* (the Act) with a strong emphasis on agreement making at both a workplace and individual level.

Work Choices uses the Corporations Power to create a single, national industrial relations system for all constitutional corporations.

The underlying objective of WorkChoices is to give greater freedom and flexibility to employers and employees to negotiate at the workplace level via the spread of agreement making options – whether collective or individual.

### Why the Australian Workplace relations system needed a change

- The old system involved a complex State and Federal system with an Award and legislation structure that varied from State-to-State comprising 130 pieces of legislation and 4000 different Awards.
- By creating a uniform system much of the legislation can be replaced and award rationalisation will take place.
- The old system meant that employers could have employees covered by both the State and Federal system.
- Agreement making under the old system was more regulated and complex.
- Decisions on annual wage increases under the old system were adversarial and did not adequately take into account the needs of the unemployed.
- The old system included an unfair dismissal process that hampered a businesses ability to employ people – particularly in smaller businesses do not have ready access to Human Resources professionals.
- The old system focused on protecting conditions for Award based employees only whereas the new system sets minimum standards for all employees covered by the Act.
- The old system did not have Right of Entry provisions that balanced the rights of employers with the rights of trade unions and employees.

### What are the Objects of the Act?

The Workplace Relations Act sets out its 'objects'. In summary the important aspects of the objects include:

- High employment and improved living standards
- A simplified national system of workplace relations
- Economically sustainable minimum wages
- Enabling the workplace to be responsible for the employment relationship
- Enabling employers and employees to determine the best agreement for their circumstances
- Ensuring compliance with minimum standards
- Ensuring that awards provide minimum safety net entitlements
- Assisting employees to balance their work and family responsibilities effectively through the development of mutually beneficial work practices with employers

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## The New Structure

Australian Fair Pay Commission (AFPC)

- Responsible for wage-setting

Office of the Employment Advocate (OEA)

- Responsible for Agreement Making

Australian Industrial Relations Commission (AIRC)

- Reduced responsibility
- Responsible for unlawful terminations, unfair dismissals, alternative dispute resolution (unless otherwise agreed at the workplace), industrial disputes and award maintenance (including rationalisation and simplification)

Australian Fair Pay and Conditions Standard (Standard)

- Guarantees key minimum entitlements that will apply to all employees covered by the Act

## WorkChoices Will

- Establish the AFPC to determine wages rather than the AIRC performing this task.
- Enshrine a set of key minimum entitlements for employees to be known as the Standard.
- Simplify current awards by removing non-allowable matters.
- Rationalise current hospitality awards as part of the award rationalisation process. This process may result in a single, national hospitality award.
- Alter unfair the dismissal laws.
- Remove compulsory arbitration and give employers a choice as to how disputes are settled.
- Alter the laws regarding union 'right of entry'.

## Constitutional Framework

The Government has placed a greater reliance on the corporations power in the Constitution to extend the scope and coverage of the Act.

As a result, the provisions of the Act will now cover all constitutional corporations.

The effect of this is that more employers and their employees will now be covered by the federal system than was the case before the reforms to the Act commenced operation.

Most employers that are incorporated would fit within the definition of 'constitutional corporation'.

However, if employers are unsure as to whether or not they are covered by the provisions of the Act after the commencement of the reforms, it is prudent that they seek appropriate advice to ensure that they comply with the obligations set out in the Act, some of which are highlighted in this material.

## Which employers are in the new system?

### Who are in?

All constitutional corporations are included in the new system. A constitutional corporation is a body incorporated under the Corporations Law and that may be classified as either a trading or financial corporation (ie a company).

Constitutional corporations include:

- o foreign corporations;
- o bodies corporate that are incorporated in a Territory; and
- o bodies that are prescribed as bodies corporate under legislation.

Associations and other bodies which have been incorporated under State legislation are corporations; however, whether they are constitutional corporations will depend on whether they may be classified as either trading or financial corporations.

To be classified as a trading or financial corporation, the incorporated body's trading or financial activities must be 'significant' or 'substantial', rather than merely peripheral or incidental. Incorporated bodies carrying out commercial activities with a view to earning revenue will be trading corporations.

### Who are out?

All non-incorporated businesses will remain in their respective state systems - this includes, other than in Victoria, trusts, partnerships, sole traders, State government employees.

### Why take advantage of reforms?

The Agreement making structure is the most user friendly system in Australia – the States have a more regulated Agreement making process.

The Agreement making structure allows the business to find flexibilities and efficiencies that may not be available in the State system.

The exemption of businesses with 100 or less employees from unfair dismissal laws and the extension to the qualifying period from 3 to 6 months.

Workplaces can implement its own dispute resolution process without the need to involve the AIRC.

Those employers who wish to operate under an Award structure will be covered by simplified and consolidated Awards – once the award rationalisation and simplification processes have been completed. This process may create a number of industry based Awards.

Unions must specify reasons for entry to workplace and the employer can, acting reasonably, determine the most appropriate place for union discussions to take place.

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## The new award system

### Awards

All federal awards to be further simplified and rationalised – the timing and scope of the rationalisation process will be outlined in a report by the Award Review Taskforce.

There may be more than one Award rationalisation process.

Each Award rationalisation process must be completed within three years of the process being initiated by the Minister.

The AIRC no longer has the power to create new Awards – other than Awards that will be created as part of the rationalisation process.

Those employers previously covered by a State Award who transfer into the federal system will have the State Award conditions transferred from the State jurisdiction and be covered by a notional agreement preserving State awards in the federal system.

These notional agreements will operate until March 2009.

The Standard will apply to all Award bound employees – however where a preserved award term concerning annual leave, personal leave or parental leave in an Award is more generous than the corresponding entitlement in the Standard, the preserved award term will apply.

An Award has no effect while a workplace agreement operates at a workplace or in relation to an individual employee.

### What is the new face of Awards?

Awards may only contain a reduced list of allowable award matters (as prescribed in the Act).

The allowable award matters are:

- Ordinary time hours of work
- Incentive-based payments and bonuses
- Annual leave loadings
- Ceremonial leave
- Leave for the purpose of seeking other employment
- Observance of gazetted Public Holidays
- Substituting gazetted Public Holidays
- Monetary allowances
- Loadings for working overtime or for shift work
- Penalty rates
- Redundancy pay
- Stand-down provisions
- Dispute settling procedures
- Types of employment
- Conditions for outworkers

In addition, Awards may include terms that are incidental to an allowable award matter and essential for the purpose of making a particular term operate in a practical way.

Further, an Award may include machinery provisions that may relate to the commencement of the Award, definitions, title, arrangement and the term of the Award.

Awards will not contain wages (including casual loadings) or classifications – these matters will now form a component of the Standard and be administered by the AFPC.

An Award may include preserved award terms. Preserved award terms are:

- Annual leave
- Personal/carer's leave
- Parental leave, including maternity and adoption leave
- Long service leave
- Notice of termination
- Jury service
- Superannuation

The preserved award terms that relate to annual leave, personal/carer's leave and parental leave will only have a practical application if an employee's entitlement under the preserved award term is more generous than the corresponding entitlement in the Standard.

- For example, if the quantum of an employee's entitlement to annual leave under a preserved award term that applies to the employee is six weeks per year of service, then that entitlement is more generous than the corresponding annual leave entitlement in the Standard (four weeks) and, therefore, the employee's annual leave entitlement under the preserved award term will apply.

A preserved award term about superannuation ceases to have effect at the end of 30 June 2008.

Preserved award terms in relation to long service leave, notice of termination, jury service and superannuation will continue to apply to an employee covered by an Award that contains one or more of these preserved award terms.

The Act also sets out a range of matters that cannot be contained in Awards. These include: union representation, union picnic day, casual conversion. These matters will be removed from Awards as part of the simplification and rationalisation processes although they are no longer enforceable once the reforms commenced.

Essentially it is hoped that by making these changes there will be less Awards and the remaining Awards will be shorter, simpler and more relevant.

## What happens to State Awards?

State Awards will transfer into the new system as Notional Agreements Preserving State Awards (NAPSA).

The NAPSA will apply for a 3 year transitional period (ie, until March 2009). During this time the NAPSA is enforceable under the Act (not the State industrial laws) and the terms of the NAPSA may be varied in limited circumstances.

A NAPSA will comprise terms and conditions of employment of one or more employees in a business that were contained in an applicable State Award or a State or Territory law.

The terms and conditions of employment contained in a NAPSA operate between the relevant employer and its employees at each workplace. The intention is that the NAPSA will operate like a collective agreement between a single business employer and its employee or employees.

A NAPSA will not come into operation at a particular workplace if any term or condition of an employee's employment with the employer was regulated by a State employment agreement entered into between the employer and one or more of its employees under the applicable State industrial legislation.

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A NAPSA may include 'preserved notional terms'. Preserved notional terms are:

- o Annual leave
- o Personal/carer's leave
- o Parental leave, including maternity and adoption leave
- o Long service leave
- o Notice of termination
- o Jury service
- o Superannuation

The preserved notional terms that relate to annual leave, personal/carer's leave and parental leave will only have a practical application if an employee's entitlement under the preserved notional term is more generous than the corresponding entitlement in the Standard.

A preserved notional term about superannuation ceases to have effect at the end of 30 June 2008.

Preserved notional terms in relation to long service leave, notice of termination, jury service and superannuation will continue to apply to an employee covered by a NAPSA that contains one or more of these preserved notional terms.

A person who has a preserved notional entitlement retains that entitlement if that person becomes bound by a federal Award, including a rationalised federal Award. This could occur after the NAPSA ceases to operate.

The maximum ordinary hours of work provisions in the Standard do not apply to an employee's employment while the employee is bound by an operational NAPSA.

A term of a NAPSA is prohibited content, and therefore void, to the extent that it prevents the employer bound by the NAPSA from making an AWA or to the extent that it restricts the range or duration of training arrangements.

The model dispute resolution clause in the Act is included in a NAPSA in place of the State Award clause.

The NAPSA will cease to operate in relation to an employee if an employee becomes bound by an Award or a workplace agreement (individual/collective) comes into operation in relation to the employee.

## Award Review Taskforce

The Government has established the Award Review Taskforce (the Taskforce). The Taskforce will provide recommendations:

- o to the AFPC concerning wages and classification structures; and
- o for the rationalisation of the federal Award system

Currently in Australia there are over 45,000 wage and classification structures contained in 4053 Awards in operation - 2251 federal Awards and 1802 State Awards. In the hospitality sector alone there are 30 federal Awards - 11 that apply to restaurateurs and caterers.

Wages will not be reduced as part of the Award rationalisation process.

Within 3 years the AFPC must remove all State-based differences from classifications and wages.

## Award Rationalisation

One of the functions of the AIRC is to undertake award rationalisation.

Award rationalisation is to be carried out in accordance with an award rationalisation request made in writing to the President of the AIRC by the Minister for Employment and Workplace Relations.

There may be more than one Award rationalisation process and each Award rationalisation process must be completed no later than 3 years after the making of the request by the Minister.

The Award rationalisation process will be undertaken by one or more Full Benches of the AIRC.

As a result of the WorkChoices reforms, the AIRC loses its ability to make new Awards other than any new Awards that are made to give effect to the outcome of an Award rationalisation process. The AIRC may also vary current Awards to give effect to the outcomes of an Award rationalisation process.

### Award Simplification

The AIRC must review all Awards for the purpose of determining whether the Awards include terms that may not be included in an Award under the terms of the Act.

After reviewing an Award, the AIRC must make an order varying the Award to an extent (if any) necessary to ensure that the Award includes only terms that may be included under the terms of the Act.

The Award simplification process may take place at the same time as the Award rationalisation process.

## Australian Fair Pay and Conditions Standard

The Standard has been introduced and will eventually apply to all employees in the national system.

The Standard will not apply to employees who are covered by Certified Agreements or AWAs that were certified or approved under the terms of the pre-reform Act until these agreements are either terminated or replaced.

This document is a summary of the Standard to inform members of the important aspects. It is important to note that this document is intended as a summary only and we recommend members refer to the Act for full details of the Standard.

The Standard guarantees conditions of employment covering the following:

- Maximum ordinary hours of work
- Annual Leave
- Personal Leave
- Parental Leave
- Minimum Wages

### How do I determine minimum conditions?

The Standard prevails over Award conditions unless an Award contains a 'preserved award term' to annual leave, personal leave or parental leave that is more generous than the corresponding entitlement in the Standard, in which case the more generous preserved award term will apply.

The Standard does not apply to employees covered by a Certified Agreement or an AWA made under the post-reform provisions of the Act until such time as that agreement ceases to operate. The Standard also prevails over a contract of employment to the extent to which the Standard provides a more favourable outcome for an employee to whom the Standard applies.

The Standard does not need to be included in a post-reform workplace agreement, but it is nonetheless binding on an employer bound by that agreement.

The Standard will override the terms and conditions of employment in existing and future contracts of employment that provide terms and conditions of the employment that are less favourable than the entitlements in the Standard.

A term of a post-reform workplace agreement or a contract of employment has no effect to the extent to which it attempts to exclude the Standard, or any part of it.

### The Standard – Summary of Maximum Hours of Work

Maximum hours of work applies to all employees, including casuals, permanent, salaried and managerial (except that those Awards with a 40 hour week will retain this as the maximum hours of work for a transitional period of 3 years up to March 2009).

An employee must not be required to work more than 38 hours per week. An employee can also be required to work reasonable additional hours. An employee and his or her employer might agree in writing that the employee's hours of work are to be averaged over a specified averaging period that is no longer than 12 months with the employee to then work an average of 38 hours per week over the specified averaging period.

Hours worked includes any hours of authorised leave (whether paid or unpaid).

The following matters, and any other relevant factors, need to be taken into account in determining whether hours worked in excess of 38 hours per week are reasonable additional hours:

- Risks to employees' health and safety that might reasonably be expected to arise by working the additional hours
- Employees' personal circumstances – including family responsibilities
- Workplace operational requirements
- Notice by employer of need to work additional hours or notice given by employee of intention to refuse to work additional hours
- Whether the additional hours are on a public holiday
- The hours worked by employees' in the 4 week period immediately prior to the intended additional hours

## The Standard – Summary of Annual Leave

Applies to all employees other than casuals.

Annual leave is guaranteed at 152 hours (4 weeks) per annum based on a 38 hour week and will be pro-rated for part-time employees.

Persons working more than 38 hours per week will not be entitled to accrue more than 152 hours leave per annum.

Annual leave is cumulative and accrues on a pro-rata basis.

Annual leave that has accrued must be credited to an employee each month.

An employee may agree to cash out a maximum of two weeks' annual leave in a 12 month period, but only in accordance with applicable terms in a workplace agreement. An employee may not be forced by his or her employer to agree to the cashing out of any amount of annual leave.

Annual leave payments must not be less than an employee's basic periodic rate of pay, prior to the leave beginning. Payment of any further amounts to the employee will be subject to the terms of any applicable workplace agreement (or, for that matter, Award provision if the preserved award term in relation to annual leave applies as a result of the application of the more generous test).

### Annual Leave Rules

The employer must not unreasonably refuse to authorise annual leave.

Authorisation by an employer may be subject to operational requirements of the workplace.

An employee must take annual leave during shut downs.

An employee may be directed to take up to a quarter of their accrued annual leave if they have accumulated more than 1/13 of the nominal hours worked in 104 weeks (in other words, a full-time employee may be directed to take 2 weeks leave if they have an accrued entitlement of 8 weeks).

### Additional Leave for Shift Workers

For each completed 12 month period of continuous service a shift worker will be entitled to accrue a further amount of paid annual leave of 1/52 of the nominal hours worked as a shift worker during the 12 month period (in other words, a shift worker would be entitled to an additional 1 weeks' annual leave).

A shift worker is defined as an employee who:

- is employed in a business in which shifts are continuously rostered 24 hours a day for 7 days a week; and
- is regularly rostered to work those shifts; and
- regularly works on Sundays and public holidays

Nominal hours are:

- 38 hours a week for a full time employee
- Specified hours for a part time employee – if no specified hours the lesser of 38 hours or their average hours

## The Standard – Summary of Personal Leave

Applies to all employees other than casuals (except unpaid carer's leave).

Personal leave includes sick leave and carer's leave.

Personal leave is cumulative and accrues on the basis of 1/26 of the nominal hours worked in each 4 week period.

An employee whose nominal hours worked each week over a 12 month period are 38 hours would be entitled to accrue 76 hours paid personal/carers leave (which would amount to 10 days of paid personal/carers leave for that employee) over the 12 month period.

Persons working more than 38 hours per week will not be entitled to accrue more than 76 hours leave per annum.

Personal leave must be credited to the employee each month.

Personal leave payments are equal to what the employee would reasonably have expected to be paid if they had worked that period.

Personal leave is not paid while an employee is on Workers' Compensation.

Carer's leave is to provide care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because of a personal illness or injury or an unexpected emergency.

Immediate family includes a spouse, child, parent, grandparent, grandchild or sibling of the employee or a child, parent, grandparent, grandchild or sibling of a spouse of the employee.

Carer's leave may only be taken for 1/26 of the nominal hours worked in each 12 month period (10 days per year for full-time employees) although the employee may have a greater amount of personal leave accrued.

Unpaid carer's leave of 2 days for each occasion is available to casual employees and employees who have exhausted their accrued personal leave or exceeded the cap on paid carer's leave.

Unpaid carer's leave can be taken as a single unbroken period of 2 days or as separate periods if agreed between the employee and employer.

Authorised personal leave – whether paid or unpaid - does not break an employee's continuity of service. Further, paid personal leave counts as service for all relevant purposes whereas a period of unpaid carer's leave may not count as service except in certain circumstances.

### Notice and Evidence

In order to be entitled to personal/carer's leave, an employee must comply with the notice and evidence requirements in the Act.

Notice of absence due to personal/carer's leave must be given to the employer as soon as reasonably practical.

An employer may require evidence for any period of sick leave.

Evidence for sick leave is a medical certificate from a registered health practitioner, if it reasonably practicable to do so, otherwise a statutory declaration.

Evidence for carer's leave for personal illness or injury is a medical certificate or a statutory declaration and a statutory declaration for an unexpected emergency.

A registered health practitioner extends beyond traditional medical doctors to practitioners that are registered by the relevant State or Territory health authority, however, the medical certificate must relate to the registered health professional's field of expertise.

The provisions concerning notice and evidence do not apply to an employee who could not comply because of circumstances beyond the employee's control.

### Compassionate Leave

An employee is entitled to 2 days paid compassionate leave on each occasion that a member of the employee's immediate family or household contracts or develops a personal illness or sustains an injury that poses a serious threat to their life, or dies.

Compassionate leave is not paid out of personal leave entitlement and is available for each permissible occasion and is unlimited.

Compassionate leave can be taken as a single unbroken period of 2 days, 2 separate periods of 1 day each or any separate periods if agreed between the employee and the employer.

Compassionate leave is subject to the employee providing any evidence that the employer reasonably requires of the illness, injury or death.

## The Standard – Summary of Parental Leave

Applies to all employees, other than casual employees who are not eligible casual employees.

Parental leave includes maternity leave, paternity leave and adoption leave.

Applies to employees with more than 12 months service.

The maximum entitlement is 52 weeks of unpaid parental leave less an amount equal to the total amount of related authorised leave taken by the employee before or after the parental leave and by the employee's spouse before, during or after the parental leave.

In order to qualify for maternity leave the employee must give her employer a medical certificate stating that she is pregnant and the expected date of birth no later than 10 weeks before the expected date of birth (unless unreasonable because of a premature birth or other compelling reason).

The employee must also give the employer a written application for maternity leave stating the first and last days of the period no later than 4 weeks before the day of the intended period of leave (unless unreasonable because of a premature birth or other compelling reason).

The employee may start her period of leave at anytime within six weeks before the expected date of birth of the child and the period must include at least 6 weeks leave after the date of birth of the child.

There are separate notice requirement if an employee seeks to take a period of paternity leave or adoption leave.

Casuals will be entitled to parental leave in circumstances where they have been employed for a period of 12 months on a regular and systematic basis and, but for the expected birth, would have a reasonable expectation of continuing to be employed on that basis.

An employee who is a casual will also be entitled to parental leave if they were employed on a regular and systematic basis for less than 12 months and:

- o Ceased employment at the employer's initiative;
- o The employer later engaged them on a regular and systematic basis less than three months after first ceasing;
- o The combined length of the two periods of employment is at least 12 months; and
- o They had a reasonable expectation, but for the expected birth, that they would continue to be employed on that basis.

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## Australian Fair Pay Commission

### Who will change the Minimum Conditions?

The Australian Fair Pay Commission (AFPC) has been established to set and adjust rates of pay of employees and determine and adjust casual loadings. In doing so, the AFPC has taken over one of the main functions previously performed by the AIRC.

The AFPC will consist of a Chairperson and 4 Commissioners.

The AFPC is independent of the Government and will adopt a consultative process and will seek industry-wide views and perform its own research rather than adopting the adversarial approach previously taken by interested parties before the AIRC.

### How does the process differ from the previous system?

The role of the AFPC is to set and adjust:

- The Federal Minimum Wage (FMW) – currently at \$12.75 an hour;
- The basic periodic rates of pay;
- The special FMW for juniors, employees with disabilities and employees to whom training arrangements apply (including school-based apprentices);
- The basic piece rates of pay for piece workers; and
- Casual loadings – currently the default casual loading is 20%.

Although the AFPC has authority to set and adjust wages, the Act guarantees that an employee cannot be paid less than the basic periodic rate of pay that applied on reform commencement.

The AFPC has the power to determine the timing, scope and frequency of wage reviews and it is hoped that this method will better align wage rates with growth in the economy.

### AFPC to monitor and evaluate the impact of its decisions.

The AFPC will be made up of representatives of various industry bodies including an academic (Ian Harper), former union leader (Hugh Armstrong), businessman (Mike O'Hagen), economist (Judith Sloan) and former Mission Australia CEO (Patrick McClure).

The AFPC must publish its wage setting decisions in a manner to be determined by the AFPC.

The Act provides that the AFPC Chair must have a high level of skill and have experience in business or economics.

The Chair is appointed for up to 5 years and Commissioners are appointed for up to 4 years on a part time basis.

When performing its wage-setting function, the AFPC may inform itself in any way it thinks appropriate, including undertaking or commissioning research, consulting with any other person, body or organisation and monitoring and evaluating the impact of its wage-setting decisions.

As part of this, the AFPC may consult with those persons and organisations who have traditionally appeared before the AIRC in previous Safety Net Review hearings.

The emphasis of this process will be on consultation rather than the adversarial approach that was previously conducted before the AIRC.

## Agreement Making

### Types of Agreements

- Australian Workplace Agreement
- Employee Collective Agreement (non union)
- Union Collective Agreement
- Union Greenfields Agreement
- Employer Greenfields Agreement
- Multi-business Agreement

### What can an Agreement contain?

Agreements entered into after reform commencement must comply or provide for the following:

- The Standard
- Nominal Expiry Date (maximum of 5 years)
- Dispute Settlement Procedure
- Protected Award Conditions
- Incorporation of terms from other instruments

An Agreement must not contain prohibited content.

### Why would I make an Agreement?

An Agreement allows a business to determine the most suitable conditions for the workplace rather than have their employment conditions determined by the Australian Industrial Relations Commission and the Australian Fair Pay Commission.

An Agreement can be used to deliver the business increased efficiency via changes to the Award penalty rate structure. When making an Agreement the business can determine the penalty rate structure that best suits the business. If the business decides that it does not require penalty rates to attract and retain labour it can agree with its employees not to include penalty rates in an Agreement.

An Agreement can be used to deliver the business increased flexibility via changes to the regulated Award rostering and working hours requirements. The Award structure contains a regulated rostering and working hours structure that can make it difficult to meet the operational needs of the business and to employ permanent employees. These structures can be revised as part of the Agreement making process so the business can ensure it can employ flexible permanent or casual employees.

An Agreement can simplify Award conditions making it easier to manage and roster employees. One of the difficulties of the Award system is that it mandates an employment structure that is complex – thereby making it difficult to educate management. In simplifying employment conditions, a properly drafted Agreement can be utilized by the business as a management educational tool.

In entering an Agreement a business can determine its own conditions of employment – thereby allowing the business to use the process to attract and retain good people – whether in a city or in regional areas.

An Agreement can run for a period of 5 years, thereby resulting in certain wage and employment conditions during this 5 year period. This provides a business and employees cost and condition certainty.

### How do I make an Agreement?

- Prepare Agreement and ensure it complies with the legislation
- Provide Staff with Access to Agreement & Information Statement (7 Days before Agreement approved)
- Approval of Agreement – depending on type of agreement, either via employer and employee signature or a majority vote or majority approval
- Lodgement with OEA within 14 days of the agreement being approved
- Agreement Becomes Operational on lodgement with the OEA
- The OEA will issue a Receipt of Lodgement
- If the Agreement is a collective agreement, the employer must provide copy of the receipt to employees within 21 days

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## What happens to existing Agreements?

An Agreement approved or certified under the previous regime continues to operate until terminated or replaced. These agreements are known as pre-reform certified agreements or pre-reform AWAs.

The Standard does not apply while these pre-reform agreements are in operation.

In order to end a pre-reform Agreement it must be properly terminated in accordance with the applicable terms of the Act and once it ceases to be operational, it may never be used or operate again.

The prohibited content provisions of the Act apply in relation to any anti-AWA term found in a pre-reform certified agreement. From the commencement of the reforms, any anti-AWA term in a pre-reform certified agreement is unenforceable.

A pre-reform certified agreement cannot be varied except to remove ambiguities, or objectionable or discriminatory provisions.

On certification or approval a pre-reform Agreement contained a nominal expiry date. All Agreements (whether pre-reform or post-reform) continue in operation after this nominal expiry date until replaced or terminated.

## Agreements - employee process

Employees must be provided with:

- ready access to a copy of the agreement; and
- an information statement
- at least 7 days before the agreement is to be approved

The information statement must include:

- the time and the manner in which approval will be sought;
- Information about bargaining agents;
- Other information required by the Employment Advocate

If using provisions from another document (award/agreement), that document must also be provided.

An employee may, in writing, waive their right to access a copy of the agreement.

## Agreement - Approval Process

Once made, an agreement, plus a statutory declaration, must be lodged with the Employment Advocate within 14 days of both parties approving the Agreement.

Upon lodgement of a collective agreement, a receipt will be issued and the employer must provide a copy of the receipt to employees covered by the agreement within 21 days.

An employer must not lodge an agreement that is not approved.

Agreements become operational on the day they are lodged with the Employment Advocate.

An AWA is *approved* when it is signed and dated by the employee and the employer (both these signatures need to be witnessed). If the employee is under 18 a parent or guardian needs to sign the AWA.

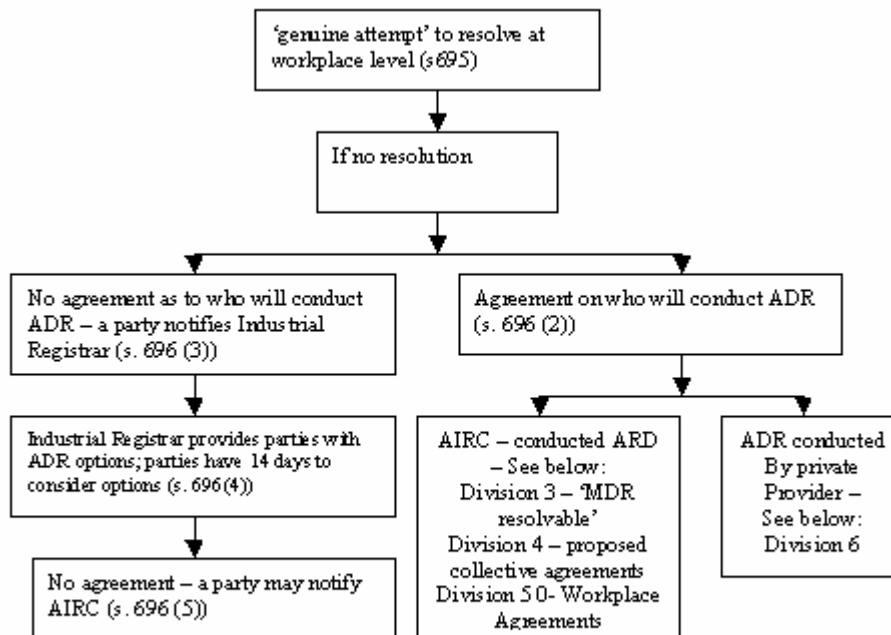
A collective agreement is *approved* when a majority of employees covered by the agreement validly cast votes or otherwise indicate their approval of the agreement.

## What is the Situation in My State

## What happens if I have a problem?

### How will Commission handle a dispute?

The Act contains the following model Dispute Resolution (ADR) Procedure:



The object of the procedure is to encourage employees and employers to resolve disputes at the workplace level.

The procedure allows parties to choose their preferred mediator instead of relying on the AIRC to conciliate or hear all unresolved workplace disputes.

In a change from most Awards, the procedure requires employees to continue to work during dispute process unless imminent safety concerns.

An attempt must be made to resolve disputes at the workplace level first, if the parties are unable to resolve the dispute, they may apply to the Commission (or appointed mediator) to resolve it. An employee cannot bypass the workplace and apply straight to the AIRC for resolution of the alleged dispute.

The AIRC has the power to arrange conferences and must do so expeditiously and in private.

The Commission does not have the power to compel a person to do anything and no longer has the automatic power to arbitrate the resolution of a dispute.

## Unfair Dismissal and Unlawful Termination

The reforms significantly alter the workings of the unfair dismissal principles.

Employees of businesses with 100 or less employees will not be able to claim unfair dismissal. Employees of businesses with more than 100 employees will not be able to claim unfair dismissal if they are dismissed within the first 6 months of their employment. The Act has a provision designed to prevent businesses restructuring into employment companies of 100 or less employees so to avail themselves of the new unfair dismissal laws.

Importantly the 100 employee head count is based on the amount of full time, part time and long-term regular casual employees employed at the time of the termination. It also includes the employee whose employment has been terminated.

There is an important distinction between 'unfair dismissal' and 'unlawful termination' and a person who is dismissed for an unlawful reason can still pursue the matter – whether they are in their probation period or qualifying period or in a business of 100 or less employees.

Unlawful termination occurs when an employer terminates an employee for a prohibited reason – these are set out in the Act and include but are not limited to:

- Temporary absence due to illness, injury or due to voluntary emergency work
- Union membership (or non-union membership)
- For discriminatory reasons
- Refusing to make or terminate an AWA
- Absence due to parental leave

The following types of employees are excluded from pursuing an unfair dismissal claim:

- Seasonal Employees
- Employees in their Qualifying Period of Employment – Increased from 3 to 6 months
- Employees terminated for genuine Operational Reasons which may include a genuine redundancy
- Employed in a business with 100 or less employees
- Employees whose 'remuneration' exceeds \$94,900 per annum (this amount is indexed) and who are not employed under award-derived conditions

## Remedies for unfair dismissal

The reforms also change the approach that will be used by the AIRC in dealing with unfair dismissal claims. Under the reforms the AIRC will be able to determine certain matters 'on the papers' rather than conducting a hearing. Examples of matters that can be determined 'on the papers' include: frivolous claims, jurisdictional objections and extension of time applications.

The reforms also add the following criteria that must be considered by the AIRC when awarding compensation or reinstatement:

- If ordering reinstatement, the amount of money earned or ought to have been earned by the employee between the termination and reinstatement
- Compensation must be reduced if the employee's conduct contributed to the dismissal
- Compensation cannot include remedies for hurt or humiliation allegedly resulting from the termination

## Compliance

### What is the compliance regime?

WorkChoices will see the expansion of the Office of Workplace Services (OWS). The Department of Employment and Workplace Relations will also have workplace inspectors.

Workplace inspectors will be able to seek compliance with:

- Workplace agreements
- Awards
- Australian Fair Pay and Conditions Standard
- Minimum entitlements of employees to meal breaks, public holidays and equal remuneration for work of equal value
- The Act and regulations generally

With the advent of WorkChoices the number of workplace inspectors has been increased from 90 to 200. Although the OWS will advise employees and employers, the new structure and resources will lead to broader protection to employees across Australia.

An inspector is entitled to enter a workplace, without force, to inspect employment records.

Inspectors have broad powers to interview any person and determine the existence and whereabouts of documents.

Inspectors will also be required to assist with education and advice on workplace matters – to both employees and employers.

### New Payslip requirements

The new regulations sees a change in the information that must be contained on all employees' Payslips.

In summary, the following information now needs to be contained:

- The name of the employer and employee
- The classification of the employee under each instrument
- The date to which the payment relates
- The period to which the payslip relates
- Where the employee is paid by the hour, the ordinary hourly rate, number of hours and the amount paid at that rate
- If not by an hourly rate – that rate as at the latest date to which the payment relates is expressed as an hourly rate
- The gross amount of the payment
- The net amount of the payment
- Any amount paid that is an incentive based payment, bonus, loading, monetary allowance, penalty rates or other separately identifiable entitlements
- The detail of the amount deducted from the gross amount including the name of the fund or account into which the deduction was paid
- The amount of each superannuation contribution and the name of the fund to which the contribution was made

## What employee records do I need?

The new regulations provide for some changes to the records that employers are required to keep and maintain.

In summary the new requirements include:

- Subject to certain conditions, records must be kept for seven years
- Records must be in a condition that allows a workplace inspector to determine entitlements
- Records must be in a legible form in the English language
- Records must include:
  - (i) The name of the employer and employee
  - (ii) The date of birth of the employee
  - (iii) The name of each instrument under which the employee derives entitlements
  - (iv) The classification of the employee
  - (v) Whether the employee is full time or part time
  - (vi) Specification of the number of hours to be worked per week
  - (vii) Whether the employee's employment is permanent, temporary or casual
  - (viii) The date upon which the employee's employment began
- Records must show the employee's start and finishing time, number of hours worked and the employee's nominal hours
- If the employer and employee agree to an averaging of the employee's hours of work, the employer must keep a copy of that agreement
- There are financial penalties that may be imposed for failing to comply with the requirements to maintain employee records.
- It is important to note that an order imposing a penalty cannot be sought until the end of six months after the new regulations commence (ie, until after 26 September 2006).
- In other words, there is a six month grace period for employers before they are required to comply with the new employee records regulations.
- A penalty will only be imposed for a breach of the new employee record regulations that occurs after this six month grace period.

### **STOP PRESS STOP PRESS STOP PRESS STOP**

The Government has announced a change to the new Regulations. Employers will now only be required to keep hours records relating to:

- the total number of hours worked by an employee where the employee earns an annual salary of less than \$55,000 (this amount will be indexed); and
- daily start and finish times where overtime is payable to the employee under an industrial instrument (e.g. an AWA) or a common law contract.

**STOP PRESS STOP PRESS STOP PRESS STOP**

## What Else?

### Transmission of Business

Transmission of business occurs when an existing business is sold to a new proprietor.

Under WorkChoices the government has strived to protect employee entitlements in the circumstance of a transmission. If an employee does not take a position with the new business they will be entitled to have all their accrued entitlements paid out.

Under WorkChoices, if an existing employee transmits to the new business the employment instrument (award or agreement) they were employed under at the time of the transmission will continue to apply to them.

An employee is considered a transferring employee if they are employed by the new business within two months of transmission

The binding industrial instrument of the transferring employee remains the applicable instrument with the new employer unless:

- The employee ceases to be employed by the new employer; or
- The nature of employment changes so that the instrument may no longer apply; or
- The Transmission Period ends (12 months commencing at the *Time of Transmission*)

A new employer remains bound to a transmitted agreement (individual/collective) until either:

- The agreement is mutually terminated;
- There cease to be any transferring employees;
- The transmission period ends; or
- The new employer makes an agreement with the transferring employee/s (no need to wait until the nominal expiry date of the transmitted instrument)

Transmitted workplace agreements and Award conditions will have a maximum life of 12 months in the new business before the instrument that covers the remainder of the workforce in the new business is applied to the transmitting employees (if no Award or Agreement then the Standard applies). If the new employer has an existing collective agreement, the transmitted collective agreement continues to apply until the above circumstances occur although only transferring employees are subject to the transmitted collective agreement.

The employer may continue to be bound by the award if they are a respondent as set out in the award - only those transferring employees are bound to the award and any existing agreements of the new employer do not apply.

The new employer must within 28 days supply a written notice to a transmitting employee that:

- Identifies the transmitted instrument; and
- States that the employer is bound by the instrument; and
- Specifies the date the transmission period ends; and
- States that the employer will remain bound by the transmitted instrument until the transmission period ends or the transmitted instrument is terminated or otherwise ceases to be in operation before the end of the transmission period; and
- Specifies the kinds of instruments that can replace it; and
- Identifies any provisions of the Standard; or any other source for terms and conditions of employment that the new employer intends to be the source for terms and conditions that will apply when the transmitted instrument ceases to apply; and
- Identifies any collective agreement or award that binds the employer and employees of the employer who are not transferring employees and that would bind the transferring employees but for the transmission provisions (employees to receive a copy).

A copy of the notice must be lodged with the OEA within 14 days of the notice being supplied to the transferring employee.

## Union Right of Entry

Unions may enter the workplace to investigate a suspected breach for an award, an agreement or the Act or to hold discussions with employees during authorised breaks.

Entry rights are subject to the official holding valid entry permit and providing 24 hours notice to the occupier of workplace.

The official must have reasonable grounds for suspecting that a breach has occurred or is occurring in respect of the Act, a workplace agreement or an Award.

The permit holder may only enter premises to investigate a suspected breach:

- During working hours;
- If the work is being carried out by one or more employees who are members of the permit holder's union; and
- If the suspected breach relates to or affects that work or any of those employees

A permit holder may only enter premises to hold discussions with employees who wish to participate in those discussions where any employee at the premises carries out work that is covered by an Award or collective agreement that is binding on the permit holder's union and is a member of the permit holder's union or is eligible to become a member of that union.

Employers may specify a place on the premises where discussions/ interviews are to be held and may also specify a particular route to reach such place – provided directions are reasonable.

The grounds upon which entry permits may be revoked, suspended or made subject to conditions have been increased.

## Employing Overseas Workers

The option to employ overseas workers is often available in restaurant and catering businesses.

If a business chooses to do so they must meet the regular industrial requirements of the workplace (ie the overseas worker will be employed on the normal conditions of employment).

In addition the worker must hold a working visa and must meet the visa requirements, including the following likely requirements:

- To ensure Health Care is covered – as insurance by the worker;
- To ensure that costs of return travel are covered;
- Prescribed gross wages (if stated, in R&CA Labour Agreement, \$35,000 for Cooks and Chefs)

## Apprenticeships and Trainees

State and Territory governments will continue to administer vocational training and therefore retain responsibility for administering training contracts between the apprentice or trainee, the employer and the training provider.

Awards and agreements cannot restrict the range and duration of apprenticeships.

Students commencing 'school based apprenticeships' under the Act have a wage set for them if their Award is silent on the subject

The Australian Fair Pay Commission will adjust the minimum rates for trainees and apprentices.

## Moving forward ...

### What should you do now?

Read the Manual provided to gain a better understanding of the reforms to the Act.

If you require any further information please contact us.

Ensure that you are meeting the Australian Fair Pay and Conditions Standard.

If you are covered by an Award, establish which Award conditions no longer apply and which provisions are replaced by the Standard.

Ensure that you are aware of the new payslip and employee record requirements.

Consider the efficiencies, flexibilities, productivity and certainty available via a workplace agreement.

### What Your Employees Will Want to Know

Many people are still not aware of the changes and how they will impact on their working lives – for this reason it is important that you inform your employees regarding these changes and how they will affect their work.

You should notify your staff of the changes to the regulatory environment for their workplace. In doing so you should assure your employees that their conditions do not fundamentally differ as a result of the reforms.

### The future?

Award rationalisation may lead to fewer awards with less prescriptive requirements.

There may be less reliance on Awards due to the gains available under agreement making.

Businesses may continue to adopt agreements and will become more adept at implementing them.