



WorkChoices

The New National Workplace Relations System

The remainder of the *Workplace Relations Amendment (WorkChoices) Act 2005* (Cth) which substantially amends the *Workplace Relations Act 1996* (Cth) ("the Act") took effect on 27 March 2006, together with the new *Workplace Relations Regulations 2006* (Cth) ("the Regulations").

Employers should now ensure that they are in full compliance with the Act and the Regulations, and in particular immediately should:

- ensure that the terms and conditions of their existing employment contracts comply with the Australian Fair Pay and Conditions Standard and other minimum entitlements set out in the Act;
- ensure that new offers of employment are compliant with the Act; and
- consider the transitional provisions of the Act and the effect upon their employees and the business. The transitional arrangements differ depending on whether or not an employer is a constitutional corporation and whether the employer was subject to state or federal regulation as at 27 March 2006.

The major details of the Act and the Regulations are outlined below.

The National System

The Act uses the corporations and trade and commerce powers in the Australian Constitution to directly establish legislated minimum wages and conditions at a national level.

Employees who are covered by the Act are no longer subject to state employment laws. However, other aspects of the employment relationship still remain regulated by the states such as occupational health and safety, workers' compensation, trading hours, anti-discrimination and long service leave.

Employees who are not covered by the Act will remain covered by their respective state systems.

Australian Fair Pay Commission

The Act establishes an independent wage setting body known as the Australian Fair Pay Commission. The responsibilities of the Australian Fair Pay Commission are to set and adjust:

- the standard federal minimum wage;
- special federal minimum wages for junior employees, employees with disabilities or employees to whom trading arrangements apply;
- basic periodic rates of pay and basic piece rates of pay payable to employees of a particular classification; and
- casual loading.

Wages are not allowed to fall below the level set by the Australian Fair Pay Commission and the 2005 National Wage Case.

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Australian Fair Pay and Conditions Standard

The Act introduces a new minimum standard of entitlements for employees called the Australian Fair Pay and Conditions Standard, consisting of:

- Wages as set by the Australian Fair Pay Commission.
- Maximum ordinary hours of work of 38 hours per week, which can be averaged over a period of 12 months. Employees will be paid at least at the relevant minimum hourly wage and any loadings or penalty rates applicable in Awards and Agreements. An employer can require an employee to work reasonable additional hours.
- Annual leave at a rate of four weeks paid per year, with an additional week allowed for certain types of shift workers. Up to two weeks annual leave can be 'cashed out' if the ability to do so is provided for in an Agreement pursuant to the Act and the employee freely exercises the option to do so.
- Personal/carer's leave (including sick leave) at a rate of ten days paid per annum which is cumulative. A further two days unpaid leave per occasion will be allowed for an unexpected emergency for employees who have exhausted their personal/carer's leave entitlement or are employed on a casual basis. A further two days compassionate leave will be allowed for reasons such as visiting a sick or dying relative or attending a funeral.
- Parental Leave, including maternity leave, at a rate of up to 52 weeks of unpaid leave at the time of the birth or adoption of a child.

Where Awards and Agreements provide for more generous entitlements than the Australian Fair Pay and Conditions Standard, the more generous provisions are preserved and continue to apply.

Employers should ensure that their existing contracts of employment are compliant with the terms of the Australian Fair Pay and Condition Standard. Any new offers of employment must take into account these changes.

Additional Minimum Entitlements of Employees

The Act also includes additional minimum entitlements of employees with respect to:

- public holidays, unless the employer asks the employee to work and they have no reasonable grounds for refusing; and
- meal breaks – an employer must not require an employee to work for more than five hours continuously without an unpaid interval of at least 30 minutes for a meal.

Awards

The Act aims to encourage the making of Agreements as opposed to the ratification of new Awards. Consequently, over the transitional period, Awards will be simplified and reduced dramatically.

An Award Review Task Force has been set up by the Federal Government which will recommend an approach on how to rationalise and simplify Awards.

The Act reduces allowable Award matters to a number of key safety net entitlements, namely:

- ordinary time hours of work and the time within which they are performed, rest breaks, notice periods and variations to working hours;

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- incentive-based payments and bonuses;
 - annual leave loadings;
 - ceremonial leave;
 - leave for the purpose of seeking other employment after the giving of a notice of termination by an employer to an employee;
 - public holidays;
 - days to be substituted for, or a procedure for substituting public holidays;
 - monetary allowances;
 - loadings for working overtime or for shift work;
 - penalty rates;
 - redundancy pay for employers with 15 or more employees;
 - stand-down provisions;
 - dispute settling procedures;
 - type of employment such as full-time employment, casual employment, regular part-time employment and shift work; and
 - conditions for outworkers, but only to the extent necessary to ensure that their overall conditions of employment are fair and reasonable in comparison with the conditions of employment specified in a relevant award or awards for employees who perform the same kind of work at an employer's business or commercial premises.
- rights of an organisation of employers or employees to participate in, or represent an employer or employee in, the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer's or employee's choice;
 - conversion from casual employment to another type of employment;
 - the number or proportion of employees that an employer may employ in a particular type of employment;
 - prohibitions on an employer employing employees in a particular type of employment;
 - the maximum or minimum hours of work for regular part-time employees;
 - restrictions on the range or duration of training arrangements;
 - restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
 - restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;
 - union picnic days;
 - tallies in the meat industry;
 - dispute resolution training leave; and
 - trade union training leave.

Matters that are not allowable award matters ceased to have effect in Awards on 27 March 2006 and will not be included in Awards following the Award rationalisation process. Non-allowable matters are:

The Australian Industrial Relations Commission has retained certain of its previous powers to vary, set aside or revoke Awards, however, it will only be able to make new awards as part of the Award rationalisation process.

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Certain Award entitlements are also preserved by the Act. The preserved Award entitlements of long service leave, notice of termination, jury service and superannuation (until 30 July 2008 only) will continue to apply to employees covered by Awards and will be included in new Awards following the rationalisation process but may not be varied.

A further three preserved award entitlements of annual leave, personal/carers' leave and parental leave continue to apply where they are more generous than the Australian Fair Pay and Conditions Standard.

Agreements

A major focus of the Act is Agreements, that is, simplifying the process to allow employers and employees to enter into agreements at the workplace. There are six types of agreements that may be entered into:

- Employee Collective Agreements - Agreements negotiated between a group of employees in the workplace and an employer.
- Union Collective Agreements - Agreements negotiated between employers and unions that represent employees in the workplace.
- Australian Workplace Agreements - Agreements between individual employees and their employer.
- Union Greenfields Agreements - Agreements negotiated for new businesses, new projects and new undertakings, which do not yet have employees. The Agreements are negotiated between the new employer and the union and will cover future employees of the business.
- Employer Greenfields Agreements - these Agreements have the same characteristics as Union Greenfields Agreements with the exception that the employer makes the Agreement without negotiation with a union.

- Multiple Business Agreements - These are either employee or union collective Agreements. Multiple Business Agreements are used where there are a number of businesses carrying on the same type of business that wish to offer their employees the same working conditions - for example, franchisee operations.

All Agreements will be lodged with the Office of the Employment Advocate and must include a nominal expiry date and a dispute resolution clause. Employees have seven days to consider a proposed Agreement and information statement from the Office of the Employment Advocate. Agreements must then be lodged within 14 days of being made by the employer, with a declaration by the employer attesting that the Agreement was negotiated in compliance with the law. Employers must meet the procedural requirements for Agreement making otherwise penalties or civil remedies may apply.

All Agreements (except for the Employer Greenfields Agreement) can be made for a term of up to five years. The Employer Greenfields Agreement can be made for a period of only 12 months. Where an Agreement (except for the Employer Greenfields Agreement) is for a period of less than five years, it can be extended by Agreement for up to five years. After an Agreement's nominal expiry date, as expressed in the Agreement, any party can terminate the Agreement with 90 days written notice lodged with the Office of the Employment Advocate. If an Agreement is terminated and not replaced, the Australian Fair Pay and Conditions Standard will apply and the Award will no longer be the safety net.

The Act also protects certain Award conditions for Award covered employees when new Agreements are negotiated.

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Protected Award conditions will only be able to be modified or removed by specific provisions in new Agreements. If these Award conditions are not specifically referred to in new Agreements, the Award conditions continue to apply. Such conditions deal with:

- rest breaks;
- incentive-based payments and bonuses;
- annual leave loadings;
- public holidays;
- monetary allowances;
- overtime and shift work loadings; and
- penalty rates.

The Regulations prescribe matters that are prohibited from being included in new Agreements:

- deductions from pay or wages of an employee bound by the agreement of trade union membership subscriptions or dues;
- provision of payroll deduction facilities for the subscriptions or dues for trade union membership;
- trade union training leave;
- paid leave to attend meetings conducted by or made up of trade union members;
- renegotiation of an Agreement;
- rights of an organisation of employers or employees to participate in or represent an employer or employee bound by the Agreement in the whole or part of a dispute settling procedure, unless the organisation is the representative of the employer or employee's choice;
- right of entry provisions;

- restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
- restrictions on the engagement of labour hire workers;
- forgoing of annual leave other than in accordance with the Act;
- provision of information about employees bound by the Agreement to a trade union or its representative, unless that information is required or authorised by law;
- terms that discourage or encourage union membership;
- to the extent that it permits a person bound by the Agreement to engage in or organise industrial action;
- terms dealing with disclosure of details of Agreements;
- terms providing for remedies for unfair dismissal (excluding disciplinary process for performance or misconduct);
- terms to the extent that it directly or indirectly restricts the ability of a person bound by the Agreement to offer, negotiate or enter into an Australian Workplace Agreement;
- to the extent it contains content that discriminates against an employee who is bound by the Agreement; and
- matters that do not pertain to the employment relationship.

Prohibited content in Agreements is unenforceable and there are penalties of up to \$33,000 if an Agreement includes or is lodged with prohibited content.

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The Act includes a model dispute settling procedure clause for employers and employees to use in an Agreement for the resolution of disputes. The procedure contains a staged approach commencing with workplace level discussions and proceeding through to alternative dispute resolution if the matter remains unresolved. The parties can choose between referring a matter to a private alternative dispute resolution provider or to the Australian Industrial Relations Commission for mediation, conciliation or assisted negotiation.

Industrial Action

The Australian Industrial Relations Commission will continue to supervise protected industrial action under the Act:

- The Act requires that the Australian Industrial Relations Commission hear and determine an application within 48 hours of an application being filed. If it is unable to determine the application in that time, it will be required to issue an interim order, unless it is contrary to the public interest.
- Employers have immediate access to the court system where tortious conduct such as trespass or interference with contractual relations has occurred during unprotected industrial action.
- Secret ballots are required before protected action can be taken by employees. The Australian Industrial Relations Commission may issue a secret ballot order after it is satisfied that the employee or the union are genuinely trying to reach agreement with the employer and that no pattern bargaining is taking place. To approve the industrial action, at least 50% of eligible employees need to vote and of them, more than 50% need to vote in favour of the proposed industrial action.

- Any industrial action by employees or employers is prohibited during the life of a collective agreement or Australian Workplace Agreement. Enforcement is by way of civil penalties of up to \$33,000 and injunctions.
- The Act provides that bargaining periods will be suspended or terminated if pattern bargaining is taking place or if third parties are threatened with significant harm.
- Any industrial action by employees or employers is prohibited during the life of a Collective Agreement or Australian Workplace Agreement. Enforcement is by way of civil penalties of up to \$33,000 and injunctions.
- The Minister for Employment and Workplace Relations may issue a declaration to terminate a bargaining period where protected industrial action threatens personal safety, health or welfare of the population, or is likely to cause significant damage to the economy. A Workplace Determination can then be made by the Australian Industrial Relations Commission.
- Civil penalties and injunctions may be enforced where damaging industrial action being taken by state system participants has a substantial adverse affect on employers and employees who are covered by the Act.

Freedom of Association

Freedom of Association laws continue to ensure that an employer cannot dismiss or otherwise victimise an employee because he or she is or is not a member of a union.

General prohibitions in relation to freedom of association are that it is unlawful to coerce a person to become or not become or remain or cease to be a member or officer of an association, it is unlawful to make false and/or misleading statements about membership of associations, and it is unlawful to take industrial action because another person is or is not a member of a registered association.

Right of Entry

Union right of entry to workplaces to investigate a suspected breach of the Act and hold discussions with employees remains.

However, there are changes that:

- Tighten the requirements for the granting of an entry permit, including introducing a fit and proper person test.
- Make it clear that there is not right of entry for discussion purposes where all employees are on Australian Workplace Agreements.
- Only allow entry to investigate a breach of an Australian Workplace Agreement if the employee party to the Australian Workplace Agreement provides written consent.
- Require a union official to provide particulars to an employer of a breach that he or she is proposing to enter the employers premises to investigate.
- A union official can only access the records of union members when investigating a breach unless an order is made by the Australian Industrial Relations Commission that non-member records can be inspected.

The revocation or suspension by the Australian Industrial Relations Commission of union entry permits are mandatory in cases where a permit holder has:

- Been found by the Australian Industrial Relations Commission to have breached the prohibition on making misrepresentations about his or her powers under their right of entry permit.
- Had their right of entry under state law cancelled, suspended or has been disqualified from exercising or applying for right of entry under a state law.
- Been ordered to pay a penalty in respect of contravention of the right of entry provisions.
- When exercising a right of entry under occupational health and safety law, engaged in conduct that was not authorised by that law.
- The right of entry provisions still allow a union permit holder entry for occupational health and safety purposes under state legislation where the union official has a Federal Right of Entry Permit and the official has complied with all requirements of the relevant state occupational health and safety legislation in relation to entry to premises.

Transmission of Business

Where a business or part of a business transmits to a new employer and no employee accepts employment with the new employer, awards or agreements do not transfer to the new employer.

Where an employee accepts employment with the new employer, industrial instruments will transmit to new employers but only for those employees transferred from the former business and only for a maximum period of 12 months. The parties can negotiate new agreements at any time.

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Termination of Employment

The Act exempts businesses from unfair dismissal laws if they have up to and including 100 employees. For businesses with over 100 employees, employees covered must be employed for six months before they can pursue an unfair dismissal claim.

The Act "covers the field" in relation to unfair dismissal and unlawful termination. State laws that provide a remedy for termination of employment are overridden, including state unfair contracts jurisdictions.

Applications where employment is terminated on the grounds of operational requirements, or grounds that include that ground, are excluded from the unfair dismissal regime.

Employees employed on a seasonal basis (as opposed to casual basis) are excluded from the unfair dismissal laws.

The onus of proof for a claim of constructive dismissal in the unfair dismissal jurisdiction is reversed so that the argument for constructive dismissal must be made out by the employee.

Transitional Agreements

The Government has put in place comprehensive transitional arrangements for state Awards and Agreements and federal Awards and Agreements which should be considered carefully by employers.

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