

Agreement making under *WorkChoices*

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The *WorkChoices* reforms to the *Workplace Relations Act 1996* have necessitated many changes at a workplace level to ensure legislative compliance. Ongoing experience in helping clients manage these changes indicates that there is still substantial confusion about the effect of *WorkChoices* on workplace instruments. In this article we focus on the effect of *WorkChoices* on constitutional corporations; that is, trading or financial corporations formed within Australia or foreign corporations.¹

Pre-*WorkChoices* arrangements

Contract

For employees whose employment is not covered by an award, agreement or other industrial instrument, the only changes to their employment conditions relate to ensuring compliance within the new minimum standards. Referred to as the “Australian Fair Pay and Conditions Standard”, it sets minimum standards for wages, hours of work, leave and other breaks. A common change that needs to be made to contracts concerns the quantity of sick leave available to the employee, which now accrues monthly at 10 days per year.

Awards

Under *WorkChoices* all federal and state awards applying to employees of constitutional corporations are combined into the one national system.

Federal awards

Employees covered by a federal award continue to be covered by that award, now known as a “pre-reform award”. However, only “allowable” award matters and “preserved terms” continue to have effect.

Allowable award matters include:

- ordinary time hours of work and the time within which they are performed, rest breaks, notice periods and variations to working hours
- 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
- penalty rates
- redundancy pay (except for small businesses)
- stand-down provisions
- type of employment, such as full-time employment, casual employment, regular part-time employment and shift work
- conditions for outworkers
- an employer to an employee

¹ The effect of *WorkChoices* on Commonwealth, Victorian, waterside, maritime and flight crew employees and those in the Territories and Cocos (Keeling) Islands is not considered in this article.

- overtime and shift work loadings
- public holidays; and
- monetary allowances

Non-allowable award matters are no longer enforceable and include (non-exhaustive):

- conversion from casual employment to another type of employment
- union picnic days
- restrictions on the engagement of independent contractors.

Preserved terms in awards:

These are terms that are not allowable award matters, but are retained if they are more generous than those specified under *WorkChoices*. These terms cannot be varied, except by entering into a new workplace agreement. They include:

- annual, personal, parental and long service leave
- jury service
- superannuation
- notice of termination

State awards

Employers who are constitutional corporations and whose employees were covered by a state award are now covered by an instrument called a “NAPSA” – a Notional Agreement Preserving State Awards.² Apart from terms relating to wages, a NAPSA includes the terms of the original state award. The content that is disallowed in NAPSAs is known as “*prohibited content*”. These terms are no longer enforceable and must be removed. Prohibited content in relation to NAPSAs includes:

- terms preventing the making of an Australian Workplace Agreement (AWA); and
- terms restricting the range or duration of training or apprenticeship arrangements.

NAPSAs expire on 27 March 2009 unless they are replaced earlier by a new workplace agreement.

Agreements

Federal agreements

Employees covered by a Federal Certified Agreement continue to be covered by that agreement. Terms preventing the making of an AWA are classed as “prohibited content” and will have no effect.

Employees previously covered by an AWA continue to be covered by that AWA. The AWA cannot be varied and will continue to apply until it is terminated or replaced by another AWA.

State agreements

Employees covered by a State Enterprise Agreement are now covered by a “Preserved State Agreement” (PSA). This agreement cannot be varied, but will continue until it is replaced by a workplace agreement or terminated. Anti-AWA terms are also prohibited content and will have no

² With the exception of most organisation-specific awards which become PSAs by virtue of the NSW Government’s amendments to the *Industrial Relations Act 1996*

effect. Preserved entitlements continue to apply. These entitlements include provisions that were required under state and territory law and which cover the same subject matter as the preserved award terms mentioned above.

Options under *WorkChoices* – Types of Workplace Agreements

AWAs

An AWA is formed with individual employees, which lends greater flexibility to the terms of the agreement. It is also beneficial for employers who wish to bypass union involvement in the negotiation of terms, as it gives the employer the ability to negotiate most terms directly with the employee. This also means that accepting the AWA can be a condition for new employees, like an individual contract.

Collective Agreements

A collective agreement can be made either with a union or directly with employees. In the latter case, a majority of employees is needed to approve the agreement. There is flexibility and most terms can be negotiated.

A possible disadvantage is that it may encourage employees to involve their union, which may slow the process down if relations with the union are poor. Collective agreements are most suitable when there is a relatively homogenous workforce.

Greenfields Agreements

A Greenfields Agreement can be made where an employer is setting up a new business and has not yet employed staff. These agreements can be made unilaterally or with a union(s).

Individual common law contracts

It may be preferable for employers in smaller or more varied workforces to offer individual employment contracts. These do not need to be lodged with any regulatory body and have the clear advantage of flexibility. The requirement to comply with the Australian Fair Pay and Conditions Standard, in relation to conditions of employment such as hours of work and leave, remains.

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