

The Work Choices Legislation: An Overview

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The Howard Government's "Work Choices" legislation, which came into effect in March 2006, has made substantial changes to the regulation of employment conditions and industrial relations.

The government's reform agenda was originally sketched out by the Prime Minister in an address to Parliament on 26 May 2005 and then outlined in somewhat greater detail in an information booklet released on 9 October. Following an expensive and controversial advertising campaign, the legality of which was unsuccessfully challenged by the ACTU and ALP (see *Combet v Commonwealth* (2005) 80 ALJR 247), the massive but very hastily drafted Workplace Relations Amendment (Work Choices) Bill 2005 was introduced into Parliament on 2 November 2005.

The government used its numbers in the Senate to ensure that a brief and largely token inquiry into the 687-page Bill was held by the Employment, Workplace Relations and Education Committee. Nevertheless, during the course of a severely truncated debate in the upper house the government did introduce 337 of its own amendments, mostly to correct errors or to make minor improvements to expression, but in some instances to respond to specific concerns highlighted during the inquiry. On 14 December 2005 the Bill received royal assent and passed into law.

The Legislation

The *Workplace Relations Amendment (Work Choices) Act* 2005 is not a "stand alone" new statute, but instead substantially rewrites the *Workplace Relations Act* 1996 (the WR Act). Some of its provisions took effect on assent, but the great majority were proclaimed to operate from 27 March 2006, a date variously referred to in what follows as the date of commencement or the date of transition.

On the same day three new sets of regulations commenced operation. The *Workplace Relations Regulations* 2006 (the WR Regs) entirely replace the *Workplace Relations Regulations* 1996 and deal with a great many important issues, both substantive and transitional. The new Regulations run to nearly 300 pages. The much shorter *Workplace Relations (Registration and Accountability of Organisations) Amendment Regulations* 2006 (No 1) make a number of changes to the *Workplace Relations (Registration and*

Accountability of Organisations) Regulations 2003. Finally, the *Workplace Relations Amendment (Work Choices) (Consequential Amendments) Regulations 2006* (No 1) make consequential amendments to 58 different federal Acts or Regulations, together with a number of minor changes to the WR Act itself.

If it seems odd that these last Regulations are amending Acts of Parliament, they are specifically authorised to do so by Clause 2 of Schedule 4 to the Work Choices Act. Indeed there are now provisions in the amended WR Act that effectively allow the government to “modify” specific aspects of the Act by regulation: see eg Schedule 2 cl 5 (a power already exercised by Schedule 8 of the new WR Regs); Schedule 6 cl 108; Schedule 8 cl 55.

One other important effect of the Work Choices amendments is to renumber the WR Act 1996, other than section or clause numbers within Schedules, with effect from the date of commencement. Hence every section number in the main part of the Act has changed, even where the provision in question has been retained — or at least every number after s 4, which is still the main provision on definitions. The Part, Division and Schedule numbers have also been changed, so that for instance we will now have to get used to Part 16 on freedom of association, rather than Part XA, and Schedule 1 on the regulation of unions and employer associations, instead of Schedule 1B.

The Main Changes

As expected, the principal thrust of the Work Choices Act is to individualise employment relations and, as a corollary, to marginalise both trade unions and industrial tribunals. Unlike the New Zealand reforms of 1991, however, the Act has not swept away the previous system of regulation. Some of the traditional elements of the old arbitration system remain, albeit greatly diminished in both scope and significance.

The more important reforms include:

- offering employers greater flexibility in the terms and conditions on which they can employ workers, with workplace agreements to be underpinned by statutory minimum conditions rather than awards;
- reducing the role played by the Australian Industrial Relations Commission (AIRC) in determining employment conditions and resolving industrial disputes;
- making it more difficult for unions to enter workplaces or organise industrial action; and
- reducing the exposure of employers to unfair dismissal claims.

The Work Choices Act also implements the government’s objective of “moving towards” a single, national system of regulation. It does this by expanding the federal system to cover all trading, financial and foreign

corporations, and precluding those employers from being subject to State awards or agreements, or certain other State employment laws.

One thing the amendments have not done is simplify the legislation. The amended WR Act is even longer, more complex and less intelligible than before. All told, the Act and its accompanying regulations now run to over 1700 pages. The legislation teems with new terminology and acronyms, and also features a major new agency in the form of the Australian Fair Pay Commission, to go with the Australian Building and Construction Commission which was separately established by the *Building and Construction Industry Improvement Act 2005* (Cth).

Expansion of the Federal System

The amended WR Act is based primarily on the power to legislate with respect to corporations granted by s 51(20) of the Constitution, rather than the conciliation and arbitration power in s 51(35) that has historically been the foundation of Australia's industrial legislation. Indeed the only part of the Act now underpinned by the arbitration power is Schedule 6, which as described below contains transitional provisions for "excluded employers".

The Commonwealth's expanded use of the corporations power has been challenged by the States in the High Court, along with other aspects of the Work Choices reforms. The Court is scheduled to hear the case in May 2006. Even if this challenge fails it will create a degree of uncertainty as to the operation of the new laws, pending a decision by the Court, which might not be handed down until later in the year or even some way into 2007.

The new federal system covers all "constitutional corporations", which (as defined in s 4(1) of the WR Act) means all trading, financial and foreign corporations within the meaning of s 51(20). As interpreted by the High Court, a "trading corporation" is any company, incorporated association or other corporation that has significant trading activities, which would for instance include universities, local councils and many other not-for-profit bodies: see Creighton & Stewart (C & S), para [4.42].

Many State public sector agencies are also captured by the new system, to the extent that they fall within the definition of a trading corporation. However, their position is complicated by the fact that under the Constitution there are certain limitations on the extent to which the employment arrangements of State instrumentalities can be regulated by the Commonwealth: see C & S, paras [4.51]–[4.55]. The application of the new arrangements to such employers is being questioned as part of the States' constitutional challenge.

Because Victoria has referred its industrial relations powers to the Commonwealth, unincorporated employers in that State are also covered by the federal system, as are all employers in the Territories and all

Commonwealth agencies. These extensions are made possible by the reference power in s 51(37) of the Constitution, the Territories power in s 122, and a variety of other powers (including s 52(2)) in the case of Commonwealth agencies.

The Act also (as prior to the reforms) uses the trade and commerce power in s 51(1) to catch the employment of flight crew officers, maritime employees or waterside workers, at least where they are engaged in connection with interstate or overseas trade or commerce. These workers would normally in any event be employed by trading corporations.

Employers who are *not* covered by the new federal system are those which operate outside Victoria and the Territories and which are unincorporated, such as sole traders, partnerships, non-corporate trustees or State Government departments. Also excluded (again outside Victoria and the Territories) are incorporated entities that do not have sufficient trading or financial activities to be characterised as a constitutional corporation.

The Commonwealth has consistently claimed that these excluded employers employ no more than 15% of the workforce, though without ever revealing the data on which this estimate is based. The Queensland Government, by contrast, has released detailed analysis suggesting that the new federal system will cover no more than 75% of employees nationally, and less than 60% in Queensland, South Australia and Western Australia (Queensland Department of Industrial Relations, *Estimating the Coverage of a New Industrial Relations System*, DIR, Brisbane, 2005).

The Howard Government has asked all the States to refer their legislative powers to the Commonwealth, so that a genuinely national system can be created, but at this stage no other State has indicated its intention to follow Victoria's example. In the absence of any referrals, the coverage of the new federal system may still increase if small businesses can be persuaded to incorporate so as to reap the benefits of more flexible agreement-making and protection from unfair dismissal laws. As against, there is the possibility of the States moving to ensure that public sector workers employed by corporatised agencies are "shielded" from the Work Choices reforms, by transferring them into the direct service of the Crown. New South Wales has already legislated to that effect: see *Public Sector Employment Legislation Amendment Act 2006* (NSW).

Definition of "Employer"

The key provision in the amended WR Act that delineates the coverage of the new federal system is the definition of "employer" in s 6. This in turn affects the definitions of "employee" and "employment" in ss 5 and 7 respectively.

Under s 6, “employer” is defined to mean:

- a constitutional corporation;
- the Commonwealth;
- a Commonwealth authority;
- those who employ flight crew officers, maritime employees or waterside workers in connection with interstate or overseas trade or commerce;
- a body incorporated in a Territory; and
- any other person or entity that carries on an activity (whether of a commercial, governmental or other nature) in a Territory and employs persons in connection with that activity.

This definition is separately extended by Part 21 of the Act (and in particular s 858) to cover all other persons or entities who employ individuals in Victoria, other than in relation to certain types of public sector worker listed in s 5 of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic).

In this overview, the term “federal system employer” is used to refer to employers who fall within these various categories.

What complicates matters, however, is that there are various provisions in the WR Act that continue to apply to *all* employers, either because the provisions in question are supported by the external affairs power in s 51(29) of the Constitution, or simply because they are using the term “employer” (or “employee” or “employment”) in a generic sense.

Instead of finding terminology that would distinguish between the general and more restricted usages of these terms, the drafters have elected to use “employer”, “employee” and “employment” throughout the legislation. (Other, that is, than in Schedules 1 and 10, which *do* the use term “federal system employer”. Section 496 also refers to a “non-federal system employer”.)

According to ss 5–7, the terms “employer”, “employee” and “employment” are to be read in the more restricted sense (ie, as being limited to the types of employer set out above), unless the legislation shows a “contrary intention”. Non-exhaustive lists of provisions in which the terms are to be given their “ordinary” (ie, common law) meaning are set out in cll 2–4 of Schedule 2.

Just to make things even more difficult for the reader, there are separate and more specific provisions in the Act as to the definition of these terms, as they apply to particular parts or divisions: see eg s 636 in relation to the termination of employment provisions in Division 4 of Part 12.

Transitional Arrangements for Federal System Employers: Federal Instruments

For employers who are caught by the new system, and who were subject at the date of transition to federal awards or agreements, those instruments can effectively continue to apply, albeit they are now referred to as “pre-reform” instruments. As explained below, however, certain award provisions have ceased to be enforceable.

Under Schedule 7 of the amended WR Act, pre-reform certified agreements and AWAs continue to operate until terminated (in accordance with the rules applicable under the pre-reform WR Act) or replaced by a workplace agreement under the new system. A new workplace agreement may take effect at any time, even before the pre-reform agreement has reached its nominal expiry date, with the exception that a pre-reform AWA cannot be ousted by a new collective agreement.

Pre-reform certified agreements can be varied to remove ambiguities or discriminatory provisions in accordance with the pre-reform Act, but there is no provision for them to be varied by consent.

Pre-reform agreements are not subject to the new rules on “prohibited content” (discussed separately below), with one exception. This is that any “anti-AWA term” in a certified agreement — that is, a term preventing the employer from making an AWA with an employee bound by the agreement — is void as from the date of transition.

Transitional Arrangements for Federal System Employers: State Instruments and Legislation

For incorporated employers previously covered by one or more State awards or agreements, and/or by certain State legislation, a different and more complicated set of transitional provisions apply by virtue of Schedule 8 of the amended WR Act.

Notional agreements

Where State award conditions applied to a worker or group of workers at the date of transition, and no State-registered agreement applied, the award conditions are deemed to be part of a “notional agreement preserving State awards” (a term some are already abbreviating as a NAPSA). A notional agreement has the force of federal law under Part 3 of Schedule 8. However any “prohibited content” is unenforceable. The only such content prescribed to date is an anti-AWA term, or a term restricting the range or duration of training arrangements (WR Regs Ch 2 reg 8.8).

Also unenforceable, with certain exceptions, will be any provisions that deal with matters covered by the new Australian Fair Pay and Conditions

Standard, which is described in a later section. This means in particular that State award provisions as to basic wage rates and job classifications will not be carried over into notional agreements but will instead, as we will see, take on a separate existence as Australian Pay and Classification Scales or APCs. Finally, all dispute resolution provisions in the former State award will be displaced by the new “model process” set out in Division 2 of Part 13 of the WR Act, also described later on.

In addition to conditions drawn from State awards, notional agreements are deemed to incorporate any “preserved entitlements” enjoyed by workers under State legislation. Such entitlements cover most forms of leave (other than long service leave, to which State legislation can continue to apply), together with any statutory entitlements relating to notice of termination, redundancy pay, shiftwork or overtime loadings, other penalty rates, and rest breaks.

Despite being titled “notional agreements preserving State awards” (a term some are already abbreviating as NAPSAs), such agreements may arise in relation to *all* types of worker who are not covered by a State-registered agreement, including senior managers, to the extent that they enjoyed any of these preserved statutory entitlements at the date of transition. This is so even if the workers concerned have been award-free, or indeed even if they are covered by a federal award.

Notional agreements operate for a transition period of three years (that is, until March 2009), unless replaced by a workplace agreement under the new federal system or by a federal award. They apply to any new employees engaged after the date of transition, provided those employees would otherwise have been covered by the replaced State award or legislation. However they cannot apply at all in relation to any workers covered by a pre-reform federal agreement, at least while that agreement is still in operation (Sch 7 cl 5(1)(d), 19(d)).

While a notional agreement is in effect, no function or power conferred by the original award or legislation may be performed by a State tribunal or authority, though the AIRC may do so instead with the consent of each of the parties to the agreement.

Preserved State agreements

If employees were subject to a State-registered agreement at the date of transition, this is deemed to operate as a “preserved State agreement” under Part 2 of Schedule 8, again with the force of federal law. The agreement is also taken to include any State award conditions or “preserved” statutory entitlements (as listed above) enjoyed by the workers in question at the date of transition, though again any prohibited content is unenforceable, and functions or powers may not be performed by State authorities. The only prohibited content prescribed so far is an anti-AWA term (WR Regs Ch 2

reg 8.8). As with notional agreements, all dispute resolution provisions are replaced by the model process in Division 2 of Part 13 of the Act.

As with a notional agreement, a preserved State agreement will cover any new employee who would have been bound by the original agreement if hired before the date of transition. It may operate indefinitely, unless terminated or replaced. It may be terminated according to the same rules that applied under the pre-reform WR Act to certified agreements (or to AWAs if it is an individual agreement); or it may be replaced at any time by a new workplace agreement. It may not be altered by consent, but may be varied to remove ambiguities, discriminatory provisions or prohibited content.

Transitional Arrangements for Excluded Employers

There are separate transitional arrangements again in Schedule 6 for excluded employers (that is, employers who do not fall within the s 6 definition of “employer” — principally unincorporated employers outside Victoria and the Territories) who are covered by a federal award at the date the reforms commence.

So long as an excluded employer is not also bound by a State-registered agreement, any federal award that covers them will remain binding as a “transitional award” for up to five years (that is, until March 2011). The terms of the award are essentially frozen for that period, except for the removal of non-allowable matters and the periodic adjustment of wage rates by the AIRC. The AIRC also retains a limited role in settling disputes involving such employers, though in adjusting wages it is required to have regard to any principles set by the Fair Pay Commission.

An excluded employer ceases to be bound by a transitional award if they make an agreement under State law, or if they resign from membership of an employer association (so long as that membership was the only reason they were bound by the award). Alternatively, they may apply to the AIRC to be released from the operation of a transitional award, though only if they can show that they have made genuine but unsuccessful attempts to make a State agreement or to settle an industrial dispute.

Failing any of these things, an excluded employer will simply “fall out” of the federal system at the end of the five year transitional period — unless of course they have incorporated in the meantime, so as to bring themselves fully within the new federal regime.

Under Division 2 of Part 2 of Schedule 7, any pre-reform Division 3 certified agreement binding on an excluded employer at the date of transition may also remain in force for up to five years, unless replaced (after its nominal expiry date) by a State agreement, or terminated in accordance with the provisions of the pre-reform WR Act.

Exclusion of State and Territory laws

Under the Work Choices amendments, certain State and Territory employment laws may no longer apply to federal system employers, at least in relation to their employees. At this stage State laws that apply to contractors will not generally be affected, though the Howard Government has indicated that it will be introducing a separate Independent Contractors Act in 2006. This might conceivably allow a worker to be conclusively designated as an independent contractor merely because they agree to be so labelled, which would effectively permit businesses to contract out of most labour regulation (including the bulk of the WR Act) at the stroke of a pen. At the very least, it is expected that restrictions will be imposed on the regulation of contract labour under State law: see Department of Employment and Workplace Relations, *Discussion Paper: Proposals for Legislative Reforms in Independent Contracting and Labour Hire*, DEWR, Canberra, 2005.

Section 16(1) of the amended WR Act declares a general intention to “apply to the exclusion of” any State or Territory industrial law or any instrument made under such a law. This provision takes effect from the date of commencement, though reg 1.2(2) of Chapter 2 of the WR Regs makes it clear that this has no effect on any obligation arising under a State or Territory law in respect of an act or omission prior to that date. Workers whose employment was terminated by what is now a federal system employer prior to the date of commencement will specifically be permitted to bring claims under State law in respect of that termination, if otherwise eligible to do so (reg 1.2(4)); while unfair contracts proceedings (for instance under s 106 of the *Industrial Relations Act* 1996 (NSW)) initiated before that date may likewise be continued (reg 1.2(5)).

A “State or Territory industrial law” is defined in s 4(1) to mean any of the five main State industrial statutes (the *Industrial Relations Acts* in NSW, Queensland, WA and Tasmania, plus the *Fair Work Act* 1994 in SA). The definition also covers any other law that “applies to employment generally” and that has as its “main purpose”, or one of its main purposes, any of the following:

- regulating workplace relations, including industrial matters, industrial disputes and industrial action “within the ordinary meaning of those expressions”;
- providing for the determination of employment conditions, or the making and enforcement of agreements determining such conditions;
- providing for rights or remedies connected with the termination of employment; or

- prohibiting conduct relating to membership or non-membership of an industrial association.

Also excluded under s 16(1) is any other State or Territory law that:

- applies to employment generally and that deals with leave (other than long service leave);
- provides for orders in relation to equal pay;
- provides for the variation or setting aside of unfair employment contracts or arrangements; or
- entitles a union representative to enter premises.

This is supplemented by s 16(4), which declares an intention to exclude any other State or Territory laws prescribed by regulation. To date the only law prescribed for this purpose is the *Contracts Review Act 1980* (NSW), so far as it applies to employment relationships (WR Regs Ch 2 reg 1.4). Clearly though the power may be used in the future to prevent States from finding ways to regulate employment relations through statutes which are constructed so as to fall outside the definition of a “State or Territory industrial law”. (Cf the *Industrial Relations Amendment Act 2006* (NSW), which in authorising the NSW Commission to resolve disputes arising under unregistered agreements would seem fairly clearly to be excluded by s 16(1) from applying to federal system employers, on the basis that it is concerned with regulating workplace relations. By contrast, the advisory services established under the *Workplace Rights Advocate Act 2005* (Vic) would seem to fall outside the scope of s 16(1) as it presently stands.)

Returning to s 16(1), a law “applies to employment generally” by virtue of s 4(1) when it is applicable (subject to any constitutional limitations) to all employers and employees in the State or Territory, or to all except certain groups. It does not matter that the law also applies to persons other than employers and employees. Laws applicable only to the public sector, or in a particular industry such as construction, would not be laws that apply to employment generally and hence would not (at least for the most part) be caught by s 16(1).

There are also a number of more specific exceptions. Section 16(2) disclaims any intention to exclude laws dealing with discrimination or the promotion of equal employment opportunity (except to the extent that those laws are, or are contained in, State or Territory industrial laws), or any laws dealing with “non-excluded matters”. By virtue of s 16(3) the following are declared to be non-excluded matters for this purpose:

- superannuation;
- workers compensation;
- occupational health and safety (including rights of entry for OHS-related purposes);
- outworkers (again including rights of entry);

- child labour;
- long service leave;
- observance of public holidays (but not rates of payment for holiday work);
- payment of wages;
- industrial action affecting essential services;
- jury service; and
- regulation of industrial associations and their members.

The list of non-excluded laws can be extended by regulation, though to date this has only been done for certain Queensland provisions that protect whistleblowers from being victimised or that relate to the election of workplace health and safety representatives (WR Regs Ch 2 reg 1.3).

While State or Territory laws on these various non-excluded matters are not automatically overridden, s 18 makes it clear that inconsistency may still arise (within the meaning of s 109 of the Constitution) by virtue of other sections of the WR Act. Thus it is possible, for instance, for employers to make workplace agreements that exclude or reduce entitlements that would otherwise arise under State or Territory laws, on matters such as long service leave or severance pay. This is confirmed by s 17(1), which states that a federal award or workplace agreement prevails over a State or Territory law, State award or State employment agreement to the extent of any inconsistency.

The only exception to this is that, just as with the pre-reform WR Act, federal awards or workplace agreements are taken to “operate subject to” State or Territory laws on occupational health or safety, workers compensation or training arrangements (s 17(2)). To that list reg 1.6 of Chapter 2 of the WR Regs has added State or Territory laws on child labour, discrimination or equal employment opportunity (except discrimination or EEO laws that are contained in a “State or Territory industrial law”). The preservation of laws on training is heavily qualified, however, with State or Territory laws being subject to being overridden by federal awards and agreements on a wide range of matters, including pay, leave, hours of work, types of employment, termination of employment, superannuation, dispute resolution (other than disputes over a training agreement) and indeed any matter capable of being regulated by a federal award (reg 1.5).

Given that the Howard Government has no current plans to take over the fields of workers compensation or health and safety, the continued operation of State and Territory laws in those areas in particular mean that we are still very far from having a “unitary” system of labour regulation, even for incorporated employers.

There must also be considerable uncertainty as to which State laws are or are not excluded by the terms of s 16. For example, can the *Workplace Surveillance Act 2005* (NSW) be regarded as a “State or Territory industrial

law”, on the basis that it is concerned with regulating workplace relations? Can it be said that one of the “main purposes” of State anti-discrimination statutes such as the *Equal Opportunity Act 1984* (SA) is to provide for rights or remedies connected with the termination of employment — even though such statutes plainly have other purposes as well, including the regulation of dealings that are nothing to do with employment? If it can, then such a statute would be precluded by s 16 from applying to federal system employers, since discrimination laws are only excepted where they do not otherwise fall within the definition of a “State or Territory industrial law”.

There will also be awkward issues as to the scope of the “non-excluded matter” exceptions. Section 16(2) saves a law from being overridden by s 16(1) only “so far as” it deals with a non-excluded matter. Workers compensation and OHS statutes typically regulate the termination of employment in various ways, notably where there is some element of “victimisation”: see C & S, para [16.72]. Are those provisions to be regarded as laws on workers compensation or OHS, or are they “really” laws on termination and hence caught by the general exclusion in s 16(1)?

In Victoria, the position is further complicated by s 898 of the amended WR Act. This indicates an intention to exclude Victorian laws relating (among other things) to minimum terms of employment or termination of employment. But its effect is limited by s 859, which prevents any provision in Part 21 from having any effect that goes beyond the 1996 reference of powers to the Commonwealth. That means that s 898 cannot affect matters excluded from the reference under s 5 of the *Commonwealth Powers (Industrial Relations) Act 1996* (Vic), such as workers compensation, health and safety and long service leave.

It is hard to know then quite what Victorian laws might be covered by s 898, over and above those otherwise excluded by s 16. The validity of s 898 is in any event being challenged by Victoria in the High Court, along with other aspects of the Work Choices reforms that are said to go beyond the State’s reference of powers to the Commonwealth.

Workplace Agreements

Under Part 8 of the amended Act, it is now much easier to make, vary and terminate “workplace agreements” (a generic term which now appears throughout the legislation).

Such agreements may either be individual Australian Workplace Agreements (AWAs) or “collective agreements”. Collective agreements, which replace certified agreements in the new system, may be either “union collective agreements” (s 328), “employee collective agreements” (s 327), “multiple-business agreements” (s 331), or “greenfields agreements” (ss 329–330).

The latter can be used for any new business established by an employer and allow an agreement to be made before any employees are actually hired. While such agreements may still be made with a union (a “union greenfields agreement”), it is also now possible to register an “employer greenfields agreement”, which is apparently an agreement between an employer and ... itself! In effect, the employer is allowed in this situation to set terms by unilateral declaration. Importantly, “new business” is broadly defined for this purpose to include any “new business, new project or new undertaking” that an employer is proposing to establish, or any “new activities” for a government agency (s 323).

Employer greenfields “agreements” may have a nominal duration of up to a year, though they will be able to continue past that date unless terminated or replaced. The nominal duration for all other types of workplace agreement, including union greenfields agreements, is up to five years, compared with three years under the pre-reform Act (s 352).

The legislation also confirms, as the courts had already more or less established (see C & S, para [9.13]), that it is not duress for an employer to make an AWA a “condition of engagement” (s 400(6)) — in other words, to refuse to hire a person unless they agree to sign an individual agreement on whatever terms the employer is proposing. It remains to be seen whether this is interpreted to cover situations where a worker transferring to a new employer is required to sign an AWA as a condition of keeping what is effectively their old job (see eg *Schanka v Employment National (Administration) Pty Ltd* (2001) 112 FCR 101, where this was held to be duress).

All types of workplace agreements are now lodged with the Office of the Employment Advocate (OEA), rather than the AIRC. A streamlined process under Divisions 4–6 of Part 8 means that agreements can start operating from the point of their lodgment, and with no need for a formal hearing. Indeed with the exception of multiple-business agreements, which as before are only available if a public interest test is satisfied (s 332, WR Regs Ch 2 reg 8.1), there is no approval process as such. Agreements are able to come into operation even if there has not been strict compliance with the pre-lodgment procedure (s 347(2)).

Employers are, however, required to lodge a declaration confirming that the statutory requirements have been met, including that they have obtained the consent of the individual employee (in the case of an AWA) or a majority of the affected employees (in the case of a collective agreement). Employers who lodge false declarations may be prosecuted and the Federal Court or the Federal Magistrates Court has the power to declare agreements to be invalid where the statutory requirements have not been met (s 409).

Similar procedures apply in relation to the consensual variation or termination of an agreement under Divisions 8 and 9 of Part 8. If an

employer lodges an appropriate declaration, indicating that the employee(s) concerned have given their approval, the variation or termination may take effect — again, even if the proper procedures have not been followed.

There is also a new right of unilateral termination for any party (including a majority of employees in the case of a collective agreement) after an agreement has passed its nominal expiry date. This can be done simply by giving 90 days' notice to the other party or parties, or as little as 14 days notice if the right to terminate has been specified in the agreement itself (ss 392–393). However, this does not apply to pre-reform agreements.

A final point to note about the new workplace agreement provisions is the possibility that they may apply to agreements never intended by the parties to have effect under the statute. At present it is not uncommon — especially after the High Court's decision in *Electrolux* (see *C & S*, paras [8.17]–[8.21]) — for parties to make unregistered or “side” agreements, sometimes expressed in deeds. These have legal effect, if at all, as common law contracts. But on a literal interpretation such a written agreement between a union and an employer might be taken to be a “union collective agreement” within the meaning of s 328. As such it could not have effect unless lodged with the OEA. This, like many other aspects of the legislation, will have to await some kind of test case in the courts.

Content of Workplace Agreements

Despite the government's emphasis upon the ability of parties to “reach an agreement of their choice”, regulations may specify certain subject matter to be “prohibited content” that cannot be included in workplace agreements (s 356). This only applies to agreements made after the date of commencement, not pre-reform agreements.

The list of prohibited content initially specified by reg 8.5 in Chapter 2 of the WR Regs is a lengthy one. It includes:

- any provision relating to the renegotiation of the agreement;
- a term prohibiting or restricting a person bound by the agreement from disclosing details about it;
- a term that directly or indirectly restrict the offering or making of AWAs;
- restrictions or conditions on the use of independent contractors or labour-hire arrangements;
- terms that contravene the freedom of association provisions in Part 16 of the Act, or that encourage or discourage union membership;
- any provision permitting industrial action;
- various union-related entitlements, including deduction of union dues from wages, trade union training leave, paid union

- meetings, mandatory union involvement in dispute resolution, rights of entry for union officials, and the provision of information about employees to unions; and
- any terms that confer a right or remedy in relation to the harsh, unjust or unreasonable termination of an employee's employment.

This last is evidently intended to stop unions from negotiating agreements to restore the right to complain of unfair dismissal that, as will be explained, has been removed by Work Choices in relation to most workers. However the restriction is worded fairly narrowly and might not, for instance, prevent the negotiation of agreements that impose strict procedures that must be followed before any employment can be terminated, or that prohibit dismissal for certain specified reasons. Regulation 8.5(6) confirms in any event that there is no intention to prevent the inclusion of a "process for managing an employee's performance or conduct".

Also prohibited under reg 8.6 is any term that has the effect of discriminating against an employee for reasons such as race, sex, age, disability and so on. Exceptions are made in relation to rates of pay that comply with the minimum standards on wages set elsewhere in the WR Act (so that for instance junior rates of pay could not be attacked on this ground), any discrimination based on the "inherent requirements" of a job, and certain practices at religious institutions.

Regulation 8.7 further specifies that a term of an agreement is prohibited to the extent that it deals with a matter that does not "pertain to the employment relationship", except where the matter in question is "incidental or ancillary" to a matter that *does* pertain, where it is a "machinery matter", or where it is "so trivial that it should be disregarded as insignificant". This effectively means that, as was the case under the pre-reform Act following the High Court's decision in *Electrolux*, there will be many provisions in agreements that might potentially be challenged as "non-pertaining", quite apart from those specifically caught by reg 8.5. While the AIRC has in recent times handed down a number of decisions clarifying what constitutes a matter pertaining, notably in *Re Rural City of Murray Bridge Nursing Employees, ANF (Aged Care) – Enterprise Agreement 2004* (2005) 142 IR 289, there remains considerable scope for judges to disagree both as to the governing principles and their application.

Where a term of an agreement does contain prohibited content, it is void to that extent (s 358). But the remainder of the agreement may continue to operate, unlike the situation under s 170LI of the pre-reform Act where an agreement could be entirely unenforceable if it included a single "non-pertaining" clause.

Financial penalties may be imposed if an employer "recklessly" includes a term in a workplace agreement that turns out to contain prohibited content

(s 357), or indeed if any person (presumably including an adviser to one of the parties) recklessly seeks to have such a term included, or misrepresents a term as not containing prohibited content (ss 365–366). However, employers (though nobody else, it would appear) are able to get written rulings from the OEA as to what is or is not prohibited (s 357(2); WR Regs Ch 2 reg 8.9). While these are not binding on a court, the employer cannot be prosecuted for including prohibited content if they had relied on such a ruling to give them clearance. The OEA is also empowered to vary agreements to remove prohibited content, either on application or on its own initiative (ss 359–364).

In addition to the new rules on prohibited content, there are also restrictions on the extent to which agreements can “call up” (ie, incorporate by reference) content from other instruments (s 355).

Abolition of the No-Disadvantage Test

Previously, certified agreements and AWAs had to satisfy the no-disadvantage test before they were approved, which involved ensuring that the terms of the agreement were at least as generous as a comparator award. Under the new system, that test has been abolished. Accordingly it is now possible for federal system employers to make agreements, either individual or collective, that significantly reduce or eliminate existing award or statutory entitlements.

The only protection for workers is that workplace agreements cannot legally offer less than the minimum entitlements enshrined in the Australian Fair Pay and Conditions Standard (AFPCS), or in a separate standard relating to public holidays. These minimum standards are discussed below.

Under s 354, agreements are also deemed to contain certain “protected conditions” drawn from awards and/or State or Territory legislation. Once again, these are discussed below. But with the exception of certain conditions relating to the engagement of outworkers, this is so only where an agreement does not explicitly state otherwise. Hence most “protected” conditions can readily be modified by agreements, or written out altogether.

In practice then — and this is arguably the central plank in the Work Choices reforms — employers now have the capacity to offer agreements that remove penalty or overtime rates, controls on the scheduling of working hours, long service leave, severance pay and a host of other rights an employee might otherwise have under the provisions of an applicable award or statute.

The Australian Fair Pay and Conditions Standard

Under Part 7 of the amended WR Act, the AFPCS covers wages, ordinary hours of work and three types of leave. It does not merely set benchmarks

for workplace agreements, but for awards and indeed for all employees whose employers fall within the new federal system. This would, for example, include senior managers and other award-free workers. The entitlements in the AFPCS do not, however, apply to workers who are covered by a pre-reform federal agreement or a preserved State agreement (Sch 7 cl 30, Sch 8 cl 15E).

Basic rates of pay and casual loadings (Division 2)

Employees are entitled, as a minimum requirement under the WR Act, to be paid for each hour they work at a basic rate calculated in accordance either with an applicable Australian Pay and Classification Scale (APCS), or a Federal Minimum Wage (FMW).

APCSs are derived from pre-existing award rates. Where at the date of transition a job was covered by a federal or State award (otherwise referred to in the legislation as a “pre-reform wage instrument”), an APCS is created for that position that includes the relevant classification standards for the position and an hourly rate of pay. In limited circumstances, an APCS derived from an award may subsequently be increased in line with a decision of a tribunal made prior to the date of commencement, as where for instance it has been determined that increases based on changes to work value should be phased in over a period of time. In general, however, any subsequent changes to APCSs can only come from decisions of the Fair Pay Commission, as described below. In particular, later decisions by State Commissions to grant safety net wage increases may benefit workers of excluded employers still covered by State awards or State minimum wage orders, but can have no effect on APCSs.

An APCS will also include whatever casual loading may have applied under the relevant pre-reform wage instrument. A workplace agreement may subsequently set a lower casual loading than that contained in the relevant APCS, but not less than 20%. That is also the default loading for non-award employees who are engaged as casuals.

What is described in the Act as the “standard FMW” is initially set at \$12.75 per hour. “Special FMWs” may also be established for juniors, workers with disabilities and trainees.

The establishment of any special FMWs, as well as the subsequent adjustment of the FMWs and all APCSs is the responsibility of a new body, the Australian Fair Pay Commission (AFPC), as established by Part 2 of the amended Act. This consists of a chair and four Commissioners, each of whom have limited-term appointments of up to 5 years in the case of the chair and 4 years for the Commissioners. Professor Ian Harper, an economist, has been appointed as the inaugural chair.

In making decisions on wage levels, the AFPC’s general objective must be to promote “economic prosperity”. While it should continue to provide a

“safety net for the low paid”, it must also consider “the capacity for the unemployed and low paid to obtain and remain in employment”, as well as “employment and competitiveness across the economy” (s 23).

The legislation guarantees that neither basic rates and loadings in APCs, nor the FMWs, can fall below their commencement figures. But there is no assurance that they will rise, or as to how often they will be updated. The general expectation is that any increases in minimum wages awarded by the AFPC will be lower, and perhaps less frequent, than would have been the case under the AIRC’s safety net wage decisions. It is also possible that the AFPC may concentrate on increasing only the FMW, not the APCs, so that over time the FMW will gradually swallow up most of the old award rates and provide a single standard for lower paid workers in the federal system.

A further aspect of the AFPC in relation to wages is that employees must be paid at whatever frequency is stipulated in an applicable agreement, award or contract, but in the absence of such a stipulation at least fortnightly in arrears.

Ordinary hours per week (Division 3)

This is set at a maximum of 38 per week, but that figure may be averaged over an agreed period of up to a year. Employees may also be required or requested to work “reasonable additional hours”, judged according to a range of factors that include both the employee’s personal circumstances (including any family responsibilities) and the employer’s operational needs. There is no requirement that any overtime rates be paid for additional hours, unless this is stipulated in an award or agreement.

Annual leave (Division 4)

The minimum is four weeks’ paid leave per year, though some shiftworkers are entitled to an extra week. Workplace agreements may provide for the cashing out of up to two of those weeks, but only on written request from a worker. Workplace agreements are specifically prohibited from providing for accrued leave to be foregone, other than in accordance with the Act (WR Regs Ch 2 reg 8.5(1)(j)). For the purpose of Division 4, leave is taken to accrue each month and is cumulative. There are also rules as to when an employee can request, or an employer can direct, that leave be taken.

Personal leave (Division 5)

There is an annual entitlement to ten days’ paid sick leave or carer’s leave, plus an extra two days’ unpaid carer’s leave if needed. Carer’s leave may be taken to provide care or support for a member of the employee’s immediate family or household because of some illness, injury or unexpected emergency. To obtain either sick or carer’s leave, the employee must notify

the employer and provide any documentary evidence that the employer may require, in each case as soon as reasonably practicable. The documentary evidence may be a medical certificate from any “registered health practitioner” (provided it is issued in respect of the area of practice for which the practitioner is registered or licensed: WR Regs Ch 2 reg 7.8); or failing that a statutory declaration by the employee. The leave entitlement is taken to accrue every four weeks and is cumulative, though no more than ten days’ paid carer’s leave can be taken over any twelve-month period.

An employer must also provide two days’ paid compassionate leave whenever a family or household member dies or the employee needs to spend time with a seriously ill family or household member. There appears to be no limit as the number of “occasions” on which such leave may be taken.

Parental leave (Division 6)

The core minimum entitlement, as under the pre-reform Act, is up to twelve months’ unpaid leave, although one change is to extend the entitlement to casuals with at least 12 months’ regular and systematic employment. By virtue of Division 6 of Part 12, which in constitutional terms is based on the external affairs power, the minimum standards on parental leave are extended to *all* eligible employees, not just those working for federal system employers.

Relationship Between AFPCS and Other Instruments

As already mentioned, the AFPCS does not apply to workers covered by pre-reform federal agreements or preserved State agreements. But the standards that form part of the AFPCS prevail over anything in a workplace agreement made under the new system, or an employment contract, to the extent that the AFPCS in a “particular respect” provides a “more favourable outcome” for a given employee (s 172(2)).

The reference to a “particular respect” suggests that the comparison is not to be made in global terms. Hence even if, for instance, an agreement provided for additional pay in return for a lower amount of personal leave, the personal leave entitlement under the AFPCS would still apply. Furthermore, it would seem that a line-by-line comparison is potentially needed in relation to each and every aspect of the AFPCS standards.

However this process of comparison is subject to regulations made under s 172(4). Regulation 7.1 in Chapter 2 of the WR Regs sets out a number of situations in which the AFPCS is or is not to be taken to provide a more favourable outcome than an agreement or employment contract, and also identifies what is or is not to be regarded as a “particular respect” for this purpose.

In relation to the guaranteed rate of pay set under Division 2 of Part 7, reg 7.1(3) states that an agreement or contract may validly provide for a period of up to a year within which that guarantee may be satisfied. Hence (as a note to the regulation makes clear) an agreement which involves levels of work that fluctuate according to seasonal factors may be constructed so that the employee receives a set wage throughout the year, even though there may be periods in which the employee is being paid for less hours than they have actually worked. What is not made clear is what happens if the employment is terminated part the way through a period, at a point at which the employee has been underpaid (or for that matter overpaid) relative to the work they have performed.

A further provision that is less than clear suggests that the pay guarantee can be satisfied by a “salary sacrifice arrangement” that involves an “amount” that would be treated as sufficient if paid to the worker (reg 7.1(4)). But it is unclear from this how the value of any non-monetary benefits is to be calculated — or indeed whether it is possible for the “arrangement” to involve no cash payment of any kind.

In relation to leave entitlements, it is made clear that each of the various types of leave specified in Divisions 4 to 6 of Part 7 is to be regarded as a “particular respect”, so that an agreement cannot validly provide less than the required minimum for one type of leave but compensate by offering more of another type (reg 7.1(6)–(8)). The statutory rules for accruing and crediting leave are also stipulated as “particular respects” (reg 7.1(12)).

On the other hand, an agreement is not to be regarded as inferior to one of the leave standards merely because the amount of the leave entitlement is expressed in a different but “equivalent” form (reg 7.1(9)); while it is specifically permitted for agreements to allow workers to take additional periods of annual leave in return for forgoing an equivalent amount of pay, such as eight weeks of leave at half-pay rather than four weeks at full pay (reg 7.1(10)).

As far as awards are concerned, s 516 provides that they may not generally deal with any matter covered by the AFPCS, other than ordinary time hours of work. Similarly, any terms of a notional agreement are generally unenforceable to the extent they deal with AFPCS matters (Sch 8 cl 44). However these general rules are subject to Division 3 of Part 10 and Division 5 of Part 3 of Schedule 8, which (as discussed later on) permit certain federal or State award provisions which were in operation at the date of transition to continue as “preserved” entitlements. In particular, existing terms in awards or notional agreements that contain provisions on annual, personal or parental leave that are more generous than the AFPCS may still apply (ss 529–532, Sch 8 cll 46–49). Once again, there are detailed rules in reg 10.3 of Chapter 2 and reg 3.2 of Chapter 5 of the WR Regs as to what constitute “more generous” entitlements in this context.

Other Minimum Standards: Public Holidays and Meal Breaks

Besides the AFPCS, two other new minimum standards have been introduced.

Under Division 2 of Part 12 of the amended Act, an employee has the “right” to take a day off on public holidays — unless their employer requests them to work and the employee cannot establish “reasonable grounds” for refusing that request. As with the question of “reasonable additional hours”, the legislation lists a range of factors to be taken into account in determining the reasonableness of a refusal. Aside from the employee’s personal circumstances and the employer’s operational needs, it is also relevant to inquire whether there was any expectation that the employee would work on the holiday in question, and how much notice had been given of either the request or the refusal.

The new public holiday provisions would seem to override anything to the contrary in awards or agreements, even if more favourable to the employee. There is also no guaranteed right to payment of penalty rates for public holiday work, though whether the employee is entitled under an award or agreement to any “additional remuneration or other benefits” for performing that work is specifically made a relevant factor in assessing the reasonableness of a refusal.

As with the AFPCS, the new public holiday provisions do not apply to workers who are covered by a pre-reform federal agreement or by a preserved State agreement (Sch 7 cl 30A, Sch 8 cl 15F).

Finally, employees who are not covered by an award or any form of statutory agreement gain a new right under Division 1 of Part 12 to demand an unpaid meal break of at least 30 minutes after every five hours of continuous work.

Awards

By virtue of Part 10 of the WR Act, federal awards continue to provide a minimum safety net for those not covered by workplace agreements, but have had their permissible content further reduced. Matters which have become non-allowable under Division 2 include:

- wage rates for basic hours of work, casual loadings and classification standards — these now form part of APCs, as discussed above;
- annual leave, personal leave and parental leave — also now covered by the AFPCS;
- long service leave;
- union picnic days;
- leave for dispute resolution training or union training;

- restrictions on the range or duration of training arrangements;
- superannuation;
- jury service;
- restrictions on, or conditions for, the engagement of contractors or labour hire workers;
- conversion from casual status to another type of employment;
- notice of termination;
- redundancy pay for businesses with fewer than 15 employees;
- mandatory union involvement in dispute resolution.

Provisions dealing with non-allowable matters have ceased to have effect as from the date of commencement (s 525). The AIRC is now expected to “simplify” all existing awards by removing non-allowable provisions (s 547).

Under Division 3 of Part 10, however, certain provisions in pre-reform awards are preserved, even if they would not otherwise be allowable. Indeed they will continue to have effect even if the awards in which they are contained are subsequently rationalised as part of the process described below. Such “preserved award entitlements” are those relating to annual, personal, parental or long service leave, plus notice of termination, jury service and (but only until 30 June 2008) superannuation. There are similar rules in Division 5 of Part 3 of Schedule 8, creating “preserved notional entitlements” in relation to provisions in notional agreements preserving State awards.

The reason for preserving such conditions is that in many instances existing awards offer entitlements that are in excess of the new statutory standards. Some workers for instance have award entitlements to six weeks’ annual leave, or long service leave in excess of the statutory minimum in each State or Territory. But there is still nothing to stop these preserved conditions being bargained away in workplace agreements.

Now that the reforms have taken effect, the only new awards will be those created as part of a process of “award rationalisation” under Division 4 of Part 10. This is in the first instance the responsibility of an Award Review Taskforce, a non-statutory body headed by O’Callaghan SDP from the AIRC.

The Taskforce has been established by the government to perform two roles. One is to advise the Fair Pay Commission as to the possible rationalisation of the multitude of pay scales and classifications derived from awards and now to be included in APCs. The AFPC is required to have regard to any “relevant recommendations” the Taskforce may make (s 177).

The Taskforce’s other role, although not mentioned in the legislation at all, is to consider how to consolidate the existing range of federal awards, to provide award coverage for employers transferring from the State systems, and to ensure that awards do not operate by reference to State or Territory boundaries. It will make recommendations to the Minister, who may in turn

task the AIRC with implementing whichever of those recommendations are approved, by making an “award rationalisation request”. Any new awards created through this process will be able to apply either to specified parties or to classes of employers or employees. Importantly though, the Minister has complete discretion as to whether to ask for any new award to be made. If no request is forthcoming, the AIRC has no power of its own to create new awards (s 540), even for the many workers transferring from the State systems and whose notional agreements are due to expire in March 2009.

The AIRC now has only a limited power to vary awards. Besides simplifying or rationalising awards, it may act to remove discriminatory provisions or ambiguities, or to make a variation that is “essential to the maintenance of minimum safety net entitlements” (s 553).

The AIRC may also vary an award to make it binding on a particular employer under Division 6 of Part 10. But in the absence of an agreement to be bound between the employer and a majority of its employees, it must be shown that reasonable but unsuccessful efforts have first been made to make a workplace agreement. Furthermore a union can only make such an application if it is acting on behalf of one or more of the relevant employees. In practice then, it will be much harder for unions to make “roping-in” applications; although that will cease to matter if awards are eventually rationalised so as to apply by way of common rule rather than on the basis of responsiveness.

Protected Conditions

Under s 354, certain federal award provisions are deemed to be “protected” (not to be confused with the concept of “preserved” entitlements, as discussed above). These protected conditions are those relating to rest breaks and meal breaks, incentive-based payments and bonuses, annual leave loadings, days to be observed as or instead of public holidays, certain allowances, overtime or shift work loadings, penalty rates and outwork.

Where workers have been subject to a preserved State agreement or a notional agreement under Schedule 8, a similar list of conditions is taken to be protected: see Division 6A of Part 2 and Division 6 of Part 3. Such “protected preserved conditions” or “protected notional conditions” may be drawn either from a State award or from a State or Territory statute that applied to the workers in question.

The main significance of conditions being protected is that, as already explained, they are deemed to be included in a workplace agreement unless explicitly excluded or modified (apart from outworker conditions, which cannot be overridden). They will also be taken to apply where an agreement made under the new system is terminated but not replaced (s 399).

Interaction Between Instruments

Under the amended WR Act, a federal award can have no effect for an employee while a workplace agreement is in operation (s 349). This has previously been the case for AWAs, but is now extended to collective agreements as well.

Indeed, once a workplace agreement under the new system is in place for a given employee or group of employees, they can never again be entirely covered by an award while working for that employer. If an agreement is terminated, any protected conditions will apply, but the balance of any otherwise applicable award will not revive (s 399).

The amended WR Act also makes it clear that an AWA always overrides an otherwise applicable collective agreement (s 348(2)). Hence even where an employer is bound by a collective agreement, they may at any time offer selected workers individual agreements that provide either superior or inferior conditions.

In addition, it is provided that there cannot be more than one workplace agreement applicable to an employee at any given time (s 348(1)). This will end the current practice at some workplaces of having separate agreements on specific issues such as redundancy.

Transmission of Business

Significant changes have been made as to the applicability of an award or agreement when a transmission of business occurs: see Part 11 (which also deals with the effect of transmission on entitlements under the AFPCS) and Schedule 9 (which covers pre-reform federal agreements, preserved State agreements and notional agreements).

While these provisions are lengthy and detailed, their essential thrust is that an award or agreement that was binding on a business (the transmitter) will only bind someone who acquires all or part of that business (the transmittee) to the extent that the transmittee hires employees who previously worked for the transmitter. The old instruments will not apply to any new employees the transmittee may hire; and even in relation to transferring employees the old instruments will cease to have effect after 12 months.

Together with the availability of employer greenfields “agreements”, the new transmission of business provisions may provide opportunities for some employers to escape the operation of awards and agreements merely by restructuring their operations and transferring their existing workers to new entities.

Industrial Action

The Work Choices amendments have added a new Part 9 to the WR Act to regulate industrial action.

Industrial action may only be protected (ie, lawful) if it occurs in a bargaining period and is for the purpose of supporting claims made in respect of a proposed collective agreement, or responding to industrial action taken by another party in relation to such an agreement (s 435). The concept of “AWA industrial action” has been abandoned.

Where industrial action is taken by employees or a union other than in response to a lockout, it must previously have been authorised in a secret ballot by a majority of the relevant workers, at least half of whom must have voted (ss 445, 478). There are complex and detailed procedures set out in Division 4 of Part 9 of the Act and accompanying regulations that must be followed in relation to the holding of such a ballot. These provisions, which comprise 44 sections and a further 20 regulations, require among other things an application to the AIRC (with the support of a prescribed number of employees) for approval even to hold the ballot, which must then be conducted either by the Australian Electoral Commission or some other “authorised ballot agent”. The cost of the process must be born by the applicant, although there is provision for the Commonwealth to contribute 80% of that cost in certain circumstances.

Action is also now unprotected where it is organised or taken:

- in support of the inclusion of prohibited content in an agreement (s 436);
- by a party engaged in “pattern bargaining” (s 439), in the sense of trying to achieve “common wages or conditions” across two or more workplaces (s 421); or
- before the nominal expiry date of a workplace agreement, regardless of whether the action relates to a matter covered by that agreement (ss 440, 494–495).

This last is plainly intended to overturn the decision in *Emwest (AIG v AMWU)* (2003) 130 FCR 524: see C & S, para [8.49]); although read literally s 494(1) would prohibit a union bound by an agreement from organising industrial action during its nominal term in relation to *any other* agreement!

There are also significant new grounds for the suspension or termination of a bargaining period by the AIRC, which will in turn preclude the taking of protected action. These apply where:

- a union is engaging in “pattern bargaining” (s 431);
- action is being taken or organised by a union or its members in support of claims being made by employees who are not eligible to be members of the union (s 430(7));

- a union is taking or organising action that is related, to a significant extent, to a demarcation dispute (s 430(8));
- a “cooling off” suspension is determined by the AIRC to be appropriate, having regard to factors including the public interest and the duration of any industrial action (s 432); or
- industrial action is threatening to cause “significant harm” to a third party (s 433).

The Minister is also entitled under Division 7 of Part 9 to terminate a bargaining period if satisfied that industrial action is threatening to endanger the life, safety, health or welfare of the population or part of it, or otherwise damage the Australian economy or an important part of it in a significant way. This in turn opens the way for the AIRC to make a “workplace determination” under Division 8, which is equivalent to an arbitrated s 170MX award under the pre-reform Act.

The AIRC’s power to make orders restraining industrial action, now to be found in s 496 of the amended Act, has been tightened up so that it *must* make an order against any action that does not appear to be protected. If it cannot decide that within 48 hours of receiving an application, it must make an interim order anyway unless it would be contrary to the public interest to do so.

The Act has also been amended to make it clear that any action by an employer, other than a lockout within “the ordinary meaning of that expression”, cannot be regarded as “industrial action” (s 420).

A further and more general change, which has particular significance in the context of union officials who organise industrial action, is the inclusion of a general provision (s 728) that creates liability for anyone who is “involved” in various contraventions of the Act, such as breaching a s 496 order (see also Part 3 of Chapter 9 of Schedule 1, which is specifically concerned with the duties of employees and officers of registered organisations in relation to orders or directions by the AIRC or the Federal Court). It is also provided that contravention by a person of a s 496 order, or various other orders made by the AIRC, is a criminal offence punishable by 12 months’ imprisonment (s 814(3)).

Given the hurdles that must now be overcome by those who wish to take protected action, and the ease with which employers (or affected third parties) may be able to get even lawful action stopped, it remains to be seen how many unions will bother to comply with the Act at all.

Dispute Resolution

The Work Choices amendments introduce significantly altered dispute resolution processes, with a stated purpose of encouraging parties to resolve their disputes themselves, either at the workplace, or with the assistance of a

nominated third party. These processes are set out in a new Part 13 to the WR Act.

The AIRC has lost its powers of compulsory arbitration, subject to only limited exceptions (including applications to vary awards, and the making of “workplace determinations” under Division 8 of Part 9 where a bargaining period has been terminated). Under the amended WR Act, there is no longer any general provision for industrial disputes to be notified to the AIRC, other than in relation to excluded employers. Indeed the term “industrial dispute” is no longer defined in the main part of the Act.

Parties may seek assistance from the AIRC under Division 4 of Part 13 to resolve a dispute as to the negotiation of a collective agreement, but only where all parties agree. Even then, the Commission may not make any order or otherwise compel a party to do anything, even if the parties have agreed it should have that power (s 706(5)).

Under Division 5, on the other hand, parties to a workplace agreement are still able to expressly authorise the AIRC not just to conciliate or mediate disputes arising under the agreement, but to arbitrate. But in performing that role the AIRC may only utilise powers expressly conferred by the parties, rather than automatically being able to call upon the general powers conferred by s 111 (a section number that, quite coincidentally, has remained the same as under the pre-reform Act). (Compare the position with “private arbitration” under the pre-reform Act: see C & S, para [8.96].)

A new model dispute resolution process is now incorporated into all federal awards and workplace determinations, all notional agreements preserving State awards and all preserved State agreements, overriding anything to the contrary in each instrument (ss 504(6), 514, Sch 8 cl 15A, 36). It also applies by default to any new workplace agreement that fails to specify otherwise (s 353(2)), and may be used where there is a dispute as to any of the minimum employment entitlements stipulated under the Act, other than those relating to wages (ss 175, 609, 614, 691). In all cases, however, parties retain the right to initiate court proceedings to resolve the dispute in question (s 693).

The model process set out in Division 2 of Part 13 provides for a tiered procedure, commencing at the workplace level, with assisted dispute resolution in the form of mediation, conciliation or (but only if the parties agree) arbitration as a last resort. Parties have the choice of nominating either the AIRC or another third party to assist their dispute resolution, with the AIRC being the default option in the absence of any agreement.

The federal government has indicated that it will establish a register of private “ADR providers” whom parties will be able to select if they wish to look outside the AIRC. It is unclear whether the AIRC will ultimately be forced to charge for its services when resolving disputes under the model

process or under customised provisions in agreements, though for the time being no such scheme has been introduced.

Freedom of Association

Part 16 of the WR Act, dealing with freedom of association, has been re-enacted in slightly different form, and with certain prohibitions (especially those directed to unions) being expanded.

One change concerns the reversal of the onus of proof in infringement proceedings. While s 809 still provides that the onus is on the defendant to show that they did not engage in the alleged conduct for a prohibited reason, this no longer applies where the plaintiff is seeking an interim injunction. It is also provided that where an employer is alleged to have taken action against an employee or job-seeker because of their entitlement to the benefit of an industrial instrument or the AFPCS, this must have been the “sole or dominant reason” for the action in question, not merely *a* reason (s 792(4)). Both changes are plainly intended to make it harder for unions to bring freedom of association cases against employers who have restructured their operations or their employment conditions in a bid to get staff onto individual agreements, rather than collectively negotiated or arbitrated terms.

Termination of Employment

Under the amended Division 4 of Part 12 of the WR Act, and subject to significant exclusions, all employees of federal system employers are now potentially eligible to bring an unfair dismissal claim in the AIRC under Subdivision B. They no longer need to be covered by an award or agreement.

By contrast, those who work for excluded employers are now barred from bringing a federal unfair dismissal claim, even if they are still covered during the transitional period by a federal instrument. Whether such workers can bring a claim under State law instead will depend on the terms of the applicable State legislation and on any arguments of inconsistency under s 109 of the Constitution: see *C & S*, paras [16.46]–[16.47]; though cf *Unions NSW v Carter Holt Harvey Wood Products Australia Pty Ltd* [2006] NSWIRComm 2 (30/1/06).

Returning to federal system employers, the net effect of the changes is to drastically reduce the availability of unfair dismissal claims, because of the addition of new exclusions in s 643 (formerly s 170CE).

The major new exclusion is that no claim may be brought against any employer with 100 or fewer employees at the date of termination. In determining how many employees a business has for this purpose, all full-time and part-time employees (including the dismissed worker) are counted, except that casuals with less than 12 months’ service are disregarded. The

count is a “head count” and makes no allowance for calculating “full time equivalents”: each part-timer who is not a short-term casual simply counts as one worker. The workforces of companies that are “related” within the meaning of the *Corporations Act 2001* (Cth) are to be counted together, but no account is taken of associated but unincorporated entities.

Even where unfair dismissal rights still apply, employees now have to serve a qualifying period of six months (up from three months under the pre-reform Act) before they are eligible to bring a claim, unless their employers have agreed on a shorter qualifying period. Nor can any claim be made in relation to any dismissal effected “for genuine operational reasons or for reasons that include genuine operational reasons”.

This latter change is apparently intended to prevent retrenched employees complaining, for instance, that they have been unfairly selected for redundancy, or that they had not been properly consulted before being made redundant. But given that “operational reasons” are defined to include “reasons of an economic, technological, structural or similar nature”, and that such a reason need only be *one* of the factors underlying a dismissal, a broad reading of this exclusion could make it applicable to just about every termination.

A further amendment is the repeal of Subdivision D, which allowed the AIRC to make general orders as to severance benefits for retrenched workers or consultation over redundancies. Subdivision E (itself now renumbered as Subdivision D) still permits the AIRC to intervene in specific cases of inadequate notification or consultation, but with new limitations on the types of order the AIRC can make.

None of the reforms affects the right of all employees, whether working for federal system employers or not, to pursue a court claim for unlawful termination under Subdivision C, which would normally be on the basis that they have been dismissed for certain discriminatory reasons in breach of s 659 (formerly s 170CK). The government has announced that it will provide up to \$4000 by way of legal assistance to certain litigants who wish to initiate such proceedings.

Record-Keeping and Payslips

One of the aspects of the Work Choices reforms that will have an immediate impact on federal system employers (and also excluded employers still bound by a transitional federal award) is the need to comply with a new set of record-keeping and payslip requirements. These are set out in Part 19 of Chapter 2 of the WR Regs.

Unlike the provisions in the pre-reform legislation that they replace, the new provisions apply to *all* employees, not just those covered by federal awards or agreements. They are also considerably more onerous in terms of

detail, for example requiring the daily starting and finishing time of every employee (from the CEO down!) to be recorded (reg 19.9). The need too to list “the name of each instrument under which the employee derives entitlements of employment” (reg 19.8(1)(d)) is likely to pose interesting challenges for the many employers transferring from State coverage and now bound by preserved State agreements or notional agreements (each of which may contain entitlements drawn from State legislation as well as awards).

There is though a six-month grace period from the date of commencement, during it which it appears no breach of these requirements can form the basis for a prosecution by a workplace inspector (reg 19.24). Inspectors will in any event now have the option of issuing infringement notices (including provision for expiation fees) under Part 19B of Chapter 2 of the WR Regs in respect of breaches of record-keeping requirements, rather than instituting prosecutions.

Registration of Unions and Employer Associations

One of the most uncertain areas of the new system concerns the registration of unions and employer associations.

Historically, federal laws dealing with the registration and control of associations were justified by reference to the important role representative bodies (but especially unions) must inevitably play in any system for resolving disputes that extended or threatened to extend beyond the boundaries of a single State. According to the High Court, the regulation of such bodies was necessarily incidental to the establishment of machinery for dealing with such disputes, and hence could validly be based on the arbitration power in s 51(35) of the Constitution: see *C & S*, para [4.37].

With the constitutional basis of federal regulation shifting to other powers, each concerned with a type of employer (a trading or financial corporation, an employer located in a Territory, etc), it is far less clear that these powers can validly support the provisions that appear in what is now Schedule 1 of the WR Act (the Registration and Accountability of Organisations Schedule or RAOS).

Nevertheless, the RAOS has been retained in the amended Act, but with one major change. In order to become or indeed remain registered, unions and employer associations must satisfy one of two criteria under ss 18A and 18B.

The first relates to their members. Employer associations must have a majority of members who are federal system employers. Unions, similarly, must have a majority of members who are employed or engaged by such employers. If this membership requirement cannot be satisfied, then the second possibility is for the association itself to be a constitutional corporation. This would require the association to have acquired corporate

status under some other law — registration under the pre-reform WR Act would not be sufficient for this purpose. The association would also need to be characterised as a “trading” or “financial” corporation (unless it had somehow incorporated overseas), which on the current test would depend on the extent of its trading or financial activities.

Even assuming the RAOS in its amended form is constitutionally valid, the continuing registration of certain associations is likely to be called into question. The Work Choices Act does though provide (in cl 24 of Schedule 4) a three-year grace period before a currently registered association is liable to have its registration cancelled on the basis that it is no longer registrable.

A further change made by the Work Choices amendments concerns State-registered unions and employer associations. Under Schedule 10 of the amended WR Act such bodies may apply for transitional federal registration, provided they have at least one member who prior to the commencement of the Work Choices amendments was covered by a State award or agreement, and who is now subject to a notional agreement or preserved State agreement. They must also not be an association that is already federally registered, or be a branch of a federal organisation. The transitional registration may last for up to three years, unless in the meantime the association satisfies the full requirements for federal registration. The effect of transitional registration is that the association is given the same status as a registered organisation for the purpose of the WR Act, except that it is not subject to the provisions of the RAOS.

Transitionally registered associations who wish to seek full registration are given the significant dispensation that no “conveniently belong” objection (see C & S, para [17.28]) may be made against their application (WR Regs Ch 6 reg 4.2). On the other hand, a transitionally registered association must not be given full registration if it is “substantially identical” to an association that is already registered, or to a State branch or constituent part of such an organisation, unless a “significant number” of its members are not eligible to join that other body (WR Regs Ch 6 reg 4.3).

Finally, the amendments have opened a further window of opportunity for “constituent parts” of an amalgamated organisation to seek to withdraw from the amalgamation under Part 3 of Chapter 3 of the RAOS: see C & S, paras [17.39]–[17.40]. As from the commencement date, disaffected branches or sections now have three years (in the case of pre-1997 amalgamations) or five years (for more recent mergers) to apply to the AIRC for a withdrawal ballot, though the former period may be extended by regulation.

Rights of Entry

The rights of unions to enter workplaces are significantly narrowed under the rewritten Part 15 of the WR Act. There are more stringent requirements for officials who wish to obtain and then maintain an entry permit; while the procedures they must observe when entering workplaces have also been tightened up, including the need to conduct meetings in any room or area stipulated by the employer, and to follow a required route to get there (ss 751, 765; cf *ANZ Banking Group Ltd v FSU* (2004) 134 IR 426).

Most significantly, officials who wish to investigate a breach of an award or an agreement, or of the Act itself, may only do so if the suspected breach affects at least one employee who is a member of the relevant union (s 747). Moreover an official has no right of entry for the purpose of holding discussions with members of their union, unless the union is bound by an award or collective agreement that covers work carried out by those members (s 760). Hence if an employer enters into a non-union agreement (including an employer greenfields “agreement”) for a workplace, or an agreement with another union, there will be no right of entry to that workplace for discussion purposes, regardless of how many members the union may have.

Division 5 of Part 15 applies where union officials are seeking to invoke rights of entry granted under State or Territory occupational health and safety laws, at least where federal system employers are concerned. In addition to whatever requirements are stipulated under the relevant State or Territory law, union officials need to obtain permits under the WR Act, and must also abide by certain procedural restrictions.

Federal Magistrates Court

A final point to note is that the Federal Magistrates Court, which to date has dealt with employment matters only in the context of discrimination claims, now has a much greater role under the amended WR Act. It has become an alternative to the Federal Court (and/or some of the State courts) in cases dealing with the enforcement of awards, agreements or minimum statutory entitlements, in proceedings for the infringement of various penalty provisions, and in unlawful termination cases, among other matters.