

Key Points

- A move away from awards to agreements will be encouraged.
- The AIRC's traditional roles will be limited.
- Unfair dismissal laws will no longer apply to businesses with fewer than 100 employees.

The federal government's Work Choices legislation fundamentally changes Australia's workplace relations system.

The Workplace Relations Amendment (Work Choices) Bill 2005 encourages the negotiation of agreements directly between employers and employees, without the intervention of third parties.

However, workplace agreements can now potentially place employees in a worse overall position than they would have been under their relevant award, as a result of the abolition of the no-disadvantage test.

Agreements (Australian Workplace Agreements and certified) will be operative upon lodgement with the Office of the Employment Advocate.

All agreements must at least meet the legislated pay and conditions standard and contain dispute-settling procedures, while certain matters are prohibited.

The traditional role of the Australian Industrial Relations Commission (AIRC) will be further reduced with the minimum wage set by a new body called the Fair Wage Commission.

The AIRC's dispute resolution powers will be limited to the provision of voluntary services, with the power to arbitrate Workplace Determinations — a new more limited form of award — confined to extreme cases (to ensure the health and safety of workers, prevent loss of life, or prevent serious damage to the economy).

Under the new system, existing award conditions will be preserved, unless they are specifically bargained away. Collective agreements or Australian Workplace Agreements (AWAs) will only need to set out how they amend or remove any of these award conditions.

Awards will be further "simplified" by the removal of certain allowable award matters, and the overall number of awards will be drastically reduced.

The reach of unfair dismissal laws will be curtailed by the exemption of businesses with fewer than 100 employees.

Further, probationary periods in companies with more than 100 employees will be extended from three to six months (currently probationary employees are excluded from making unfair dismissal claims).

Unfair dismissal claims will be unavailable for those made redundant.

However, unlawful dismissal provisions remain unchanged.

The changes aren't limited to the federal sphere, since the federal government is seeking to create a single national system of workplace relations, relying heavily on the corporations power for constitutional validity to override the power of the states.

The federal government estimates up to 85 per cent of Australian employees will be covered by the system.

Work Choices: the big picture

Unincorporated businesses outside of Victoria and the territories — including trusts, partnerships and sole traders — will be faced with a choice: incorporate or move to the relevant state industrial relations system.

The Bill's complex transitional provisions set out how existing agreements will be affected when businesses move into, and out of, the new national system.

A new section (s 7C) sets out the laws of states and territories that are intended to be overridden by the *Workplace Relations Act*. They include:

- union right-of-entry laws except where entry is for OHS purposes
- unfair contracts provisions
- laws dealing with leave other than long service leave
- laws enabling state or territory courts or tribunals to make orders regarding equal remuneration for work of equal value.

The new safety net: the Australian Fair Pay and Conditions Standard

The Australian Fair Pay and Conditions Standard (referred to as "the Standard") is contained in proposed Part VA of the WR Act.

It has two purposes:

- to provide guaranteed minimum terms and conditions for all employees who come within the jurisdictional reach of the new legislation, including those who are award-free or agreement-free
- to underpin workplace bargaining in that it prevails over a

workplace agreement or a contract of employment to the extent that it provides a more favourable outcome for the employee.

The Standard includes minimum requirements for annual leave, parental leave, personal/carer's leave (including sick leave), compassionate leave, maximum 38-hour week, and minimum wage rates.

Annual leave

The Standard provides for four weeks' annual leave. Shiftworkers will get an additional week for working irregular hours.

Employees will be able to cash out up to two weeks of their leave at their written request if there is a workplace agreement specifically entitling the employee to cash out leave. Leave cannot be cashed out in advance of it being credited. Payment for cashed out leave must be at a rate no less than the employee's basic periodic rate of pay.

Employers can only refuse a request to cash out leave on reasonable grounds. However, it will be unlawful to force employees to cash out their holidays. The new workplace watchdog, the Office of Workplace Services (OWS), will have the responsibility for ensuring employees' consent is freely given.

An employer would be able to direct an employee to take up to a quarter of their annual leave entitlement if the employee had an annual leave credit greater than eight weeks.

Parental leave

Employees will be entitled to 12 months' unpaid parental leave after 12 months' continuous service.

Casual workers with 12 months' service and a "reasonable expectation of ongoing employment" will enjoy the same entitlement. (These are the current arrangements for parental leave and include none of the provisions in the AIRC's recent Family Provisions Test Case decision.)

Personal/carer's leave (including sick leave)

Personal/carer's leave (including sick leave) of 10 days' paid leave a year will be available. This leave will be cumulative, but only up to 10 days a year can be used as carer's leave. An additional two days of unpaid carer's leave will be available for emergencies, for both permanent and casual employees. The unpaid leave can be taken in distinctly separate periods, including four half-days. However, unpaid leave would be conditional on an employee not having any accumulated paid carer's leave or other authorised leave for caring purposes.

Compassionate leave

Employees, other than casuals, would be entitled to take two days' paid compassionate leave upon the death of a member of their immediate family or household. The leave need not be taken immediately after the death, and can be taken in two consecutive days, two single days or in distinctly separate periods.

Maximum 38-hour week

Maximum ordinary weekly work hours will be 38 hours a week, but they can be averaged over 12 months and employees can be required to work reasonable additional hours. A non-exhaustive list of factors that must be taken into account in determining what are reasonable additional hours

is consistent with the AIRC's decision in the Working Hours Test Case.

Minimum wage rates

Wages rates must be no less than the relevant award classification wage as set by the Fair Pay Commission from time to time.

Dispute-settling procedures

In addition, all agreements will have to include dispute-settling procedures (DSP) — a default model DSP is provided by the legislation, which will apply unless parties agree to their own modified version.

Casuals

For casual employees, the Standard will include a minimum casual loading of 20 per cent on commencement of the legislation (subject to future consideration by the Fair Pay Commission). In the event that a casual employee is not covered by an award classification, the adult casual wage will be the federal minimum wage, plus the "default" loading of 20 per cent for casual employees.

Goodbye to the no-disadvantage test

The no-disadvantage test will be abolished.

Currently all workplace agreements, including AWAs and certified agreements, are scrutinised to ensure that on balance they don't lead to a reduction in the overall terms and conditions of employment.

Instead, all workplace agreements will now simply need to meet the minimum conditions in the Standard.

All other conditions will be subject to negotiation.

Termination

The principle that an employee who is about to lose their employment is entitled to expect a "fair go" from their employer will disappear next year, for employees of all small and medium sized business plus employees of large business who have been employed for less than six months.

As expected, the federal government's Workplace Relations Amendment (Work Choices) Bill 2005 has taken away the unfair dismissal protections for these workers but left them with the option to pursue an unlawful (but not inexpensive) termination claim instead.

In order to understand the effect these changes to dismissal laws will have at your workplace, it is essential to first understand the difference between what is an unfair dismissal and what is an unlawful dismissal (or termination) and which employees will be affected by the changes.

Unfair dismissal — what is it?

Unfair dismissal occurs when an employer fails to give an employee a "fair go all round" when terminating their employment, making the termination "harsh, unjust or unreasonable". In deciding whether a dismissal meets these criteria, the AIRC assesses such factors as whether the employer had a valid reason for terminating the worker's employment, whether the worker was afforded procedural fairness and the individual circumstances of the case. Today's legislation adds to this list of considerations — the AIRC must now also have regard to whether the employee's capacity may have put at risk the safety or welfare of other employees and any conduct of the employee that may have put at risk the safety or welfare of other employees.

Unlawful dismissal — what is it?

Unlawful termination occurs when an employer terminates a worker's employment for a prohibited reason. These reasons are:

- temporary absence from work due to illness or injury
- union membership (or non-membership) or involvement in union activities
- having acted, or seeking to act, as an employee representative
- filing a complaint or participating in proceedings against an employer
- race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin
- refusing to enter into, vary or terminate an AWA
- absence from work due to parental or maternity leave
- temporary absence due to a voluntary emergency management activity.

Unlawful termination also occurs in instances where an employer dismisses a worker without providing them with appropriate notice of the termination or payment in lieu of notice.

The legislation in a nutshell — how it affects dismissal

The Workplace Relations Amendment (Work Choices) Bill 2005 leaves untouched *all* employees' rights to seek compensation from

their employer if they are unlawfully dismissed.

The legislation does however drastically curb the rights of workers to access the federal unfair dismissal jurisdiction.

The AIRC will be able to deal with certain matters 'on the papers', that is, without a formal hearing. The government hopes that businesses will also benefit from this streamlined approach to processing unfair dismissal claims.

How the new laws affect small and medium sized business

All businesses with less than 100 employees from unfair dismissal claims are exempt altogether. Although, whether or not an employer is covered by this exemption will depend on a head count of all employees (full-time, part-time and long-term regular casual employees) rather than the number of full-time workers it employs.

How the new laws affect bigger business

For those businesses that employ more than 100 employees, unfair dismissal laws will continue to apply, but the categories of termination the laws cover, as well as the categories of workers that can rely on them, will be reduced.

Any employee of a bigger business with less than six months' service will not be able to bring an unfair dismissal claim. Seasonal workers will also be excluded from bringing a claim.

Redundancy

Dismissals based on the operational reasons of the company or where the

employer is insolvent and the termination arises from the insolvency, will be exempt (the AIRC will be the umpire in determining whether the operational reasons relied on by the employer are genuine). This means an employee will no longer have the chance to plead before the commission that he or she was unfairly treated when selected for redundancy.

Unfair contracts

State unfair contracts laws (such as s 106 of the *NSW Industrial Relations Act 1996* and s 276 of the *Qld Industrial Relations Act 1999*) have up until now, provided a remedy for employees whose complaint was not that their termination was procedurally unfair, but rather that the contract itself was unfair in that it did not, for example, provide for adequate/reasonable notice on termination. These state laws too, will now be overridden with the inclusion of a new section 7C which sets out the exclusion. State anti-discrimination laws however will continue to apply.

\$4000 government assistance to help with dismissal claims

Today's legislation has not tinkered with all employees' rights to pursue an unlawful termination claim. At the federal level, unlawful termination claims usually involve bringing an action in the federal court. A far more costly legal exercise than an unfair dismissal claim which is heard by the Australian Industrial Relations Commission. In his second reading speech introducing the legislation, Workplace Relations Minister Kevin Andrews acknowledged this cost and pledged up to \$4,000 in legal assistance to be offered to employees bringing unlawful termination claims.

New institutions for a new system

The Workplace Relations Amendment (Work Choices) Bill 2005 alters the roles of certain established industrial relations institutions, and also creates a new institution, the Australian Fair Pay Commission.

Australian Fair Pay Commission

Establishment of the Australian Fair Pay Commission (AFPC) is one of the major reforms under the Bill. It is stated in the explanatory memorandum to the Bill that the primary purpose of the AFPC will be to promote economic prosperity and job creation.

The AFPC will protect minimum and award classification wages. The new commission will be responsible for setting and adjusting:

- the federal minimum wage
- minimum award classification rates of pay
- federal minimum wages for juniors, trainees and employees with disabilities
- minimum wage for piece workers
- casual loadings.

Factors that the AFPC will have to consider include:

- the capacity of the unemployed and low paid to obtain and remain in employment
- employment and competitiveness across the economy
- providing a safety net for the low paid

- providing minimum wages for junior employees and employees to who training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.

The AFPC can inform itself in any way it thinks appropriate, including undertaking or commissioning research, consultation and monitoring/evaluating the impact of its wage setting decisions.

Australian Industrial Relations Commission

The Australian Industrial Relations Commission's wage fixing role (through the annual National Wage Case) ceases. This commission will also cease to exercise compulsory powers of conciliation and arbitration. It will provide voluntary dispute resolution services and will also have powers to deal with industrial action, including:

- making an order to prevent or stop unprotected industrial action
- making an order to remove access to protected industrial action
- making a Workplace Determination to resolve disputes where access to protected industrial action has been removed.

It will also be responsible for simplifying and rationalising awards, right of entry, the new unfair dismissal system and regulating registered organisations. It will retain its role in providing an initial conciliation service for unlawful termination claims.

Office of the Employment Advocate

The existing agreement certification process will be replaced with a lodgement-based process to be administered by the Office of the Employment Advocate (OEA).

Currently it is the practice of the AIRC to hold formal hearings for agreement certification, although there is no statutory requirement to do so. Under the new legislation all collective agreements and AWAs will be lodged with the OEA. All agreements must meet the Fair Pay and Conditions Standard (which replaces the "no disadvantage" test) Agreements must be accompanied by a statutory declaration attesting that they were negotiated in compliance with the law, and will take effect on the day they are lodged (rather than on certification or approval as was previously the case). The new legislation does not provide for an approval process.

The OEA will provide employers and employees with free advice about agreement making. It is responsible for explaining agreements to employees (previously the employer's responsibility) Employers and employees can ask the OEA to check agreements before they are lodged to ensure that they do not contain prohibited content.

Office of Workplace Services

The Office of Workplace Services (OWS) is currently responsible for WageLine, WageNet and performs workplace investigations into breaches of federal industrial law.

Under the new legislation, the federal government intends to expand the role of the OWS and boost its enforcement powers, transforming it

into a "one-stop-shop" for all compliance grievances.

Under the new legislation, the OWS will be responsible for enforcing:

- the terms and conditions of awards, AWAs and other agreements, and will deal with any claims made against persons for misrepresentation or coercion with regarding to the agreement process
- compliance with the reformed WR Act.

As the Office of the Employment Advocate (OEA) will be expanding its agreement-processing function, the OWS will be absorbing some of its responsibilities.

Currently one of the functions of the OEA is to promote, process and regulate AWAs.

Under the amended Act, the compliance function will be shifted to the OWS and the OEA will only promote and process AWAs.

In addition, the OWS will become responsible for the enforcement of freedom of association breaches and incidents of duress.

It is intended that OWS inspectors will now not only perform audits and monitor workplaces, but will also provide advice and information to employees and employers.

To this end, the government is intending to create additional educational and compliance resources aimed at informing workers of their rights and employers of their workplace obligations.

In light of the expanding role of the OWS, it will increase inspector numbers from 90 to 200.

Tougher to strike in the new system

The federal government's new workplace relations legislation effectively restricts the right to embark on industrial action for both unions and employees.

The burden of proof is now on the employee regarding the cessation of work on OHS grounds - under s 106A employees are required to prove that their action does not constitute industrial action because it was motivated by *reasonable concern* of an *imminent risk* to their health or safety.

The definition of protected industrial action has been narrowed. Industrial action now constitutes protected action only if:

- it is undertaken by a party to the negotiations, including a union
- in the case of a suspended bargaining period, three days' written notice of intention to strike at the end of the suspension period is given to the employer
- it is not undertaken to encourage the inclusion of prohibited content in a proposed collective agreement
- it is not undertaken during the suspension of a collective bargaining period
- it is not undertaken in support of 'pattern bargaining' claims
- it is not undertaken before the expiry date of workplace agreements or determinations
- it is undertaken only by employees and unions that have complied with all Australian

Industrial Relations Commission (AIRC) orders and directions.

A host of newly valid reasons under which the AIRC may make orders suspending, terminating or restricting the ability to initiate bargaining periods will have the (no doubt intended) effect of severely restricting the opportunity to engage in protected industrial action.

One of the new circumstances in which the AIRC can suspend or terminate a bargaining period is when industrial action is being "taken, or is threatened, impending or probable" which would adversely affect the employer or employees and is also threatening or would threaten "the life, personal safety or health, or the welfare, of the population or part of it" or cause "significant damage" to part or all of the Australian economy. [s 107G(3)]

Other circumstances include situations where the industrial action is being undertaken by "an organisation" on behalf of employees who are not members of that organisation, and where the "organisation" that is striking is striking because of a demarcation dispute.

The Commission can make orders suspending or termination bargaining periods regardless of the orders actually applied for, under s 107H(3).

The full bench of the Commission must make a *workplace determination* if a bargaining period has been terminated, and the parties have still not settled matters.

This determination will be treated as though it is a collective agreement under s 113F of the legislation.

Secret ballots must be held to determine whether a union or group

of employees should engage in industrial action, otherwise the action will not be viewed by the Commission as protected action.

Employees or the union will be required to apply to the Commission for a secret ballot order, as these ballots must be authorised.

At least 50 per cent of those eligible must vote in the ballot, and more than 50 per cent of those votes must be favourable in order for the proposed industrial action to go ahead.

However, the opportunity to apply for such an order will be restricted to the time-period after the expiry of the existing agreement, if the AIRC has been notified of a bargaining period, and only if the proposed industrial action is solely for the purpose of promoting claims to include allowable content in the proposed agreement.

Civil penalties that may be imposed under the new legislation for engaging in unprotected industrial action may be up to 60 penalty units for individuals and 300 penalty units for organisations, in addition to any damages payable as a result of loss caused by breach of an AWA [s 176].

Moving from awards to agreements

A central plank of the workplace reforms is, as was expected, a continued push away from awards in favour of more flexible forms of employment contracts.

A system of federal awards will be retained, but an Award Review Taskforce will be established to simplify them and reduce their number.

Any specific provision in an agreement will modify or remove

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award conditions according to the terms of the agreement.

This means that award provisions that are more generous than the Fair Pay and Conditions Standards — such as six weeks' annual leave for nurses — will continue to apply.

It seems, though, that these matters can also be subject to negotiation if employees move to agreements in the future.

Allowable matters in awards

The list of allowable matters that the provisions of an award might cover include only:

- ordinary time hours of work
- incentive-based payments and bonuses
- annual leave loadings
- ceremonial leave
- public holidays
- monetary allowances
- loadings for working overtime or for shift work
- penalty rates
- redundancy pay, within the meaning of subsection
- stand-down provisions
- dispute settling procedures
- type of employment, such as full-time employment, casual or part-time employment and shift work
- conditions for outworkers.

Moreover, all awards must contain a clause permitting the employment of

regular part-time workers, and are encouraged to include "facilitative" provisions, that is, provisions allowing agreement at the workplace or enterprise level (as opposed to running to the courts or commission) on how a particular term is to operate.

Non-allowable matters

The government specifically says that certain matters will not be allowed in awards, including:

- (a) 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
- (b) transfers from one type of employment to another type of employment
- (c) the number or proportion of employees that an employer may employ in a particular type of employment
- (d) prohibitions (whether direct or indirect) on an employer employing employees in a particular type of employment
- (e) the maximum or minimum hours of work for regular part-time employees
- (f) restrictions on the range or duration of training arrangements
- (g) restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement
- (h) restrictions on the engagement of labour hire workers
- (i) union picnic days
- (j) tallies

(k) dispute resolution training leave

(l) trade union training leave

(m) any other matter prescribed by the regulations.

Importantly, as part of its process of reducing the number of awards, the AIRC will not be given the power to create any new awards unless it is to rationalise existing ones.

The AIRC may also still vary awards as long as any variation is consistent with Fair Pay Commission decisions, part of the award simplification process and promotes agreement-making at the workplace level.

At the same time, the government is making the process for making a workplace agreement much simpler.

The old method of having any agreement certified by the AIRC will be replaced with a lodgement-only approach (any agreement need only be accompanied by a statutory declaration attesting that it was agreed in accordance with the law).

The government is also attempting to reduce the influence that unions have over agreement making. The Office of the Employment Advocate will provide free advice to any employer or employee seeking to make a workplace agreement, and the types of allowable agreement will be expanded to give employees and employers the choice to sign on without union involvement.

The government proposes having both "employee collective agreements" and "union collective agreements", as well as AWAs, "union greenfields agreements" and "employer greenfields agreements".

The government will also allow multiple business agreements, which

it envisages will cover franchise operations.

Like awards, agreements have a certain amount of mandatory content (including a nominal expiry date and a dispute settling procedure) and prohibited content. On the banned list are clauses prohibiting AWAs, restricting the use of independent contractors, those that provide a remedy for unfair dismissal (more on that later) and those that allow for industrial action during the life of the agreement.

In the hierarchy of agreements, the government says that AWAs will replace any collective agreements, which will in turn replace any awards.

"Preserved" conditions unless expressly removed or modified

Certain existing employment conditions will be "preserved". These include:

- public holidays
- rest breaks (including meal breaks)
- incentive-based payments and bonuses
- annual leave loadings
- allowances
- penalty rates
- shift/overtime loadings.

However, these conditions are only "preserved" if they are not specifically referred to in the agreement.

They can be the subject of bargaining by the employee(s) and employer.

A collective agreement or AWA will be able to modify or remove these conditions by indicating in the agreement how they will be either changed or removed.

Unions: New restrictions for right of entry

Unions face tougher right of entry requirements under the federal government's Work Choices legislation.

Right of entry permits will only be available to those who pass a "fit and proper" test.

No right of entry for "discussion" purposes will apply when all employees are on AWAs.

However, unions will be able to enter a workplace to investigate breaches of AWA conditions with the written consent of the relevant employee.

When investigating breaches of workplace laws, union officials will have to provide employers with specific details about their inquiry.

Union officials will only be able to access employee records of union members, unless an AIRC order allows the inspection of non-member records.

Employers will be able to specify that meetings or interviews will occur in a particular room or areas of the workplace, and even nominate a specified route to the location.

Union officials must comply with all reasonable employer requests on this matter.

The new right of entry provisions will seek to "cover the field", excluding right of entry under state industrial

provisions, underpinned by the corporations and territories powers.

But right of entry under state OHS laws will still be allowable, in addition to the federal right.

Sanctions

While unions will still have a limited right to enter workplaces to investigate breaches of workplace law, or hold discussions with employees, the following sanctions will apply to those who don't follow the rules, including:

- revocation of the union's right of entry permit
- suspension of the union's right of entry permit
- placement of limiting conditions on right of entry as determined by the Australian Industrial Relations Commission (AIRC).

Revocation or suspension of right of entry permits will be mandatory when the permit holder has:

- made misrepresentations about his or her right of entry powers
- had their state right of entry permit cancelled, suspended or disqualified
- been ordered to pay a penalty for contravention of right-of-entry provisions
- engaged in unlawful conduct during the exercise of a right of entry under occupational health and safety (OHS) law.

New transmission of business rules

New Part VIAA of the Workplace Relations Amendment (Work Choices) Bill 2005 contains the transmission of business rules relevant to the transfer of industrial instruments.

Where a business or part of a business transmits to a new employer, and an employee accepts employment with the new employer, the awards, collective agreements and AWAs that cover the employees of the transferring business will transmit to the new employer.

However, the awards or agreements will not transfer to the new employer if no employee accepts employment with the new employer.

The transmitted awards, collective agreements and AWAs will only apply to the transferred employees at the new business.

Transmitted collective agreements, AWAs and award provisions will have a maximum period of application of 12 months, after which employees will be covered by whichever of the instruments is capable of applying to them.

Transfer of entitlements on transmission

The Bill provides that parental leave entitlements transfer to a new employer from an old employer when a business changes hands.

Where the new employer takes on the old employer's liability for parental leave under the Australian Fair Pay and Conditions Standard, any entitlement to parental leave will be unaffected by the transmission of business.

This will be the case even where a transferring employee is on parental leave at the time of transmission.

Transfer of accrued employee entitlements other than parental leave under the Standard is possible in certain circumstances.

The provisions allow for new and old employers to agree to transfer particular entitlements to the new employer upon transmission of business. Where this does not occur, the old employer will remain liable for those accrued entitlements

These provisions are intended to allow for a 'clean break' in relation to particular accrued entitlements (with the exception of parental leave).

A national system, or is it?

The federal government's workplace reform relies on the "corporations" power of the constitution to dramatically increase the coverage of the national system, but still not everyone will be covered.

You can blame (or thank) the nation's founders for that. When they wrote the constitution, they only gave the federal government a limited industrial relations power to settle interstate disputes.

The federal government failed to convince the states to follow Victoria's lead and refer their industrial relations powers to the Commonwealth.

The new national workplace relations regime will therefore only cover up to an estimated 85 per cent of all employees, including those employed by:

- trading, financial and foreign corporations (constitutional corporations)
- employers in territories (the ACT and NT) and Christmas and Cocos Islands
- Australian government, including its authorities
- waterside, maritime and flight crew employers
- Victorian employers.

If a business is not covered by one of these categories, then its employees will remain in the state system.

Examples of types of businesses not covered by the new system include trusts, partnerships and sole traders (with the exception of those in Victoria and the Territories).

Transitional period

A transitional period will apply for businesses transferring from state systems to the national system.

State awards and agreements will still apply during the transition period for those entering the national system.

While businesses leaving the national system will have a transitional period to adjust, and will automatically revert to the relevant state industrial relations system at the end of this period.

High Court challenge on the cards

But don't rule out a High Court challenge by the States.

Before the ink on the new legislation dries, it is highly likely that the Labor premiers will mount a legal challenge

against the new workplace relations laws.

Ultimately it will come down to how much work the High Court thinks that corporations power can (and should) do.

If they opt for a broad interpretation of that power, then the laws will stand.

However, if they adopt a more restrictive approach and decide that the entire industrial relations system shouldn't be underpinned by the corporations power then the laws could be held invalid.

A more complex situation might also occur, if specific elements of the package are allowed while other parts are cut.

No crystal ball

No one can really predict what will be the outcome of the High Court challenge, although the experts seem to think that the odds favour the federal government.

Even if the High Court gives its nod to the new workplace relations system, we will still have a complex mix of federal and state laws applying to businesses, with transitional provisions for those moving between jurisdictions.

The only way to achieve a truly national workplace relations system is with the cooperation of the federal and state governments.

And it seems one thing is for certain: we still don't have a simple industrial relations system that will cover everyone.

Apprentices and trainees affected by IR changes

The Work Choices Bill includes changes that affect apprentices and trainees. Vocational training is administered by the states and territories and this structure will continue, but award matters will now essentially fall under the Work Choices regime.

The effect on awards that apply to apprentices and trainees is that if the employer is a constituted corporation, the award will come under the Work Choices regime (following a transition period of up to three years). On the other hand, if the employer is a non-constitutional corporation or unincorporated business and the apprentice or trainee works under a federal award, after the transition period (up to five years), employment will be regulated by the state industrial relations system.

Although matters relating to apprenticeships and traineeships remain with the states and territories, where Work Choices assumes jurisdiction over awards and agreements, it will be the Commonwealth jurisdiction that determines pay rates.

If an award or agreement is transitional, the Australian Industrial Relations Commission (AIRC) has only limited scope to vary it, but one of the matters that can be amended is wage arrangements for apprentices and trainees. The AIRC must, if varying such an award or agreement, ensure that it covers this matter.

The Employment Advocate, in carrying out its functions relating to workplace agreements, must have regard to the needs of apprentices and trainees.

School-based apprenticeships and traineeships are included in the legislation. It establishes the basis for pay rates that take into account the fact that the young people involved work part-time and spend the rest of their time at school. The Fair Pay Commission will set and adjust minimum wages for juniors, trainees and apprentices.

Transitional issues

The new legislation will be phased in over a period of up to five years. The government's intention is that at the end of the transition, the federal system will regulate most workers in Australia, using the constitution's corporations power. What will be left in the hands of the states (assuming they do not refer their industrial relations powers to the Commonwealth) is employment matters relating to employers that are not corporations.

The Act will affect constitutional corporations that have state awards and agreements, non-constitutional corporations that have federal awards or agreements, and unincorporated employers (eg sole traders and partnerships) that have federal awards or agreements.

Constitutional corporations will have three years to make the transition to the federal system. During that time, awards and agreements that were established under the state system will become "transitional agreements" under the Work Choices system. As such, they will not be able to be varied, but will continue to operate until they expire.

Current federal awards and agreements for non-constitutional corporations and unincorporated businesses will continue until they expire, during a transition period of up to five years. On expiry or after five

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years, these employers will automatically revert to the state industrial relations system.

The legislation will commence on the day it receives Royal Assent. However, the Act consists largely of five Schedules, and most of these will commence on a day fixed by Proclamation. If the legislation is passed before Christmas, the Act could commence almost immediately, but the government has up to six months to proclaim the Act.

An employment law specialist can provide you with more details on how the workplace relations reforms will affect your business.

To discuss your company's training requirements during the transition to Work Choices, please contact Wood Brown & Company on its web site at www.wbco.com.au, or by telephone:

Melbourne: (03) 9388-9595

Sydney & ACT: (02) 8011-4876

Tasmania: (03) 9018-7606