



Work Choices

Occasional Paper

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Introduction

Work Choices was a controversial workplace relations reform package.

Today almost any workplace relations reform proposed by the Coalition, employers and their representative associations is labelled by unions and the ALP as a return to Work Choices. Some of this labelling is correct; much of it is wrong.

Some Work Choices changes were considered excessive. Other Work Choices changes were considered incremental and justified as improving the management of workplace relations. A number were retained in the Fair Work package.

The initial Work Choices package was modified. The most notable change was the introduction of a fairness test to ensure an employee was fairly compensated if an agreement modified or removed a protected award condition.

This paper sets out the key features of Work Choices. It also identifies aspects of Work Choices retained by the Fair Work system, see **Attachment C**.

The Institute of Public Affairs will also keep a scorecard of the number of times reform proposals are incorrectly labelled as a return to Work Choices.

Work Choices Changes

Constitutional Underpinning

1. The corporations power in the constitution was used to an extent not previously seen in Australian workplace relations. The High Court upheld the reliance on the corporations power finding that the power 'extends to laws prescribing the industrial rights and obligations of corporations and their employees and the means by which they are to conduct their industrial relations.'
2. Work Choices represented a substantial advance towards a national workplace relations system. The jurisdiction of state workplace relations systems was significantly reduced.

Australian Fair Pay and Conditions Standard

3. The Australian Fair Pay and Conditions Standard (AFPCS) applied to all employees in the federal system. Standard entitlements were set in five areas:
 - minimum wages;
 - annual leave;
 - personal leave;
 - maximum ordinary hours of work; and
 - parental leave.
4. The AFPCS operated in conjunction with the award safety net.

Awards

5. Awards were simplified and reduced in number.
6. The list of allowable award matters was reduced to 15 categories. Matters removed from the list were:
 - long service leave;
 - notice of termination;
 - jury service; and
 - superannuation.
7. A list of matters not to be included in awards was established. The list is at **Attachment A**.
8. A list of seven preserved award terms was established. An employee who had an entitlement to a preserved award term that was more generous than the AFPCS or other legislative minima was entitled to the benefit of the preserved award term. The preserved award matters are set out in **Attachment A**.

9. Protected award conditions were established. These protected award conditions were taken to be included in a workplace agreement. They also applied, in conjunction with the AFPCS, when a workplace agreement was terminated. The list of protected award conditions is at **Attachment A**.

Agreements

10. Employer greenfields agreements were available.
11. Workplace agreements were not required to meet the no disadvantage test against the relevant award.
12. A workplace agreement displaced an award. Protected award conditions were taken to be included unless expressly modified by the workplace agreement.
13. Workplace agreements were subject to the AFPCS.
14. The duration of workplace agreements, except for an employer greenfields agreement, was up to five years. Employer greenfields agreement duration was up to 12 months.
15. Collective agreement clauses banning the use of AWAs were void.
16. Content considered prohibited content could not be included in a workplace agreement. The prohibited content list is set out in **Attachment B**.
17. If a workplace agreement was terminated, the AFPCS applied together with protected award conditions.
18. Employers were to provide an information statement to employees at least seven days before a workplace agreement was approved.
19. Employers were to lodge a workplace agreement – accompanied by a declaration that it complied with the law – with the Office of the Employment Advocate. The OEA was not required to scrutinise the workplace agreement.
20. An expired workplace agreement could be terminated on 90 days written notice.
21. Workplace agreements had to include a dispute settlement procedure.

Bargaining

22. Industrial action taken in support of a prohibited matter was unprotected action.
23. Industrial action taken in support of pattern bargaining was grounds for the suspension or termination of a bargaining period.

24. Industrial action threatening to cause significant damage to a person who was not a negotiating party was grounds for the suspension of a bargaining period.
25. A bargaining party could apply to the Australian Industrial Relations Commission (AIRC) for a suspension of the bargaining period to allow a “cooling off”.
26. The Minister could declare the termination of a bargaining period where protected action threatened the life, safety, health or welfare of the population or was likely to cause significant damage to the Australian economy.
27. After the termination of a bargaining period, the parties were given a further 21 day negotiating period which could be extended on application. At the conclusion of the further negotiating period, if the dispute was not settled, the Full Bench of the AIRC must make a workplace determination.
28. A secret ballot of employees was required before protected industrial action could be taken.

Responses to Industrial Action

29. The AIRC had to hear an application for an order to stop industrial action within 48 hours. If unable to determine an application within 48 hours, the AIRC had to issue an interim order to stop the industrial action.
30. If a negotiating party failed to comply with an order to stop industrial action, then the AIRC had to suspend or terminate the bargaining period.

Right of Entry

31. The federal Act’s right of entry provisions applied to the exclusion of state and territory right of entry regimes. An exception was a right of entry for OHS purposes.
32. The requirements for granting a permit tightened including a “fit and proper person” test.
33. Permits had to be revoked where an official had:
 - been ordered to pay a penalty under the Act;
 - misrepresented the right of entry powers; or
 - misused entry powers under OHS laws.
34. The AIRC could make orders to restrict the rights of a union or its officials if satisfied there had been an abuse of the right of entry regime.
35. The right to inspect records was limited to records of members of the union. An AIRC order was required to inspect and copy records of non-members.
36. Notice of entry was to be given to the employer at least 24 hours before the entry.

37. The entry notice had to specify the particulars of the suspected breach.
38. Employers could make reasonable requests for the official to conduct interviews in a particular room and to follow a particular route to reach the room.
39. Officials could not enter premises for the purposes of holding discussions if all employees were covered by AWAs.

Termination of Employment

40. An unfair dismissal claim could not be brought by an employee of an employer who employed 100 or fewer workers.
41. An unfair dismissal claim could not be brought by an employee dismissed for 'genuine operational reasons.' Operational reasons were reasons of an economic, technological, structural or similar nature related to the employer's business.
42. An unfair dismissal claim could not be brought by an employee engaged on a seasonal basis.
43. An employee had to be employed for six months before being eligible to make an unfair dismissal claim.
44. The AIRC was able to deal with certain matters, such as frivolous claims and jurisdictional objections on the papers.
45. The AIRC, when ordering reinstatement, had to consider income earned between the termination and the reinstatement. This was relevant to an order to pay for income lost.
46. The AIRC had to reduce compensation if the employee's misconduct contributed to the dismissal.
47. The AIRC could not award compensation for shock, distress, humiliation or similar hurt caused to the employee by the manner of the termination.

Attachments

Attachment A

Matters Not To Be Included In Awards

1. Representation of an employer or employee in dispute resolution by an employer association or union.
2. Conversion from casual employment to another employment type.
3. Restrictions on the number or proportion of employees in a particular employment type.
4. Restrictions on an employer employing workers in a particular employment type.
5. Maximum or minimum hours for regular part time work.
6. Restrictions on the range or duration of training arrangements.
7. Restrictions on the engagement of independent contractors and labour hire workers.
8. Union picnic days.
9. Meat industry tallies.
10. Trade union training leave.
11. Right of entry provisions.

Preserved Award Terms

1. Annual leave.
2. Personal/carers leave.
3. Parental leave.
4. Long service leave.
5. Notice of termination.
6. Jury service.
7. Superannuation.

Protected Award Conditions

1. Rest breaks.
2. Incentive payments and bonuses.
3. Annual leave loadings.
4. Public holidays.
5. Allowances for expenses, skills and work conditions.
6. Overtime and shift work loadings.
7. Penalty rates.
8. Outworker conditions.

Workplace Agreements – Prohibited Content

1. Deductions from wages for trade union subscriptions.
2. Leave to attend training provided by a union.
3. Paid leave to attend trade union meetings.
4. The renegotiation of a workplace agreement.
5. Union rights to represent employees as part of dispute settling, unless chosen by the employee.
6. Right of entry.
7. Restrictions on the engagement of independent contractors and labour hire workers.
8. Annual leave arrangements departing from the Act.
9. Providing information about employees to a union.
10. Encouraging or discouraging union membership.
11. Allowing industrial action.
12. Disclosure of the details of a workplace agreement.
13. Remedies for unfair dismissal.
14. Restrictions on the ability of a person to enter into an AWA.
15. Discriminatory provisions.
16. Terms that do not pertain to the employment relationship.

Work Choices Reforms Retained in Fair Work

1. Reliance on the corporations head of power for much of the legislation.
2. The substantial creation of a national system.

Bargaining

3. The suspension of a bargaining period due to significant damage to a third party.
4. The suspension of a bargaining period to allow for a cooling off period.
5. The Minister may declare the termination of a bargaining period where protected action threatens the life, safety, health or welfare of the population or is likely to cause significant damage to the Australian economy.
6. After the termination of a bargaining period, the parties are given a further 21 day negotiating period which may be extended on application. At the conclusion of the further negotiating period if the dispute is not settled, the Full Bench of the AIRC must make a workplace determination.
7. A secret ballot of employees is required before protected industrial action can be taken.

Unfair Dismissal

8. An employee must be employed for six months before being eligible to make an unfair dismissal claim.
9. The AIRC, when ordering reinstatement, must consider income earned between the termination and the reinstatement. This is relevant to an order to pay for income lost.
10. The AIRC must not award compensation for shock, distress, humiliation or similar hurt caused to the employee by the manner of the termination.

Right of Entry

11. Notice of entry to be given to the employer at least 24 hours before the entry.
12. Entry notice to specify the particulars of the suspected breach.