Australian Government Solicitor *the leading lawyers to government*

Legal briefing

Number 77 | 31 May 2006

The Work Choices Act – how will it affect Commonwealth employment?

The *Workplace Relations Amendment (Work Choices) Act 2005* (the Work Choices Act) was assented to on 14 December 2005 and commenced in full on 27 March 2006. The Work Choices Act makes major amendments to the *Workplace Relations Act 1996* (the WR Act).

The Work Choices Act represents by far the biggest change in Commonwealth industrial laws since the first legislation was passed in 1904. That legislation was the *Commonwealth Conciliation and Arbitration Act 1904*. The 1904 Act was a petite 22 pages, and it was entirely based on s 51(xxxv) of the Constitution, the conciliation and arbitration power.

Indeed, the long title of the 1904 Act is 'An Act relating to Conciliation and Arbitration for the Prevention and Settlement of Industrial Disputes extending beyond the Limits of any one State'. The title picks up the exact words of the constitutional head of power.

Professor George Williams has noted in his book *Labour Law and the Constitution*, that the 'limited nature of [the federal conciliation and arbitration power] is its most striking feature'.[1]

The limitations of the conciliation and arbitration power in the Constitution are numerous. The most singular of them is that the Commonwealth cannot, under the conciliation and arbitration power, *legislate to provide terms and conditions of employment for employees* – it can only set up tribunals. And those tribunals can only use particular mechanisms – conciliation and arbitration – for certain purposes – prevention and settlement – of particular types of disputes – being disputes that are both 'industrial' and 'interstate'.

And, more problematically, when the tribunal does resolve a dispute, the resolution – the award – *cannot have general application across an industry*. It cannot operate as a common rule. It cannot bind all of the employers in an industry. Awards under the conciliation and arbitration power can only bind identified parties.

The High Court decided this in *Whybrow's* case in 1910.[2] Professor Ron McCallum has described this decision as 'a blow from which the [federal award mechanism] has never recovered'. It can be argued that the dysfunction created by this decision has led inexorably, if very slowly, to the abandonment of the conciliation and arbitration power that the Work Choices Act represents.

Canberra

Richard Harding *Senior General Counsel*
T *02 6253 7026* ***F*** *02 6253 7304*
richard.harding@ags.gov.au

The Work Choices Act represents by far the biggest change in Commonwealth industrial laws since the first legislation was passed in 1904.

The limitations of the conciliation and arbitration power in the Constitution have been recognised for a very long time. In 1911, just seven years after the Conciliation and Arbitration Act was passed, the first referendum to fix s 51(xxxv) was held. Five more referendum attempts were made – in 1913, 1919, 1926, 1944 and 1946. Some got close. None were successful.

The limitations of the conciliation and arbitration power, and High Court decisions in the early 1970s and early 1980s which took the shackles off the corporations power in s 51(xx) and the external affairs power in s 51(xxix) of the Constitution led successive federal governments, especially in the 1990s, to look to other constitutional heads of power for their industrial relations legislation.

The reforms in the 1990s saw a significantly increased reliance for parts of the Industrial Relations Act, and subsequently the Workplace Relations Act, on the external affairs power and the corporations power. In 1996 the State of Victoria referred powers over industrial relations to the Commonwealth.

So the WR Act, as it stood before 27 March 2006, was based on a patchwork of constitutional heads of power. The unfair dismissal provisions familiar to so many HR managers are based on an amalgam of the territories power, the corporations power, the trade and commerce power and the Commonwealth's power in respect of its own employees. The unlawful termination provisions, by contrast, are primarily based on the external affairs power, implementing international covenants Australia has agreed to.

What is so momentous about the Work Choices Act?

The Work Choices Act makes a great many changes. But most fundamentally, it does two things:

— it moves the WR Act from one set of primary constitutional foundations – the conciliation and arbitration power – to a new set of primary constitutional foundations – the corporations power, and

— although preserving agreement-making as the preferred method of industrial regulation, it legislates directly (and indirectly) for the terms and conditions of employment of employees of constitutional corporations.

The reach of the new WR Act ... will be far greater than the reach of the old WR Act under the conciliation and arbitration power.

The consequence of the constitutional re-basing is that the reach of the new WR Act (assuming the challenges to the constitutionality of the Work Choices Act are not successful) will be far greater than the reach of the old WR Act under the conciliation and arbitration power.

Estimates of the potential coverage of the new WR Act range between about 70–85 per cent of employees in Australia. This leaves the states in a position where they may not have many workers, other than state government employees, to regulate.

These are some of the reasons why the Work Choices Act represents the most significant change in a century of federal industrial relations legislation.

How will the Work Choices Act impact on Commonwealth public sector employment?

There are many things that can said about the content of the Work Choices Act. This briefing will only examine a few aspects of the Act and the amendments it has made to the WR Act. There are significant changes to the handling of industrial disputes, to the right to strike, and to right of entry, among other things, but these are outside the scope of this briefing.

The Work Choices Act does much more than re-base the federal workplace relations system. It introduces major change to the setting of terms and conditions of employment. Some of this change is related to a corporations power based system. Some of it is unrelated to the constitutional change.

It is going to take quite some time to analyse and to get to know the legislation. The rest of this briefing will examine some key issues of relevance to Commonwealth public sector employment, both in terms of new arrangements and transitional arrangements.

New arrangements

Workplace agreements

Under the new WR Act, industrial agreements are known generically as workplace agreements. The term 'workplace agreement' covers individual agreements – still known as 'Australian workplace agreements' (AWAs), and collective agreements. Collective agreements are of two types: union collective agreements and employee collective agreements.

Collective agreements

Some significant changes have been made to the way collective agreements are made. Perhaps the two most important differences between the process for making certified agreements under the old WR Act and the process for making collective agreements under the new WR Act are that:

— the no disadvantage test will no longer operate, and

— there will be no process of certification by the Australian Industrial Relations Commission (the AIRC).

The no disadvantage test, at least as we have known it, has vanished under the new WR Act.

However, it has been replaced by a legislative guarantee, including for those who are working under workplace agreements, of certain core conditions of employment.

The guaranteed core conditions of employment cover five matters (see s 171):

— basic rates of pay and casual loadings

— maximum ordinary hours of work

— annual leave

— personal leave

— parental leave and related entitlements.

This set of five minimum entitlements is known collectively as the Australian Fair Pay and Conditions Standard (the AFPC Standard).

One of the key provisions of the new WR Act is s 172. That section provides that the AFPC Standard prevails over:

— a workplace agreement, or

— a contract of employment

that operates in relation to an employee, if the AFPC Standard, in a particular respect, provides a more favourable outcome for the employee.

This is perhaps the most obvious example of the Commonwealth doing what it could not do under the conciliation and arbitration power: legislating terms and conditions of employment.

The Work Choices Act does much more than re-base the federal workplace relations system. It introduces major change to the setting of terms and conditions of employment.

What happens to federal award conditions?

Federal award

	20 Allowable award matters
1	Classification
3	Rates of pay
11b	Casual loadings
20a	Rates of pay for outworkers
2	Ordinary hours of work including rest breaks
4	Incentive-based payments and bonuses
5b	Annual leave loadings
9a	Public holidays
9b	Days to be substituted for public holidays
10	Monetary allowances
11a	Overtime or shift work loadings
12	Penalty rates
20b	Conditions for outworkers
7b	Ceremonial leave
13	Redundancy pay
15	Stand-down provisions
16	Dispute settling procedures
18	Type of employment
5a	Annual leave
7a	Personal/carer's leave
8	Parental leave, including maternity and adoption leave
6	Long service leave
14	Notice of termination
17	Jury service
19	Superannuation

Work Choices Act commences

Award provisions cease

Award provisions continue

Award provisions continue

Award provisions continue

Pre-reform award

	Allowable award matters that are protected award conditions (PACs)
1	Ordinary hours of work including rest breaks
2	Incentive-based payments and bonuses
3	Annual leave loadings
4	Public holidays
5	Days to be substituted for public holidays
6	Monetary allowances
7	Overtime or shift work loadings
8	Penalty rates
9	Conditions for outworkers
	Allowable award matters that are not PACs
10	Ceremonial leave
11	Leave to find employment after notice of termination
12	Redundancy pay
13	Stand-down provisions
14	Dispute settling procedures
15	Type of employment

Preserved award terms

1	Annual leave
2	Personal/carer's leave
3	Parental leave, including maternity and adoption leave
4	Long service leave
5	Notice of termination
6	Jury service
7	Superannuation (only until 30/6/08)

AFPC standard

1	Classification and rates of pay (including casual loadings)
2	Maximum ordinary hours of work
3	Annual leave
4	Personal/carer's leave
5	Parental leave

Conceptually, then, one might say that the no disadvantage test for certified agreements has been replaced not by a process, but by an outcome. And the outcome is focused on far fewer criteria – because it is concerned with five subject matter areas, rather than the 20 allowable award matters that could be covered by the awards against which the no disadvantage test was formerly applied.

One can also note, however, that the application of the AFPC Standard goes well beyond that of the no disadvantage test, because the AFPC Standard will, ultimately, apply to *all employees covered by the Act*, whereas previously the no disadvantage test only came into play for employees who were to be subject to a certified agreement or AWA.

The AFPC Standard will, ultimately, apply to all employees covered by the Act.

In a paper issued by the federal Minister for Employment, Workplace Relations and Small Business in 2000 it was estimated that some 13.4 per cent of Australian non-farm employees were award free – that is, not covered by a federal or state industrial award or agreement.[3] It was estimated at that time that the extended reach of a federal system based on the corporations power would mean that only 2.2 per cent of employees would be award free. If the estimates in the paper are correct, then some 85 per cent of non-farm employees could ultimately be covered by the AFPC Standard.

At first glance it might seem that the AFPC Standard is unlikely to have much impact on Commonwealth employment. But there is a lot of detail in the Standard and agencies will have to examine it carefully.

The AFPC Standard does not apply to employees who are covered by pre-reform certified agreements and by pre-reform AWAs (see clause 30 of Schedule 7), so there is no issue for the time being if your employees are staying on their pre-reform certified agreement or pre-reform AWAs.

But the AFPC Standard will apply to employees working under new collective agreements or new AWAs. And the Standard has some interesting features that may not line up with all agencies' current certified agreements and AWAs, if provisions in these agreements were to be carried over to a new workplace agreement. For example, the Standard puts a limit on cashing out annual leave so that in practice no more than two weeks' leave will be able to be cashed out per year (see s 233). And the Standard also provides for an uncapped amount of paid compassionate leave, if the circumstances arise (see s 257). There are many other examples.

Not being consistent with the AFPC Standard will not affect the validity of a workplace agreement. But providing a less favourable outcome than the Standard will leave an agency open to enforcement action under the WR Act (see s 719).

How do you make a new collective agreement?

The process for making collective agreements is simplified and abbreviated. Employees have to be given an information statement at least seven days before a collective agreement is made, and generally must be given ready access to the agreement. Unlike the previous arrangements, there is no requirement in the new WR Act for the employer to ensure that the terms of the agreement are explained to employees (cf subs 170LJ(3) and 170LK(7) of the old WR Act).

The AIRC will have no role in the making of a collective agreement.

What is also new is that it is possible, if all employees agree, for the seven-day period for ready access to the agreement to be waived (see s 338).

Once a collective agreement is approved, it needs to be lodged with the Employment Advocate within 14 days. There is no process for third party scrutiny of the collective agreement. The AIRC has no role in the making of a collective agreement. And once the collective agreement has been lodged with the Employment Advocate, it will come into operation – on the same day (see sub 347(1)).

How do you make a new AWA?

The process for making a new AWA is virtually the same as the process for making a collective agreement, except, of course, that there is no scope for a union AWA, and no voting on an AWA. Most of the process provisions in the new WR Act apply to workplace agreements generally, and do not distinguish between collective agreements and AWAs.

This means that a new AWA does not need the approval of the Employment Advocate, and is not subject to the no disadvantage test.

Like a union collective agreement and an employee collective agreement, an AWA will have to be lodged with the Employment Advocate within 14 days of approval. And an AWA will commence on the day it is lodged with the Employment Advocate.

How do new collective agreements and new AWAs operate?

Some of the rules about how collective agreements and new AWAs operate are different from (and simpler than) the rules that previously applied to certified agreements and pre-reform AWAs. The main differences are as follows.

— The nominal expiry date can be up to five years from the date the collective agreement or AWA was lodged (see s 352). (Previously there was a maximum of three years.)

— Only one workplace agreement can have effect at a particular time in relation to a particular employee (see s 348).

  This is a very significant change, as it removes the complex and sometimes confusing interaction between certified agreements and AWAs, and between overlapping certified agreements.

  This means the conundrum of having to sort out terms and conditions where one certified agreement prevails to the extent of any inconsistency with another certified agreement, or with an AWA, has been removed.

— An AWA will operate to the entire exclusion of a collective agreement (s 348).

— A workplace agreement will operate to the entire exclusion of an award (s 349).

  So it will not be necessary to specify in a collective agreement or an AWA that it displaces the X, Y and Z awards (this was never necessary in a pre-reform AWA).

— Collective agreements and AWAs will be taken to include any protected award conditions that would otherwise apply to the employee, unless the agreement or AWA expressly excludes or modifies those conditions.

— Protected award conditions are provided for in s 354. They cover eight matters, which relate to:

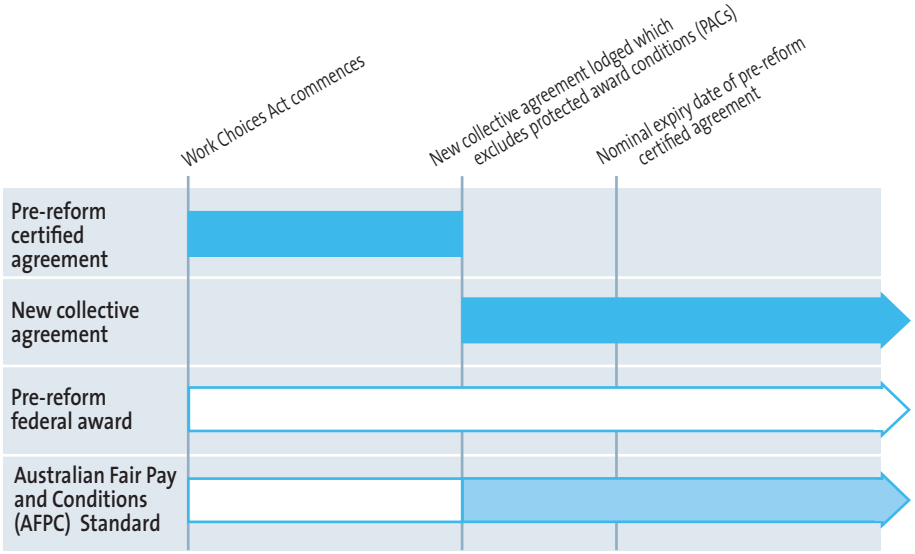
  – rest breaks
  – bonuses
  – annual leave loadings
  – shift loadings
  – public holidays
  – some allowances
  – penalty rates
  – outworker conditions.

  There is provision for the regulations to specify additional matters as protected award conditions.

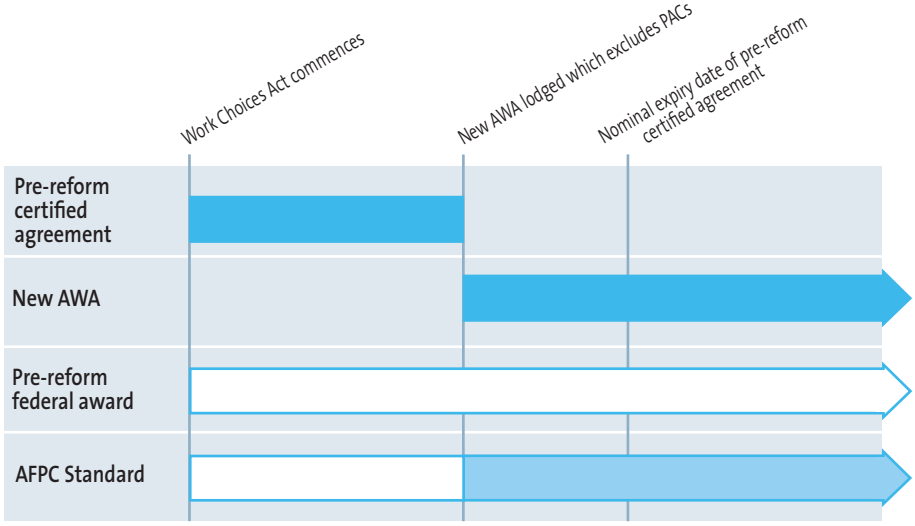
A new AWA will not require the approval of the Employment Advocate, and will not be subject to the no disadvantage test.

Figure 1: ***Transition of a pre-reform certified agreement that excludes award***

(a) Pre-reform CA ceases when replaced at any time by a collective agreement



(b) Pre-reform CA ceases when replaced at any time by an AWA

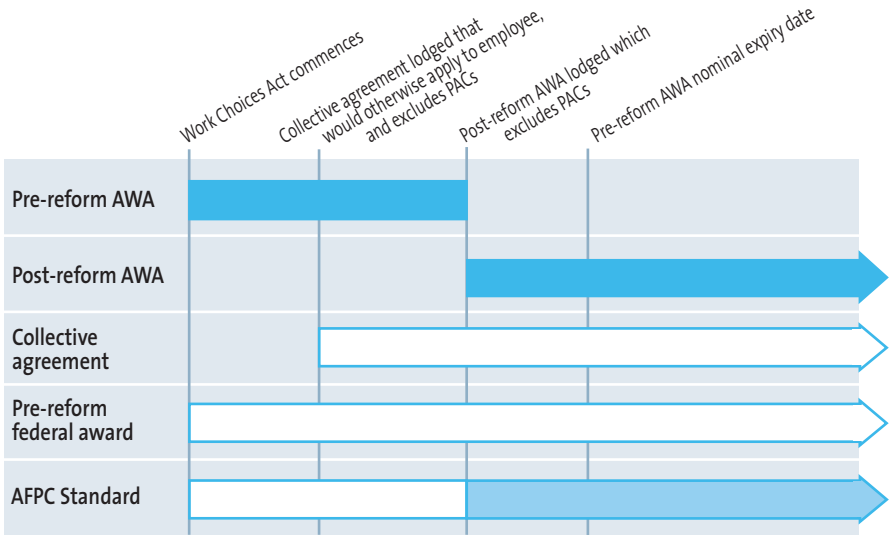


- A pre-reform certified agreement will continue to operate in relation to an employee until a collective agreement or AWA comes into operation (subclause 3(1), Schedule 7).
- If a pre-reform certified agreement is replaced by a new collective agreement or a new AWA or terminated, it can never operate again (clause 3, Schedule 7).
- The AFPC Standard does not apply to an employee on a pre-reform certified agreement (clause 30, Schedule 7).
- The AFPC Standard will operate to the extent it provides a more favourable outcome in a particular respect than a collective agreement or new AWA (s 172).
- These figures assume that the pre-reform certified agreement displaces the pre-reform federal award.

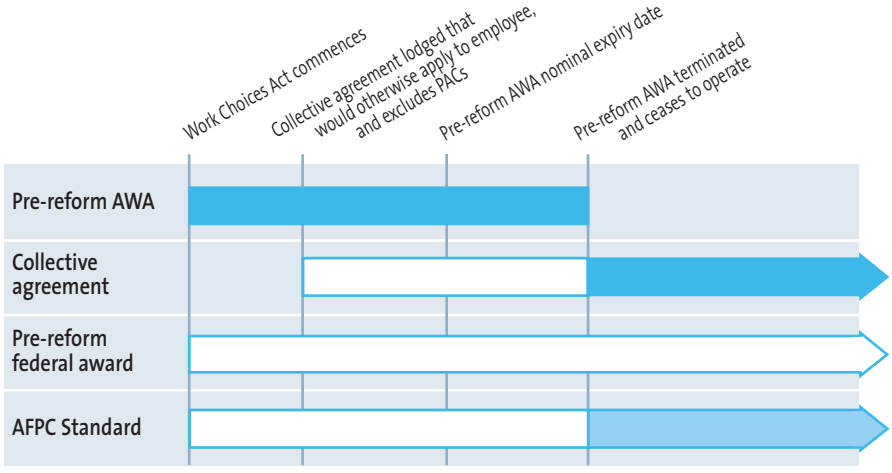
- Operative
- Operative to extent of more favourable outcomes than post-reform AWA or collective agreement
- Inoperative

Figure 2: ***Transition of a pre-reform AWA***

(a) A pre-reform AWA is unaffected by a new collective agreement, and ceases if replaced by a post-reform AWA



(b) A pre-reform AWA ceases to operate if terminated but the employee can fall back to a collective agreement



- A collective agreement has no effect in relation to an employee while a new AWA operates (sub 348(2)).
- A pre-reform AWA will continue to operate in relation to an employee beyond its nominal expiry date until it is terminated under section 170VM of the pre-reform Act (clause 18, Schedule 7) or replaced by a new AWA.
- If a pre-reform AWA is terminated (but not replaced by a new AWA), the employee will fall back to a collective agreement operating at the time the pre-reform AWA was terminated.
- If a pre-reform AWA is replaced by a new AWA or terminated, it can never operate again in relation to that employee (clause 18, Schedule 7).
- A collective agreement has no effect while a pre-reform AWA operates (clause 19, Schedule 7).
- The AFPC Standard does not apply to an employee on pre-reform AWA (clause 30, Schedule 7).
- The AFPC Standard will operate to the extent it provides a more favourable outcome in a particular respect than a new AWA (s 172).

Operative

Operative to extent of more favourable outcomes than post-reform AWA or collective agreement

Inoperative

— Unilateral termination of a workplace agreement by the employer or employee(s) will be available without any involvement of the AIRC, once the nominal expiry date of the agreement has passed, provided 90 days' notice of termination has been given (see s 393). Employers intending to terminate under this section will be able to give written undertakings about post-termination conditions.

  The consequence of termination of a workplace agreement is that a workplace agreement, or an award (except for protected award conditions) that would otherwise apply to the employee from termination will not apply to the employee (see s 399). (This 'fallback' situation is discussed in more detail later in this briefing.)

— Workplace agreements must not contain prohibited content (see s 357). And a term of a workplace agreement is void to the extent that it contains prohibited content (see s 358).

Regulations 8.5, 8.6 and 8.7 of Chapter 2 of the Workplace Relations Regulations 2006 specify matters that are prohibited content. Some 20 matters are specified, including deductions for trade union dues, trade union training leave, automatic union representation in dispute resolution, union right of entry, annual leave cash out beyond the AFPC Standard, the renegotiation of a workplace agreement, remedies for unfair dismissal, restrictions on making AWAs, discrimination, and matters that do not pertain to the employment relationship. Agencies should study the prohibited content regulations thoroughly.

It is worth mentioning that there has been some conjecture – apparently caused by new subsection 400(6) – about whether the new WR Act will allow an employer to require their *existing* employees to sign AWAs. In our view the new subsection 400(6) merely puts beyond doubt that requiring a *new* employee to sign an AWA does not amount to duress for the purposes of the Act, but does not have anything to say about existing employees.

The small to medium business exemption from the unfair dismissal provisions will not affect the Australian Public Service or any part of it.

What changes have been made to unfair dismissal?

There are some changes to the unfair dismissal arrangements.

The three key changes are that:

— the unfair dismissal provisions do not apply to organisations with fewer than 100 employees (including regular and systematic casual employees) (see sub 643(10))

— the qualifying period in employment for access to the unfair dismissal jurisdiction has increased from a default of three months, to a default of six months (see sub 643(6))

— 'genuine operational reasons', if they apply, will answer an unfair dismissal claim (see sub 643(8)).

The small to medium business exemption from the unfair dismissal provisions does not affect the Australian Public Service or any part of it. All employees in the APS are employed by the Commonwealth.

However, small to medium Commonwealth agencies that have a legal personality separate from the Commonwealth (typically because they are established as a body corporate) and who employ staff on their own account may be covered by this exemption.

The extension of the qualifying period in employment excludes a larger class of employees from the unfair dismissal jurisdiction than was previously excluded. Agencies may want to rethink their probation arrangements, in order to give themselves longer to assess employees without having to worry about their termination of employment being subject to unfair dismissal action.

Genuine operational reasons are defined in sub 643(9) to be reasons of an economic, structural or similar nature relating to the employer's undertaking, establishment, service or business. It remains to be seen how the AIRC and the Federal Court will interpret this new restriction on the unfair dismissal jurisdiction.

What happens to transmission of business?

The transmission of business provisions, which quite frequently affect Commonwealth agencies, are changed and simplified.

Transmitted collective agreements, AWAs and awards will only apply to employees who transfer to the new business.

Transmitted collective agreements, AWAs and awards will only apply to employees who transfer to the new business – and not to new employees of the receiving employer who do not come from the losing business. This resolves in the negative the issue of whether transmitted instruments can affect other parts of the receiving business.

The transmitted instruments will have a maximum period of operation of 12 months.

A transmitted collective agreement will, in relation to the transferring employees, disapply any collective agreement in the receiving business. And it will be possible to make a new collective agreement for the transferred employees which will operate even if the nominal expiry date of the transmitted collective agreement has not passed.

It will not be possible to unilaterally terminate a transmitted collective agreement or AWA.

What are the transitional arrangements for certified agreements, AWAs and awards?

Pre-reform certified agreements

Certified agreements that were made before the commencement of the main Work Choices amendments are known as 'pre-reform certified agreements'. They continue to operate in substantially the same way as they have done in the past. Many of the current provisions of the old WR Act continue to apply to them (see clause 2 of Schedule 7).

Certified agreements will continue to operate in substantially the same way as they have done in the past.

Broadly, a pre-reform certified agreement continues to operate in relation to an employee, beyond its nominal expiry date, until it is terminated, or until a collective agreement or a new AWA comes into operation that applies to the employee. (These new agreements will, however, be able to come into operation whether or not the pre-reform certified agreement has passed its nominal expiry date.) The making of a new collective agreement or a new AWA will effectively switch off the pre-reform certified agreement forever (see clauses 3 and 7 of Schedule 7).

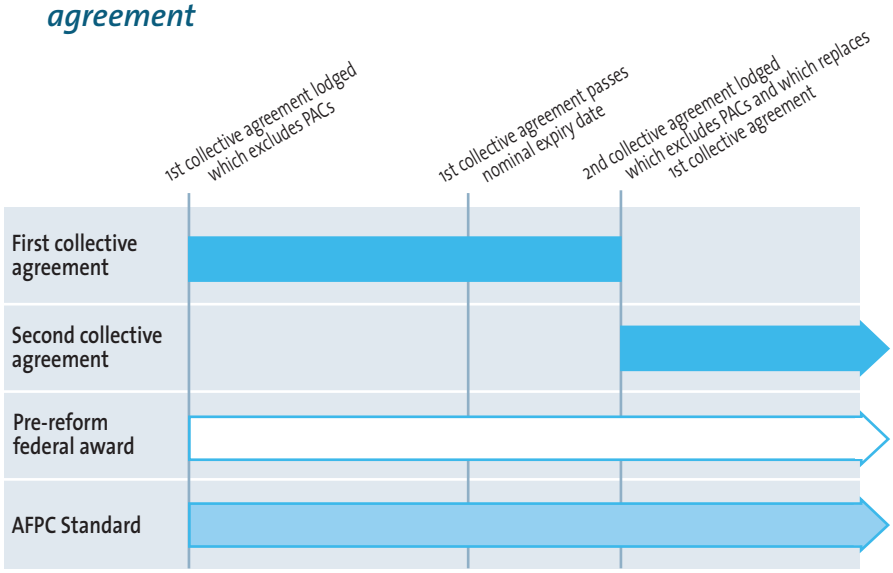
Termination arrangements for pre-reform certified agreements are the same as they were under the old provisions (see paragraph 2(1)(k) of Schedule 7).

Pre-reform certified agreements continue to prevail over awards (other than awards made under s 170MX) to the extent of any inconsistency.

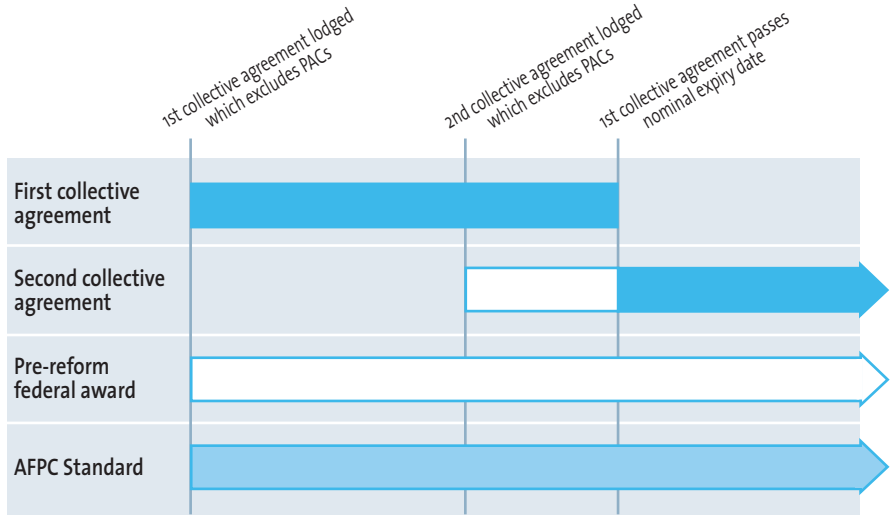
And the relationship between pre-reform certified agreements continues as it was under the old WR Act.

Figure 3: ***Operation of a new collective agreement***

(a) Agreement ceases when replaced by another collective agreement



(b) Only one collective agreement can operate at one time

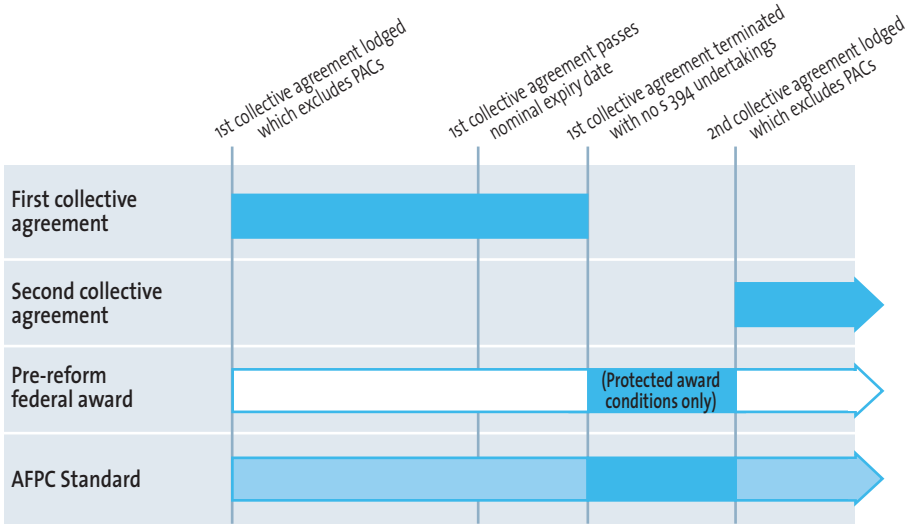


- A collective agreement will cease to operate if it has passed its nominal expiry date and been replaced by another collective agreement (sub 347(5)).
- Only one workplace agreement can have effect at any time in relation to an employee (sub 348(1)).
- A collective agreement will be taken to include any protected award conditions (PACs) that would otherwise apply to the employee unless the collective agreement expressly excludes or modifies them (sub 354(2)).
- A new collective agreement will operate to the exclusion of the award (s 349).
- The AFPC Standard will operate to the extent it provides a more favourable outcome in a particular respect than a collective agreement (s 172).

- Operative
- Operative to the extent of a more favourable outcome than collective agreement
- Inoperative

Figure 3: ***Operation of a new collective agreement (cont.)***

(c) Termination of a collective agreement and fallback conditions



- A collective agreement will be taken to include any protected award conditions (PACs) that would otherwise apply to the employee unless the collective agreement expressly excludes or modifies them (sub 354(2)).
- A collective agreement will operate to the exclusion of the award (s 349).
- Where a collective agreement is terminated with no undertakings after its nominal expiry date, the employee falls back to the AFPC Standard and any PACs (s 399).
- The AFPC Standard will operate to the extent it provides a more favourable outcome in a particular respect than a collective agreement (s 172).

- Operative
- Operative to the extent of a more favourable outcome than collective agreement
- Inoperative

Pre-reform AWAs

Australian workplace agreements made before the commencement of the main Work Choices amendments are known as 'pre-reform AWAs' and continue to operate in much the same way as they had in the past. Many of the provisions of the old WR Act continue to apply to them (see clause 17 of Schedule 7).

Broadly, a pre-reform AWA continues to operate in relation to an employee, past its nominal expiry date, until it is terminated, or until a new AWA comes into operation. Once either of those things happens, the pre-reform AWA can never operate again.

Termination arrangements for pre-reform AWAs remain the same as they were under the old WR Act provisions (see paragraph 17(1)(c) of Schedule 7). This means that unilateral termination after nominal expiry date will only be able to occur with the approval of the AIRC.

Importantly, pre-reform AWAs operate to the exclusion of a new collective agreement (see clause 19, Schedule 7).

Pre-reform awards

There are two sets of arrangements here.

Employers who are not covered by the new system

There is a set of transitional arrangements (in Schedule 6) for employers who are not covered by the new federal system. These arrangements will preserve awards for a transitional period of five years. This briefing does not deal with these arrangements further, because they are unlikely to affect Commonwealth or Commonwealth authority employment.

Employers who are covered by the new system

The Commonwealth and Commonwealth authorities are covered by the new system. They fall within the definition of 'employer' in s 6. This means that the transitional arrangements in Schedule 4 of the Work Choices Act (not the WR Act) apply to them.

The transitional arrangements for employers within the new system are that awards continue to operate, potentially indefinitely. They are known as 'pre-reform awards'. And they are 'awards' for the purposes of the WR Act generally. But they have a modified operation.

First, they are generally confined in their operation to the new list of 15 allowable award matters set out at s 513. Generally, any matter in an award that is not an allowable matter ceased to have effect on 27 March 2006 (see s 525). (This is similar to what happened after the 20 allowable award matters were introduced in 1996.) The exception to this is in relation to preserved award terms (see s 527). (Note that preserved award terms are entirely different from protected award conditions, dealt with above.) Preserved award terms are award terms that relate to:

— annual leave
— personal/carer's leave
— parental leave, including maternity and adoption leave
— long service leave
— notice of termination
— jury service
— superannuation.

All of these terms will operate potentially indefinitely, except for superannuation terms, which will cease to have effect on 30 June 2008.

The transitional arrangement for employers within the new system is that awards will continue to operate, potentially indefinitely.

Award rationalisation will not affect preserved award terms. But an award (and this includes a pre-reform award) has no effect in relation to an employee while a workplace agreement operates in relation to the employee (s 349).

If we take the *Australian Public Service Award 1998* as an example, then, some of its terms fall within the new list of 15 allowable award matters, and continue to operate, but are subject to award rationalisation; some of its terms are preserved award terms, and continue to operate and are not subject to award rationalisation; and those matters that are neither preserved award terms nor allowable matters ceased to operate after commencement. But the whole operation of a pre-reform award is suspended by a new collective agreement or a new AWA (and continues to be excluded by a pre-reform AWA, and by a pre-reform certified agreement if it provides for this).

It is particularly worth noting that awards no longer deal with wages, as wages is not one of the 15 allowable matters, nor is it a preserved award term. Wages are now the province of the AFPC Standard.

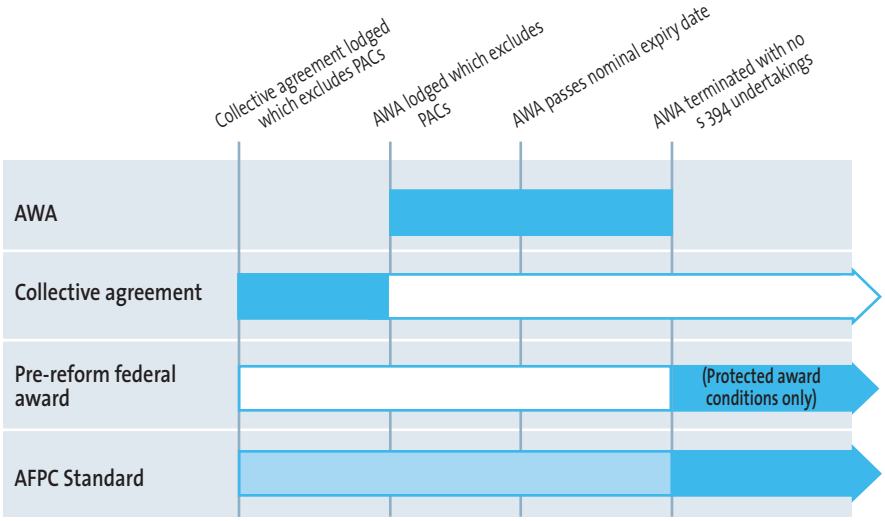
Fallback arrangements

A number of agencies have asked what will happen to an employee's terms and conditions if they are working under a particular agreement and it ceases to apply to them.

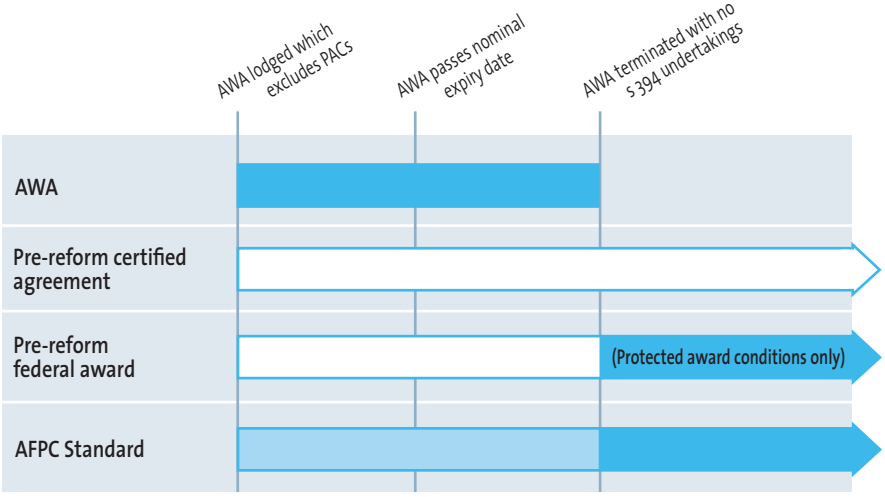
This briefing will only look at two permutations: what happens if a new collective agreement is terminated, and what happens if a new AWA is terminated. Termination of pre-reform certified agreements and termination of pre-reform AWAs have not been common occurrences. But the new unilateral termination provisions for collective agreements and new AWAs may well mean they are commonly terminated.

Figure 4: ***New AWAs***

(a) Operation and termination of a new AWA



(b) Termination of new AWA where a pre-reform certified agreement was operating



- An award has no effect in relation to an employee while they are on an AWA (s 349).
- The AWA will include protected award conditions (PACs) (if the award otherwise applies) unless expressly excluded by the AWA (sub 354(2)).
- The AFPC Standard will operate to the extent it provides a more favourable outcome in a particular respect than an AWA or a collective agreement (s 172).
- A collective agreement has no effect in relation to an employee while they are on an AWA (sub 348(2)).
- A new AWA continues to operate until terminated or replaced by another AWA (sub 347(4)).
- Where a new AWA is terminated, either by approval or unilaterally after its nominal expiry date, the employee falls back to the AFPC Standard and any PACs that apply to them (s 399).
- A collective agreement that was already operating when an employee's AWA was terminated will never operate in relation to that employee (s 399).
- A pre-reform certified agreement has no effect in relation to an employee while they are on an AWA (clause 3, Schedule 7).
- Where a new AWA is terminated, the employee will not fall back to a pre-reform certified agreement that would otherwise apply to them (clause 7, Schedule 7).

- Operative
- Operative to the extent of a more favourable outcome than collective agreement or AWA
- Inoperative

Where a new collective agreement or a new AWA is terminated, s 399 will switch off the operation of another new workplace agreement – a collective agreement or an AWA – and it will switch off the operation of an award, except to the extent that the award contains protected award conditions. And those instruments will respectively remain switched off, and partially switched off, until another workplace agreement starts operating in relation to the employee.

To give an example: if, under the new arrangements an employee was covered by a collective agreement and some months later entered into an AWA, and that AWA was terminated, then the employee would not fall back to the collective agreement, or to a successor to that collective agreement that was operating before the termination. In the absence of any undertakings from the employer, they would fall back to the AFPC Standard and to any protected award conditions in any award that applied to them. In the Commonwealth public sector, this could be quite a long way to fall.

The new unilateral termination provisions for collective agreements and new AWAs may well mean they are commonly terminated.

A second example: if an employee was covered by a pre-reform certified agreement and moved onto a new AWA, and if that AWA was terminated, then the employee would not fall back to the pre-reform certified agreement. As in the previous example, they would fall back to the AFPC Standard and to any protected award conditions in any award that applied to them. This result is produced by clause 7 of Schedule 7 of the WR Act.

Richard Harding *specialises in employment and workplace relations matters. He has drafted or revised numerous Australian workplace agreements and certified agreements for departments and agencies, and has assisted in interpreting existing agreements.*

Notes

1 G Williams, *Labour Law and the Constitution*, The Federation Press, Sydney, 1998, p 43.

2 *The Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311.

3 *Breaking the Gridlock: Towards a Simpler National Workplace Relations System, Discussion Paper 1 – The Case for Change*, October 2000, p 63 <http://www.simplerwrsystem.gov.au/discussion/pdf/changecase.pdf>.

AGS contacts

This briefing was prepared by Richard Harding of our Canberra office with the assistance of Jenny Burnett and Caroline McGregor. For further information please contact Richard on tel 02 6253 7026, email richard.harding@ags.gov.au or any of the following lawyers:

Canberra	Leah Edwards	02 6253 7090
Sydney	Jim Heard	02 9581 7477
Melbourne	Craig Rawson	03 9242 1248
Brisbane	Maurice Swan	07 3360 5702
Perth	Wendy Endebrock-Brown	08 9268 1113
Adelaide	Sarah Court	08 8205 4211
Hobart	Peter Bowen	03 6220 5474
Darwin	Jude Lee	08 8943 1405

For enquiries regarding supply of issues, change of address details etc.

T *02 6253 7052* ***F*** *02 6253 7313* ***E*** *ags@ags.gov.au*

Offices

Canberra
50 Blackall Street Barton ACT 2600

Sydney
Level 23, 133 Castlereagh Street Sydney NSW 2000

Melbourne
Level 21, 200 Queen Street Melbourne VIC 3000

Brisbane
Level 12, 340 Adelaide Street Brisbane QLD 4000

Perth
Level 19, 2 The Esplanade Perth WA 6000

Adelaide
Level 20, 25 Grenfell Street Adelaide SA 5000

Hobart
Level 8, 188 Collins Street Hobart TAS 7000

Darwin
Level 3, 9–11 Cavenagh Street Darwin NT 0800

Web site
For a full review of AGS services, visit <www.ags.gov.au>.

Electronic versions of AGS newsletters are available for clients who prefer to receive issues in this form. Please contact 02 6253 7052 or email ags@ags.gov.au to arrange supply.

For enquiries regarding supply of issues, change of address details:
T *02 6253 7052* ***F*** *02 6253 7313*
E *ags@ags.gov.au*

ISSN 1448-4803
Approved Postage PP 233744/00042