

Inside:

New Rules When
Purchasing A Business

So How Many Employees
Do You Really Have?

Work Place Privacy
in Victoria

Some Relief for Small
Business Employers -
Redundancy Pay
Obligations

WorkChoices - are you ready?

The Federal Government's overhaul of our industrial relations system WorkChoices is to come into effect in March 2006.

WorkChoices will implement a national industrial relations system covering up to 85% of Australian employees including all Victorian employees and all employees of constitutional corporations.

All employers need to be aware of the changes under WorkChoices and how they will impact on their business, and be ready to comply with them.

The new Fair Pay & Conditions Standard

One of the main WorkChoices changes is the introduction of the new Fair Pay & Conditions Standard.

All employees, with the exception of those on current AWAs and certified agreements, must be given terms and conditions of employment that comply with the new Standard.

Under the new Standard, employees are entitled to:

- a basic minimum rate of pay for each hour worked;
- a maximum of 38 hours work per week plus reasonable additional hours;
- a minimum of 4 weeks annual leave;
- 10 days paid personal leave (sick and carer's leave); and
- minimum entitlements to unpaid carer's leave, compassionate leave and parental leave.

The effect of the Standard on industrial instruments

The new Standard will impact on AWAs, certified (collective) agreements, federal/common rule awards and common law contracts.

AWAs and certified agreements operating before WorkChoices begins will continue to have effect under WorkChoices, even after their nominal expiry date. However, new AWAs and certified agreements must comply with the new Standard.

Awards will continue to apply under WorkChoices except to the extent that they are inconsistent or offer less than the new Standard. If an AWA or certified agreement is implemented under WorkChoices, the award will become totally irrelevant.

Common law contracts will continue to apply under WorkChoices, however they cannot contain terms that are inferior or inconsistent with the new Standard.

Reasons to review industrial instruments

Employers should conduct an audit of their industrial instruments prior to the WorkChoices changes taking effect to determine whether their industrial instruments are WorkChoices compliant.

If an Employer uses AWAs to govern the terms and conditions of employment, the employer will need to introduce new WorkChoices-compliant AWAs when employing new employees.

If an employer has a current certified agreement, it can maintain the status quo. However, an employer entering into a new certified agreement will need to use a certified agreement that is WorkChoices compliant.

If covered by an award, an employer can dispense with the award by offering employees a WorkChoices AWA or certified agreement.

Importantly, for those employers who have used common law contracts to avoid the complex approval system for AWAs and certified agreements, the approval system under WorkChoices will be far simpler involving a quick and easy lodgment process with the Office of the Employment Advocate.

However, if an employer wants to continue using common law contracts, such contracts must comply with the new Standard.

Mark Dunphy, Partner + 61 3 9603 3591
mark.dunphy@hallandwilcox.com.au

Alison Baker, Senior Associate + 61 3 9603 3568
alison.baker@hallandwilcox.com.au

New rules when purchasing a business

Businesses - particularly prospective purchasers of another business - should now be familiarising themselves with the changes to the transmission of business rules that WorkChoices will introduce. Below we discuss the current rules and then consider the rules under WorkChoices.

The current transmission of business rules

Where a transmission of business occurs under the current system, the purchaser of a business will normally be bound by any industrial instruments which bind the vendor (awards, collective agreements or Australian Workplace Agreements ("AWA")).

In short, under the current system:

- **collective agreements/awards transmit to a purchaser even if the purchaser of a business does not hire any transferring employees covered by such instruments, and will bind the purchaser until the relevant instrument is either terminated or replaced by another instrument;**
- **collective agreements/awards which transmit to a purchaser will bind not only transferring employees, but also the purchaser's existing employees if their employment comes within the scope of the relevant collective agreement or award; and**
- **AWAs only transmit if the purchaser hires transferring employees covered by an AWA.**

Transmission of business rules under WorkChoices

WorkChoices will significantly lessen the effect and duration of transmitted industrial instruments on the purchaser. It will however introduce new notice requirements.

Effect and Duration of transmitted industrial instruments

Under WorkChoices, awards and workplace agreements (including AWAs and collective agreements) will only transmit to a purchaser if the purchaser hires transferring employees covered by one of those instruments. Further, the purchaser will only be bound by the transmitted instruments in relation to the transferring employees and for a maximum period of 12 months after the transmission occurred i.e. the completion date.

During the 12 month transmission period, the purchaser may enter into either a collective agreement or AWAs with transferring employees, both of which would have the effect of terminating any applicable transmitted instrument.

Alternatively, the purchaser could wait until the end of the 12 month period, when any transmitted instruments cease to apply. The employment of the transferring employees could then be governed by either:

- **an applicable award; or**
- **an AWA; or**

- **an existing collective agreement (entered into under WorkChoices) between the purchaser and its existing employees that is capable of applying; or**
- **a new collective agreement; or**
- **in the event that none of the above apply, the new Australian Fair Pay and Conditions Standard.**

Notice requirements

As stated earlier, WorkChoices will impose new notice requirements on purchasers.

To this end, within 28 days of a transferring employee becoming an employee of the purchaser, the purchaser must provide the transferring employee(s) with a written notice which:

- **identifies the relevant transmitted instrument;**
- **states that the purchaser is bound by the transmitted instrument;**
- **specifies the date on which the 12 month period ends;**
- **states that the purchaser will remain bound by the transmitted instrument until the end of the 12 month period unless the transmitted instrument is terminated, or otherwise ceases to be in operation, before the end of that period;**
- **specifies the kinds of instruments (if any) that can replace, or exclude the operation of, the transmitted instrument (e.g. an AWA or collective agreement entered into with transferring employees prior to the end of the transmission period);**
- **sets out the source for the terms and conditions that the purchaser intends to apply to the matters dealt with by the transmitted instrument when the transmitted instrument ceases to bind the purchaser; and**
- **identifies any award or collective agreement that binds the purchaser and the purchaser's existing employees that would bind the transferring employees but for the transmission of business provisions.**

This written notice must be lodged with the Employment Advocate within 14 days of the date on which the notice was given to all transferring employees (or in the case the notice is provided to employees on different days, within 14 days of the earliest of those dates).

Due diligence

Notwithstanding the more advantageous transmission of business provisions under WorkChoices, prospective purchasers should nevertheless continue to conduct thorough due diligence into any industrial instruments which may apply to them if they purchase a business. They should also be aware of the new notice requirements.

Karl Rozenbergs, Partner + 61 3 9603 3583
karl.rozenbergs@hallandwilcox.com.au

Fiona Jamieson, Lawyer + 61 3 9603 3556
fiona.jamieson@hallandwilcox.com.au

So how many employees do you really have?

One of the most contentious reforms introduced by WorkChoices is the exclusion from the unfair dismissals jurisdiction of employers with 100 employees or less.

Employers should be aware that when calculating the number of employees of one employer that employees of “related bodies corporate” should also be included. This may result in a greater number of employers still being subject to unfair dismissal laws.

To determine whether an employer is a “related body corporate” to another entity, the employer must be a constitutional corporation and meet the definition of “related bodies corporate” in the Corporations Act 2001.

Generally speaking, an employer will be grouped with another entity if the employer is:

- (a) a subsidiary of the other entity;**
- (b) a holding company of the other entity; or**
- (c) a subsidiary of a holding company of another entity.**

There are a number of criteria that need to be met to determine whether an employer that is a constitutional corporation is a subsidiary of another. In particular, an employer will only be a subsidiary of the other employer if:

- (a) the other employer controls the composition of the employer’s board; or**
- (b) the other employer is in a position to cast, or control the casting of, more than one half of the maximum number of votes that might be cast at the general meeting of the employer company; or**
- (c) the other employer holds more than one half of the issued share capital of the employer; or**
- (d) the employer is a subsidiary of a subsidiary of the other employer.**

Given the way in which the WorkChoices legislation can group employees, employers who potentially have more than 100 employees should keep in mind that the exclusion may not apply to them in the event they wish to terminate the employment of an employee.

Karl Rozenbergs, Partner + 61 3 9603 3583
karl.rozenbergs@hallandwilcox.com.au

Jessica Fletcher, Lawyer + 61 3 9603 3576
jessica.fletcher@hallandwilcox.com.au

Workplace Privacy in Victoria

The Victorian Law Reform Commission recently released a report on workplace privacy, “Workplace Privacy - Final Report” (“the Report”).

The Report recommends the introduction of legislation to regulate workplace privacy in Victoria. Specifically, the Report recommends that when undertaking workplace surveillance activities, an employer must:

- **only undertake the activities if they are directly connected with the employer’s business;**
- **not undertake the activities in a manner that is not proportionate to the purpose for which they are being used;**
- **first take reasonable steps to inform and consult employees of the nature of the activities (e.g. computer surveillance, camera surveillance etc), the time period in which they will be undertaken, and the safeguards used to ensure they are conducted appropriately; and**
- **provide adequate safeguards to ensure the activities are conducted appropriately.**

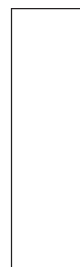
Also, the Report recommends the introduction of mandatory codes for covert surveillance and advisory codes for general workplace surveillance, together with the establishment of a regulator to issue such codes and monitor employer compliance.

The Victorian Government has indicated that it will legislate on the basis of the recommendations contained in the Report.

The practical effect of this is that all Victorian employers will need to be aware of, and comply with, the new workplace privacy laws or risk facing a substantial penalty. The first step to compliance is to implement workplace surveillance policies and communicate such policies to employees.

We will provide you with further updates as the Victorian Government progresses towards legislating workplace privacy. In the interim, we are able to assist you with the drafting and implementation of workplace surveillance policies.

Alison Baker, Senior Associate +61 3 9603 3568
alison.baker@hallandwilcox.com.au





Hall & Wilcox
Lawyers

EMPLOYMENT & WORKPLACE RELATIONS

Mark Dunphy +61 3 9603 3591
Partner
mark.dunphy@hallandwilcox.com.au

Karl Rozenbergs +61 3 9603 3583
Partner
karl.rozenbergs@hallandwilcox.com.au

Alison Baker +61 3 9603 3568
Senior Associate
alison.baker@hallandwilcox.com.au

Jessica Fletcher +61 3 9603 3576
Lawyer
jessica.fletcher@hallandwilcox.com.au

Fiona Jamieson +61 3 9603 3556
Lawyer
fiona.jamieson@hallandwilcox.com.au

Some relief for small business employers - redundancy pay obligations

Federal Parliament has given effect to the provisions in WorkChoices that remove the burden on small businesses to make severance payments to redundant employees in certain circumstances.

Typically, an employer has an obligation to make severance payments on redundancy if the employer:

- **is bound by an award or certified agreement that requires the employer to make a severance payment to its employee;**
- **is bound by a law that requires the employer to make severance payments;**
- **includes an entitlement to severance pay in the employee's common law contract; or**
- **has a redundancy policy that applies to its employees.**

However, under the provisions of WorkChoices that took effect on December 14 2005, small business employers may no longer have the obligation to make severance payments. The new provisions apply to employers of 15 or less employees that are constitutional corporations or an employer in Victoria and the Territories ("small business employer").

To determine if an employer has 15 or less employees, you need to count the number of full-time, part-time employees (including employees about to be made redundant) and casual employees employed for a period of at least 12 months on a regular and systematic basis.

Specifically, the provisions in WorkChoices have the effect of eliminating severance pay for redundant employees from the list of "allowable award matters" and removing the obligation on small business employers to pay severance pay that arises under an award, State or Territory law or order of the Australian Industrial Relations Commission ("AIRC").

The new provisions state that an obligation to make severance payments on small businesses will be of no effect if it was an obligation imposed after 26 March 2004. That was the effective date of the AIRC's Termination Change and Redundancy Case 2004 that first required small business employers to make severance payments to employees on redundancy.

However, a small business employer will still have an obligation to make severance payments to redundant employees where:

- **The small business employer was a respondent to a federal award before 26 March 2004 and a term of that award imposes an obligation on the employer to make severance payments.**
- **The obligation to pay a severance payment arose due to a redundancy situation occurring before 14 December 2005. For example, if the employer retrenched an employee on 1 December 2005 and at that time had an obligation to make a severance payment to the employees but had not yet made the payment.**
- **The obligation to make a severance payment arises under a common law contract or policy.**

In light of the above, we suggest employers review their redundancy obligations before implementing redundancies in the workplace. That way they may avoid making severance payments they are not obliged to.

Mark Dunphy, Partner +61 3 9603 3591
mark.dunphy@hallandwilcox.com.au

Jessica Fletcher, Lawyer +61 3 9603 3576
jessica.fletcher@hallandwilcox.com.au

Level 30, Bourke Place
600 Bourke Street, Melbourne
Victoria 3000 Australia

Phone +61 3 9603 3555
Facsimile +61 3 9670 9632
www.hallandwilcox.com.au