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WorkChoices Checklists

Acronyms List:

AFPC	Australian Fair Pay Commission
AFPCS	Australian Fair Pay and Conditions Standard
AIRC	Australian Industrial Relations Commission
AWA	Australian Workplace Agreement
OEA	Office of the Employment Advocate
OWS	Office of Workplace Services

1. COVERAGE

Who is covered by WorkChoices?	<ul style="list-style-type: none"> trading, financial and foreign corporations (constitutional corporations) and their employees. To be considered a trading or financial corporation an employer must meet two tests: <ul style="list-style-type: none"> i. an employer must be incorporated; and ii. the employer's trading or financial activities must be 'significant' or 'substantial' employees and employers in the Australian Capital Territory, the Northern Territory and Christmas and Cocos (Keeling) Islands the Commonwealth, including its authorities, and its employees employers in respect of waterside, maritime and flight crew employees employed in connection with interstate, overseas, inter-territory or state-territory trade and commerce and employees and employers in Victoria.
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2. TRANSITIONAL APPLICATION

If the employer <i>is</i> a 'trading' or 'financial' corporation etc:	Is there a workplace agreement in place?	Federal (' <i>pre-reform agreement</i> ') Sched 7 Pt 2	Terms prevail over award; ' <i>anti-AWA terms</i> ' unenforceable; does not need to comply with AFPCS minima
		State (' <i>preserved state agreement</i> ') Sched 8 Pt 2	Operates until expires or replaced by WorkChoices agreement; may not be extended; ' <i>prohibited content</i> ' unenforceable; does not need to comply with AFPCS minima
	Is there an applicable award?	Federal Award (' <i>pre-reform award</i> ') Sched 6	Only covers ' <i>allowable award matters</i> '; ' <i>non-allowable award matters</i> ' unenforceable; needs to comply with AFPCS minima
		State Award (' <i>notional agreement preserving state award</i> ' or ' <i>transitional federal agreement</i> ') Sched 8 Pt 3	Retains nominal expiry date; only covers ' <i>allowable award matters</i> '; needs to comply with AFPCS minima; 3 years to make transition to Federal system
	No award or agreement	Common law of employment continues to apply plus applicable state & federal legislation. Option for employers to enter into WorkChoices agreements.	
If the employer <i>is not</i> a 'trading' or 'financial' corporation etc (an 'excluded employer'):	Is there a workplace agreement in place?	Federal (' <i>pre-reform agreement</i> ') Sched 7 Pt 2	Continues to operate, within 5 year transitional period, until it expires; prevails over awards, <i>preserved state agreements</i> , or <i>notional agreements preserving state award</i>
		State (collective and individual)	Continues to operate under State system
	Is there an applicable award?	Federal Award (' <i>transitional award</i> ') Sched 6	Continues in operation within 5 year transitional period; lapses if negotiated through trade union or employer organization and membership ceases; ceases on making state agreement
		State Award	Continues to operate under State system
	No award or agreement	Common law of employment continues to apply plus applicable state & federal legislation. No option for employers to enter into WorkChoices agreements.	
Provisions that apply to <u>all</u> employers (including those not in WorkChoices)	<ol style="list-style-type: none"> Equal remuneration for work of equal value Parental leave Unlawful termination Redundancy Consultation: <i>if terminating 15 or more employees due to redundancy, need to consult with relevant unions</i> Union Right of entry 		

3. THE AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD (AFPCS) Part 7 of the Act

The AFPCS sets out the minimum wages and conditions of employment that apply to employees in the WorkChoices system.

Minimum conditions of employment are:

1. a maximum of 38 ordinary hours of work per week (plus reasonable additional hours of work) **Division 3**;
2. four weeks of paid annual leave (with an additional week for shift workers) **Division 4**;
3. ten days of paid personal/carer's leave (including sick leave and carer's leave), with provision for an additional two days of unpaid carer's leave per occasion and an additional two days of paid compassionate leave per occasion **Division 5**; and
4. 52 weeks of unpaid parental leave (including maternity, paternity and adoption leave) **Division 6**.

4. AWARDS UNDER WORKCHOICES

Allowable Award Matters

(other than '*preserved award terms*', terms in awards that do not fall under this list will no longer be enforceable)

- ordinary time hours of work, rest breaks, notice periods and variations to working hours;
- incentive-based payments and bonuses;
- annual leave loadings;
- ceremonial leave;
- leave for the purpose of seeking other employment after notice of termination;
- state or territory public holidays, entitlements of employees to payment in respect of those days, and days to be substituted for public holidays;
- monetary allowances (for expenses, responsibilities or skills not included in rates of pay, or for the performance of particular tasks, or work under certain conditions or locations);
- loadings or working overtime or for shift work;
- penalty rates;
- redundancy pay by an employer of 15 or more employees;
- stand-down provisions;
- dispute settling procedures;
- type of employment, such as full-time employment, casual employment, regular part-time employment and shift work; and
- conditions for outworkers to the extent necessary to ensure that their overall conditions of employment are fair and reasonable.

Non-Allowable Award Matters include:

- 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, unless the organisation is the representative of the employer's or employee's choice;
- conversion from casual employment to another type of employment;
- the number or proportion of employees that an employer may employ in a particular type of employment;
- prohibitions (whether direct or indirect) on an employer employing employees in a particular type of employment;
- the maximum or minimum hours of work for regular part-time employees;
- restrictions on the range or duration of training arrangements;
- restrictions on the engagement of independent contractors and requirements relating to the conditions of their engagement;
- restrictions on the engagement of labour hire workers, and requirements relating to the conditions of their engagement, imposed on an entity or person for whom the labour hire worker performs work under a contract with a labour hire agency;
- union picnic days;
- tallies in the meat industry;
- dispute resolution training leave;
- trade union training leave;
- any other matter prescribed by the regulations.

Preserved Award Entitlements

(may continue more generous than the AFPCS, but will not apply to new employers)

- annual leave;
- personal/carers leave;
- parental leave, including maternity and adoption leave;
- long service leave;
- notice of termination;
- jury service; and
- superannuation (until 30 June 2008).

5. UNFAIR DISMISSAL UNDER WORKCHOICES

<p>Who Cannot Claim for unfair dismissal?</p> <ul style="list-style-type: none"> • Employees employed by an employer with 100 or fewer employees • Employees terminated within the “qualifying period of employment” (generally six months) • Employees engaged for a specified period of time • Employees engaged for a specified task • Employees under a fixed-term trainee agreement • Seasonal employees • Employees terminated for, or for reasons that include, genuine operational reasons • Employees who are not employed under award derived conditions and whose remuneration exceeds \$94,900 per annum
<p>Factors required to be taken into account in determining claim</p> <ul style="list-style-type: none"> • Was there a valid reason relating to the employee’s capacity or conduct (including its effect on the safety and welfare of other employees)? • Was the employee notified of the reason? • Was the employee given an opportunity to respond to any reason related to their capacity/ conduct? • If termination was for reason of performance, was the employee warned of their unsatisfactory performance? • The size of the employer’s undertaking and absence of HR specialists and the likely effect this would have on termination procedures
<p>Remedies</p> <ul style="list-style-type: none"> • Reinstatement and attendant orders regarding continuity of service • Back pay • If reinstatement is inappropriate, an amount in lieu of reinstatement to a maximum of six months’ remuneration
<p>What must be considered by the Commission in awarding remedies?</p> <ul style="list-style-type: none"> • Where reinstatement is ordered, the income earned between termination and the order for reinstatement and the likely income to be earned between the order and actual reinstatement • If misconduct contributed to the decision to terminate the employment, an amount awarded in lieu of reinstatement must be reduced by an appropriate amount in consideration of the misconduct • No amount is to be awarded by way of compensation for shock, distress, humiliation, or other analogous hurt caused to the employee by the manner of terminating the employment
<p>Time Limits</p> <p>An application for unfair dismissal must be lodged with AIRC within 21 days after termination of employment. The AIRC can extend this period.</p>

6. UNLAWFUL TERMINATION UNDER WORKCHOICES: Part 12 Division 4

<ul style="list-style-type: none"> • Less than Required Notice 	<p>Period of continuous service</p> <ul style="list-style-type: none"> • Not more than 1 year • Greater than 1, less than 3 years • Greater than 3, less than 5 years • More than 5 years 	<p>Period of Notice (add 1 week if employee over 45 and has completed 2 yrs cont. service)</p> <ul style="list-style-type: none"> At least 1 week At least 2 weeks At least 3 weeks At least 4 weeks
	<p>Who Cannot Claim re inadequate notice?</p> <ul style="list-style-type: none"> • Employees engaged for a specified period of time • Employees engaged for a specified task • Employees under a fixed-term trainee agreement • Employees serving a period of probation if the period is three months or less (or such reasonably longer period as was agreed in advance) • Casual employees • Employees who are not employed under award derived conditions and whose remuneration exceeds \$94,900 per annum • Seasonal employees • Daily hire employees working in the building and construction industry or the meat industry • Weekly hire employees performing work in the meat industry whose termination of employment is solely determined by seasonal factors 	
<ul style="list-style-type: none"> • Temporary absence from work because of illness or injury within the meaning of the regulations • Trade union membership or participation in trade union activities outside working hours or, with the employer’s consent, during working hours; non membership of a trade union • Seeking office as, or acting or having acted in the capacity of, a representative of employees; the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities • 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 negotiate in connection with, make, sign, extend, vary or terminate an AWA • Absence from work during maternity leave or other parental leave • Temporary absence from work because of the carrying out of a voluntary emergency management activity, where the absence is reasonable having regard to all the circumstances 		
<p>Time Limits</p> <p>An application for unlawful termination must be lodged with the AIRC within 21 days after termination of employment. The AIRC can extend this period. The AIRC must try to conciliate the matter, and if conciliation is unsuccessful, the AIRC must issue a certificate on the merits of the application. At that point, the employee has 28 days to elect whether to proceed to court.</p>		
<p>Grant of Legal Assistance</p> <p>Employees who believe they have been unlawfully terminated may be eligible to receive up to \$4,000 of independent legal advice, based on the merits of their claim. To be eligible for assistance, the person’s income prior to termination must be below \$915.70 per week or \$47,745 per year.</p>		

7. EMPLOYMENT AGREEMENTS UNDER WORKCHOICES

Types

- *Employee Collective Agreements*: between an employer and a group of employees
- *Union Collective Agreements*: between an employer and a union
- *Australian Workplace Agreements*: between an employer and an individual employee
- *Union Greenfield Agreements*: between a union and an employer for a new business which does not yet have employees
- *Employer Greenfields Agreements*: made by an employer for a new business which does not yet have employees
- *Multiple Business Agreements*: between an employer and either a union or a group of employees

Required Content

- Compliance with the Australian Fair Pay and Conditions Standard (AFPCS) relating to basic rates of pay, hours of work, annual leave, personal/carer's leave, and parental leave
- Nominal expiry date
- A dispute settling procedure
- If the following '*protected award conditions*' are not expressly referred to in the workplace agreement, then they will continue to apply:
 - public holidays;
 - rest breaks (including meal breaks);
 - incentive-based payments and bonuses;
 - annual leave loadings;
 - monetary allowances (for work expenses, for additional responsibilities or skills, or for disabilities regarding particular work conditions or locations);
 - penalty rates;
 - shift/overtime loadings; and
 - outworker conditions.

Prohibited Content includes:

- union dues deductions, including payroll facilities for such deductions;
- employees receiving leave to attend training provided by a trade union;
- employees receiving paid leave to attend meetings conducted by or made up of union members;
- renegotiation of a workplace agreement;
- rights of unions and employer organisations to participate in dispute settling procedures unless such representation is at the employer's or employee's choice;
- the right of entry of union officials;
- restrictions on engagement of independent contractors and labour hire workers, including requirements relating to the conditions of such engagements;
- the foregoing of annual leave, unless otherwise done in accordance with the Act;
- provision of information about employees bound by the workplace agreement to a trade union unless provision of that information is required or authorised by law;
- directly or indirectly requiring a person bound by the workplace agreement to encourage or discourage another person bound by the agreement to become or remain a member of an industrial association;
- permitting persons bound by the workplace agreement to engage in or organise industrial action;
- the prohibition or restriction of disclosure details of a workplace agreement by a person bound by the agreement;
- conferring a right or remedy in relation to termination of employment for reason that is harsh, unjust or unreasonable (this does not apply to a process for managing employee's performance or conduct);
- an objectionable provision within the meaning of the Act;
- restricting (either directly or indirectly) the ability of a person bound by the workplace agreement to offer, negotiate or enter into an AWA.

Procedure

- Employers must take reasonable steps to ensure that employees either have, or have ready access to, a written copy of a proposed workplace agreement **at least 7 days prior to the agreement being approved**;
- employers must take reasonable steps to ensure that employees are given an OEA Information Statement **at least 7 days prior to the agreement being approved** (including information on employer rights and responsibilities in agreement making, and information on protections and services available to employees as part of the agreement making process, although there is **no** requirement to explain the terms of the agreement);
- employees can appoint a bargaining agent to assist them negotiate an Australian Workplace Agreement, an Employee Collective Agreement, or an Employer Greenfields Agreement;
- employers must obtain the approval of the employee(s) to the agreement (note that an employer can require an employee to make an Australian Workplace Agreement as a condition of employment);
- all workplace agreements must be lodged with the OEA within 14 days of approval.