

PART D

ANALYSIS - DIFFERENCES BETWEEN WORK CHOICES AND THE QUEENSLAND INDUSTRIAL RELATIONS ACT 1999

WORKPLACE AGREEMENTS (INDIVIDUAL)

Industrial Relations Act 1999

- Individual workplace agreements (Queensland Workplace Agreements or QWAs) are provided for in the Act.
- They may be negotiated between employers and employees over the age of 18 (s. 192).
- QWAs come into operation for new employees once a filing receipt is issued by the Registrar or Chief Inspector and, for existing employees, once an approval notice is issued by the QIRC (ss. 190, 195). The QIRC must ensure that *all* QWAs meet the statutory requirements, including the “no disadvantage” test (s. 203).
- QWAs displace any award or agreement that would otherwise apply (ss. 209, 213). QWAs made after 1 September 2005 may also displace a number of “default” statutory minimum conditions by expressly varying or removing them. The default minima include maximum working hours, penalties for overtime and shift work, rest breaks, casual loadings (s. 9A), annual leave loading (s. 13A), jury service leave (s. 14A), paid public holidays (s. 15) and redundancy payments (s.85A). QWAs cannot displace the basic statutory entitlements to a minimum wage, sick leave, annual leave, parental leave, carer’s leave, bereavement leave (s. 41) or long service leave (s. 43).
- Due to their ability to override basic minimum conditions established under collective industrial instruments, QWAs cannot operate unless they pass the “no disadvantage” test (ss. 203, 209). This test compares the terms and conditions of the QWA with the entitlements and protections that would apply to the employee in the absence of the agreement - if the QWA would result in an overall reduction in the employee’s terms and conditions, it fails the “no disadvantage” test and cannot be approved (ss. 203, 209).
- In addition, QWAs must not be inconsistent with statutory protections in relation to equal remuneration and anti-discrimination (s. 193), may not unfairly or unreasonably discriminate between employees (s. 202) and may not be contrary to the public interest in light of factors such as the bargaining power of the parties and the needs of low paid and vulnerable workers (s. 203).
- QWAs have a nominal expiry date of 3 years unless a shorter period is stipulated in the agreement (s. 194). They continue to operate until they are replaced by a new agreement or terminated (s. 195).
- During a QWAs operation, it can be amended or terminated by consent of the parties (ss. 197, 198) and on approval by the QIRC (ss. 204, 205). After the QWAs nominal expiry date, it may be terminated by either party giving notice to the other and filing a notice of termination (s. 198), which takes effect 28 days later.
- When a QWA has been terminated, the employees revert to their relevant award or certified agreement and any new QWA must pass the “no disadvantage” test in relation to that instrument.
- New employees must be given at least 5 days to consider a QWA. Existing employees must be given at least 14 days (ss. 187, 202). The employer must explain the terms and effect of the QWA as soon as practicable after giving the employee a copy of it (s. 202).
- Employees must be advised of their right to appoint a bargaining agent (which may or may not be a union) to negotiate a QWA (s. 196).

Work Choices

- Individual workplace agreements (Australian Workplace Agreements or AWAs) are provided for in the Act.



- They may be negotiated between employers and employees (s. 326). Persons under 18 years of age require “an appropriate person” over 18 (e.g. a parent) to sign the AWA (s. 340).
- AWAs come into operation once they are lodged with the Employment Advocate (s. 347), even if the requirements of the legislation have not been met (s. 347). The Employment Advocate is specifically not required to ensure that the statutory requirements have been complied with when an agreement is lodged (s. 344(5)).
- AWAs displace any award or agreement that would otherwise apply (ss. 348, 349), including "protected award conditions" (other than outworker conditions) if the agreement explicitly varies or removes them (s. 354(2)(c)). The protected award conditions are rest breaks, incentive payments or bonuses, annual leave loadings, paid public holidays, certain types of monetary allowances, loadings for overtime and shift work, penalty rates and outworker conditions.
- AWAs cannot displace the Australian Fair Pay and Conditions Standard, which currently comprises a minimum wage, maximum working hours, annual leave, personal leave and parental leave.
- AWAs must be consistent with statutory protections in relation to anti-discrimination (Regulations, Ch.2, Reg 8.6) and freedom of association (Regulations, Ch.2, Reg 8.5(7) and s.810). They must not contain prohibited content (s. 357). Prohibited content for AWAs is the same as for collective agreements.
- There is no "no disadvantage" test.
- AWAs have a nominal expiry date of 5 years unless a shorter period is stipulated in the agreement (s. 352). They continue to operate until they are replaced by a new AWA or terminated (s. 347).
- During the AWA's operation, it can be varied (Part 8, Div. 8) or terminated (Part 8, Div. 9) by consent of the parties. A variation comes into effect once the variation is lodged with the Employment Advocate, even if the statutory requirements for variation, such as employee approval, have not been met (s. 380). A termination comes into effect in similar circumstances (s. 398).
- For terminations after the nominal expiry date, a party to the agreement may terminate unilaterally by giving 90 days written notice to the other party and lodging a declaration with the Employment Advocate (s. 393).
- When an agreement has been terminated, the employees are entitled to the AFPCS and any of the protected award conditions which were contained in the award that would have previously applied to the employee (s. 399). This becomes the starting point for negotiations on any new agreement.
- To commence negotiations for an AWA, the employer must take reasonable steps to ensure that all employees to be covered by the agreement have 7 days to consider it and must provide an information statement containing information about when and how approval will be sought (s. 337). There is no requirement that the terms and effect of the agreement be explained to employees. Employees may also waive the 7 day consideration period (s. 337(5)).
- Employees must also be advised of their right to be represented by a bargaining agent during negotiations (s. 337). The agent need not be a union.



MINIMUM SAFETY NET ENTITLEMENTS

Industrial Relations Act 1999

Wage setting

- The IR Act provides employees with a minimum wage that is not less than the Queensland minimum wage declared by a general ruling of a Full Bench of the QIRC (s. 8A). The Full Bench must make a ruling for a Queensland minimum wage at least once each calendar year (s. 287), and conducts a public hearing in which industrial stakeholders have the opportunity to make submissions.
- In setting award rates, the QIRC must provide "for secure, relevant and consistent wages and employment conditions"; "fair standards for employees in the context of living standards" and take into account "the efficiency and effectiveness of the economy" (s. 126). The decisions of the QIRC must also provide support for training arrangements, where possible (s.126) and must structure wages in a way that encourages employees' skill development (s. 8A).
- All employees must be paid at least the Queensland minimum wage.

Penalty rates and allowances

- A number of minimum penalties and allowances apply to employees covered by industrial instruments made after 1 September 2005, unless their industrial instrument specifies otherwise. These are:
 - casual loading of 23%;
 - annual leave loading of 17.5%;
 - shift work allowance of 12.5% of ordinary time wages for an afternoon shift and 15% of ordinary time wages for a night shift;
 - weekend penalty rates of 25% in addition to the ordinary hourly rate for work on Saturday and 50% in addition to the ordinary hourly rate for work on Sunday;
 - overtime rates of time and a half, or double time for shiftworkers, for working in excess of a 38 hour week or 7.6 hour day.

Working time provisions

- Maximum hours of work for employees on industrial instruments made on or prior to 1 September 2005 are (s. 9):
 - no more than 6 days in any 7 consecutive days;
 - no more than 40 hours in any 6 consecutive days;
 - no more than 8 hours in any day.
- For employees on industrial instruments made after 1 September 2005, maximum hours of work are (s. 9A):
 - no more than 6 days in any 7 consecutive days;
 - no more than 38 hours in any 6 consecutive days;
 - no more than 7.6 hours per day unless the instrument provides otherwise.
- Hours worked in excess of these hours must be paid at overtime rates. Where practicable, a paid rest pause of 10 minutes for every 4 hours worked is to be taken.

Annual leave

- Employees are entitled to at least 4 weeks annual leave for each completed year of employment (5 weeks for shift workers) (s. 11). Annual leave is cumulative unless an industrial instrument provides otherwise.



- Leave loading of 17.5% applies to employees on industrial instruments made after 1 September 2005 unless the instrument provides otherwise.

Personal leave

- Sick leave - 8 days paid sick leave per year, accrued at 1 day for every six weeks worked. Medical certificate or other satisfactory evidence of illness is required if taking more than 2 days sick leave at any one time (s. 10).
- Carer's leave - up to 10 days of accrued sick leave may be taken as carer's leave (s. 39). Up to 2 days of unpaid carer's leave in each instance may be taken when paid leave entitlements have run out.
- Section 39A and B also provide for long- and short-term casuals to have access to unpaid carer's leave, and specify that an employer must not fail to re-engage a casual employee only because the casual employee has taken carer's/bereavement leave under these clauses.
- Section 40 allows 2 days of paid bereavement leave for permanent employees for each instance. It also allows unpaid bereavement leave to long-term casuals.
- Up to 5 days unpaid cultural leave each year is provided for under s. 40A.

Family leave

- The Act provides family leave for employees, including casuals, with at least 12 months continuous service.
- The Act provides up to 52 weeks of unpaid parental leave, which can be extended to a maximum of 104 weeks by agreement (s. 29A). An employee and his or her spouse must not both be on long family leave at the same time.
- The Act does not specify a maximum combined total of leave that an employee and their spouse may take, but does stipulate that both partners must not be on long family leave at the same.
- An employer must not dismiss an employee because the employee or their spouse is pregnant or has applied to adopt a child. Female employees have an entitlement to be transferred to a safe job (s. 34).
- An employee is entitled to return to their previous position after parental leave or, if the position no longer exists, another position for which the employee is qualified and capable of performing that is comparable in status and remuneration.
- The employer must advise employees on family leave of any significant changes that take place in the workplace, where possible before such change is implemented, and give the employee a reasonable opportunity to discuss the effect of such changes on their position (s. 38A). Employees have a corresponding obligation to keep their employer informed about changes, e.g. address changes or changes to their leave conditions.

Work Choices

Wage setting

- The Australian Fair Pay Commission (AFPC) will set and adjust the Federal Minimum Wage (FMW), the rates of pay in Australian Pay and Classification Scales (APCSs), and the rates for juniors, trainees, employees with disabilities, piece workers, and decide upon casual loadings (ss. 22, 172, 186).
- In performing its wage-setting function, the AFPC is instructed to consider the following (s. 23):
 - (a) the capacity for the unemployed and low paid to obtain and remain in employment;
 - (b) employment and competitiveness across the economy;
 - (c) providing a safety net for the low paid;
 - (d) providing minimum wages for junior employees, employees to whom training arrangements apply and employees with disabilities that ensure those employees are competitive in the labour market.
 The AFPC must also apply equal remuneration and anti-discrimination principles and take family responsibilities into account (s. 222).

There are no requirements for the AFPC to consult with stakeholders or follow any particular process, although it must provide reasons for its decisions (ss. 24-27).



- Work Choices establishes five legislated minimum entitlements under the Australian Fair Pay and Conditions Standard (s. 171) - these being:
 - basic pay rates and casual loadings
 - maximum ordinary hours
 - annual leave
 - personal leave
 - parental leave.

Award terms that are more generous than these standards will continue to apply as “preserved award terms” (ss. 529-530).

- To derive minimum wages, Work Choices provides for Australian Pay and Classification Scales (APCSs). Employees covered by a pre-reform award or law (federal or state) will be covered by an APCS (ss. 204-208) with a rate of pay and classification level as per the relevant pre-reform award or law (ss. 208, 214). The AFPC will also create new APCSs for employees (s.214) and may revoke and adjust existing APCSs (s. 215).
- Within the first year, the AFPC will adjust existing APCSs in line with the AIRC’s Safety Net Review Case 2005 (s. 218). The AFPC must not adjust an APCS so as to reduce the basic wage for any employee below the rate that applied at the start of Work Choices (s. 190).
- Employees in the federal jurisdiction who are not covered by an APCS are entitled to the more generous of the FMW of \$12.75 per hour or the state minimum wage that applied at reform commencement; after the AFPC’s first decision to set the new FMW, the new FMW will apply.
- The AFPC may also set piece rates and casual loadings for APCS employees.
- Employees are entitled to a casual loading, which is the higher of the statutory casual loading of 20% (which may be adjusted by the AFPC) or the loading provided in their APCS (ss. 185 -187).
- Other minimum entitlements, known as "protected award conditions", may apply to employees if they are or were (immediately prior to reform commencement) covered by an award containing those conditions. The protected award conditions are public holidays, rest breaks including meal breaks, incentive payments and bonuses, annual leave loading, penalty rates and overtime and shift loadings (s. 354). These conditions can be expressly modified or excluded by a workplace agreement (s. 354).

Working time provisions

- Employers must not require employees to work more than 38 hours per week, which can be averaged over a period of up to 12 months, plus reasonable additional hours at ordinary rates (or the rate specified in the relevant award or agreement) (s. 226).
- Factors which must be taken into account to determine if extra hours are “reasonable” include:
 - the health and safety of the employee
 - the employee’s personal circumstances including family responsibilities
 - the operational requirements of the business
 - the amount of notice given by the employer requesting the employee work additional hours, and the amount of notice given by the employee of their intention to refuse working additional hours
 - whether the additional hours fall on a public holiday; and
 - the hours worked by the employee in the 4 week period immediately prior to the additional hours.

Annual leave

- Section 232 provides permanent employees with 4 weeks annual leave for each completed year (5 weeks for regular shift workers), to be paid at ordinary rates (s. 235). There is no provision for loading.
- Section 233 entitles an employee under a workplace agreement to cash out up to 2 weeks annual leave each year.

Personal leave

- Full-time employees accrue 10 days per year of paid personal/carer’s leave (s. 246). An employee must present reasonable proof of reasons for absence on sick or carer’s leave if the employer requests it (ss. 254 and 256).



- Only sick leave is cumulative (ss. 246-249).
- An employee may take up to 10 days of accrued carer's leave per year (s. 249). After this amount of leave has been taken, an employee is entitled to a period of up to 2 days unpaid carer's leave for each permissible occasion (s. 250). Unpaid carer's leave is available to casuals (s. 239).
- A period of 2 days of compassionate leave is available for each occasion a member of an employee's family dies or is life-threateningly ill (s. 257). This leave is contingent on the employee providing any evidence that the employer requires.

Family leave

- The Act deals with maternity, paternity and adoption leave separately. It provides up to 52 weeks of unpaid leave per year for employees, including casuals, with 12 months' continuous service. The 52 weeks is reduced by other authorised leave that the employee/s avail themselves of at the time, such as annual leave and long service leave (ss. 266, 283, 301).
- Pregnant employees have an entitlement to be transferred to a safe job (s. 268).
- Sections 273 and 274 require an employee to take ordinary maternity leave of at least 6 weeks, starting from the date of birth of the child, and require the employee (if asked and if she is entitled to ordinary maternity leave) to present the employer with a medical certificate 6 weeks prior to the expected date of birth indicating whether she is fit to work.
- An employee is entitled to return to their previous position after parental leave or, if the position no longer exists, another position for which the employee is qualified and capable of performing that is comparable in status and remuneration (ss. 280, 296, 314).
- There is no duty on the employer to advise employees on family leave of any significant changes that take place in the workplace.



COLLECTIVE BARGAINING

Industrial Relations Act 1999

- Collective bargaining is recognised by the IR Act, which includes in its objects: “promoting participation in industrial relations by employees and employers; and encouraging responsible representation of employees and employers by democratically run organisations and associations” (s. 3).
- There is no “right” to bargain collectively, in that employers are under no obligation to enter into collective agreements with employees. However, employers may not unfairly “pick and choose” which groups of employees will be subject to a collective agreement and which group will not (s. 157(6)).
- The Act continues and maintains the traditional conciliation and arbitration model of industrial relations regulation. For collective bargaining, the most significant by-product of this system is awards. The award process is the primary means by which unions raise issues of a collective nature affecting workers in specific categories or across industry or occupational groupings (e.g. awards for employees in the clothing trades).
- The QIRC may make an award of its own initiative or on application by the Minister, an industrial organisation, an employer or another person (s. 125). The award can be about any industrial matter.
- An award is legally binding on the parties named in it (s. 123) although employers are free to offer “above award” terms and conditions. Awards can be limited to a class of employees, one or more employers or one or more parts of Queensland (s. 124).
- Collective bargaining is also recognised at the enterprise level. Enterprise agreements may be negotiated by employee organisations or by groups of employees (s. 142). They may be negotiated for individual enterprises, joint ventures or multiple businesses run by related corporations or engaging in similar work (multi-employer agreements) and projects (for example in the building and construction industry) (s. 141). See the section on **workplace agreements (collective)** for further information.
- Agreements negotiated by employee organisations cover members of the organisation as well as employees who, while not members, are eligible to be members (s. 142).
- Agreements may complement an award or displace its operation, but are subject to a “no disadvantage” test. Agreements cannot be displaced during their period of operation by an individual agreement (Queensland Workplace Agreement) unless the collective agreement expressly allows this to occur (s. 213).
- Employees are able to exert collective bargaining power through collective action. The only, completely legitimate type of collective action recognised by the Act is action taken for the purposes of negotiating a certified agreement, which is protected from any legal action other than action resulting in personal injury, wilful or reckless damage to property or the unlawful use or keeping of property (s. 174). All employees to be covered by the agreement may participate in protected action.
- The Act does not render all unprotected collective action unlawful *per se*. Depending on the particular circumstances of the case, the QIRC may refuse to order that the action stop and an employee dismissed for participating in the action may still have a case for unfair dismissal. See the section on **industrial disputes and industrial action** for further information.
- The freedom of association provisions in Chapter 4 protect an employee’s right to belong to an employee organisation and to participate in lawful collective bargaining. In particular, s. 104 prohibits an employer from retaliating against an employee because the employee is a member of an employee organisation, has participated in a secret ballot for collective action, is entitled to the benefit of an industrial instrument, is a member of an organisation that is seeking better industrial conditions or is engaged in lawful activity to further or protect the industrial interests of an employee organisation.
- Although “closed shop” practices are not permitted, awards and agreements may contain clauses which encourage employees to belong to a union (s. 110).

Work Choices

- Work Choices recognises collective bargaining but only at the individual workplace or enterprise level. The objects in section 4 require the Act to ensure that, as far as possible, the primary responsibility for determining employment matters rests with the employer and employees at the workplace or enterprise



- (s. 3(d)) and that the right to take collective action at the workplace level must be balanced with the public interest and appropriately deal with illegitimate and unprotected collective action (s. 3(i)).
- There is no "right" to bargain collectively, in that employers are under no obligation to enter into collective agreements with employees. However, employers must not discriminate between union members and non-members when negotiating agreements (s. 402).
 - Employee organisations have no ability to establish national employment standards or secure awards covering an industry or occupation. There is no provision in the Act for making new federal awards other than as part of the award rationalisation process (ss. 539-540) and, in the context of agreement making, such conduct would be pattern bargaining, which is not permitted (s. 431).
 - Awards existing prior to Work Choices continue (Schedule 6), subject to modification and rationalisation by the AIRC under Ministerial direction as to timing, content and process (s. 534). A number of matters in awards have been removed by Work Choices and no longer operate. There is no requirement for employee or employer organisations to be consulted about the changes to awards made by the rationalisation process or to initiate changes to terms and conditions.
 - The role of employee organisations in maintaining effective safety net minimum wages and conditions has been taken over by the Australian Fair Pay Commission. There is no requirement in the Act for employees or employee organisations to be represented on or consulted by the Commission.
 - Workplace agreements may be negotiated by employees directly (s. 327) or by employee organisations if the organisation has at least one member who will be covered by the agreement (s. 328). Collective agreements negotiated by employee organisations cover the employees nominated in the agreement (ss. 328, 351). See the section on **workplace agreements** for further information.
 - A collective agreement is deemed to be collectively approved either by vote of the majority to be covered by the agreement, or when "the majority of those persons decide that they want to approve the agreement" (s. 340). However, agreements are effective on lodgment even if employee approval has not been validly given (s. 347(2)).
 - Collective agreements may be negotiated for individual enterprises, joint ventures or multiple businesses run by related corporations or engaging in a common enterprise (ss. 322, 331). Pattern bargaining is not permitted (s. 431).
 - Collective agreements completely displace the operation of awards (s. 349).
 - Employees are able to exert collective bargaining power through collective action. The only legitimate type of collective action recognised by the Act is protected action in support of negotiating a collective agreement, which is protected from any legal action unless it involves personal injury, wilful or reckless damage to property or the unlawful use or keeping of property (s. 447). The AIRC may order protected action to stop in a broad range of circumstances, including where it threatens to cause significant harm to a third person (s. 433) (see **Industrial disputes and industrial action** for further information).
 - For agreements negotiated by an employee organisation, only the members of that organisation are entitled to take part in collective action (s. 435(2)). For agreements negotiated directly by employees, all employees may take part.
 - The Act treats as illegitimate all collective action that is not protected action, by requiring the AIRC to order that such action stop or not occur or not be organised (s. 496).
 - The freedom of association provisions in Part 16 protect an employee's right to belong to an employee organisation and to participate in lawful collective bargaining. In particular, section 793 prohibits an employer from retaliating against an employee because the employee is a member of an employee organisation, has participated in a secret ballot for collective action, is entitled to the benefits of an industrial instrument, is a member of an organisation that is seeking better industrial conditions or is engaged in lawful activity to further or protect the industrial interests of an employee organisation and has the express authorisation of the organisation to engage in such activity.
 - Union encouragement clauses are prohibited in agreements (Workplace Relations Regulations 2006, Chapter 2, Reg. 8.5(2)).



TERMINATION OF EMPLOYMENT

Industrial Relations Act 1999

- Most employees are protected from dismissals that are harsh, unjust or unreasonable (**unfair dismissal**) (s. 73). Excluded employees (s. 73) are:
 - those on high incomes (over \$98,200 per year) other than public servants and employees covered by an industrial instrument;
 - probationary employees during the first 3 months of employment (or other reasonable probationary period as agreed in writing);
 - apprentices and trainees (who are protected by specific laws for apprentices and trainees in Chapter 5, Part 5 and under the *Vocational Education, Training and Employment Act 2000* – see **Apprentices and Trainees**);
 - short-term casuals (less than 12 months' service);
 - employees hired for a fixed period or task.
- All employees are protected from dismissals for an invalid reason, other than apprentices and trainees (who are protected by specific laws for apprentices and trainees) (s. 72). Invalid reasons for dismissal (s. 73) are because:
 - the employee is temporarily absent from work because of illness or injury;
 - the employee is temporarily and reasonably absent from work to perform duties associated with emergency relief;
 - the employee is a member or officer of a union;
 - the employee is not a member of a union;
 - the employee has filed a complaint or been involved in legal proceedings against an employer;
 - the employee has made a complaint to a health commission or a public interest disclosure;
 - the employee has refused to negotiate or make a certified agreement or AWA under the Commonwealth Act;
 - the employee or their spouse is pregnant, has adopted a child or applied to adopt a child;
 - the employee has applied for or is away on parental leave;
 - the reason is discriminatory.
- Employees who are injured and entitled to workers' compensation are protected from dismissal for 12 months after the date of injury (Workers Compensation and Rehabilitation Act, ss. 232A-232G).
- Most employees are entitled to **minimum notice periods** prior to dismissal (s. 84), i.e.
 - Service of not more than 1 year – notice is 1 week;
 - Service of more than 1 year but not more than 3 years – 2 weeks;
 - Service of more than 3 years but not more than 5 years – 3 weeks;
 - Service of more than 5 years – 4 weeks;
 - An additional 1 week applies if the employee is: 45 years old or over and has completed at least 2 years of continuous service with the employer (s. 84).

The categories of employees who are not entitled to minimum notice periods are similar to the categories excluded from unfair dismissal (see s. 72(3)). Employees who engage in serious misconduct are also not entitled to notice.

- Most employees may also apply for orders under Articles 12 and 13 of ILO Convention 158 in the event of being made **redundant** (Chapter 3, Part 4). Where an employer decides to make 15 or more employees redundant, the employer must notify the Commonwealth unemployment agency and the relevant union/s as soon as possible after making the decision. The relevant union/s must be given an opportunity to suggest ways to avoid or minimise the dismissals and their adverse effects.
- Applicants seeking a remedy for unfair dismissal must apply to the QIRC within 21 days of the dismissal.



- The QIRC must attempt to settle the application by conciliation (s. 75). If conciliation fails, the QIRC may settle the matter by arbitration (s. 76).
- The primary remedy for unfair dismissal is reinstatement. If reinstatement to the employee's particular job is impracticable, the employee may be re-employed in another suitable position (s. 78). The QIRC may only order compensation if reinstatement or re-employment would be impracticable (s. 79).
- Compensation limits are 6 months' wages for employees on award and agreements and \$49,100 (from 11 August 2006) for "non-award" employees (s. 79).
- If an employee is stood down during December and re-employed by the same employer before the end of the next January, the employee must be paid for Christmas Day, Boxing Day and the New Years Day public holidays between the stand down and the re-employment (s. 97).

Work Choices

- Some employees are protected from dismissals that are harsh, unjust or unreasonable. The major exceptions are where the business has 100 employees or less (s. 643(10), where reasons of an economic, technological, structural or similar nature formed part of the reason for dismissal (s. 643(8)) and where the employee has been employed for less than 6 months (s. 643(6)). Other excluded employees (s. 638) are:
 - those on high incomes (over \$98,200 per year) other than employees on conditions derived from an award;
 - probationary employees whose probationary period is 3 months or, if greater, the probationary period is reasonable having regard to the nature and circumstances of the employment (this provision operates independently of the 6 month qualifying period);
 - trainees whose traineeship is for a specified period;
 - short term casuals (less than 12 months' service);
 - employees engaged for a fixed period or task;
 - seasonal workers (s. 659(2));
 - any other categories specified by the Regulations.
- All employees are protected from dismissals for an unlawful reason. The unlawful reasons are similar to the invalid reasons under the IR Act, except that refusal to negotiate or make a certified agreement is not an invalid reason and temporary absence from work due to illness or injury only covers a 3 month absence in a 12 month period (as opposed to the protection from dismissal for 12 months provided in the Workers' Compensation and Rehabilitation Act (Qld)). Discriminatory dismissals in the WR Act are wider, in that they include dismissal for political opinion, national extraction or social origin.
- Unfair and unlawful dismissals must both occur "at the initiative of the employer" (s. 642(1)), defined in s. 642(4) as including a resignation "if the employee can prove, on the balance of probabilities, that the employee did not resign voluntarily but was forced to do so because of conduct, or a course of conduct, engaged in by the employer".
- Most employees are entitled to **minimum notice periods** calculated on the same basis as applies in Queensland (s. 611(2)). The employees who are not entitled to notice periods are the same as those excluded from federal unfair dismissal, as well as all casual employees, daily hire employees in the building and construction and meat industries and weekly hire employees in the meat industry who are terminated because of seasonal factors (s. 638). Employees who engage in serious misconduct are also not entitled to notice (s. 611(1)).
- Employees have no right to apply for orders to give effect to Articles 12 and 13 of ILO convention 158. **Redundancy pay** is an allowable award matter for employees in businesses employing 15 or more employees (s. 513(1)(k) and 513(4)). Where an employer decides to make 15 or more employees redundant (other than the categories of employees excluded for unfair dismissal), the employer must notify the Commonwealth unemployment agency. There is no requirement to consult with unions about proposed redundancies.
- Applicants seeking a remedy for unfair dismissal must apply to the AIRC within 21 days of the dismissal (s. 643(14)).



- The AIRC must attempt to settle the application by conciliation (s. 650(1)) but can deal with jurisdictional objections on the part of employers "on the papers" (s. 648).
- If a dismissal is found to be for genuine operational reasons, the Commission must dismiss the application to the extent that it is made on operational reasons (s. 649(2)).
- If conciliation fails, the AIRC may settle the matter by arbitration (s. 652).
- The primary remedy for unfair dismissal is reinstatement. If reinstatement to the employee's particular job is impracticable, the employee may be redeployed to another suitable position (s. 654). The AIRC may only order compensation if reinstatement or redeployment would be impracticable (s. 654).
- The AIRC is expressly prohibited from awarding compensation for "shock, distress or humiliation or other analogous hurt, caused to the employee by the manner of terminating the employee's employment" (s. 654(9)).
- Compensation limits are 6 months' wages for employees on award-derived conditions and \$49,100 for "non-award" employees (s. 654(12)).
- Compensation must be reduced where the employee's misconduct contributed to the termination (s.654(8)).

INDUSTRIAL DISPUTES AND INDUSTRIAL ACTION

Industrial Relations Act 1999

- For industrial disputes and industrial action, the object of the Act is to provide for the "effective, responsive and accessible support for negotiations and resolution of industrial disputes" (s. 3).
- Industrial action in Queensland falls into two categories: protected and unprotected. Protected action is available for employees negotiating certified agreements, subject to any industrial action having been preceded by a genuine attempt to reach agreement with the employer. All other collective action is unprotected, although unprotected action is not unlawful per se.
- All industrial disputes between employers, employees and industrial organisations must be immediately notified to the Industrial Registrar by the disputants if the parties have genuinely, but unsuccessfully, attempted to settle the dispute (s. 229).
- The QIRC must take the steps it considers appropriate to prevent or promptly settle the dispute and may act on its own motion, whether or not it has been notified of the dispute (s. 230).
- The QIRC must attempt to conciliate the dispute in the first instance (s. 230). It may also mediate the dispute at the request of the parties or if the QIRC considers that mediation is desirable in the public interest (s. 231).
- If conciliation fails, the QIRC may move to arbitration (s. 230) and may make any order it considers appropriate, including directing that the industrial action stop or not occur, making interlocutory orders, granting injunctions (s. 230) and ordering the parties to attend a conference (s. 232).
- Failure by an industrial organisation to abide by an order of the QIRC may result in a range of penalties, including fines, amendment of an industrial instrument to which the organisation is a party, amendment of the organisation's eligibility rules and suspension or termination of the organisation's registration (s. 234).
- The QIRC may order a secret ballot of employees to determine support for a strike (s. 236). If the secret ballot indicates that a majority of employees do not support a strike, the Industrial Registrar may direct that it be discontinued (s. 236).
- An employer has a discretion whether to pay striking employees and no industrial action may be taken against an employer who refuses to pay (s. 238).
- Employees have a right to refuse to perform work if it would create an imminent risk to the employee's health or safety (s. 241).

Protected action

- Protected industrial action is available to parties negotiating a certified agreement (Chapter 6).

- No action lies at law against a person who participates in protected action, unless the action involves or is likely to involve personal injury, wilful or reckless damage to property or the unlawful taking, keeping or use of property (s. 174).
- To commence negotiations for a certified agreement, the initiating party must give 14 days' notice to the other party/parties (s. 143) (multi-employer and project agreements require 21 days' notice). 21 days must elapse from the giving of the notice before any industrial action can be taken or the QIRC's assistance is sought (s. 147).
- Protected action must not be taken before the nominal expiry date of a certified agreement (s. 181).
- The parties negotiating for an agreement must act in good faith (s. 146).
- If negotiations for an agreement break down, the QIRC's assistance may be sought (s. 148). The QIRC may assist with conciliation and, as a last resort, arbitration (s. 149). Industrial action taken or continued when the QIRC moves to arbitrate a matter is not protected.
- The QIRC may intervene of its own accord in protected action which has been protracted or which threatens to cause significant damage to an enterprise, to employees or to a part of the economy or threatens to endanger the personal health, safety or welfare of the community (s. 149).
- When arbitrating a dispute involving protected action, the QIRC may make a determination which operates in a similar manner to a certified agreement by settling the rights and obligations of the employer and employees (s. 150).

Work Choices

- For industrial disputes and industrial action, the objects of the Act are to "ensure that, as far as possible, the primary responsibility for determining matters affecting the employment relationship rests with the employer and employees at the workplace or enterprise level", "supporting harmonious and productive workplace relations by providing flexible mechanisms for the voluntary settlement of disputes" and "balancing the right to take industrial action for the purposes of collective bargaining at the workplace level with the need to protect the public interest and appropriately deal with illegitimate and unprotected industrial action".
- Like Queensland, industrial action in the federal sphere falls into two categories: protected and unprotected. Protected action is available for employees negotiating collective agreements, subject to any industrial action having been preceded by a genuine attempt to reach agreement with the employer. All other collective action is unprotected and the AIRC must order it to stop.
- The AIRC can only assist in the resolution of particular types of disputes, which are specified in the Act. These are disputes about the AFPCS (s. 172), an award (s. 514), a workplace determination (s. 504), a preserved state agreement (Schedule 8, cl.15A) and a NAPSA (Schedule 8, cl. 35). In all of these cases, the model dispute resolution procedure (model DSP) must be used. The AIRC may also assist in the resolution of disputes about federal workplace agreements, where the agreement specifies the AIRC as the dispute provider (s. 699), and also where the agreement does not contain a dispute resolution procedure (in which case the model DSP applies – s. 353). The AIRC may also assist in resolving disputes arising during a bargaining period if all parties agree to the AIRC's involvement (s. 704).
- Under the model DSP, the parties must genuinely attempt to resolve the dispute at the workplace level (s. 695). Where the dispute cannot be resolved at the workplace level, the parties may refer the matter to an alternative dispute provider (s. 696), which can be the AIRC (s. 699) or a private arbitrator (Part 13, Division 6). If the parties cannot agree on the dispute provider, the matter can be referred to the AIRC (s. 696).
- The AIRC, in assisting to resolve disputes, does not have the power to compel any party to do anything (s. 706).
- If industrial action occurs, the AIRC does have coercive powers. The AIRC must order industrial action to stop, not occur or not be organised if it considers that the action would not be protected (s. 496). It must make this order within 48 hours of an application being made under s. 496 and, if this cannot be done, must make an interim order to stop or prevent the action. The AIRC must also order industrial action by non-federal system employees to stop, not occur or not be organised if the action would be likely to have the effect of causing substantial loss or damage to the business of a constitutional corporation (s. 496(2)).



- The AIRC must also suspend (or in some cases, terminate) bargaining periods (so that protected action cannot be taken) in a number of situations, including where:
 - the parties have not genuinely tried to reach agreement (s. 430(2));
 - the action could threaten to endanger life or the personal safety, health or welfare of the population or significant damage to the Australian economy or an important part of it (s. 430(3));
 - the action is being taken to support or advance claims in respect of employees who are not eligible members of the union (for union agreements) (s. 430(7));
 - the action relates to a significant extent to a demarcation dispute (s. 430(8));
 - pattern bargaining is occurring (s. 431);
 - suspension is appropriate having regard to whether it would assist in resolving the dispute, the duration of the action and whether suspension would be contrary to the public interest or inconsistent with the objects of the Act (s. 432);
 - a third person directly affected by the action applies for suspension and the AIRC considers that the action is threatening to cause significant harm to any third person (s. 433).
- The federal Minister is also empowered to terminate bargaining periods if the action threatens to endanger life or the personal safety, health or welfare of the population or significant damage to the Australian economy or an important part of it (s. 498).
- Employers must deduct a minimum of four hours' pay from employees who participate in industrial action (including protected action). For industrial action lasting more than a day, wages must be deducted for the whole period of the industrial action (s. 507).
- Work Choices provides that during a dispute, employees must continue to work in accordance with their contracts of employment, unless there is a reasonable concern about an imminent risk to the employee's health or safety (s. 697).

Protected action

- Protected industrial action is available to parties negotiating a collective agreement (Part 9, Division 3).
- No action lies under any state or Territory law against a person who participates in protected action, unless the action involves or is likely to involve personal injury, wilful or reckless damage to property or the unlawful use or taking of property (s. 447). However, defamation actions may still be taken (s. 447).
- Industrial action in support of a collective agreement may be taken 7 days after giving notice of an intention to commence bargaining (s. 427) and 3 days after giving notice of an intention to take industrial action (s. 441). For employee action, a majority of employees must approve the action in a secret ballot (s. 445) prior to giving the 3 days' notice. Secret ballots must be approved by the AIRC and employers have a right to make submissions (ss. 457-458). Employees or their organisation must pay 20% of the ballot cost. For union agreements, the action must also be authorised by the union's committee of management (s. 446) and only union members can take part in the action (s. 438). The 3 days' notice and secret ballot requirements are waived for action taken in response to industrial action (ss. 441, 445).
- If negotiations for an agreement break down, the AIRC can be called upon to assist, provided the parties agree (s. 704), but cannot make orders (s. 706). The AIRC can only make orders if it has suspended or terminated the bargaining period because it threatens to endanger life or the personal safety, health or welfare of the population or significant damage to the Australian economy or an important part of it.
- Industrial action is not protected if:
 - it is taken in order to include prohibited content in an agreement (s. 436)
 - if the bargaining period has been suspended (s. 437)
 - it involves persons who are not protected for that action (s. 438)
 - it is taken in support of pattern bargaining (s. 439)
 - it is taken before the nominal expiry date of an agreement (s. 440)

- the industrial action is taken by a member of an organisation while the organisation fails to comply with an order of the AIRC (s. 443)
- the action (other than action in response to a lockout) has not been authorised by secret ballot (s. 445)
- the committee of management of a relevant industrial organisation has not approved the action or given written notice of its authorisation to the Registrar (s. 446).



WORKPLACE AGREEMENTS (COLLECTIVE)

Industrial Relations Act 1999

- Collective workplace agreements (certified agreements) may be negotiated between employers and employees or employee organisations (s. 142).
- They may be negotiated for individual enterprises, joint ventures or multiple businesses run by related corporations or engaging in similar work (multi-employer agreements) as well as for projects (e.g. in the building and construction industry) (ss.141, 143). Pattern bargaining is permitted.
- Certified agreements come into operation once they are certified by the QIRC (s. 164). In certifying an agreement, the QIRC must ensure that the statutory requirements governing certified agreements have been met (ss. 156-158). Unions with coverage at the workplace are entitled to be heard on applications for certification.
- Agreements prevail to the extent of an inconsistency with an award that would otherwise apply (s. 165). Agreements made after 1 September 2005 may also displace a number of "default" statutory minimum conditions by expressly varying or removing them. The default minima include maximum working hours, penalties for overtime and shift work, rest breaks, casual loadings (s. 9A), annual leave loading (s. 13A), jury service leave (s. 14A), paid public holidays (s. 15) and redundancy payments (s. 85A). Agreements cannot displace the basic statutory entitlements to a minimum wage, sick leave, annual leave, parental leave, carer's leave, bereavement leave or long service leave.
- Due to their ability to override awards and some statutory minima, agreements cannot operate unless they pass a "no disadvantage" test (ss. 156(1)(h)). This test compares the terms and conditions of the agreement with the entitlements and protections that would apply to the employee in the absence of the agreement - if the agreement would result in an overall reduction in the employee's terms and conditions, it fails the "no disadvantage" test and cannot be certified (ss. 156(h), 160).
- Agreements are subjected to a number of other tests, including consistency with equal remuneration, anti-discrimination and freedom of association principles (s. 157), whether the agreement unfairly excludes a group of employees who ought rightly to be covered and whether the employer discriminated between unionists and non-unionists during the negotiations (s. 157). Certification can still occur if appropriate undertakings are given.
- Agreements have a nominal expiry date of 3 years unless a shorter period is stipulated in the agreement (s. 156). They continue to operate until replaced by a new agreement or they are terminated (s. 164).
- During the agreement's operation, it cannot be amended or terminated unless the employer and a majority of employees agree (ss. 169, 172). The QIRC must approve such amendments and terminations and must be satisfied that a valid majority of employees have consented (ss. 169, 172).
- After the agreement's nominal expiry date, it may be terminated on application to the QIRC, provided any pre-conditions to termination in the agreement have been met. If there are no pre-conditions, the QIRC may terminate the agreement if it is in the public interest (s. 173).
- When an agreement has been terminated (as opposed to being replaced by a new agreement), the employees revert to their relevant award. This becomes the starting point for negotiations on any new agreement and the basis of the "no disadvantage" test.
- To begin negotiations for an agreement, the initiating party must give 14 days' notice to the other party/parties (s. 143) (multi-employer and project agreements require 21 days' notice). 21 days must then elapse before any industrial action can be taken or the QIRC's assistance is sought (s. 147).
- For non-union agreements, employees must be advised of their right to be represented by a union during the negotiations (s. 144). The identity of employees who appoint a union to represent them can be protected (s. 152).
- The parties negotiating for an agreement must act in good faith (s. 146).
- Employees must be given at least 14 days to consider a proposed agreement. The employer must explain the terms and effect of the agreement to the employees, before seeking their approval, in a manner that is appropriate having regard to the persons' particular circumstances and needs, e.g. persons from a non-English speaking background (ss. 144, 156).



- Industrial action to support a party's bargaining position may be taken 21 days after the initial notice to commence bargaining and such action is protected from any legal action, other than action resulting in personal injury, wilful or reckless damage to property or the unlawful taking, keeping or use of property (s. 174). All employees to be covered by an agreement may participate in protected action.
- If negotiations for an agreement break down, the QIRC's assistance may be sought (s. 148). The QIRC may assist with conciliation and, as a last resort, arbitration (s. 149). Industrial action taken or continued when the QIRC moves to arbitrate a matter is not protected.
- The QIRC may intervene of its own accord in protected action which has been protracted or which threatens to cause significant damage to an enterprise, to employees or to a part of the economy or threatens to endanger the personal health, safety or welfare of the community and may make orders to assist the negotiation process (s. 149).

Work Choices

- Collective workplace agreements may be negotiated between employers and employees (s. 327) or employee organisations (s. 328).
- They may be negotiated for individual enterprises, joint ventures or multiple businesses run by related corporations or engaging in a common enterprise (ss. 322, 331). Employers starting a new business may also make agreements unilaterally (employer greenfields agreements). Pattern bargaining by employee organisations is not permitted (s. 431).
- Workplace agreements come into effect when they are lodged with the Employment Advocate (s. 347). They are effective even if the requirements of the legislation, such as employee approval, have not been met (s. 347). The Employment Advocate is specifically not required to ensure that the statutory requirements have been complied with when an agreement is lodged (s. 344).
- A majority of employees must approve a workplace agreement, either by a majority vote or when a "majority of those persons [to be covered by the agreement] decide that they want to approve the agreement" (s. 340).
- There is no provision for employee organisations to be involved in non-union agreements other than as bargaining agents for individual employees.
- Agreements displace the operation of any award that would otherwise apply (s. 349), including "protected award conditions" (other than outworker conditions) if the agreement explicitly varies or removes them (s. 354(2)(c)). The protected award conditions are rest breaks, incentive payments or bonuses, annual leave loadings, paid public holidays, certain types of monetary allowances, loadings for overtime and shift work, penalty rates and outworker conditions. Agreements cannot displace the Australian Fair Pay and Conditions Standard.
- In addition, agreements must be consistent with statutory protections in relation to anti-discrimination (Regulations, Ch.2, Reg 8.6) and freedom of association (Regulations, Ch.2, Reg 8.5(7) and s. 810).
- There is no "no disadvantage" test.
- Agreements must not contain prohibited content (s. 357). "Prohibited content" means clauses extraneous to the relationship of employers and employees or clauses dealing with the payment or deduction of union dues, leave to attend training provided by a trade union, paid leave to attend meetings conducted by or made up of trade union members, providing information about employees to a union, encouraging employees to join a union, the renegotiation of a workplace agreement, allowing employees to take industrial action, providing a remedy for unfair dismissal, the rights of an employee or employer organisation to participate in dispute resolution (other than where the employee or employer chooses the organisation), rights of entry, restrictions on the engagement of independent contractors or labour hire workers or the ability to enter into AWAs (Regulations, Ch.2, Part 8, Div. 7.1). It is an offence to recklessly seek to include prohibited content in an agreement (s. 357).
- Agreements have a nominal expiry date of 5 years unless a shorter period is stipulated in the agreement (s. 352).
- During the agreement's operation, it can be varied (Part 8, Div. 8) or terminated (Part 8, Div. 9) by consent of the parties. For non-union agreements, the consent of employees is either through majority vote or where a majority "decide that they want to approve" the variation or termination (ss. 373, 386).



respectively). A variation comes into effect once the variation is lodged with the Employment Advocate, even if the statutory requirements for variation, such as employee approval, have not been met (s. 380). A termination comes into effect in similar circumstances (s. 398).

- For terminations after the nominal expiry date, a party to the agreement may terminate unilaterally by giving 90 days written notice to the other party and lodging a declaration with the Employment Advocate (s. 393).
- When an agreement has been terminated, the employees are entitled to the AFPCS and any of the protected award conditions which were contained in the award that would have previously applied to the employee (s. 399). This becomes the starting point for negotiations on any new agreement.
- To commence negotiations for a workplace agreement, the employer must ensure that all employees to be covered by the agreement have 7 days to consider it and must provide a statement about when and how approval will be sought and (for non-union agreements) the employee's right to request a bargaining agent (s. 337(4)). There is no requirement that the terms and effect of the agreement be explained to employees. Employees may also waive the 7 day consideration period (s. 337(5)).
- For non-union agreements, employees must also be advised of their right to be represented by a bargaining agent during negotiations (s. 337(4)). The agent need not be a union. The identity of employees who appoint a bargaining agent to initiate a bargaining period on their behalf can be protected (ss. 424, 425).
- Industrial action to support a party's bargaining position may be taken 7 days after giving notice of an intention to commence bargaining (s. 427) and 3 days after giving notice of an intention to take industrial action (s. 441). For employee action, a majority of employees must approve the action in a secret ballot (s. 445) prior to giving the 3 days' notice. Secret ballots must be approved by the AIRC and employers have a right to make submissions (ss. 457-458). Employees or their organisation must pay 20% of the ballot cost. For union agreements, the action must also be authorised by the union's committee of management (s. 446). The 3 days' notice and secret ballot requirements are waived for action taken in response to industrial action by the other party (ss. 441, 445).
- For agreements negotiated by an employee organisation, only the members of that organisation are entitled to take part in collective action (s. 435(2), 438). For agreements negotiated directly by employees, all employees may take part.
- Protected industrial action cannot be taken unless the parties have genuinely tried to reach agreement (ss. 444, 461) and can be suspended or terminated for a failure to do so (s. 430).
- Action that complies with the statutory requirements is protected from any legal action, other than action resulting in personal injury, wilful or reckless damage to property or the unlawful taking, keeping or use of property (s. 447).
- If negotiations for an agreement break down, the AIRC may suspend the bargaining period and must do so on in specific circumstances, e.g. if this would assist the parties to resolve the dispute and not be contrary to the public interest or if the industrial action threatens to cause significant harm to any person (s. 432). The federal Minister may also suspend or terminate bargaining periods (see Industrial disputes and industrial action for further information).
- When a bargaining period has been suspended or terminated because it threatens to cause significant harm to a part of the population or economy, the AIRC may settle the "matters in issue" by making a workplace determination (s. 500). A workplace determination has effect as if it were a collective agreement (s. 506).

APPRENTICES AND TRAINEES

Vocational Education, Training and Employment Act 2000

Industrial Relations Act 1999

- The terms and conditions of employment for apprentices and trainees are determined by the *Vocational Education, Training and Employment Act 2000* (VETE Act) and the *Industrial Relations Act 1999* (IR Act).
- The VETE Act primarily regulates the training contracts and arrangements of apprentices and trainees, while the IR Act primarily regulates their employment terms and conditions. However, the statutes operate interdependently because the VETE Act contemplates that training will be employment based training and the training contract is underpinned by the existence of the employment contract.
- All training contracts must be registered with the Training and Employment Recognition Council (TERC). The TERC may register a contract if it conforms to the requirements in the approved Guidelines (VETE Act, s. 54).
- Under the IR Act, the QIRC is empowered to make an order setting minimum wages and employment conditions for apprentices and trainees on the basis of age, competency or other method of progression through the training of the apprentices and trainees (s. 137). The Act provides that the QIRC's order prevails over an award to the extent of any inconsistency (s. 137). The Commission made an order, the *Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003*, on 2 June 2003.
- The QIRC is empowered to make an order setting minimum wages and conditions for students under vocational placements that are for more than 240 hours a year. Vocational placements for 240 hours or less are unpaid (s. 140A).
- The QIRC may make an order setting minimum wages and employment conditions for employees participating in labour market programs on the basis of age, competency, disability, incapacity, kind of work to be done or experience to be gained (IR Act, s. 140). The Commission made an order *Community Jobs Plan Employee's Conditions* on 20 December 2002.
- The QIRC may also provide for tool allowances or the provision of tools of trade to a certain value to apprentices and trainees (IR Act, s. 138). The Commission made an order, *Supply of Tools to Apprentices*, on 19 June 1998.
- The TERC may determine probationary periods for apprentices and trainees. The current determinations are: apprentices 3 months; trainees 1 month (VETE Act, s. 50).
- Apprentices and trainees may be dismissed during their probationary period by the giving of one week's notice by either party (VETE Act, s. 51). One week's pay must be paid in lieu of notice (IR Act, s. 138A). If a training contract is not signed by the end of the probationary period and the employee is continued in employment, he/she must be paid the relevant training wage or wage applicable to the type of work the employee is doing, whichever is higher (IR Act, s. 138B).
- All time spent by an apprentice or trainee undertaking training delivered by their registered training organisation is taken to be time worked for the employer (IR Act, s. 392). This also forms part of the QIRC's order: *Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003*.
- Existing employees who undertake apprenticeships or traineeships do not have their continuity of service disrupted (s. 70). In addition, if the apprenticeship or traineeship is not registered, is cancelled, is completed or ends before the probationary period ends, the employee is deemed to be reinstated to their previous position (IR Act, s. 139A).
- An apprentice or trainee cannot be dismissed unless the training contract is first cancelled or completed (IR Act, s. 139) and employers must continue to pay the wages of an apprentice or trainee until that occurs (IR Act, s. 391(2)). The TERC is the body authorised to cancel training contracts (VETE Act, ss. 63-66).
- The TERC may cancel training contracts for certain specified reasons (VETE Act, s. 66). In addition, a party to a training contract may apply to the TERC for cancellation of the contract if the party is unable to perform its obligations under the contract due to the reasons specified in the Act (VETE Act, s. 63).



- If a party cancels a training contract otherwise than in accordance with the VETE Act, the other party may apply to the TERC for an order that the training be resumed. If the TERC considers that it would be impracticable to make such an order, it may cancel the contract (VETE Act, s. 65).
- An employer may suspend an apprentice or trainee and apply to cancel the training contract if the employer believes the apprentice or trainee is guilty of serious misconduct (VETE Act, ss. 64, 71). Under s. 71, the TERC may discipline an apprentice or trainee believed to be guilty of misconduct by reprimand, order to comply with the training contract, fine, suspension for up to 30 days or cancellation of the contract.
- An apprentice or trainee may be stood down for a maximum of 30 days without pay, on approval by the TERC, if the employer is temporarily unable to provide the training required (VETE Act, s. 86).

Work Choices

- Work Choices excludes the application of the IR Act to constitutional corporations (s. 16), except where expressly permitted to operate by Work Choices. State laws with respect to apprentices and trainees are not preserved by Work Choices. However, s. 17(2) provides that federal awards and agreements are subject to state laws with respect to training arrangements, other than in areas specified by the Regulations. Regulation 1.5 specifies the following areas that may be overridden by federal awards and agreements:
 - remuneration and any other payment of an amount of money to an employee;
 - non-monetary allowances and benefits;
 - leave (whether paid or unpaid) and leave loadings;
 - public holidays;
 - hours of work;
 - types of employment (e.g. full-time, casual or shift work);
 - probationary employment;
 - termination of employment, except to the extent to which the law deals with or allows arrangements to be made for the termination of a training contract;
 - stand downs;
 - jury service;
 - superannuation;
 - dispute resolution, except to the extent to which the law deals with or allows arrangements to be made for dispute resolution processes about matters arising under a training contract;
 - the performance, conduct and discipline of an employee, except to the extent to which it deals with or allows arrangements to be made for the award of training qualifications;
 - any other matter that could be included in an award or any term or condition of employment in relation to apprentices and trainees not mentioned in the above.
- Wages and conditions for apprentices and trainees will be determined by the Australian Fair Pay Commission (AFPC). The AFPC will determine a special Federal Minimum Wage (FMW) for apprentices and trainees (s. 197) and/or an Australian Pay and Classification Scale (APCS) (s. 221). In determining the rate for apprentices and trainees, the AFPC must have regard to ensuring that they are competitive in the labour market (s. 23).
- An APCS may contain provisions that determine whether the hours an apprentice or trainee attends off the job training (supervised training) are hours for which the basic periodic rate of pay are payable (s. 202).
- Under s. 34 of Schedule 8, state awards are preserved as notional agreements preserving state awards (NAPSAs). The basic wage and classification scales under a NAPSA become a preserved APCS (s. 182). A preserved APCS is derived from the QIRC order *Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003*. The AFPC must not make an APCS that would result in less pay than a preserved APCS (ss. 182, 190). Other terms and conditions in NAPSAs continue (other than non-allowable matters), however these terms can be expressly modified or excluded by federal workplace agreements (s. 354).



- The WRA contains no exclusion of apprentices employed by corporations with more than 100 employees from applying for unfair termination, but it excludes trainees whose employment is for a specified period or for any reason limited to the duration of the traineeship agreement (s. 638).

RECOGNITION OF EMPLOYEE ORGANISATIONS

Industrial Relations Act 1999

- The IR Act allows employee organisations to participate in the industrial relations system, for example through applying for awards, making collective agreements, enforcing employee entitlements on behalf of their members and monitoring compliance with industrial instruments.
- The award process is the primary means under the Act through which employee organisations raise issues of a collective nature affecting workers generally, or workers in specific categories or across industry or occupational groupings (e.g. State wage case).
- The objects of the IR Act include “*promoting participation in industrial relations by employees and employers; and encouraging responsible representation of employees and employers by democratically run organisations and associations*” (s. 3).
- The right of employees to belong to an employee organisation is protected under the freedom of association provisions in Chapter 4. In particular, s. 104 prohibits an employer from retaliating against an employee because the employee is a member of an employee organisation or an organisation that is seeking better industrial conditions, or is engaged in lawful activity to further or protect the industrial interests of an employee organisation.
- "Closed shop" practices are not permitted under the IR Act, although awards and agreements may contain clauses which encourage employees to belong to an employee organisation (s. 110). Awards and agreements may also contain clauses to facilitate the involvement of employee representatives at the workplace, e.g. rights of entry, mandatory consultation clauses and involvement in disputes procedures and bargaining processes.
- The IR Act provides for the officials of employee organisations to be authorised to enter workplaces to inspect the time and wages records of members and eligible members. Authorisation is by the Industrial Registrar (s. 363). Authorities may be revoked, suspended or cancelled by the Registrar for inappropriate or unreasonable behaviour (s. 363) and it is an offence for an official to wilfully obstruct an employer or employee during an inspection. Entry must be during business hours and the official must notify the employer upon entering the premises (s. 372).
- On entering a workplace to inspect time and wage records, officials may hold discussions with employees who are members or eligible to be members about industrial matters. Other matters may be discussed in non-working time, e.g. meal breaks (s. 373(5), 373(6)).
- The *Workplace Health and Safety Act 1995* also allows officials to enter premises and inspect plant and equipment and employment records where it is reasonably suspected that a contravention of OHS laws has occurred.
- Chapter 12 of the IR Act regulates the registration of employee organisations and specifies requirements about the organisation’s rules, elections, officers, membership, accounts and audits.
- Membership of employee organisations is determined by the organisation’s eligibility rules (s. 416). To prevent a multiplicity of organisations and consequent overlaps in coverage, an organisation may not register if there is another organisation to which its members might belong or there is no organisation to which could conveniently belong that would effectively represent them (s. 420).
- Employee organisations must be free from control by, or improper influence from, an employer or employer organisation (s. 420).
- A Full Bench of the QIRC may deregister an organisation on broad grounds, including continued contravention of a Commission order or continued failure to prevent its members from contravening an industrial instrument, or for engaging in industrial action that is likely to have a substantial adverse effect on the safety, health or welfare of the community (s. 638).



Work Choices

- Work Choices allows employee organisations to participate in the industrial relations system, for example through making collective agreements, enforcing employee entitlements on behalf of their members and monitoring compliance with industrial instruments.
- Employee organisations cannot take action under Work Choices to address issues of a collective nature affecting workers generally, or workers in specific categories or across industry or occupational groupings. Such conduct would constitute pattern bargaining in the context of agreement making, which is not permitted (s. 431). There is no provision in the Act for making new federal awards other than as part of the award rationalisation process (ss. 539-540).
- The objects of Work Choices in section 4 provide that freedom of association is to be ensured but that, as far as possible, the primary responsibility for determining employment matters rests with the employer and employees at the workplace.
- The freedom of association provisions in Part 16 protect the right of employees to belong to an employee organisation. In particular, s. 793 prohibits an employer from retaliating against an employee because the employee is a member of an employee organisation or an organisation that is seeking better industrial conditions or is engaged in lawful activity to further or protect the industrial interests of an employee organisation who has given express authority to engage in such activity.
- "Closed shop" practices are not permitted. Union encouragement clauses may not be included in awards and are prohibited in agreements (*Workplace Relations Regulations 2006*, Chapter 2, Reg. 8.5(2)).
- Procedural clauses in workplace agreements to facilitate the involvement of employee representatives in the workplace are generally prohibited. Specifically prohibited are clauses dealing with the payment or deduction of union dues, leave to attend training provided by a trade union, paid leave to attend meetings conducted by or made up of trade union members, providing information about employees to a union, encouraging employees to join a union, allowing employees to take industrial action, the rights of an employee or employer organisation to participate in dispute resolution (other than where the employee or employer chooses the organisation) and rights of entry (Regulations, Ch.2, Part 8, Div. 7.1). It is an offence to recklessly seek to include prohibited content in an agreement (s. 357). Such clauses also cannot be included in awards.
- Work Choices provides for the officials of employee organisations to be authorised to enter workplaces if they suspect on reasonable grounds that there has been a breach of the Act or an industrial instrument to which the organisation is bound. Officials are authorised by the Industrial Registrar if they are "fit and proper persons" (ss. 740-742), a test primarily dependent on whether the official has had appropriate training on rights of entry and has ever had a permit suspended, revoked or made conditional.
- Entry can only occur if work is being carried out on the premises by at least one member of the organisation and the suspected breach is in relation to that work (s. 747). Twenty-four hours' notice is required. If entry is with regard to an AWA, the employee/s on the AWA must have specifically requested the union's presence (s. 747). While on the premises, officials may inspect the employment records of union members relevant to the suspected breach. Access to non-union employee records requires AIRC approval.
- Officials may also enter a workplace to hold discussions during non-working time (e.g. meal breaks) with employees who are members or eligible to be members.
- State laws governing right of entry for OHS purposes are allowed to continue (ss. 737, 756).
- An employer may direct an official to use a particular room or area of the premises to conduct interviews and to take a particular route to reach that room or area (ss. 751, 765).
- Schedule 1 of the Act regulates the registration of employee organisations and specifies requirements about the organisation's rules, elections, officers, membership, accounts and audits.
- Membership of employee organisations is determined by the organisation's eligibility rules. To prevent a multiplicity of organisations and consequent overlaps in coverage, an organisation may not register if there is another organisation to which its members could more conveniently belong that would more effectively represent those members (Schedule 1, cl.19).

- Employee organisations must be free from control by, or improper influence from, an employer or employer organisation (Schedule 1, cl.19).
- The Federal Court may deregister an organisation on broad grounds, including continued contravention of a commission order or continued failure to prevent its members from contravening an industrial instrument, or for hindering the achievement of Parliament’s intention in enacting Schedule 1, set out in cl.5(1) of the Schedule, i.e. “to enhance relations within workplaces between federal system employers and federal system employees and to reduce the adverse effects of industrial disputation” (Schedule 1, cl.28).

