Part 2

The Impact of Work Choices

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THE IMPACT OF WORK CHOICES

2.1 Overview

This part of the Report provides an overview of the changes as a consequence of the introduction of the Workplace Relations Amendment (Work Choices) Act 2005 (Work Choices Act). It also addresses the Directive issued on 13 November 2006 requiring that the Inquiry take into account the outcomes of the High Court decision on the constitutional challenge to Work Choices, and its implications for Queensland workplaces, employees and employers. As such, this section begins with a discussion of the outcome from the High Court Decision and then considers the implications for Queensland workplaces, employees and employers. This discussion provides the context in which the submissions before the Inquiry were considered. Also considered in this section are aspects of submissions before the Inquiry which discussed the more general implications of Work Choices even though this was not part of the Directions. In particular the Inquiry Panel considered the economic and social impact of Work Choices, likely changes of the introduction and establishment of the AFPC, the intersection between Work Choices and Welfare to Work changes, occupational health and safety issues, subclass 457 visas and regional issues.

2.2 The Workplace Relations Amendment (Work Choices) Act 2005

The Work Choices Act introduced significant amendments to the WRA. In Part D of the Interim Report, the Inquiry provided a detailed analysis of the differences between the WRA, as amended by Work Choices, and the IRA.

Since completion of the Interim Report, the following significant events have occurred:

- the Workplace Relations Regulations 2006 were amended by:
  - Workplace Relations Amendment Regulations 2006 (No. 2); and
  - Workplace Relations Amendment Regulations 2006 (No. 3);

- the High Court decision New South Wales v Commonwealth of Australia; Western Australia v Commonwealth of Australia [2006] HCA 52 (High Court decision) on the constitutional challenge to Work Choices was released on 14 November 2006;

- the Australian Fair Pay Commission Wage-Setting Decision No. 1/2006 (AFPC Wage decision) was released in October 2006; and

- the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (Cth) has introduced further amendments to the WRA.\(^{25}\)

In this section, the Inquiry considers those developments. In particular, the Inquiry considers the outcomes from the High Court decision and consequent implications for Queensland workplaces, employees and employers.

\(^{25}\) At the time of writing, the Workplace Relations Legislation Amendment (Independent Contractors) Bill 2006 (Cth) has been approved by Parliament however it has not yet received Royal Assent. This report refers to the WRA as amended by that Bill as if it were in currently in force. (The related Independent Contractors Bill 2006 (Cth) has also been approved by Parliament however it has not yet received Royal Assent. This Inquiry will not consider the latter instrument as it is not within the Terms of Reference of the Inquiry.)
2.3 Outcomes from the High Court Decision

2.3.1 Background

Prior to Work Choices, federal industrial relations laws were based primarily on section 51(xxxv) of the Commonwealth Constitution (Constitution), which gives the federal Parliament power to make laws with respect to “conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State” (the conciliation and arbitration power). By virtue of this, federal industrial laws applied only where an inter-state industrial dispute was in existence (apart from limited exceptions).

However, Work Choices is instead based primarily on section 51(xx) of the Constitution, which gives the federal Parliament power to make laws with respect to “foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth” (the corporations power). By virtue of this, Work Choices provides for federal industrial laws to apply in a wide-ranging manner to trading, financial or foreign corporations incorporated within Australia (called constitutional corporations) and their employees. This had the result that Work Choices significantly extended federal industrial laws into areas that were previously covered by state industrial relations laws.

Section 109 of the Constitution provides that a federal law prevails over a state law to the extent of any inconsistency. The effect of s. 109 is that the WRA prevails over a state law, where it is inconsistent with the state law.

2.3.2 Challenges to Work Choices

The states of New South Wales, Victoria, Queensland, South Australia and Western Australia and two Union organisations commenced proceedings in the High Court, seeking declarations of invalidity of the whole of Work Choices or alternatively to particular aspects of Work Choices or the WRA as amended by Work Choices. The Attorneys-General of Tasmania, the Northern Territory and the Australian Capital Territory intervened in support of the plaintiffs. The Attorney General for Victoria intervened in particular proceedings.

The arguments of the plaintiffs were similar in many significant respects. Largely, the challenges to Work Choices were directed to the Commonwealth’s use of the s. 51(xx) corporations power to underpin the legislation. The major arguments in this regard included:

- the corporations power can only be used to regulate a corporation’s dealings with external entities such as the public, and not its internal affairs such as its relationship with actual or prospective employees;
- the corporations power can only be used to regulate the trading or financial activities of trading or financial corporations;
- the corporations power cannot be used to regulate the employees of trading or financial corporations who are not involved in the corporation’s trading or financial activities; and
- the corporations power can only be used, insofar as it deals with industrial disputes, subject to the limitations of the conciliation and arbitration power.

Challenges to particular aspects of the WRA as amended by Work Choices included arguments that:

- s. 16, which expressed an intention to exclude certain state or territory industrial relations laws, was invalid because it is a law about regulating state laws rather than a law about corporations; and
- s. 117, which allows the AIRC to restrain state tribunals from hearing matters that are before the AIRC, was invalid because it effectively interfered with continuation of state Constitutions in contravention of s. 107 of the Constitution.
2.3.3 The High Court Decision

The Inquiry noted that the High Court did not judge the social, economic or other impact of Work Choices. The High Court decision ruled only on the issues of constitutional validity put before the Court, and associated matters.

In a joint judgement, a majority of the High Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) rejected all of the arguments put by the plaintiffs, and found Work Choices and the amended provisions of the WRA to be valid. In separate judgements, Kirby J and Callinan J dissented, and found Work Choices to be invalid in its entirety.

2.3.3.1 The majority judgement of Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ

The majority considered the various arguments advanced, previous decisions of the High Court and the terms of the Constitution.

In relation to the corporations power generally:

- The majority rejected the argument that the nature of the corporation (i.e. trading, financial or foreign) had to be significant as an element in the nature or character of the law enacted. In this regard, the majority ruled that the corporations power will support a law even if the nature of the corporation is not significant as an element in the particular law.

- The majority rejected the argument that the corporations power can only be used to regulate a corporation’s dealings with external entities such as the public, and that it could not be used to regulate a corporation’s internal affairs such as its relationship with actual or prospective employees. In this regard, the majority ruled that it was inappropriate to interpret the corporations power on the basis of external and internal relationships of a corporation.

- The majority rejected the argument that the corporations power was limited by the conciliation and arbitration power. In this regard, the majority ruled that the extent of the corporations power was not to be determined by reference to other, more particular, grants of power, such as the conciliation and arbitration power.

- The majority adopted the views expressed by Gaudron J in Re Pacific Coal Pty Ltd; Ex parte Construction, Forestry, Mining and Energy Union where Her Honour said:26

  “I have no doubt that the power conferred by s.51(xx) of the Constitution extends to the regulation of the activities, functions, relationships and the business of a corporation described in that sub-section, the creation of rights, and privileges belonging to such a corporation, the imposition of obligations on it and, in respect of those matters through whom it acts, its employees and shareholders and, also, the regulation of those whose conduct is or is capable of affecting its activities, functions, relationships or business.”

- The majority ruled that the corporations power will support:

  “A law which prescribes norms regulating the relationship between constitutional corporations and their employees, or affecting constitutional corporations in the manner considered and upheld in Fontana Films or, as Gaudron J said in Re Pacific Coal [(2000) 203 CLR 346 at 375 [83]], ‘laws prescribing the industrial rights and obligations of [constitutional] corporations and their employees and the means by which they are to conduct their industrial relations.’” (at [198]).

26 (2000) 203 CLR 346 at 375 [83]
The majority found that there was no need to limit the ambit of the corporations power to preserve a balance of legislative power between the Commonwealth and the states (the federal balance) on the basis that the plaintiffs had not identified or defined impermissible alteration of the federal balance.

The majority applied these broad principles to Work Choices and to specific provisions of Work Choices challenged by the plaintiffs, and ruled them to be valid.

2.3.3.2 The dissenting judgement of Kirby J

Justice Kirby expressed intense opposition to the decision of the majority and indicated that he would have declared Work Choices and the amended provisions of the WRA to be entirely invalid.

Justice Kirby considered that:

- properly characterised, Work Choices was a law “with respect to” the prevention and settlement of industrial disputes necessary for the regulation of industrial relations;
- the corporations power could not sustain such a law;
- to be valid, such a law must conform to the requirements of the conciliation and arbitration power, namely it must be with respect to conciliation and arbitration of an industrial dispute extending beyond the limits of one state;
- the corporations power should be limited accordingly by the other provisions of s. 51 of the Constitution, including the restrictions in the conciliation and arbitration power; and
- the corporations power should also be limited by the federal character of the Constitution.

Justice Kirby considered the need to preserve a balance between the Commonwealth and the states to be of prime importance. In this regard Justice Kirby said:

“[611] … the unnuanced interpretation of the corporations power now embraced by a majority of this Court, released from the previous check stated in the industrial disputes power (and other similar constitutional checks), has the potential greatly to alter the nation’s federal balance. It risks a destabilising intrusion of federal lawmaking into areas of legislation which, since federation, have been the subjects of State laws. It does so unchecked by any express provisions in such powers or by any implied features of the Constitution derived from the federal system that lies at its very heart.

[612] This Court and the Australian Commonwealth need to rediscover the federal character of the Constitution. It is a feature that tends to protect liberty and to restrain the over-concentration of power which modern government, global forces, technology, and now the modern corporation, tend to encourage. In this sense, the federal balance has the potential to be an important restraint on the deployment of power. In that respect, federalism is a concept of constitutional government especially important in the current age. By this decision, the majority deals another serious blow to the federal character of the Australian Constitution. We should not so lightly turn our backs on the repeatedly expressed will of the Australian electors and the wisdom of our predecessors concerning our governance.” (reference omitted).

2.3.3.3 The dissenting judgement of Callinan J

Justice Callinan also expressed strong opposition to the decision of the majority and indicated that he would have declared Work Choices and the amended provisions of the WRA to be entirely invalid.

Justice Callinan considered that the majority paid insufficient regard to previous decisions of the High Court which interpreted the Constitution.
Justice Callinan’s reasons for disagreeing with the majority view included:

“(iii) The substance, nature and true character of the Amending Act is of an Act with respect to industrial affairs.

(iv) The power of the Commonwealth with respect to industrial affairs is a power in relation to ‘conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State’ and not otherwise (except for Commonwealth employment and other presently not relevant purposes). As the jurisprudence of this Court shows, that power is a very large one. Much can properly be characterized as preventative of a relevant industrial dispute.

(v) The corporations power has nothing to say about industrial relations or their regulation by the Commonwealth. To the extent, if any, that s. 51(xx) might otherwise appear to confer such power, it must be subject to the implied negative restriction imposed by s. 51(xxxv).

(vi) The corporations power is concerned with the foreign, trading and financial activities and aspects of corporations, the precise limits of which it is unnecessary to decide in this case. In Australia, history, the founders, until 1993 the legislators who have followed them, and this Court over 100 years, as Kirby J has pointed out, have treated industrial affairs as a separate and complete topic, and s. 51(xxxv) as defining the Commonwealth’s total measure of power over them, except in wartime.

(vii) To give the Act the valid operation claimed by the Commonwealth would be to authorize it to trespass upon essential functions of the States. This may not be the decisive factor in the case but it at least serves to reinforce the construction of the Constitution which I prefer, that industrial affairs within the States, whether of corporations or of natural persons, are for the States, and are essential for their constitutional existence.

(viii) The validation of the legislation would constitute an unacceptable distortion of the federal balance intended by the founders, accepted on many occasions as a relevant and vital reality by Justices of this Court, and manifested by those provisions of the Constitution to which I have referred, and its structure.” (at [913], reference omitted).

2.4 Implications for Queensland Workplaces, Employees and Employers of the High Court Decision

2.4.1 General implications for all Queensland workplaces, employees and employers

General implications of the High Court decision for all Queensland workplaces, employees and employers include the following:

- Uncertainty regarding the validity of Work Choices (and the validity of the WRA as amended by Work Choices) has been removed: the majority of the High Court has confirmed that Work Choices is valid in its entirety.
- Determination of whether an employer, and their employees, is regulated by the WRA will depend on:
  - whether the employer is a “constitutional employer”, that is whether it is:
    - a “constitutional corporation”;
    - the Commonwealth;
    - a Commonwealth authority;
• Some Queensland employers, and their employees, will have uncertainty in relation to whether or not they are subject to the WRA, until the issue of what is a “constitutional corporation” is conclusively resolved. The majority in the High Court decision did not consider the kinds of corporations that fall within the definition of “constitutional corporation”, leaving the issue for later determination.

• In respect of Queensland employers who are “constitutional employers”, and their employees, as from 27 March 2006:
  – the WRA as amended by Work Choices applies to them in its entirety (in the next sub-section, the Inquiry summarises some of the particular implications for those employees and employers who were previously regulated by state industrial laws, but who are now regulated by the WRA as a result of Work Choices);
  – the following state industrial laws will not apply to them:
    ➢ the IRA, and any instrument made under it which is of a legislative character;
    ➢ state laws that apply to employment generally and deal with leave other than long service leave;
    ➢ state laws that allow a state court or tribunal to make an order about equal remuneration;
    ➢ state unfair contract laws;
    ➢ state right of entry laws other than for a purpose connected with occupational health and safety; and
    ➢ state laws prescribed by federal regulation.

• The WRA will apply only for a transitional period to “non-constitutional employers” who were regulated by a federal award or workplace agreement immediately prior to the commencement of Work Choices (and their employees), subject to those employers and their employees either reverting to the state industrial system or alternatively becoming eligible for coverage by the WRA.

• All state industrial laws will apply to Queensland employers (and their employees) who are “non-constitutional employers” (except those employers covered by the WRA during a transitional period because they were regulated by a federal award or workplace agreement immediately prior to the commencement of Work Choices). This includes:
  – sole traders or partnerships (i.e. not incorporated) not covered by a federal award or workplace agreement as at the date of commencement of Work Choices;
  – corporations that are not “constitutional corporations” not covered by a federal award or workplace agreement as at the date of commencement of Work Choices; and
  – state government employing entities that are not “constitutional corporations”.

• The following state laws will nevertheless apply to all Queensland employers, and their employees, irrespective of whether or not the employer is a “constitutional” employer:
  – discrimination and equal opportunity laws, provided they are not a “State industrial law” or contained in such;
  – superannuation laws;
  – workers’ compensation laws;
  – occupational health and safety laws (including entry of a representative of a Union to premises for a purpose connected with occupational health and safety);
  – matters relating to outworkers (including entry of a representative of a Union to premises for a purpose connected with outworkers);
  – child labour laws;
long service leave laws;
- public holiday laws, except regarding the rate of payment for public holidays;
- laws dealing with the method of payment of wages or salaries;
- laws dealing with the frequency of payment of wages or salaries;
- laws dealing with deductions from wages or salaries;
- laws dealing with industrial action affecting essential services;
- laws dealing with attendance for jury service; and
- laws dealing with regulation of associations of employees or associations of employers or their respective members.

- The WRA will apply to federally registrable associations of employees, associations of employers and enterprise associations which are registered under the WRA. Associations which are not federally registered, or transitionally registered under the transitional provisions, will have no right to be recognised under the WRA.

2.4.2 Particular implications for those Queensland workplaces, employees and employers previously regulated by state industrial laws who are now regulated by the Workplace Relations Act 1996 as a result of Work Choices

The Inquiry set out in Part D of the Interim Report, a detailed analysis of the differences between the IRA and the WRA as amended by Work Choices.

Given the enormous scope of the WRA and the detail that it encompasses, the Inquiry will not set out an exhaustive list of all implications of coverage by the WRA. However, the Inquiry sets out below examples of some particularly pertinent implications that will be experienced by Queensland workplaces, employees and employers of now being regulated by the WRA, instead of the IRA, as a result of Work Choices.

2.4.2.1 Changes to basic rates of pay and casual loadings

Employers and employees who were previously regulated by the IRA but are now regulated by the WRA, will experience significant changes in the system for determining basic rates of pay and casual loadings.

(A) Basic rates of pay and casual loadings under the Industrial Relations Act 1999

Under the state industrial system, classification structures, basic rates of pay and casual loadings are primarily contained in awards (and workplace agreements assessed against relevant awards on the basis of the no-disadvantage test).

The QIRC exercises powers in relation to principles of wage fixing by way of general ruling and statement of policy, and is obliged to ensure a general ruling about a Queensland minimum wage for all employees is made at least once each calendar year. The objectives imposed on the QIRC in exercise of its powers include objectives to provide “for an effective, and efficient economy, with strong economic growth, high employment, employment security, improved living standards, low inflation and national and international competitiveness” and to ensure “wages and employment conditions provide fair standards in relation to living standards prevailing in the community”.

27 s. 287, s. 288 IRA
28 s. 287(2) IRA
29 ss. 3(b), (g) IRA
On 27 July 2006 the QIRC issued a Declaration of General Ruling - State Wage Case 2006 (QIRC Wage decision). The QIRC Wage decision declared a general increase in all award rates for wages or salaries for full-time adult employees of $19.40 per week from 1 September 2006, with corresponding pro-rata increases in respect of rates for junior employees, part-time employees and piece-workers. The QIRC Wage decision also declared a full-time adult minimum rate of $503.80 per week.

An implication of the High Court decision is that application of the QIRC Wage decision (and future QIRC Wage decisions) is effectively limited to wage increases in respect of employees of “non-constitutional employers” and those employees on agreements who receive a flow-on of adjustments from the QIRC Wage decision.

(B) Basic rates of pay and casual loadings under the Workplace Relations Act 1996

The WRA now establishes a new system of minimum safety net basic rates of pay and casual loadings as part of an Australian Fair Pay and Conditions Standard (AFPCS). The AFPCS standard for basic rates of pay and casual loadings is essentially applicable to those employers and their employees who are covered by the WRA and were subject to federal and state awards upon the commencement of Work Choices, or who were award free, and junior employees, employees with disabilities and employees to whom training arrangements apply. Employers and their employees who were subject to state or federal workplace agreements upon the commencement of Work Choices are excluded from the operation of the AFPCS standard.

Under the AFPCS standard, the WRA now provides for minimum basic rates of pay (periodic rates and piece rates) by the Australian Pay and Classification Scales (APCS) or standard Federal Minimum Wage (FMW) or special Federal Minimum Wages (special FMW). The AFPCS standard also includes:

- a “guarantee” of casual loadings;
- a “guarantee” of frequency of payment;
- a “guarantee” against reductions below pre-reform commencement rates; and
- a “guarantee” against reductions below FMWs.

The AFPC generally determines terms of the APCS (although some will be initially derived from certain instruments in effect prior to the commencement of Work Choices) and exercises other wage-setting powers including:

- adjusting the FMW;
- determining or adjusting special FMW;
- determining or adjusting basic periodic rates of pay and basic piece rates of pay; and
- determining or adjusting casual loadings.

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30 182 QGIG 608
31 See clause 30, Schedule 7 WRA (excludes from operation of the AFPCS employees whose employment is subject to a pre-reform certified agreement, a pre-reform AWA or a s. 170MX award to the extent it deals with a relevant matter); clause 15E, Schedule 8 WRA (excludes from operation of the AFPCS employees whose employment is subject to a PSA to the extent it deals with a relevant matter).
32 s. 182-s. 184 WRA. See generally Division 2, Part 7 WRA
33 s. 185-s. 188 WRA
34 s. 189 WRA
35 s. 190-s. 192 WRA
36 s. 193 WRA
37 s. 208 WRA
38 s. 22-s. 24 WRA
The AFPC is required to conduct wage “reviews” and to exercise its wage setting powers “as necessary”.\textsuperscript{39} In contrast to the QIRC,\textsuperscript{40} there is no obligation on the AFPC to conduct wage reviews annually or within any regularised time frame. In making its determination, the AFPC is required to have regard to objectives such as “the capacity for the unemployed and the low paid to obtain and remain in employment”, “employment and competitiveness across the economy”, “providing a safety net for the low paid” and “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”.\textsuperscript{41} This is substantially different to the objectives imposed on the QIRC.\textsuperscript{42}

The AFPC released its first decision in October 2006, being the Australian Fair Pay Commission Wage-Setting Decision No. 1/2006 (AFPC Wage decision). The AFPC Wage decision was specified to take effect from 1 December 2006, approximately 18 months after the last previous pay increase for APCS reliant employees. In summary, the AFPC Wage decision resulted in the following:

(a) an increase in the standard FMW of $0.72 per hour, from $12.75 to $13.47 per hour (which is equivalent to an increase of $27.36 per week);
(b) an increase in all APCS up to and including $699.96 per week ($18.42 per hour) of $0.72 per hour (which is equivalent to an increase of $27.36 per week); and:
(c) an increase in all APCS above $699.96 per week ($18.42 per hour) of $0.58 per hour (which is equivalent to an increase of $22.04 per week).

The AFPC determined an additional increase to compensate certain employees who missed out on the 2005 safety net adjustment. In this regard, the AFPC Wage decision determined an additional increase of $17 per week, expressed as an hourly rate, for certain APCS from a pre-reform federal wage instrument (predominantly federal and state awards) that was not adjusted for the AIRC’s 2005 Safety Net Review decision by the AIRC or a state industrial body, but:

• was adjusted in accordance with the AIRC’s 2004 Safety Net Review decision (by the AIRC or a state industrial body); or
• received a safety net adjustment during the 12 months to 27 March 2006 (by the AIRC or a state industrial body); or
• took effect after the AIRC’s 2004 Safety Net Review decision.

Whilst the AFPC Wage decision did not specifically provide for an increase in casual loadings, it was anticipated that pay rates for casual employees would be similarly increased by virtue of the general pay increase that adjusts their base rate of pay and a higher dollar value for any given casual loading by virtue of the fact that the loading is applied to a higher base rate. Where a flat dollar amount is payable for casual employees, these rates will be increased by the same amounts and in the same way as the general increase.

In general, the AFPC Wage decision increases flow on to junior employees, employees to whom training arrangements apply, and basic piece rates of pay on a pro-rata basis in accordance with applicable formulae. The AFPC Wage decision also determined certain minimum wages for employees with disabilities, which incorporated similar increases.

The AFPC has advised that it intends to initiate a review of wage arrangements for junior employees and conduct a wage review of APCS for employees to whom training arrangements apply.

The AFPC has further advised that it intends to deliver its second general wage-setting decision in mid-2007.

\textsuperscript{39} s. 22 WRA
\textsuperscript{40} ss. 287(2) IRA
\textsuperscript{41} s. 23 WRA
\textsuperscript{42} ss. 3(h), (g) IRA
2.4.2.2 Changes to minimum conditions of employment

The IRA and the WRA (by virtue of the new AFPCS and otherwise) provide minimum statutory conditions of employment which are similar in some respects, although there are some noticeable differences. For example:

- minimum entitlements in relation to hours of work are different under the IRA and the WRA;\(^{43}\)
- the IRA and the WRA provide similar accrual of annual leave.\(^{44}\) The IRA provides for leave loading in respect of certain employees,\(^{45}\) however the WRA does not provide leave loading. Whilst the “cashing out” of annual leave is not provided by the IRA, the WRA permits “cashing out” of annual leave subject to certain criteria;\(^{46}\)
- entitlements in relation to personal leave are expressed differently in the IRA and WRA.\(^{47}\) Under the WRA employees may cash out an amount of paid personal/carers leave in certain circumstances,\(^{48}\) although this is not provided by the IRA;
- the IRA and the WRA provide entitlements in respect of parental leave that are similar in some respects, although not identical;\(^{49}\)
- whilst the IRA and the WRA specify similar entitlements to meal breaks, such entitlements apply only to certain employees. Entitlements to meal breaks under the IRA arise only in respect of employees under certain instruments made after 1 September 2005.\(^{50}\) The WRA entitlements to meal breaks are excluded from applying to employees subject to a federal award, a workplace agreement or another instrument specified in the *Workplace Relations Regulations 2006* (Cth);\(^{51}\) and
- the provisions of the IRA in relation to public holidays are more generous to employees than those of the WRA. The IRA generally requires payment for public holidays whether or not the employee worked on the public holiday (and in some cases payment at an increased rate when the employee did work the public holiday).\(^{52}\) However, the WRA does not provide for payment for public holidays not worked. Further, the WRA provides that an employee may only refuse a request to work on a public holiday if the employee has reasonable grounds to do so.\(^{53}\)

AFPCS entitlements under the WRA do not apply to an employee in relation to a matter if the employee is covered by a state or federal workplace agreement which was in force at the commencement of Work Choices that deals with that matter.\(^{54}\)

2.4.2.3 Changes under *Workplace Relations Act 1996* transitional arrangements

State awards and industrial agreements which applied to constitutional corporations and their employees prior to Work Choices will generally continue to operate, as “notional agreements preserving State awards” (NAPSAs) or “preserved State agreements” (PSAs) respectively, for a period of time under the complex transitional provisions of Work Choices, pending full transition to the federal industrial system.\(^{55}\) However, those instruments will be subject to a number of significant changes. For example, NAPSAs will now incorporate terms of state industrial

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\(^{43}\) See s. 9 and s. 9A IRA; s. 226 WRA (Note that AFPCS in relation to minimum ordinary hours of work does not apply to employees covered by a NAPSA: clause 51 Schedule 8 WRA.)

\(^{44}\) s. 11 IRA; s. 232 WRA

\(^{45}\) s. 13A IRA

\(^{46}\) s. 233 WRA

\(^{47}\) See generally s. 10, s. 39-40A IRA; Division 5, Part 7 WRA

\(^{48}\) s. 245A WRA

\(^{49}\) See generally Division 2, Part 2, Chapter 2 IRA; Division 6, Part 7 WRA

\(^{50}\) s. 9A IRA

\(^{51}\) s. 607 and s. 608 WRA

\(^{52}\) s. 15 IRA

\(^{53}\) s. 612, s. 613 WRA. Note that the WRA minimum entitlements in relation to public holidays do not apply to employees subject to a pre-reform certified agreement, a pre-reform AWA or a s. 170MX award (clause 30A Schedule 7 WRA) or to a PSA (clause 15F Schedule 8 WRA).

\(^{54}\) Clause 30, Schedule 7 WRA (excludes from operation of the AFPCS employees whose employment is subject to a pre-reform certified agreement, a pre-reform AWA or a s.170MX award to the extent it deals with a relevant matter); clause 15E, Schedule 8 WRA (excludes from operation of the AFPCS employees whose employment is subject to a PSA to the extent it deals with a relevant matter)

\(^{55}\) See generally Schedule 8 WRA “Transitional treatment of State employment agreements and State awards”
laws relating to particular “preserved entitlements” and the model dispute resolution process, and certain prohibited content will be void. PSAs will now incorporate terms of relevant state awards and state industrial laws relating to particular “preserved entitlements” and the model dispute resolution process, and certain prohibited content will be void.

NAPSA and NAPSA will be subject to the AFPCS (with the exception of the hours of work provisions), and the more favourable terms will apply. PSAs will not be subject to the AFPCS to the extent they deal with a relevant matter, and accordingly such agreements may provide for terms and conditions lesser than those contained in the AFPCS.

NAPSA and NAPSA will be ultimately replaced by other forms of industrial regulation provided by the WRA. Such other forms of industrial regulation include federal awards or collective or individual federal agreements or the minimum standard entitlements contained in the AFPCS.

Changes to awards

In contrast to the relatively wide permissible content of awards under the IRA, awards under the WRA are more restricted in their content and operation. Apart from limited exceptions, WRA awards may only contain terms about certain “allowable” award matters. Terms of WRA awards which are not “allowable” no longer have effect, with limited exceptions including some “preserved” award terms.

Awards under the WRA will be further altered including through a process of award simplification and rationalisation.

Changes to agreements

In comparison to requirements under the IRA, the WRA generally prescribes lesser timeframes for notification and agreements to be provided to employees prior to approval.

A significant difference to the position under the IRA is that federal agreements generally commence operation on lodgement with the relevant authority, even if particular requirements have not been satisfied.

In contrast to the system of assessing agreements on the basis of the no-disadvantage test under the IRA, new federal agreements made after the commencement of Work Choices will not be assessed against federal awards as the no-disadvantage test no longer operates under the WRA. However, all new federal agreements made after the commencement of Work Choices will be subject to the AFPCS to the extent that it provides a more favourable outcome for relevant employees.
Also partly in contrast to the position under the IRA, federal agreements will now ordinarily exclude the operation of federal awards with the exception of certain “protected” award conditions which are taken to be included in the relevant agreement but subject to being expressly excluded or modified. Under the WRA, award provisions will not be reinstated to apply to relevant employees following termination of a workplace agreement, with the exception of certain “protected” award conditions.

2.4.2.6 Changes to laws relating to termination of employment

A significant change that will be experienced by employers and employees now regulated by the WRA concerns laws relating to termination of employment.

In particular, access to the “unfair” dismissal jurisdiction under the WRA is considerably curtailed by the introduction of additional bases for exclusion from the “unfair” dismissal provisions. For example, an employee is now excluded from seeking relief under the WRA on the basis that a termination of employment was harsh, unjust or unreasonable:

(a) if their employer employed 100 employees or fewer; or
(b) if their employment was terminated for genuine reasons of an economic, technological, structural or similar nature or reasons that include such reasons; or
(c) if they have not completed a six month qualifying period (or such other period as may be determined by written agreement).

These exclusions from access to “unfair” dismissal remedies do not apply under the IRA.

In relation to remedies for “unlawful” termination, “unlawful” reasons under the WRA are similar in many respects to “invalid” reasons under the IRA. However, the WRA does not include as “unlawful” reasons, refusal to negotiate or make a certified agreement, and the IRA does not include as “invalid” reasons discriminatory reasons of political opinion, national extraction or social origin.

The WRA and the IRA provide similar protection from “unlawful” termination for temporary absence from work due to illness or injury due to cases of absence for no greater than 3 months absence in a 12 month period. The WRA excludes the significant protection provided by the IRA, from dismissal within 12 months after the date of an injury for which workers’ compensation is payable, for reason of the injury.

The IRA provides employees with an entitlement to notice of termination of employment or pay in lieu of notice, subject to certain exceptions. The WRA does not provide an entitlement to notice of termination.

2.4.2.7 Changes to laws relating to unfair contracts

The WRA excludes remedies which are provided by the IRA in respect of unfair contracts with employees.
2.4.2.8 Changes to laws relating to industrial disputes

The IRA and the WRA have some significant differences in relation to industrial disputes and industrial action.

Under the IRA, the QIRC has relatively wide powers to conciliate a dispute, and to arbitrate where conciliation has failed and the parties are unlikely to resolve the dispute.\(^87\) In contrast under the WRA, the AIRC has much more limited powers to conduct dispute resolution processes,\(^88\) and except for limited circumstances,\(^89\) the AIRC has no power to arbitrate or make orders, compulsory directions or determinations in relation to a dispute.\(^90\)

2.4.2.9 Changes to laws relating to industrial action

There are some noticeable differences between the WRA and the IRA in relation to the regulation of protected and unprotected industrial action.

The QIRC has a wide discretion to make any orders it considers appropriate in the case of a dispute, including orders that industrial action stop or not occur, orders or directions of an interlocutory nature or exercise power to grant an interim injunction.\(^91\) In contrast, the AIRC is obliged to order that industrial action which appears to be unprotected stop, not occur and not be organised, including orders against third parties where substantial loss of damage to the business of a constitutional corporation is likely.\(^92\) (The AIRC is required to determine applications for such orders within 48 hours, or to issue an interim order to stop or prevent the industrial action within that time, unless it is not in the public interest to do so).\(^93\) Further, the AIRC is obliged to terminate or suspend a bargaining period in certain circumstances.\(^94\)

Whilst a secret ballot may be ordered under the IRA in relation to industrial action, and may affect whether such industrial action is protected, secret ballots are generally not a compulsory pre-condition to the taking of protected action.\(^95\) However, before industrial action by employees can be protected under the WRA, it is compulsory to make application and obtain a ballot order, conduct a secret ballot of employees and obtain prior approval of the industrial action by such ballot.\(^96\) The cost of a compulsory secret ballot of employees under the WRA is generally borne by the applicant,\(^97\) which is the relevant employee or employees or organisation of employees.\(^98\)

Under the IRA, employers have a discretion to pay, or refuse to pay, an employee for a period when the employee engages in industrial action.\(^99\) However, the WRA expressly prohibits an employer from paying an employee in relation to periods of industrial action, whether protected or unprotected.\(^100\)

2.4.2.10 Changes in respect of apprentices and trainees

The QIRC order *Apprentices' and Trainees' Wages and Conditions (Excluding Certain Government Entities) 2003* will operate as a NAPSA under the WRA, with a preserved APCS derived from that NAPSA. Future wages and

\(^{87}\) s. 250 and s. 253 IRA
\(^{88}\) ss. 700, s. 705, s. 710
\(^{89}\) ss. 713(1), (2) WRA
\(^{90}\) ss. 701(4) and ss. 706(4) WRA
\(^{91}\) ss. 230(4) IRA
\(^{92}\) ss. 496(1), (2) and (6) WRA
\(^{93}\) ss. 496(3), (6), (7) and (8) WRA
\(^{94}\) ss. 430(2), (3), (7), (8), s. 431 and s. 432 and s. 433 WRA
\(^{95}\) ss. 176 IRA (In relation to requirements for protected industrial action see s. 174-s. 178, s. 181 IRA generally; also s. 235 and s. 236 IRA in relation to orders consequent on strike action not approved by secret ballot)
\(^{96}\) s. 445 and s. 449-479 WRA (Note that these are in addition to other requirements: see s. 435-s. 446 WRA generally)
\(^{97}\) s. 442 WRA, but see s. 443, s. 444 WRA
\(^{98}\) s. 451 and s. 455 WRA
\(^{99}\) s. 238 IRA
\(^{100}\) s. 507 WRA
conditions for apprentices and trainees will now be determined by the AFPC.  

Queensland Department of Employment and Training submissions suggested that apprentices and trainees now under the WRA, may generally lose the protections in relation to termination of employment previously contained in the Vocational Education, Training and Employment Act 2000 (Qld). It is arguable that their employment may now be terminated, subject to the WRA dismissal laws.

### Changes in respect of representation, right of entry and freedom of association

The WRA will apply to federally registrable associations of employees, associations of employers and enterprise associations which are registered under the WRA. Associations which are not federally registered, or transitionally registered under the transitional provisions, will have no right to be recognised under the WRA.

Under the WRA, organisations or parties cannot engage in “pattern bargaining” in the context of agreement making.

In contrast to the relatively wide and unrestricted powers of entry allowed to authorised industrial officers under the IRA, the WRA is considerably more restrictive and prescriptive in relation to powers of entry allowed to authorised officials. Nevertheless, the WRA does generally allow entry for a purpose connected with state occupational health and safety laws.

Both the IRA and the WRA broadly protect freedom of association, however, the WRA has refined, clarified and added to protections in this regard.

Whilst the IRA specifically permits Union “encouragement provisions” to be included in industrial instruments and permits specified conduct in relation to Union “encouragement provisions”, Union “encouragement provisions” may not be included in awards or agreements under the WRA.

### The Economic and Social Impact of Work Choices

#### Economic and Social Impact

A number of submissions expressed concern with regard to the wider economic impact of Work Choices. In contrast to the federal Government’s predictions of more jobs and greater economic prosperity as a result of the introduction of Work Choices, the Queensland Government submission contended that the evidence suggested that further deregulation of the labour market is likely, at best, to have only minimal positive economic impact, while creating the social risk of greater inequity and wage disparities.

The evidence to support this contention is said to come from the Organisation for Economic Co-operation and Development (OECD) Employment Outlook Report for 2006 (as discussed further in Part 2.5.1.1); cross-country comparisons of economic performance and productivity showing that countries with highly regulated labour markets record similar productivity levels to those countries with much less regulation; and the New Zealand experience of labour  

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101 Queensland Department of Employment and Training Submission p 3
102 Queensland Department of Employment and Training Submission p 5
103 see s. 4 WRA definition of “organisation”, and generally ss. 32(a) and (c) Registration and Accountability of Organisations Schedule, Schedule 1 WRA
104 s. 421 and s. 431 WRA
105 s. 372 and s. 373 IRA
106 See generally Part 15 WRA
107 s. 756 WRA and see s. 755 s. 759 WRA generally
108 See generally Chapter 4 IRA and Part 16 WRA
109 For example, see s. 789, s. 790, s. 791, s. 804
110 See generally Chapter 4 IRA
111 Workplace Relations Regulations 2006, Chapter 2, Reg.8.5(2)
112 Queensland Government Submission p 15
113 ibid pp 15-17
114 ibid pp 17-18
market deregulation.\textsuperscript{115} From this the Queensland Government submission argues that economic performance rests on other factors.\textsuperscript{116}

In addition, the Queensland Government submission contests the claim that changes to the unfair dismissal laws will create jobs. They see the claim as lacking in evidence and that the changes will only result in high social costs and lack of job security for workers.\textsuperscript{117} In concluding this section, the submission stated:

\begin{quote}
“The evidence and research [cited in the discussion above] has demonstrated that deregulation has failed to produce any positive impact on economic outcomes. At the same time, the research shows that weakening employment protections has led to adverse social consequences, particularly in the form of widening wage disparities.”\textsuperscript{118}
\end{quote}

Similarly, the AWU submission questions whether any positive impact will be felt from Work Choices. They see the erosion of workers’ rights and conditions as causing hardship for communities and families.\textsuperscript{119} The QCU submission also suggested that the economic impact of Work Choices will be negative for many in the workforce but particularly for more vulnerable groups in the labour market and in regional areas. The QCU submission suggested that the negative effects of Work Choices will be disproportionately felt in regional areas due to such things as the size of the workforce, limited available industries, lack of economic mobility in and out of regions and fewer employment opportunities.\textsuperscript{120}

This concern with potential negative outcomes is then reflected in the concern expressed in a number of submissions with regard to the uneven impacts of Work Choices and the related social impacts. The Queensland Government submission suggested that Work Choices is likely to have greatest adverse consequences for those people in particular sections of the workforce who have more limited bargaining power including groups such as young workers, women, low skilled workers, workers in rural and remote areas, workers from non-English speaking backgrounds and workers with family responsibilities.\textsuperscript{121} A number of submissions contend that this situation will be exacerbated by the removal of the no-disadvantage test and altered unfair dismissal laws. The Queensland Government submission also shows that the Department of Employment and Workplace Relations’ (DEWR) own research suggested that AWAs do little to help workers balance their work and family responsibilities\textsuperscript{122} and highlights the potential negative impact of this for families and communities.

\subsection*{2.5.1.1 OECD Employment Outlook 2006}

The Queensland Government’s submissions referred to the most recent report from the OECD\textsuperscript{123} in which three particular findings were made. These were that:

\begin{quote}
“Collective bargaining is strongly related to low unemployment; 
Minimum wages do not harm employment; and
Employment protection legislation (unfair dismissal laws) does not cost jobs.”\textsuperscript{124}
\end{quote}

\begin{flushright}
\textsuperscript{115} ibid pp 19-22 \\
\textsuperscript{116} ibid p 23 \\
\textsuperscript{117} ibid pp 25-27 \\
\textsuperscript{118} ibid p 27 \\
\textsuperscript{119} AWU Submission p 5 \\
\textsuperscript{120} QCU Submission pp 7-11 \\
\textsuperscript{121} Queensland Government Submission p 30 \\
\textsuperscript{122} ibid p 32 \\
\textsuperscript{123} OECD Employment Outlook 2006 \\
\textsuperscript{124} Queensland Government Submission, 21 July 2006, p 15
\end{flushright}
The Queensland Government asserts that the findings were significant in that:

“The key findings from the report discredit much of the economic argument advanced by the federal Government to explain the Work Choices reforms; second, this is particularly significant coming from the OECD, which is a leading body in the field of economic and labour market policy and which for much of the 1990s itself advocated a much more deregulatory approach to the labour market; and third, the findings add to and confirm much of the earlier evidence in this area.” 125

It is contended that previously, the OECD economic strategy for the labour market included, amongst other things, a focus upon making wage and labour costs more flexible by reassessing the role of statutory minimum wages and by easing the stringency of employment protection legislation in areas such as termination of employment (i.e. dismissal laws). The OECD had previously expressed the view that employment protection legislation had increased costs for employers and had created barriers to hiring employees.126

However, after consideration of the most recent OECD Report, the Queensland Government stated that:

“...the OECD, which has been at the forefront in the last decade of the push to deregulate, has looked at these issues afresh, based on the evidence available. In the 2004 edition of its Employment Outlook, the OECD observes that a single approach aimed at creating a flexible labour market in the style of the US may not be sufficient or even necessary to promote economic growth and decrease unemployment. While the OECD still promotes some reduction in employment regulation, it now acknowledges the importance of addressing issues such as job security, wage inequality, and provisions for a good working life - such as work and family policies.”.127

It is further contended that, within the OECD Report, there is evidence to show that in countries with higher Union density and involvement in the bargaining process, “overall wage dispersion” has increased and also that the centralisation and co-ordination of wage bargaining has been strongly associated with lower wage inequality.128

2.5.2 Australian Fair Pay Commission

Section 2.4.2.1 of this Report provides an overview of the changes to the setting of basic rates of pay and casual loading under the WRA. This discussion includes some detail with respect to the AFPC and the AFPCS. A number of submissions before the Inquiry raised concerns in relation to the impact of the role of the AFPC and AFPCS on the wages and conditions of employment of employees. An overview of these main concerns is provided in this part of the Report.

As discussed in the earlier section, the AFPC is a legislative body which was established in 2006 under the federal Government’s Work Choices legislation. It is a body established to set the minimum rate of pay for employees covered by Work Choices. Its role is to adjust the standard FMW; determine or adjust special FMWs; determine or adjust basic periodic rates of pay and basic piece rates of pay and determine or adjust casual loadings. Effectively, the AFPC replaces the AIRC in its previously held role of setting minimum rates of pay for employees.

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125 ibid p 15
126 ibid p 16
127 ibid p 16
128 ibid p 16; OECD Report, p 83
In performing its role, the AFPC must have regard to:

- the capacity for the unemployed and the low paid to obtain and remain in employment;
- provide a safety net for the low paid; and
- provide 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.

As pointed out in section 2.4.2.1 of this Report, these objectives are substantially different to those imposed on the QIRC. In exercising its role in determining matters, including basic wage rates, together with other rates of pay, the QIRC must have regard to the Objects of the IRA as follows:

“\textit{The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by -}

\begin{enumerate}
\item providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers; and
\item providing for an effective and efficient economy, with strong economic growth, high employment, employment security, improved living standards, low inflation and national and international competitiveness; and
\item preventing and eliminating discrimination in employment; and
\item ensuring equal remuneration for men and women employees for work of equal or comparable value; and
\item helping balance work and family life; and
\item promoting the effective and efficient operation of enterprises and industries; and
\item ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community; and
\item promoting participation in industrial relations by employees and employers; and
\item promoting and facilitating the regulation of employment by awards and agreements; and
\item meeting the needs of emerging labour markets and work patterns; and
\item promoting and facilitating jobs growth, skills acquisition and vocational training through apprenticeships, traineeships and labour market programs; and
\item assisting in giving effect to Australia’s international obligations in relation to labour standards.}”  

The QIRC must also “be governed in its decisions by equity, good conscience and the substantial merits of the case having regard to the interests of (a) the persons immediately concerned; and (b) the community as a whole.”

The Queensland Government submission expressed concern that the wage-fixing parameters for the AFPC have been set by the federal Government in such a way as to encourage lower real wages over time, particularly given there is no requirement in the federal legislation for wages to be fair.\textsuperscript{131} The submission also expressed concern that the AFPC has no capacity to hear equal remuneration applications as the federal legislation explicitly overrides laws that provide for state courts and tribunals to make equal remuneration for work of equal value orders (s. 16C).\textsuperscript{132}

\textsuperscript{129} s. 3 IRA
\textsuperscript{130} s. 320 IRA
\textsuperscript{131} Queensland Government Submission, 21 July 2006, p 31
\textsuperscript{132} ibid p 31
The submission by YWAS claims that the “AFPCS essentially lowers the bar in terms of the standards of treatment toward employees. This in turn gives employers greater opportunity to treat employees unfairly”. 133 Similarly, the AWU submission considers that the practical effect of the legislated AFPCS “is to reduce the previous protection provided, to a now small non-prescriptive set of standards that do not reflect the community standards in most circumstances”. 134

The submission of the TCFUA provides the example of maximum ordinary hours of work as way of illustration of their points in regard to the lack of protections for employees under the AFPCS. They argue that although the AFPCS appears to institute a maximum ordinary hours of work of 38 hours per week, this is not actually the case as it allows the 38 hours to be averaged over 12 months and for “reasonable” additional hours to be worked without the need for any overtime payments. 135 They see this as undermining common community standards of work.

Together these submissions express serious concerns that the AFPC and AFPCS will have the effect of producing downward pressure on wages and conditions, especially for previously award reliant employees.

2.5.3 Welfare to Work Changes

A number of submissions also referred to the intersection between the Work Choices changes and the welfare to work changes. The interaction between these two sets of work related changes were seen to impact significantly on more vulnerable workers.

The Welfare Rights Centre (WRC) submission 136 noted that the Welfare to Work Bill was announced in the 2005 federal Budget and passed through the Senate in December 2005 being effective from 1 July 2006. The people targeted in this legislation are people of “workforce age”, in particular: parents from low income families in receipt of a welfare payment whose youngest child is six years of age or older; people with a disability or chronic medical condition who are deemed able to work for more than 15 hours a week; sole parents whose youngest child is eight years or older; and mature aged unemployed. The changes in the welfare to work initiative include new applicants in the targeted groups being put onto the Newstart Allowance (with lower payments) rather than a pension type payment. These people will be required to satisfy the activity test and must not refuse any suitable work.

The WRC submission quoted Australian Council of Social Services (ACOSS) research which estimates that in Queensland the new measures will add some 52,300 parents and people with a disability seeking part-time work over the next three years. WRC believe that the industries most likely to be affected are “Childcare (particularly Family Day Care); Cleaning Services; Community Services (Care Work); Hospitality; Manufacturing (Production Work) and Retail”. 137 The submission also highlighted the barriers to work facing many of these workers including lack of child care; lack of education, skills and qualifications; lack of transport and/or mobility issues; and caring responsibilities. 138 The impact of the imposition of penalties for non-compliance with agreed job seeking activity is also seen to have potentially significantly adverse effects for individuals including exclusion from payments for an eight week period.

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133 YWAS Submission p 9
134 AWU Submission p 7
135 TCFUA Submission p 2-3
136 WRC Submission, p 3
137 ibid p 3
138 ibid p 4
The WRC submission fully supported the notion that people are better off in the paid workforce than on a welfare payment, however, they express concern that many of the people in the targeted groups will have little training and/or education and that their capacity to compete for a fair days pay will be restricted. The submission called for safeguards to ensure that vulnerable workers will be able to access fair and reasonable conditions of employment including a reasonable and fair minimum wage which takes into consideration living standards; the maintenance of universal provisions which support a balance between work and caring; and a reassurance that all workers will be provided with equal opportunities in the workforce. The issues raised in the WRC submission were supported in other submissions, in particular that of QWWS.

2.5.4 Occupational Health and Safety Issues

A number of participants before the Inquiry expressed concern about occupational health and safety issues at the workplace which have most recently impacted upon employees. It is submitted that these concerns have been exacerbated with the introduction of Work Choices. Much of the evidence centred around the new restrictions placed upon Union representatives’ access to worksites where their members are employed.

This point is highlighted in submissions made by Mr H. Williams, Secretary of the Transport Workers’ Union of Australia, Union of Employees (Queensland Branch) (TWU).

Mr Williams referred to the campaign the TWU had been involved in for the previous 6 or 7 years aimed at ensuring that employers complied with occupational health and safety regulations. Of major concern were the hours being worked by drivers within the trucking industry. The TWU had been besieged with complaints from employees claiming that they had been required to work approximately 18 hours in one day.

Mr Williams referred to the investigation the TWU had undertaken with a Brisbane trucking company. Complaints had been made by employees concerning the work practices of this company. Consequently, the TWU had visited the site to inspect time and wages records. Because of difficulties encountered in going on site for the inspections, the TWU brought the matter before the QIRC. The right to enter the site was confirmed by the QIRC. After inspecting the time and wages books of the company, the TWU brought the matter to the attention of the Queensland Department of Transport and the company was prosecuted for various breaches of the award, amongst other things. The company pleaded guilty to approximately 700 charges and was found guilty of some 1,000 charges of breaching fatigue and driving hours regulations.

In a number of cases to which Mr Williams referred, deaths had occurred as a consequence of fatigue on the part of drivers who were working well beyond the regulatory hours of work. Reference was made to other successful prosecutions made against trucking companies for similar breaches. Mr Williams stated that the monitoring of this situation occurred through right of entry provisions contained within awards prior to the event of the Work Choices legislation.

Under Work Choices, Mr Williams stated that his officials were required to provide written notice to the employer 24 hours in advance of a visit but no more than 14 days in advance of the visit. He stated that by nominating the day of entry, he believed that some employers had sought to shred documentation which would show that they were non-compliant with required standards. Mr Williams stated that:

"the right of entry ... is absolutely imperative, very important and we must at all - in all particular methods retain that ability of ourselves to go to these workplaces and make sure that we can stamp out these illegal driving hours of these parasites and criminals."
Submissions from participants before the Inquiry showed that employees were reticent about raising workplace health and safety issues through fear of termination of employment. This fear was exacerbated with the loss of unfair dismissal protections after the commencement of Work Choices.\textsuperscript{146}

A number of the points raised by Mr Williams are supported by the submission of Professor Michael Quinlan, School of Organisation and Management, University of New South Wales. In his submission Professor Quinlan stated that research undertaken with workplace health and safety inspectors from various inspectorates in Queensland, New South Wales, Victoria, Tasmania and Western Australia has suggested that a number of employees dismissed for a range of reasons, may actually have been dismissed for raising health and safety issues.\textsuperscript{147}

Prior to the introduction of Work Choices, awards contained many workplace health and safety provisions. This however has now changed with awards containing only minimum conditions.\textsuperscript{148}

Professor Quinlan referred to examples which showed that many employees who worked part-time, as casual workers and as labour hire workers, often had a second job to supplement their income. This in itself, it was submitted, pointed to health and safety risks associated with longer working hours, moving between jobs and inadequate supervision on each job site. Within this context, Professor Quinlan referred to the emerging trend of what is termed “presenteeism” whereby an employee attends at work through fear of placing their job in jeopardy regardless of the state of their health.\textsuperscript{149}

For many years, Unions have undertaken the role of ensuring that workplace health and safety representatives had undergone the appropriate training. The de-unionisation of the workplace, according to Professor Quinlan could lead to a lessening of occupational health and safety standards at the workplace. This coupled with lower job security was argued to jeopardise health and safety standards in the workplace.\textsuperscript{150}

2.5.5 Regional Issues

The Inquiry was concerned from the outset to ensure that regional interests were represented. To that end, it was decided to undertake hearings in a range of regional locations throughout the state. In addition, a number of concerns with regard to regional issues were raised in submissions. These issues are overviewed here, with excerpts from direct evidence heard in regional hearings included in support of the submissions.

QCU submission contended that “one of the strengths of the state industrial relations system is its responsiveness to regional needs”.\textsuperscript{151} They also contend that the impact on rural communities will be disproportionate given the higher unemployment rate in regional Australia and the limited mobility of many regional workers.

Similarly, the Queensland Government’s submission contended that in a decentralised state such as Queensland the recognition of the requirements of employees and employers in regional areas is particularly important.\textsuperscript{152}

Significant interest was forthcoming from regional areas, to the extent that 44% of witnesses who gave evidence to the Inquiry came from outside the Brisbane metropolitan area.

The Inquiry, apart from taking evidence, was also provided with extensive submissions which related to the varying circumstances of each of the regional locations.

\textsuperscript{146} Professor M. Quinlan, Transcript 23 November 2006, p 767
\textsuperscript{147} ibid p 760
\textsuperscript{148} ibid p 770
\textsuperscript{149} ibid p 771
\textsuperscript{150} ibid p 778
\textsuperscript{151} QCU Submission, 21 July 2006, p 7
\textsuperscript{152} Queensland Government Submission, 21 July 2006, p 12
In particular, submissions before the Inquiry from Bundaberg, Hervey Bay, Cairns and the Gold Coast provided an insight into difficulties encountered by employees where limited employment opportunities were available if one’s employment was ceased under Work Choices or if one refused to accept terms of employment that were being forced upon them.

Extracts from the aforementioned submissions included:

**Bundaberg and Hervey Bay**

“In the transient nature of the workforce, the concentration of seasonal work, and where those workers are employed, suggests to me that they would have little knowledge of the impact of Workchoices.

This means that they would not really know if they are getting duded or not on what the employer offers them.

Remember that this workforce is moving on when the season is finished. And a lot of them do not return for the next season.

As such it is likely that they would accept whatever employment arrangement is offered to them without challenge.

If they were to challenge there would always be someone else looking for short term work.” 153

**Cairns**

“The Cairns region as the above data suggests has a cross-sectional employment base coupled with a degree of transience in employment attached to the tourism sector. It also has a mixed age group, with older residents (and workers) who have a connection with the area, and younger workers whose commitment to the region reflects a temporary employment arrangement.

There is also that mix that comes with the rural meeting urban.

My assessment is that the knowledge base of Workchoices, outside of the public sector area, is low here. Most likely this is because of the seasonal, casual and transient nature of the workforce. These workers have precarious employment at the best of times.

It is also the case that in the service sector there are a lot of young workers.

The impact of Workchoices really only comes to light when these workers are confronted by an adverse situation. However with the growing population here, and the capacity to access an alternate labour force from those short term visitors to the city, it really means that being unhappy about your working conditions just means you get the sack.” 154

Submissions were also received from the AWU District Secretary for that region, Mr Brischke which supported the views expressed by the QCU representative. Mr Brischke discussed the level of confusion experienced by workers in this region with regard to Work Choices. He also referred to the restrictions placed upon Union
representatives in accessing work sites where Union members were employed. This restriction exacerbated the level of confusion experienced by employees about their workplace rights and conditions. References were also made to the nature of work within this region with a high percentage of employees being engaged in the casual hospitality industries. Because of the transient nature of work in these industries, employees were often not in the position to debate or question their terms and conditions of their employment.\textsuperscript{155}

\begin{quote}
Gold Coast

“In an economy where employment options say in the construction industry give you the opportunity to find alternate employment, the resil\textsuperscript{sic} option is a feasible one. There is alternate employment.

In the instance of those workers in the tourism industry, principally young workers notably employed in the retail trade; and accommodation, cafes and restaurants there [sic] strength to deal with adverse work situations can be marginal. Yes there will be examples of those who confront. Those stories have come to light during the course of the Brisbane sittings of the Inquiry. However, it is the case that young workers, employed on a casual basis, with limited alternate options for employment, are inclined to take the resil\textsuperscript{sic} option.

The Gold Coast City is like other centres in Queensland. Scratch the surface of what appears to be an idyllic setting and the adverse impact of Workchoices are exposed.”\textsuperscript{156}
\end{quote}

A common thread that emerged in the course of the regional hearings related to concerns in respect of possible ramifications “job wise” for those coming forward to give evidence to the Inquiry.

\subsection*{2.5.6 Positive Responses to Work Choices}

The Inquiry received one submission strongly supportive of Work Choices which was provided by The Restaurant and Caterers’ Employers Association of Queensland, Industrial Organisation of Employers (RCEAQ). The submission stated their support for Work Choices in broad terms arguing that the strong emphasis on bargaining at the workplace and individual level allowed for increased efficiency, flexibility and productivity.\textsuperscript{157} The submission suggested that “Work Choices is a far less intrusive form of workplace bargaining than its counterpart in the State system”.\textsuperscript{158}

More specifically, the submission highlighted the high number of small businesses in the industry and the regional location of a significant number of these businesses. It was argued that many of the RCEAQ’s members were moving to incorporate their sole trader, partnership and trust businesses to take advantage of the opportunities offered by Work Choices. It was also submitted that the RCEAQ had recently been in receipt of DEWR funding “to take Work Choices to those members who are interested and require a further level of understanding”\textsuperscript{159}. The submission notes a high level of interest in the seminars run on Work Choices and in collective agreement making but also notes that “the RCEAQ supports the uniform approach of a classification structure in its agreements”.\textsuperscript{160}

\textsuperscript{155} AWU Submission, 2 October 2006, Transcript pp 469-476
\textsuperscript{156} QCU Submission, p 4
\textsuperscript{157} RCEAQ Submission, 9 October 2006, p 1
\textsuperscript{158} ibid p 5
\textsuperscript{159} ibid p 2
\textsuperscript{160} ibid p 3
The submission noted the high proportion of wage costs as a proportion of operating costs in the industry and suggested that wages needed to be in the vicinity of 32%-34% to ensure financial viability. Work Choices was seen as being particularly important in this regard and able to “actually assist employers to control the wages bill and in many cases bring it down”. It was also argued at the same time, however, that the introduction of a certified agreement or AWA “is not an exercise in reducing wages to employees” but rather an exercise in ensuring the long term viability of the business and the retention of good employees.

The submission also contended that the removal of the threat of unfair dismissal action (for employers with less than 100 employees) will support further employment opportunities and encourage more permanent employment.

A further submission by the Local Government Association of Queensland (LGAQ) did not embrace Work Choices but did welcome reforms that would lead to a single employer being captured by a single jurisdiction as well as the potential for the modernisation and harmonisation of employment conditions. The submission argued that “[l]ocal government has, prior to the advent of Work Choices, been beset with a miscellany of awards and agreements”. The submission also supported the review and reformation of pay and classification scales, which were considered necessary reforms emanating out of the Work Choices reforms, but which were seen as also possible under previous legislation.

The submission also noted a number of concerns in relation to the removal of the no-disadvantage test and changes to unfair dismissal laws. Although LGAQ had previously called for reform in the handling of unfair dismissals, most notably from a procedural perspective, the submission did not consider that the current arbitrary cut-off of 100 employees appropriate or fair. The submission noted that there is currently no reformation of procedures pertaining to unfair dismissal for employers with more than 100 employees. In addition, the LGAQ submission did not support the removal of the no-disadvantage test from agreement making. The submission took the view that the preservation of this test would have assisted in the successful application of reforms in agreement making which are part of Work Choices.

The submission made clear that local government and its constituent councils are committed to being ethical employers. It was stated that it is “[i]n best interest of local government employers to provide attractive industrial relations arrangements if they wish to survive challenge of labour and skills shortages”. The submission goes on to assert that changes to conditions of employment of themselves should not be interpreted as a diminution in conditions and provides examples of changes in employment conditions in local government councils which have merely resulted in the removal of irrelevant and outdated conditions. Also noted is the accommodation, by the LGAQ, of legitimate input from unions representing their members in the period since the introduction of Work Choices and the likely continuation of that practice.

The LGAQ submission recommended a collegial relationship between DEWR and Department of Industrial Relations as a way of “more than adequately provid[ing] an avenue of regular advice to the Queensland Government pertaining to performance of Queensland constitutional corporations operating in the federal jurisdiction”. In summary, the submission argued that “[i]f the High Court upholds constitutional validity of the corporations powers, … any duplication of functions or roles attached to the QIRC would be unnecessary; and would complicate rather than simplify industrial relations.”

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161 ibid p 3
162 ibid p 3
163 ibid p 3
164 ibid p 4
165 Local Government Association Queensland Submission p 15
166 ibid p 3
167 ibid p 9-10
168 ibid p 10
169 ibid p 3
170 ibid p 12
171 ibid p 13
172 ibid p 15
173 ibid p 16

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2.6 Part 2 Conclusion

The Inquiry has been required to consider the outcomes of the High Court decision for Queensland workplaces, employees and employers. As well, the Inquiry has been asked to consider the general implications of the High Court decision for those Queensland workplaces, employees and employers previously regulated by state industrial laws who are now regulated by the WRA as a result of Work Choices.

Importantly, the High Court decision relates only to the constitutional validity of the Work Choices legislation and does not consider social, economic or any other impacts of Work Choices.

In upholding the constitutional validity of the Work Choices legislation the High Court has not resolved the uncertainty in the community around the question of what constitutes a "constitutional corporation". The High Court did not consider the type of corporation which falls within that definition. There remains a considerable amount of confusion in Queensland workplaces around this question. As stated in the Recommendations to this Report, the Inquiry recommends the establishment of a separate statutory body which will undertake, amongst other things, an educative role in addressing these and other concerns associated with the introduction of the Work Choices legislation.

The Inquiry notes that as a consequence of the Work Choices legislation there will be significant changes to the manner in which work is performed and conducted within Queensland. These changes are far reaching. The Inquiry has not observed any advantages to employees emanating from the outcomes derived thus far from the introduction of Work Choices. It should also be noted that there is no evidence before the Inquiry of any advantages to employers arising from Work Choices, other than the enhanced capacity to reduce wages costs through removal of what were previously standard award entitlements such as penalty payments, overtime rates, shift loadings, annual leave loadings and casual loadings.

A longer period of time will be required in order to fully assess the real impact of Work Choices upon Queensland workplaces, employees and employers. To this end, the Inquiry recommends the establishment of a separate statutory body to monitor outcomes as they unfold.

At this point in time, what is of grave concern to the Inquiry is the impact that this deregulated regime will have and appears to have had upon employees throughout Queensland. Examples of this include:

- creating an environment of economic uncertainty for employees and their families because of the removal of unfair dismissal laws and the decrease in wages and conditions of employment through AWAs;
- uncertainty experienced by employees in the following areas:
  - financial difficulty meeting rental and mortgage payments with no recourse to unfair dismissal legislation;
  - a reduction in living standards for many employees;
  - the inability to undertake future financial planning; and
  - a loss of a meaningful work and family life balance;
- the potential for this type of environment to seriously impact upon employees and their families through uncertainty around rates of pay; hours of work; days required to work; shift work; penalty rates and other previously held award conditions;
- placing vulnerable employees in the precarious position of having to "take it or leave it" with regard to conditions of employment under AWAs and other types of workplace agreements; and
- reducing the monitoring of workplace health and safety through restrictions placed upon employee representatives' rights of entry into work sites and removing health and safety training provisions from industrial instruments governing the employment of workers.
The economic and social impact of Work Choices is far reaching. The Work Choices legislation has been in operation since March 2006 and there is evidence and submissions before the Inquiry which suggests a very strong trend that employees, and especially those in less skilled employment will fare badly as a consequence of Work Choices. The material put before the Inquiry in the form of AWAs shows a real lowering of wages and conditions of employment for employees. There has been no evidence to show that any of the altered conditions provide greater productivity or efficiency for the employer. The only outcome appears to be lower wages and conditions for employees.

The Inquiry believes that these trends must be monitored through an independent statutory body and that public awareness of what constitutes fair, appropriate and reasonable workplace practices, must be raised.