The Federal Government's Work Choices legislation which came into effect on 27 March 2006 does not create one federal industrial relations (IR) system. The State and federal systems continue to operate in parallel and WA's IR system remains unchanged although its coverage of some employers and employees is likely to have changed.

While it is not yet possible to give a precise indication of the numbers involved, it is likely that the new legislation applies to no more than 60 per cent of the State's workforce. In other words, for approximately 40 per cent of Western Australian employers and employees, it is "business as usual".

The WA Industrial Relations Commission will continue to exercise its powers in the interests of both employers and employees, except in cases where it is established *as a matter of law* that it does not have the jurisdiction to do so.

How can WA's industrial system remain unchanged?

As a matter of law, Work Choices cannot abolish the industrial relations systems of any State (except Victoria) as the Victorian parliament by an Act has referred its powers to make industrial laws to the Commonwealth. This is because the State system, which establishes the WAIRC and gives it its jurisdiction and powers, is an Act of the WA Parliament. The Federal Parliament cannot amend, much less repeal, the Act. Only the WA Parliament can do that. However the Federal Parliament can render State law inoperative through the operation of s 109 of the Commonwealth Constitution.

Who does Work Choices apply to?

Work Choices applies to employers who were previously under the WA State IR system and who are trading, financial or foreign corporations, as defined in the Australian Constitution. This generally means incorporated business, Australian Government, State government corporations and local government (the latter category is still to be tested).

Work Choices also applies for 5 years to any employer, incorporated or not, that was already under the federal system.

Who does Work Choices not apply to?

Work Choices does *not* apply to WA employers who are not constitutional corporations – in other words who do not come within the definition of a trading, financial or foreign corporation – and who were within the State IR system before Work Choices. This generally covers unincorporated business and the State Government.

Are there any exceptions ?

Not all incorporated businesses in WA may be covered by Work Choices. Not all State Government corporations may be covered either. The test of whether an employer is or is not a constitutional corporation is not whether the employer is "incorporated"; it is, generally speaking, whether its trading or financial activities form a substantial part of its overall activities. Not all corporations will be trading, financial or foreign corporations, although most are likely to be. Any company that is in business to make a profit is clearly a trading corporation. Not for profit associations that are incorporated can also be a trading corporation providing they have enough trading activities. This can mean that some sporting clubs, private schools, charities community service organisations, local government organisations, universities may in law be trading corporations. This is an issue that will be addressed next week by the Full Bench in respect of the Aboriginal Legal Service Wa Inc. As Justice Callinan in the recent Work Choices constitutional challenge before the High Court noted the question as to which corporations should be characterised as trading or financial corporations will occupy a great deal of time of courts in the future.

For those of you who have a role in providing advice to the public or acting for members of the public if you are industrial inspectors you will have to look closely at the identity of the employer. For example if an employee tells you he or she was employed by Lock it up lock service at x address. You cannot assume that the employer's identity is lock it up lock service as that is a trading name. The owner of the trading name may be an individual, a partnership, a company or a trust. These details are fundamentally important.

Unincorporated businesses already under the federal system will be covered by the new legislation for a transitional 5 year period. If they remain unincorporated they will be covered by the State system after five years.

So some have gone and some will come back. An example of one large State government employer that will have to come back is those employed by the DG of Education. The DG is not a corporate body unlike some other heads of Depts such as the Commissioner for Main Roads. Also the DG of Education is unlikely to engage in substantial trading activities.

One issue that will be vexed is what happens if the activities of a corporation change over time?

What type of employers are affected?

According to figures from the WA Department of Consumer and Employment Protection, which are based on unpublished data from the ABS Employee, Earnings and Hours (EEH) Survey for May 2004, the proportion of employment by type of legal organisation in WA may be broken down as follows:

Work Choices applies to:

Incorporated business: (*if trading or financial activities form a substantial part of its overall activities*)	46.6%
Australian Government:	2.0%
State government corporations: (*State Government may bring under state laws*)	8.5%
Local government: (*Definition as constitutional corporation to be tested*)	2.9%

Work Choices does not apply to:

Unincorporated business: (if under WA IR system)	31.5%
State Government:	8.6%

These figures were provided to the Commission during the 2006 State wage case.

How many people will remain in the State IR system?

According to the above figures, as at May 2004, 40.1% (31.5 + 8.6%) of the State's workforce was employed by unincorporated business or the State Government. In other words, that is the proportion of the workforce that is likely to remain in the WA State IR system.

How many people will come under Work Choices?

According to the above figures, the proportion of the State's workforce to be covered by Work Choices will be approximately 60 %.

What about unfair dismissal claims or denied contractual benefit claims

Where the employer is *not* covered by Work Choices, a claim of unfair dismissal can still be made by a dismissed employee. Where the employer is *not* covered by Work Choices, an employee may still be able to make a claim that they are entitled to a benefit under their contract of employment.

Where the employer is covered by Work Choices, it may prevent the WAIRC from dealing with a claim that an employee is entitled to a benefit under their contract of employment where the benefit arose before or after 27 March 2006. The decisions where the Commission has considered the issues are listed here:

Gary Phillips v TR7 Pty ltd (2006) 86 WAIG 2646 This decision is pre the decision of the High Court and decides that contractual benefits claims are not ousted by s 16 WRA.

Donna Leo v Community Choice Financial Services Pty Ltd (2006) 86 WAIG 1541 In this matter the parties assumed s 16 ousted contractual benefit claim and the Commission decided that the transitional provisions in the Workplace relations Regulations 2006 did not preserve the right to bring a claim where the benefit claimed arose prior to 27 March 2006.

I will be delivering a decision which deals with both of these issues in the next week or so. It will be posted on the Commission's website. The parties are Smith v Albany Esplanade Pty Ltd trading as Esplanade Hotel.