

July 2007

## Fairness Test Update

The *Workplace Relations Amendment (A Stronger Safety Net) Act 2007* (Cth) ('the Amendment') has received Royal Assent and commenced on 1 July 2007. This Amendment amends the *Workplace Relations Act 1996* (Cth) ('the Act') by making 4 significant changes to the federal workplace relations system:

- . introducing the Fairness Test;
- . establishing the Workplace Authority;
- . introducing the compulsory Workplace Relations fact sheet; and
- . establishing the Workplace Ombudsman.

### THE FAIRNESS TEST

The rationale behind the Fairness Test is to prevent employers from implementing workplace agreements that take otherwise applicable award entitlements from employees without offering adequate compensation in return.

The Fairness Test applies to all employees who would have otherwise had the benefit of protected award conditions in an industrial award. In particular, the Fairness Test will apply to the following agreements lodged on, or after, 7 May 2007:

- . Australian workplace agreements (AWAs) that remove or change protected conditions for employees earning less than \$75,000 per year working in a job or industry where an award usually applies;
- . collective agreements that remove or change protected conditions for any employees working in a job or industry where an award usually applies; and
- . variations to existing AWAs or collective agreements that meet these conditions.

AWAs or collective agreements lodged before 7 May 2007 are not affected by the introduction of the Fairness Test.

### Operation of the Fairness Test

The Fairness Test operates in a similar way to the previous 'no disadvantage test', however only the removal or modification of protected award conditions will be considered.

The protected award conditions are:

- . penalty rates, including for working on public holidays and weekends
- . shift and overtime loadings
- . monetary allowances
- . annual leave loading
- . public holidays
- . rest breaks
- . incentive based payments and bonuses

Agreements will still become effective at the time of lodgement and will be reviewed to ensure that adequate compensation has been provided if a protected condition has been modified or removed.

When applying the Fairness Test, the Workplace Authority will consider:

- . both the monetary and non-monetary compensation provided; and
- . the work obligations of the employee.

The Workplace Authority may also consider the personal circumstances of the employee, including their family responsibilities.

The parties will be notified whether the agreement passes or fails the Fairness Test.

### **Exceptions and Exemptions**

In exceptional circumstances the Workplace Authority may also consider other factors, specifically the industry, location and economic circumstances of the employer or the employment circumstances of the employee.

Employers whose business is facing a short-term crisis will be considered to fall into an exceptional circumstance exemption and their agreements will not be subject to the Fairness Test.

### **Failing the Fairness Test**

If an agreement does not pass the Fairness Test the parties will have 14 days to amend the agreement so that it complies with the fairness test. Employers will be expected to make up any back pay from the date of lodgement. Failure to make a 'fair' agreement within 14 days will result in the agreement being declared void.

If an agreement is declared void, the conditions of employment governing the employee if no agreement was made will apply.

### **WORKPLACE AUTHORITY**

The Fairness Test is being administered by the Workplace Authority (previously called the Office of Employment Advocate). The Workplace Authority began operation on 4 July 2007 and is expected to have a staff of 600 people to process the workplace agreements. Current figures indicate that there are approximately 50,000 AWAs currently waiting to be reviewed by the Workplace Authority.

The Department of Workplace Relations has suggested that each AWA will take 10-14 days to process.

### **Pre-lodgement Assessment**

The Workplace Authority offers a pre-lodgement assessment for proposed agreements. The Workplace Authority will review the proposed agreement and advise the employer whether sufficient monetary compensation has been provided for in the agreement. If the agreement does not provide for adequate compensation, the Workplace Authority will then advise employers on how to amend the AWA so that it complies with the Fairness Test.

Non-monetary compensation will not be considered at this stage.

## WORKPLACE RELATIONS FACT SHEET

All employers are now required to provide new employees with a Workplace Relations Fact Sheet within seven days of the start of their employment. Existing employees must be also be provided with the fact sheet by 20 October 2007.

The Fact Sheet is available from the Workplace Authority website at:

<http://www.workplaceauthority.gov.au/docs/EMPLOYERS/FactSheet/FS-WR-020707.pdf>.

Employers will face a penalty of \$110 per offence for failing to provide the fact sheet to employees.

## WORKPLACE OMBUDSMAN

The Office of Workplace Service has been renamed the Workplace Ombudsman and is charged with the task of ensuring employers comply with their obligations in relation to the *Workplace Relations Act 1996* (Cth).

The Workplace Ombudsman is responsible for investigations into alleged breaches and will undertake compliance audits of employers to ensure that their obligations under the Act are being met.

### HOW DOES THIS AFFECT YOU?

- Employers must ensure they consider the implications of the Fairness Test when making new agreements.
- Fair compensation needs to be provided if an agreement is made that removes or modifies any of the protected award conditions.
- Employers must also take into account the expectation of employees who are working under an AWA lodged prior to 7 May 2007. Such employees may feel that they are at a relative disadvantage to new employees merely because of the timing of their AWA.
- Employers must provide new employees with the Workplace Relations fact sheet within 7 days of the start of their employment, and for existing employees by 20 October 2007.



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