

March 2008

TRANSITION TO FORWARD WITH FAIRNESS

In fulfilment of the ALP's promise made before last years election to abolish Australian Workplace Agreements ("AWAs"), on 19 March 2008 the *Workplace Relations Amendment (Transition to Forward with Fairness) 2008* (the "Act") commenced today.

Despite the 37, mostly technical, amendments made as a result of the Senate inquiry, the Act passed through both houses of Parliament without opposition.

The main purpose of the Act is to prevent employers from making new AWAs with existing or new employees. However, this is not yet the end of individual workplace agreements. Employers are now able to enter into Individual Transitional Employment Agreements ("ITEAs") with their employees.

The Act also reintroduces a "No Disadvantage Test" to replace the abolished Fairness Test. The No Disadvantage Test will apply to all ITEAs and new collective agreements.

This Act now begins the Government's ambitious target to have individual agreements completely abolished by 31 December 2012, and creates the framework by which the substantial legislation implementing the Forward with Fairness policy will be introduced later in the year.

In this Alert, we consider the main features and implications of these changes.

WORKPLACE AGREEMENTS

First and foremost, for employers who implemented agreements under Workchoices, the Act will have little or no effect on those agreements. In particular, AWAs and collective agreements registered with the Workplace Authority (previously the Office of the Employment Advocate) will continue to run until their expiry date or are otherwise terminated by those who are party to the agreements.

AWAs or collective agreements that were made prior to the commencement date of the Act and lodged with 14 days of the commencement date will also continue to operate until terminated or replaced and will be subject to the Fairness Test.

No AWA will be able to be made after the commencement date of the Act (subject to the 14 day grace period), however employers who had at least one employee on an AWA as at 1 December 2007 will be able to use the newly introduced ITEAs. ITEAs are able to be made with new employees before the employment starts, or within 14 days after the employment with the new employer starts. ITEAs for existing employees can only be made where their employment is already regulated by an ITEA or AWA.

The Bill also provides for the commencement of the award rationalisation process. Ambitiously, the Government has requested that the AIRC complete the award rationalisation process by 1 January 2010.

As part of the award rationalisation process, awards will be developed to build on and provide industry detail on the application of the Governments Ten National Employment Standards which will be legislated on later this year. Awards will be limited to a further ten minimum employment conditions which will include allowances, overtime rates, penalty rates, leave, superannuation, minimum wages, type of work performed, consultation and dispute settling procedures.

All awards will also contain a flexibility clause designed to enable arrangements to meet the genuine individual needs of employers and employees.

In response to concerns from the mining industry, the Government has stated that employees who have ordinary earnings above \$100,000 per year will have the ability to contract out of the requirements of the applicable award.

NO DISADVANTAGE TEST

The Fairness Test, introduced by the Howard Government in response to public concern, is now abolished. In its place, all ITEAs and collective agreements are required to pass the No Disadvantage Test.

The No Disadvantage Test will be passed if the Workplace Authority is satisfied that the ITEA or collective agreement does not result, or would not result on balance, in a reduction in the employee's overall terms and conditions of employment when compared with the Australian Fair Pay and Conditions Standard and the relevant award.

In comparison, the Fairness Test only required an assessment as to whether the agreement provided fair compensation for the removal or modification of "protected award conditions".

An important implication of the No Disadvantage Test for employers is that where adequate compensation is provided for the removal of penalty rates or overtime rates, the agreement may still fail the test due to the removal of redundancy entitlements or where there are unfair rostering arrangements.

TEN NATIONAL EMPLOYMENT STANDARDS

The Government has also released its Exposure Draft and Discussion paper on the ten National Employment Standards.

Please see our previous Alert which details the content of the Ten National Employment Standards.

Submissions are still able to be made on the Discussion Paper up until 4 April 2008.

HOW DOES THIS AFFECT YOU?

- No AWAs can be entered into after the commencement date of the Act (subject to the 14 day grace period);
- ITEAs will be available where an employer had at least one employee under an AWA as at 1 December 2007;
- The Award Rationalisation process is to be completed by 1 January 2010;
- The Fairness Test is now abolished and replaced with the No Disadvantage Test; and
- The Ten National Employment Standards are to be incorporated into the Government's substantive Workplace Relations legislation later this year.



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