

Employment & Industrial Alert

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The Fairness Test

The Federal Government has now introduced into Parliament the Workplace Relations Amendment (a Stronger Safety Net) Bill 2007.

The Bill has introduced what has been called a *Fairness Test* for assessment of workplace agreements lodged with the new Workplace Authority (renamed from Office of Employment Advocate).

The Federal Opposition have confirmed that they will support the amendments. There will be a Senate Enquiry and report by the Senate by 14 June 2007.

As warned by the Federal Government the Fairness Test applies to workplace agreements lodged on and from 7 May 2007. The Fairness Test therefore applies to all Australian workplace agreement (AWAs) and collective agreements lodged on or after 7 May 2007. As well all variations to agreements after 7 May 2007 must also meet the Fairness Test.

Importantly there is a monetary limit to the Fairness Test. That is not all workplace agreements will be subject to the Fairness Test. A monetary jurisdiction is one of \$75,000.00 annual salary. Benefits paid in addition to salary are not included therefore the key amount is \$75,000.00 and this sum can be calculated as an equivalent amount for those earning casual or part-time rates. As to collective agreements the \$75,000.00 figure does not apply in that covered in a collective agreement might be employees earning less than \$75,000.00 and those earning more than \$75,000.00. The overall benefit of the collective agreement to its various employees must be assessed. At this point we are unsure as to how stringent the workplace authority will be to employees earning over \$75,000.00 and subject to a collective agreement.

The purpose of the Fairness Test is directed to those agreements with protected award conditions removed or modified or changed in some way in the agreement. Protected award conditions include the following:

- Shift and overtime loadings;
- Monetary allowances;
- Annual leave loadings;
- Public holidays;
- Incentive based payments and bonuses;
- Rest breaks;
- Penalty rates including for working on public holidays and weekends.

Therefore if any protected award conditions have been removed or modified or changed in any way the Fairness Test must be applied and the agreement assessed in the light of that Fairness Test. This in many ways is a reversion to the no disadvantage system in place prior to the Work Choices changes.

Importantly the fairness test has again brought to the fore something that Work Choices was directed to in many ways overcome it – the Award system.

What then is the Fairness Test:

The Workplace Authority will undertake an assessment by assessing either/or the monetary and non-monetary compensation offered – where the protected award conditions are removed or modified or changed – relative to what would have been payable under the relevant award. In most cases this will mean that

compensation will be assessed relative to what has been taken away so therefore an employee if achieving a pay rise under the agreement but losing a protected award condition(s) the award condition must be assessed in light of the amount of the increase. In other cases if there is no or limited increase in pay but other non-monetary benefits included then the Workplace Authority will have to assess if it can the monetary or other value that might be given to that benefit as it relates to the removal of the protected award condition(s). In some cases this will be easy and in others quite arbitrary and difficult to assess without precedent.

If the Workplace Authority rules that the Fairness Test has not been met then contact is made with both employer and employee and opportunity is given to rectify the agreement. If that rectification does not take place then the agreement is ruled void and the employee reverts to the pre-existing employment conditions under the pre-existing Award/instrument. If the agreement is varied so that it now meets the Fairness Test the gap period between lodgement and variation will have to be made up by the employer that is extra amounts or variation will have to be instituted as the workplace agreement is operative, as now, on lodgement.

Further if the agreement is ruled void then there will also have to be a make-up of lost income relative to the protected award conditions that have not been met from the time of lodgement as the workplace agreement is operative, as now, on lodgement.

The difficulties with the new system are in first of all assessing what Award/instrument is applicable and then assessing the new agreement as it relates to monetary or non-monetary value. The Workplace Authority can be contacted prior to lodgement of the agreement for approval of the Award/instrument that is going to be used. The Workplace Authority may also be able to pre-approve an agreement subject to what is the correct Award/instrument.

Employers will need advice on agreement making and assessing the conditions included in the Workplace Agreement, the pre-existing award conditions and the Fairness Test. There will definitely be a slowing down in the assessment process given the extent of the assessment that will have to be undertaken by the Workplace Authority.

The ultimate conclusion from a review of the amendments is that there is more regulation for employers lodging workplace agreements, more work prior to lodgement of agreements and then delay in having those agreements assessed. The question to be answered by interested parties is whether the Government's intended *flexibility* has now gone.

More information will be posted on our website as the Bill is debated and then passed by the Parliament and practice and procedure of the workplace authority is understood.

For further information about workplace agreements please do not hesitate to contact our Employment & Industrial Team on (07) 32236400