

WORK CHOICES UPDATES - WHAT YOU NEED TO KNOW

WORK CHOICES UPDATE # 22 - WORKPLACE RELATIONS AMENDMENT (A STRONGER SAFETY NET) BILL 2007

The Howard Government released the *Workplace Relations Amendment (A Stronger Safety Net) Bill 2007* ("the Bill"), on 28 May 2007. The Bill will amend the current *Workplace Relations Act 1996* ("the Act") to establish a fairness test for workplace agreements. As with previous amendments, the process for implementing the changes and the political commentary around the changes has confused the issues. This article aims to ignore the politics and summarise the main features of the Bill.

What is the Fairness Test?

The fairness test is conducted by the Workplace Authority (formerly known as the Office of the Employment Advocate). The objective of the 'fairness test' is to prevent employees from being worse off under a workplace agreement than if they were covered by an award or a notional agreement preserving state award ("NAPSA"). Under the fairness test, the Workplace Authority will determine whether employees are fairly compensated under a workplace agreement, which has excluded or modified protected conditions.

An AWA will pass the fairness test if the Workplace Authority is satisfied that the AWA provides fair compensation to the employee in lieu of excluded or modified protected conditions. A collective agreement will pass the fairness test if the Workplace Authority is satisfied that the agreement provides fair compensation in its overall effect on the employees in lieu of excluded or modified protected conditions.

In determining fair compensation, the principal factors considered are the monetary and non-monetary compensation the employees will receive, and their work obligations. The Workplace Authority may also consider personal circumstances of the employees. Where it is not contrary to the public interest, the Workplace Authority may have regard to the industry,

location or economic circumstances of the employer and the employment circumstances of the employees. The fairness test will be carried out on the date the workplace agreement or variation of an agreement is lodged.

The Workplace Authority must provide written notice to an employer, an employee in the case of an AWA, and the organisations bound by a union collective agreement or union greenfields agreement, about whether or not a workplace agreement or variation of an agreement has passed the fairness test.

When does the fairness test apply?

The fairness test applies to workplace agreements or variations of a workplace agreement lodged on or after 7 May 2007, which excludes or modifies one or more protected conditions. The fairness test will apply to AWAs which cover employees earning less than \$75,000 per annum. All collective agreements will be subject to the fairness test.

What are the protected conditions?

The protected conditions are:

- Rest breaks
- Incentive-based payments and bonuses
- Annual leave loadings
- Monetary allowances
- Observance of a payment for public holidays
- Overtime and shift loadings
- Penalty rates

Where do protected conditions come from and when are they said to be excluded?

The protected conditions are certain conditions arising out of an award or NAPSA that would have otherwise covered an employee. For employees who would not have otherwise been covered by an award or NAPSA, the protected conditions will be those contained in a

designated award, determined by the Workplace Authority.

A workplace agreement covering an employee, who would not have been covered under an award or NAPSA is deemed to have modified or excluded a protected condition under a designated award where the condition has no effect or a different effect in relation to the employees. Protected conditions will be taken to have no effect where an agreement is silent about the conditions.

What if there is no award or NAPSA that applies?

For employees where there is no award or NAPSA, the Workplace Authority will determine a designated award to apply to the employee's employment for the purposes of the fairness test. An award may become a designated award if the relevant employees perform work in a similar role, industry, and geographic area covered by an award. An enterprise award can not be a designated award.

Prior to lodging a workplace agreement or a variation of an agreement, an employer may apply to the Workplace Authority to determine that an award is a designated award for its employees. Alternatively, the Workplace Authority will determine a designated award where a workplace agreement or variation of an agreement is lodged, which is subject to the fairness test and there is no relevant award.

What happens if an agreement fails the fairness test?

If an AWA is in operation and fails the fairness test, the employer has 14 days from the date of issue specified in the notice provided by the Workplace Authority, to lodge a variation of the AWA or give a written undertaking. Where the agreement is a collective agreement the employer has 14 days to give a written undertaking to the Workplace Authority. Failure to lodge a variation or undertaking will cause the agreement to cease operation.

If an agreement fails the fairness test (despite lodgment of a varied agreement or undertakings), then the agreement ceases operation on the date of issue specified in the notice provided by the Workplace Authority.

The employer must pay any back pay if the agreement does not pass the "fairness test".

Where an agreement or variation of an agreement fails the fairness test, the employees will be covered by the relevant instrument that they would have otherwise been bound. The relevant instrument may include a previous workplace agreement.

Where employees would not have been bound by any other instrument, the employees will be bound by the designated award.

CONTACT US

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