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Changes to the Work Choices "Safety Net"

# Employment Matters

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## Changes to the Work Choices "Safety Net"

On 4 May 2007, the Prime Minister announced that the federal government would be moving to strengthen the "safety net" of minimum conditions provided by the Workplace Relations Act 1996 (the Act).

One of the major changes introduced by the Work Choices reforms was to abolish the no-disadvantage test for workplace agreements.

Prior to March 2006, agreements were not supposed to be approved if they left the workers concerned worse off than they would have been under the award most relevant to their employment.

Since then, however, it has been possible for employers to offer agreements that remove a range of award entitlements (other than certain "outworker" provisions), whether with or without compensation.

Under the Act as it stands, agreements need only comply with the Australian Fair Pay and Conditions Standard. This is confined to basic rates of pay, maximum hours of work, annual leave, personal leave and parental leave.

Since the Work Choices changes took effect, a number of examples have been highlighted in the media of employers seeking to exploit the new system to get rid of penalty rates, leave loadings and other such entitlements.

According to the Prime Minister, it was "never the Government's intention that it should become the norm for penalty rates or other protected conditions to be traded off without proper compensation".



In order to allay community concerns on this issue, the government will introduce a new "fairness test" for agreements. This will be administered by the Office of the Employment Advocate, which will be renamed the Workplace Authority.

The changes are outlined in a factsheet entitled "A Stronger Safety Net for Working Australians", which can be accessed at [www.workplace.gov.au](http://www.workplace.gov.au). However until legislation is introduced to Parliament to give effect to the government's proposals, various details are likely to remain unclear.

### The new "fairness test"

The new test will apply to all collective agreements. It will also apply to AWAs, but only where the workers concerned are covered by an award and earn less than \$75,000 a year.

The purpose of the new test is to ensure that if workers lose the benefit of certain "protected award conditions", they must receive "fair compensation" in return.

The conditions that will be protected are those relating to penalty rates (including for working on holidays or weekends), shift and overtime loadings, monetary allowances, annual leave loadings, public holidays, rest breaks and bonuses or other incentive-based payments.

What the Workplace Authority will be required to do is identify whether any such conditions have been modified or removed. If they have, the Authority must be "satisfied that fair compensation has been provided in return". In making this assessment, it must consider "both the monetary and non-monetary compensation offered relative to what would have been payable under the relevant award".

In most cases, the test would be satisfied by the employer paying a higher basic wage. But the government's factsheet contemplates that the Authority may also need to consider factors such as the "the work obligations of the employee", the employer's industry,

location and “economic circumstances” and indeed “all relevant working arrangements and entitlements”.

**The new process will not alter the current rule that an agreement takes effect when lodged by the employer. But if the Authority subsequently finds that an agreement fails the fairness test, the employer will need to compensate each affected employee for not providing the relevant award entitlement.**

Where it identifies a problem with an agreement, the Authority will be required to advise the parties as to how the agreement could be changed to satisfy the test. If appropriate changes to the agreement cannot be agreed within 14 days, the whole agreement will be treated as void.

In order to minimise the chances of this happening, the Authority will be required to provide pre-lodgement assessments of agreements on request from any party. Where a positive assessment is given, the approval of the agreement will be “fast-tracked”.

Questions that remain unanswered at this stage include:

- > when the legislation to implement these changes will be tabled in Parliament;
- > what will or will not be included in determining whether a worker’s annual “earnings” are less than \$75,000;
- > the extent to which the legislation will seek to define what constitutes “fair” compensation;
- > what additional information parties will be required to provide when lodging agreements, as compared to the current system;
- > what process the Workplace Authority will use to scrutinise agreements and how long that will take in each case;
- > whether there will be any provision for challenging a decision to reject (or for that matter approve) an agreement; and
- > how any “back pay” is to be calculated where an agreement is found to fail the fairness test.

### **When the new test is to take effect**

The government has indicated that the fairness test will apply to all agreements lodged on or after Monday, 7 May 2007.

In reality, the new procedure for scrutinising both proposed and actual agreements cannot commence prior to the relevant legislation being

passed by Parliament. Until that happens, there will be no Workplace Authority and no fairness test to apply.

The Office of the Employment Advocate is required to administer the Act in its present form. It cannot lawfully refuse to accept agreements which meet the requirements of the current legislation.

Presumably, however, the amendments to be proposed by the government will include transitional provisions to cover the period from 7 May 2007 to the date the new system actually commences.

Those provisions can be expected to provide that agreements lodged during that period that would have failed the fairness test will either be void, or at least unenforceable to the extent they modify or exclude protected award conditions.

Hence employers have been put on notice. If they lodge agreements during this interim period that may not comply with the new fairness test, they run the risk of being exposed to claims for “back pay” — even though there is no way of being sure of how the new test will be applied until the legislation is amended and the new Authority starts issuing rulings.

### **Other changes**

Besides renaming the Office of the Employment Advocate, the government has also announced that the Office of Workplace Services will become the Workplace Ombudsman. The change appears to be purely cosmetic, since there is no indication its role will change in any significant respect.

To complement the new fairness test, the Act will be amended to provide that an employee must not be forced to agree to the modification or removal of protected conditions, or dismissed if an agreement does not meet the test.

**In an unrelated change, the Act will also be amended to clarify that an employer who takes over a business cannot require a worker to sign an AWA as a condition of keeping their job in the business. As the Act stands, it is unclear whether such an employer would be guilty of duress, though a number of test cases on the issue are presently before the courts.**

At this stage, no other changes have been signalled, but it is clearly possible that the government will take the opportunity to address other issues or problems that may have arisen since the last round of “fine tuning” in December 2006.

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