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Employment Matters

PIPER ALDERMAN'S EMPLOYMENT RELATIONS SECTION SPECIALISES IN ASSISTING EMPLOYERS TO DEAL WITH EMPLOYMENT AND INDUSTRIAL ISSUES. WE HOPE THAT YOU WILL FIND THE ARTICLES IN EMPLOYMENT MATTERS RELEVANT TO YOUR BUSINESS.

A Stronger Safety Net – and a Fact Sheet Too

The Workplace Relations Amendment (A Stronger Safety Net) Bill 2007 (Cth) has been passed by both the House of Representatives and the Senate and will shortly become law. The Bill makes a number of amendments to the *Workplace Relations Act 1996* (**the Act**).

As previously reported in *Employment Matters*, the major change is the introduction of a new “fairness test” for workplace agreements. But during the Bill’s passage through parliament, the government added a number of other new provisions. For employers in the federal system, the most significant of these is a requirement to distribute a “Workplace Relations Fact Sheet” to all employees.

The fairness test: when it applies

The fairness test is set out in a new Division 5A to Part 8 of the Act. It will be administered by the Director of the Workplace Authority, as the Employment Advocate is now to be known. In practice, responsibility for deciding whether an agreement passes the test will be delegated to what may be hundreds of officials around the country.

In order for the test to apply to a workplace agreement, a number of conditions must be satisfied.

First, the agreement must have been lodged or varied on or after 7 May 2007. Agreements from before that date will not be affected.

Secondly, the employee (or in the case of a collective agreement one or more of the employees) to whom the agreement relates must either:

- > be doing work regulated by a federal award;
- > have been covered by a notional agreement preserving State awards (NAPSA), or by a preserved State agreement (PSA) containing State award conditions, immediately before the agreement took effect; or
- > work in an industry or occupation usually regulated by a federal award or (prior to the Work Choices reforms) by a State award.

In the first two cases, the test is administered by reference to each award, NAPSA or PSA that actually applies or has just been displaced. Such an instrument is called a “relevant award”.

Otherwise, the Authority must designate an appropriate federal award that regulates the same kind of work, provided it is not an enterprise award. This may be done by application from an employer even before an agreement is lodged. Where a collective agreement covers more than one type of work, there may be a number of different designated awards.

In industries such as retail, where new national awards are yet to be made under the stalled process of award rationalisation,

the Authority will presumably have to find a federal award that currently applies in Victoria and/or the Territories.

Thirdly, the agreement, or a variation to the agreement, must have the effect of modifying or excluding “protected award conditions”, as defined in s 354. These include penalty and overtime rates, leave loadings, rest breaks, the observance of public holidays, incentive payments and certain allowances.

Fourthly, and in the case of an AWA only, the employee concerned must have an “annual rate of salary” of less than \$75,000 at the date the agreement or variation is lodged.

The term “salary” is defined to exclude bonuses, loadings (other than a casual loading), allowances, penalty rates, employer superannuation contributions and other like entitlements. Hence, someone with a total remuneration package of over \$75,000 might still qualify.

For part-time employees, their “annual rate of salary” is calculated by working out what they would have earned had they been employed full-time at an equivalent rate of pay.

Administering the test: the requirement of fair compensation

Once an agreement or variation has been lodged, it can still take effect as soon as the parties wish. But under the new process it will automatically be assessed by the Authority. The Authority must then give written notice to the employer involved, any union that is party to the agreement and (in the case of an AWA) the employee concerned, informing them whether the fairness test applies.

If it does, the Authority must proceed to determine whether “fair compensation” has been provided for the modification or exclusion of protected award conditions.

In the case of a collective agreement, this must be assessed by reference to the “overall effect” of the agreement on the employees concerned.

The *first* requirement on the official administering the test is to consider the work obligations of the employee(s) concerned, and whether they will receive “monetary and non-monetary compensation” under the agreement in lieu of protected award conditions.

“Monetary compensation” would most obviously involve a higher basic rate of pay to compensate for any removal or reduction of penalty rates, allowances, leave loadings and so on.

The term “non-monetary compensation” is defined to mean compensation which is not a payment as such, but for which a “money value equivalent” can reasonably be assigned, and that confers a significant benefit or advantage on an employee. This could, for instance, include free board and lodging. But according to the government it would not include the like of free pizzas, or discounts on the employer’s products, since these would not have “significant” value.

Secondly, the official may have regard to the “personal circumstances” of the employee(s), including in particular their family responsibilities. The government has suggested this might for instance justify an employee agreeing to work at a particular time of day without penalty rates, on the basis that it suits their need to be able to look after or pick up children at a certain time.

Thirdly, but only in “exceptional circumstances” and if not contrary to the public interest, the official may take into account the employer’s “industry, location or economic circumstances”, or the “employment circumstances” of the employee(s) concerned.

The legislation indicates that an example of such circumstances might be where the agreement is “part of a reasonable strategy to deal with a short-term crisis in, and to assist in the revival of, the employer’s

business”. This is similar to an exception that used to exist under the pre-Work Choices no-disadvantage test.

In making these determinations, each agreement must be assessed as at the time it is lodged — or in the case of a variation, as it operates immediately after the variation takes effect. It is also made clear that the Authority may obtain the information it needs to conduct the test in any way it sees fit, including by contacting the employer and some or all of the employees covered by the agreement.

Consequences of failing the fairness test

Once the fairness test has been applied, the Authority must notify the parties concerned whether the agreement passes the test. If it does not, the Authority must also provide advice as to how the agreement could be varied to pass the test.

Where an agreement has failed the test, the employer may respond by lodging an undertaking that has the effect of varying the agreement. No approval is required from any other party. Alternatively, but only in the case of an AWA, the employer may ask the employee to consent to a variation. In either case, the variation must ordinarily be lodged within 14 days of the Authority issuing its notice as to the agreement having failed the test.

If a variation is lodged it takes effect immediately, but the agreement as varied then has to be reassessed against the fairness test.

If an employer fails to lodge a variation within the required time, the agreement (if still in effect) ceases to operate. Likewise, if a variation is lodged but the Authority finds that the agreement still fails the fairness test, the agreement will cease to operate from the date the Authority issues a notice to that effect.

In either case, the effect is that the parties will revert to whatever industrial instrument

(including an award, NAPSA or previous registered agreement) would have applied but for the agreement in question. If there is no such instrument, the protected conditions in any designated award will apply, though not the rest of that award.

Where an agreement has failed the fairness test, the employee(s) concerned must be compensated by the employer for any “shortfall” that arose while the substandard agreement was in operation, or until it was varied to rectify the problem.

For each employee, a shortfall is calculated by working out the difference between two amounts:

- > the value of any entitlements they received under the substandard agreement (and any other law or arrangement operating in conjunction with it) over the relevant period; and
- > the value of any entitlements they would have received under whatever instruments (including if necessary protected conditions under a delegated award), laws and arrangements would have applied if the substandard agreement had not been in force.

The legislation also contains detailed provisions as to what happens, and who bears what responsibility, where there has been a transmission of business while the fairness test is in the process of being applied to an agreement.

The impact of the fairness test

The introduction of the fairness test represents a significant change of policy and has been widely described as a “backflip” by the government.

It remains to be seen how the new test is put into practice and to what extent it complicates the process for making workplace agreements.

Given in particular the imprecision (or flexibility) of the concept of “fair compensation”, it may be difficult for employers to be certain what they can and cannot put in agreements. It can also be expected that, just as with prohibited content, different officials may take different views of what is permissible.

To meet these concerns, the government has indicated that the Authority will issue “guidance material” on the operation of the test. It will also be possible for employers to seek pre-lodgement assessments of proposed agreements. Where this has been done, any subsequent processing will be “expedited”.

The legislation provides no formal process for any decisions of the Authority to be reviewed. But again, the government has suggested that the Authority will adopt a policy of allowing for “internal review of decisions where errors of law or fact [are] drawn to its attention”. It is unclear whether such a review may actually result in the withdrawal of an incorrect decision.

The Workplace Relations Fact Sheet

The Workplace Authority Director will be required to issue a Workplace Relations Fact Sheet with information about the Fair Pay and Conditions Standard, protected award conditions, the fairness test, the role of the Authority and the Workplace Ombudsman, and any other matters prescribed by regulation.

From the date the Fact Sheet is first issued, federal system employers will have three months to give copies to existing employees. All new employees will have to receive a copy within seven days of being employed.

An employer that fails to take reasonable steps to do this may be prosecuted and fined up to \$110 per employee affected.

Other amendments

A number of other changes are introduced by the Stronger Safety Net Bill. They include:

- > renaming the Office of Workplace Services, which investigates compliance with federal laws and instruments, as the Workplace Ombudsman;
- > doubling the length of time for which redundancy provisions may apply after an agreement is terminated, from one year to two years;
- > clarifying that where a worker transferring to a new employer is required to sign an AWA as a condition of keeping their old job, the new employer may not rely on s 400(6) of the Act to defeat a claim that they have used duress;
- > prohibiting an employer from coercing an employee to agree to the modification or removal of protected conditions, or from dismissing them if an agreement does not meet the new fairness test;
- > relocating into s 356 of the Act some of the matters that are currently listed in regulations as prohibited content for agreements; and
- > changing the requirements for registration of unions or employer associations, so that it is enough that they have *some* members in the federal system, not necessarily a majority of their members.

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