



A Stronger Safety Net for Working Australians

4 May 2007

Australia's Workplace Relations System

The reforms to Australia's workplace relations system have helped strengthen the Australian economy. The reforms are designed to further encourage employees and employers to establish flexible arrangements at their workplace which best suit their needs.

By moving away from a rigid and centralised workplace relations system, the Australian economy has continued to grow. Flexible workplace arrangements have helped deliver higher real wages, more jobs and greater productivity. They have helped ensure Australians continue to prosper.

Since WorkChoices was introduced in March 2006, more than 276,000 new jobs have been created – 96 per cent of these full-time. Significantly, long-term unemployment has dropped to its lowest level on record. Real wages - which have risen by 19.8 per cent over the life of the Coalition Government - have continued to grow and industrial strikes have reached the lowest level on record.

Economically responsible decisions such as the removal of industry-wide pattern bargaining have helped keep inflation under control meaning less pressure on interest rates.

The fundamental changes introduced by the new workplace relations system in March 2006 included:

- fixing Labor's job destroying unfair dismissal laws;
- creating for the first time a national system of workplace laws;
- simplifying the agreement making process;
- increasing the focus on workplace based arrangements rather than industry wide awards;
- legislating standard employment conditions for the first time;
- strengthening protections against wild cat industrial action by introducing secret ballots and other protections;
- creating a new independent minimum wage-setting body.

An important element of this reform has been agreement making which has allowed for more flexible work arrangements that better suit both workers and their employers. In particular, Australian Workplace Agreements (AWAs) allow employees and employers to make flexible work arrangements which best suit their needs.

There will be nearly one million Australian Workplace Agreements in operation by the end of this year. They are now the agreement of choice in key industries such as mining which is vital to the future of the Australian economy.

Overview

A stronger safety net

The goal of WorkChoices was to achieve better outcomes for both employers and employees through greater flexibility in employment arrangements in the workplace.

That is why such things as penalty rates were not mandated by inclusion in the minimum standard. Such a step would have limited flexibility. It is often the case that a better outcome is achieved, for both the employer and the worker, if penalty rates, for example, are traded off for a higher base salary or other improved working conditions.

It was never the intention that it should become the norm for penalty rates to be traded off without proper compensation, although it was accepted that in some limited cases a job without penalty rates was better than no job at all.

There is concern amongst some in the community that the trading off of penalty rates and other loadings without fair compensation could occur with adverse consequences for final take home pay.

Therefore the Government has decided to amend the law to introduce an extra Fairness Test that will guarantee entitlements such as penalty rates are not traded off without adequate compensation.

A simple Fairness Test

The Government will introduce a simple Fairness Test to protect all workers who would have otherwise been entitled to the benefit of protected award conditions such as penalty rates in an industrial award and are paid under \$75,000 a year. The Fairness Test will apply to agreements lodged on or after 7 May 2007.

If an agreement has removed or modified those award conditions, then the employee will be required to receive fair compensation for their removal.

These protected award conditions are:

- penalty rates, including for working on public holidays and weekends;
- shift and overtime loadings;
- monetary allowances;
- annual leave loadings;
- public holidays;
- rest breaks; and
- incentive-based payments and bonuses.

Agreements will continue to operate from the day that they are lodged.

Agreements will continue to be lodged with the Office of Employment Advocate which will be renamed the Workplace Authority.

The Workplace Authority will conduct the Fairness Test by considering both the monetary and non-monetary compensation offered relative to what would have been payable under the relevant award. In most cases this will mean a higher rate of pay in lieu of protected award conditions that have been modified or removed.

In establishing what is fair compensation, like the previous no-disadvantage test, the Workplace Authority will consider the work obligations of the employee, for instance, whether the employee would be required to work shift work or at weekends. In appropriate circumstances the Workplace Authority will also consider other factors such as the industry, location and economic circumstances of the business and the specific employment circumstances or opportunities of the employee. It will take into account all relevant working arrangements and entitlements, including family friendly conditions.

The Fairness Test will be conducted in a similar fashion to the old no-disadvantage test. Like the no-disadvantage test, the employee will most often be compensated with a higher rate of pay for each hour worked.

If an Agreement Fails the Fairness Test

If an agreement does not pass the Fairness Test, the employer and employee will have 14 days to make the agreement fair. The Workplace Authority will provide advice to the employer and employee on why the agreement is not fair and how it could be changed to make it fair. Further details are attached.

If an agreement does not pass the Fairness Test, the employer will be expected to make up any back pay.

The Workplace Authority will offer a pre-lodgment assessment of proposed agreements against the Fairness Test. This will assist people to make fair and clear agreements from the start and help them to know where they stand in regard to protections, entitlements and obligations.

Extending the safety net for existing workers

The Workplace Relations Act will be amended to expressly prohibit an employer dismissing an employee because their agreement does not meet the Fairness Test.

The Workplace Relations Act already prohibits an employer forcing employees to accept a workplace agreement, whether individual or collective. However, to strengthen this protection, the law will be amended to explicitly state that an employer

must not force an existing employee to agree to remove or vary a protected award condition.

The Workplace Authority and the Workplace Ombudsman

In addition to the Employment Advocate's current responsibilities, the Workplace Authority will be responsible for:

- conducting the Fairness Test,
- providing a pre-lodgement facility to check agreements,
- providing information and advice to employees and employers about agreement making,
- providing a single information source for straightforward information and advice on all aspects of workplace relations, and
- providing advice specifically targeted at young people.

The Office of Workplace Services will be renamed the Workplace Ombudsman. The Workplace Ombudsman will take on a greater role in ensuring that employers comply with their legal obligations. For instance, the Workplace Ombudsman will conduct regular random audits to ensure employers are meeting their obligations to young people.

How the Strengthened safety net will work

The current safety net for agreement making

The Australian Fair Pay and Conditions Standard (the Standard) sets out the minimum wages and conditions of employment that apply to employees in the federal workplace relations system. The Standard is the current safety net for agreement making.

The Standard is made up of:

- minimum and classification wages as adjusted by the Australian Fair Pay Commission;
- a maximum of 38 hours of work per week (plus reasonable additional hours);
- four weeks of paid annual leave (with an additional week for shift workers);
- ten days of paid personal/carer's leave (including sick leave and carer's leave) with provision for an additional two days of unpaid carer's leave per occasion and an additional two days of paid compassionate leave per occasion; and
- 52 weeks of unpaid parental leave (including maternity, paternity and adoption leave).

Employees must receive pay and conditions equal to or better than those in the Standard.

An expanded safety net for agreement making

As a result of the changes announced today, employees earning less than \$75,000 per annum in industries covered by an award will be guaranteed the protected award conditions contained in their award or fair compensation in lieu of those conditions.

The protected award conditions are:

- penalty rates, including for working on public holidays and weekends;
- shift and overtime loadings;
- monetary allowances;
- annual leave loadings;
- public holidays;
- rest breaks; and
- incentive-based payments and bonuses.

The current prohibition on reducing the special protections afforded outworkers in the Workplace Relations Act will be retained unchanged.

A simple Fairness Test

A simple Fairness Test will be introduced to assess whether employees are fairly compensated where their workplace agreement, whether individual or collective, modifies or removes any or all of the protected award conditions such as penalty rates.

The Fairness Test will have some characteristics similar to the previous no-disadvantage test.

Importantly, the Fairness Test builds on the protections of the Standard, but also allows employers and employees to modify conditions in a way that guarantees employees are fairly compensated where this occurs.

The stronger safety net will provide significant additional protection for vulnerable employees, including young people and workers from a non-English speaking background.

Which agreements will be tested?

The Fairness Test will automatically apply to all AWAs covering employees earning less than \$75,000 per annum in industries covered by an award and where the agreement modifies or removes any or all of the protected award conditions.

The Fairness Test will also automatically apply to collective agreements in industries covered by an award where the agreement modifies or removes any or all of the protected award conditions.

The Fairness Test will apply to all workplace agreements lodged on or after 7 May 2007. Employers and employees who are currently making an agreement will therefore need to be conscious of the Fairness Test in circumstances where they are considering modifying or removing any or all of the protected award conditions. The Office of the Employment Advocate will assist employees and employers with information about how they can meet the Fairness Test.

Agreements lodged before 7 May 2007 will not be affected.

Who will undertake the Fairness Test?

The Fairness Test will be administered by the Workplace Authority. An agreement will pass the Fairness Test where the Workplace Authority is satisfied that fair compensation has been provided in return for modifying or removing any or all protected award conditions.

How will the Fairness Test work?

The Workplace Authority will conduct the Fairness Test by considering both the monetary and non-monetary compensation offered relative to what would have been payable under the relevant award. In most cases this will mean a higher rate of pay in lieu of protected award conditions that have been modified or removed.

In establishing what is fair compensation, like the previous no-disadvantage test, the Workplace Authority will consider the work obligations of the employee, for instance,

whether the employee would be required to work shift work or at weekends. In appropriate circumstances the Workplace Authority will also consider other factors such as the industry, location and economic circumstances of the business and the specific employment circumstances or opportunities of the employee. It will take into account all relevant working arrangements and entitlements, including family friendly conditions.

The Fairness Test will be conducted in a similar fashion to the old no-disadvantage test. Like the no-disadvantage test, the employee will most often be compensated with a higher rate of pay for each hour worked.

The agreement and information lodged will enable the Workplace Authority to undertake the Fairness Test. If further information is needed, the Workplace Authority may contact the employee (or their bargaining agent) and/or employer. The Fairness Test will not involve legalistic hearings.

The Workplace Authority will not arbitrate agreement outcomes.

Will a proposed agreement meet the Fairness Test?

The Workplace Authority will offer a pre-lodgment assessment of proposed agreements against the Fairness Test. This will assist people to make fair and clear agreements from the start and help them to know where they stand in regard to protections, entitlements and obligations. It will minimise the risk of a shortfall in payments where an agreement fails the Fairness Test.

Both an employee or an employer will be able to request a pre-lodgement assessment of a proposed agreement.

What happens when an agreement fails the Fairness Test?

If an agreement does not meet the Fairness Test, the Workplace Authority will provide advice to the employer and employee on why the agreement is not fair, how it could be changed to make it fair and the amount of any back pay to compensate the employee. In these circumstances back pay from the date the agreement was lodged with the Workplace Authority will need to be made.

The Workplace Authority, currently called the Office of the Employment Advocate, will be able to assist employees and employers with information about how they can meet the Fairness Test.

The employer and employee(s) will be given 14 days to agree on how they will vary the agreement so that it fairly compensates the employee(s) for changes to protected award conditions. An employee will be able to be represented by their bargaining agent. If the necessary changes are not made, the agreement will be void.

In these circumstances:

- existing employees will be covered by the workplace arrangements that previously applied to them; and
- new employees will be covered by the workplace arrangements that would have applied to them but for the failed agreement.

Where an agreement fails the Fairness Test and an employer does not compensate the employee(s), the Workplace Ombudsman will be able to seek to recover any shortfall in payments on behalf of affected employees. Back pay for conditions like penalty rates will be payable from the date the agreement came into effect.

The Workplace Relations Act will also be amended to expressly prohibit an employer dismissing an employee because their agreement does not meet the Fairness Test.

What does this mean for employees?

As a result of these changes, any employee who enters an agreement that modifies or removes any or all protected award conditions can be assured that they will receive fair compensation in return or the agreement will be void.

Simply put, employees must receive fair compensation if they trade away conditions such as penalty rates.

The Workplace Authority

The Workplace Authority will be the place for people to go to for straightforward and independent advice on workplace relations issues. The Workplace Authority will:

- administer the Fairness Test;
- provide a pre-lodgement facility to check agreements;
- provide information and advice to employees and employers about agreement making;
- provide a comprehensive information service about pay and conditions issues; and
- providing advice specifically targeted at young people.

People will be able to get clear advice, at no cost, about how to make an agreement and what should be included in an agreement to ensure it meets the Fairness Test. Employees already receive an Information Statement when they are offered an AWA or collective agreement. The Statement will inform them of their right to the Fairness Test.

The Workplace Authority will review workplace agreements to determine whether they meet the Fairness Test. Once this occurs the Workplace Authority will advise the employee and employer of the outcome. Where an agreement fails the Fairness Test,

the Workplace Authority will provide advice on the how the agreement fails to compensate the employee fairly, what will be required to meet the test and the amount of any back pay to compensate the employee.

Where a pre-lodgement assessment is requested, the Workplace Authority will provide written advice indicating whether or not the agreement passes the Fairness Test. A positive assessment will see approval of the agreement fast-tracked.

The Workplace Authority can also explain the content of agreements in ways appropriate to an employee's specific needs including, for example, the circumstances of people from a non-English speaking background and young people.

The Workplace Authority will be headed up by a statutory appointee, guaranteeing their independence.

The Workplace Ombudsman

As part of these changes, the Office of Workplace Services will be renamed the Workplace Ombudsman. The Workplace Ombudsman will take on a greater role in ensuring that employers comply with their obligations. For instance, the Workplace Ombudsman will conduct regular random audits to ensure employers are meeting their obligations to young people.

The Workplace Ombudsman will investigate alleged breaches, undertake compliance audits and prosecute those employers who breach the law. Where an employer breaches the law, the Workplace Ombudsman will in the first instance seek voluntary compliance. The Workplace Ombudsman has a range of powers to ensure compliance with the law.

The Workplace Ombudsman will particularly be asked to focus on ensuring that young working Australians are not being unfairly treated in the workplace.

The Workplace Ombudsman will be a statutory appointee, guaranteeing their independence.

Stronger employee protection in agreement making

Employee protection in agreement making will be significantly enhanced.

The Workplace Relations Act already prohibits an employer forcing employees to accept a workplace agreement, whether individual or collective. However, to strengthen this protection, the law will be amended to explicitly state that an employer must not force an existing employee to agree to remove or vary a protected award condition.

Of course, an employee can agree with their employer to modify or remove any or all protected award conditions. The Fairness Test will ensure that employees receive fair compensation if they do so.

It was always the intention that an employer who takes over a business cannot require an employee to sign an AWA as a condition of continued employment. To ensure certainty in this area, the Workplace Relations Act will be further amended to make this clear.