

Forward with Fairness Update

The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (the Transition Act) Act was passed by Parliament on 19 March 2008 and came into force on 28 March 2008.

The Transition Act is the first step in the process of winding back WorkChoices reforms, and reasserting the importance of collective bargaining in the industrial relations system at the expense of individual employment arrangements.

The main industrial relations legislation is due to be finalised by the end of 2008.

The Transition Act - Summary of the major changes

- Australian Workplace Agreements (AWAs) abolished
- Individual Transitional Employment Agreements (ITEAs) introduced
- Extension of pre-WorkChoices collective agreements allowed for up to 3 years
- No Disadvantage Test (NDT) introduced for ITEAs and collective agreements
- Award modernisation process to commence and to be undertaken by the Australian Industrial Relations Commission (AIRC)

The Act does not contain any changes to unfair dismissal laws, does not abolish employer greenfields agreements and does not alter the existing prohibited content rules.

Australian Workplace Agreements (AWAs)

The Act abolishes AWAs by providing that no new AWAs can be made after the date that the Act came into effect. Existing AWAs will continue to operate and will be subject to the provisions of the pre-transition Workplace Relations Act 1996 (Cth) (WR Act) in relation to termination. This means that AWAs can still be terminated unilaterally after their expiry date with 90 days notice by either party.

The major change introduced by the Transition Act is that if an AWA is terminated, the employee will fall back to any relevant collective agreement or award, rather than

just the 5 minimum conditions currently contained in the Australian Fair Pay and Conditions Standard (AFPCS).

Employees on AWAs that have passed their nominal expiry date are now able to participate in collective bargaining agreement making processes. This includes voting on proposed collective agreements and variations to collective agreements, as well as voting in protected action secret ballots.

Individual Transitional Employment Agreements (ITEAs)

While there will be no equivalent individual statutory agreement in the new industrial relations system, employers who currently use AWAs and as at 1 December 2007 had at least one employee on an AWA are able to enter into ITEAs with new employees, existing employees currently on AWAs, or former employees (as long as the former employees have not been terminated in order to be re-hired on ITEAs): section 326.

ITEAs are subject to some restrictions that did not previously apply to AWAs. ITEAs must pass the new no-disadvantage test. Essentially this means that an ITEA cannot disadvantage an employee when compared with an applicable collective agreement and/or a relevant award: section 346D.

ITEAs cannot have a nominal expiry date beyond 31 December 2009: section 352. An ITEA may be terminated after its nominal expiry date has passed: section 393. As with employees on expired AWAs, an employee whose ITEA has passed its nominal expiry date is able to participate in collective bargaining agreement-making processes.

ITEAs for new employees come into operation on lodgement with the federal Workplace Authority (section 347) but an employer may be liable to pay compensation later if the ITEA fails to pass the no-disadvantage test: section 346V.

If an agreement which is in operation does not pass the no-disadvantage test then an employer has approximately 30 days to lodge a variation with the Workplace Authority Director (WAD), failing which the agreement ceases to operate at the end of the period. Any workplace agreement which ceases to operate for this reason can never operate again: section 346ZE.

Further, an employee cannot be dismissed for the reason that any workplace agreement fails to pass the no-disadvantage test: section 346ZJ.

No-Disadvantage Test

All agreements lodged after the commencement of the Transition Act will have to pass the new no-disadvantage test. The new test is similar to the test previously applied by the AIRC prior to the WorkChoices legislation coming into operation. Agreements are assessed by the WAD to ensure that, on balance, employees do not suffer a reduction in their overall terms and conditions of employment when compared to the relevant 'reference instrument'.

The relevant 'reference instrument' for a collective agreement will be the federal or state award that applies to the particular workplace or an award designated by the WAD: section 346E(1)(b)..

For ITEAs the reference instrument will either be the relevant collective agreement or the relevant collective agreement and applicable award (if the two are capable of operating together) or an award designated by the WAD: section 346E(1)(a).

A new feature introduced by the Transition Act is that employers can face claims for compensation from employees if an agreement is subsequently found not to pass the NDT: section 346ZG. If an agreement that comes into force immediately (such as an employer or union greenfields agreement or an ITEA for a new employee) is later found not to pass the NDT, employees are entitled to compensation equal to the difference between the entitlements under the failed agreement, and what they would have received under the industrial instrument (eg a collective agreement and/or award) that would have applied immediately to them prior to the lodgement of the failed agreement.

When an agreement ceases to apply due to its failure to pass the NDT, the instrument(s) that applied to the employee or employees immediately prior to the lodgement of the failed agreement is revived. If no such instrument was in place, then an award designated by the WAD shall apply: section 346ZB.

In exceptional circumstances the WAD can pass an agreement even if it fails the NDT – such as when the agreement is a part of a reasonable business strategy to deal with a short-term crisis. These agreements can only have a maximum two year nominal term: section 346D(3).

Collective Agreements

Collective agreements will continue to be lodged with the Workplace Authority, with the Director responsible for applying the new NDT to all agreements.

While most collective agreements come into operation 7 days after they have passed the NDT, employer and union greenfields agreements and multi-business agreements come into force immediately upon lodgement with the Authority, but may cease to operate if they do not pass the no-disadvantage test, and a variation is not lodged within the relevant time: section 346W.

The Transition Act also allows for the nominal expiry dates of pre-WorkChoices collective agreements to be extended for up to three years and for those agreements to be varied, upon application to the AIRC: schedule 7(2A).

It enables pre-WorkChoices collective agreement to continue without having parties make new agreements under the current transitional framework, only to make new agreements once again when Labor's final workplace reforms come into effect in 2010. It is a bridge across the transitional period avoiding further business disruption.

Extensions/variations can only be granted by the AIRC where it is satisfied that:

- a) the parties to the agreement genuinely agreed to the extension/variation
 - b) the employees covered by it have approved the extension/variation
- and
- c) from 13 February 2008 none of the parties to the agreement had threatened, organised or engaged in industrial action in relation to another party to the agreement or applied for a protected action ballot.

Any variations to these agreements are subject to a NDT which is essentially the same as that which applied to certified agreements pre-WorkChoices.

Though at first glance, to vary and extend a pre-WorkChoices collective agreement appears straightforward, it is actually problematic.

First, Pre-WorkChoices collective agreements were made at a time when the WR Act contained section 170MC(1), limiting the period for which their nominal expiry date could be extended. The date could not be extended past 3 years from the date the pre-WorkChoices collective agreement was made.

Section 170MC(1) was repealed by the Work Choices reforms, which further removed the power to extend and vary pre-WorkChoices collective agreements. However it is arguable that it now continues to apply on the basis that clause 2A of Schedule 7 provides for the extension and variation of pre-WorkChoices collective agreements.

Unfortunately the poor drafting of clause 2A of Schedule 7 does not provide a conclusive answer.

Clause 2 of Schedule 7 does not include section 170MC(1) in the list of old provisions that continue to operate; sub-clause 2A(7) of Schedule 7 appears to incorporate it.

From a legal perspective, it appears unlawful to exclude section 170MC(1) from continuing to operate. It operated when parties were making pre-WorkChoices collective agreements and the structure of the WR Act is designed to encourage the making of agreements every 3 years.

In practice though, the Commission is likely to accept an application for an extension on 2 bases:

- a. The parties to the agreement agree to the extension;
- b. The purpose of clause 2A of Schedule 7 is for parties to avoid having to make new agreements before 2010.

Secondly, as referred to above, parties to the agreement must not engage in or threaten to engage in industrial action or apply for a protected action ballot after 13 February 2008, if they wish to extend or vary a pre-WorkChoices collective agreement.

However it is not clear in the drafting, whether parties must only refrain from industrial action or a protected action ballot that is in connection to the particular agreement that is being extended and varied.

Despite the uncertainty, it would appear based on the rules of statutory construction that it will be interpreted as meaning industrial action or a protected action ballot relevant to the agreement being extended and varied.

The restrictions on incorporating the terms of other industrial instruments (such as previous collective agreements) have been removed for all collective agreements.

Parties are no longer able to unilaterally terminate a collective agreement after its nominal expiry date by giving 90 days notice. Instead application must be made to the AIRC to terminate the agreement. The AIRC may then make an order terminating the agreement if it is satisfied that to do so is not contrary to the public interest. In determining whether the termination would be contrary to the public interest, the AIRC must have regard to the views of the parties (including employees covered by the agreement) and the effect on the parties of the termination.

Upon termination of a collective agreement, the employees covered by it will be entitled to the terms and conditions of employment contained in any award and/or agreement that would have applied to them but for the operation of the terminated agreement.

Award Modernisation: the Provisions

The Transition Act provides for a Full Bench of the Commission to make a modern award in accordance with an 'award modernisation request'. The aim of the process is to create simplified and relevant awards that can operate as part of a safety net of terms and conditions. As part of this process, the Government has also devised 10 National Employment Standards (NES), which cannot be excluded by a collective agreement or contract.

Modernised awards cannot come into effect before **1 January 2010**.

A request to the President of the Australian Industrial Relations Commission for Award Modernisation can only be made by the Minister for Employment and Workplace Relations (section 576C).

The Full Bench may adopt any procedure which it wishes, and may inform itself in any way it thinks appropriate, including by research or consultation.

According to the statement of objects in section 576A, modern awards must:

- (a) Be simple to understand and easy to apply and must reduce the regulatory burden on business
 - (b) Provide a fair minimum safety net of enforceable terms and conditions of employment;
 - (c) Be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work;
 - (d) Be in a form appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for individual employment agreements; and
 - (e) Result in a certain, stable and sustainable modern award system for Australia.
- The Commission is directed to have regard to a list of factors, including economic criteria (such as the creation of jobs, high productivity and low inflation), protecting young people in the labour market, the needs of the low-paid, prevention of discrimination, work/family balance etc.
 - Section 576J, provides that a modern award may include terms about any of the 10 following matters, as well as any other matter specified in the award modernisation request, but only to the extent that the terms provide a fair minimum safety net (section 576L):
 - (a) Minimum wages. This will include skill based classifications and career structures, incentive based payments and bonuses, wage rates and other arrangements for apprentices and trainees;
 - (b) The type of employment, for example whether an employee is permanent or casual, and the facilitation of flexible working

arrangements, particularly for workers with family responsibilities, including quality part time employment and job sharing;

- (c) Arrangements for when work is performed, including hours of work, rostering, rest breaks and meal breaks;
 - (d) Overtime rates for employees working long hours;
 - (e) Penalty rates for employees working unsocial, irregular or unpredictable hours, on weekends or public holidays, and as shift workers;
 - (f) Provisions for minimum annualised wage or salary arrangements that have regard to the patterns of work in an occupation, industry or enterprise as an alternative to the payment of penalty rates, with appropriate safeguards to ensure individual employees are not disadvantaged;
 - (g) Allowances including reimbursement of expenses, higher duties and disability based payments;
 - (h) Leave, leave loadings and the arrangements for taking leave;
 - (i) Superannuation; and
 - (j) Consultation, representation and dispute settling procedures.
- A modern award cannot include any term that contravenes Freedom of Association provisions (section 576Q), which confers a right of entry (section 576R), or which is discriminatory (section 576S). Further, there is a five year limit on the inclusion of terms which differentiate between different States or Territories (section 576T).
 - A modern award must be expressed not to bind an employer who is bound by an enterprise award in respect of an employee to whom the enterprise award applies (section 576V).
 - The new provisions remove the concept of “protected award conditions” by repealing section 354 of the Act. According to the Explanatory Memorandum, this is because it “is no longer required because the whole award could be used as the basis for the no-disadvantage test and the whole award could apply to the parties when a workplace agreement is terminated.”

The First Request

The first request from the Minister for Employment and Workplace Relations was made on 28 March 2008 (the day the Forward with Fairness changes took effect). On 16 June 2008, the Government issued a revised Award Modernisation Request to the AIRC. This request attached the final version of the 10 NES to assist the AIRC in its task of modernising Awards.

These standards cover:

1. Maximum weekly hours of work
2. Request for flexible working arrangements
3. Parental leave and related entitlements
4. Annual leave
5. Personal/Carer's leave and compassionate leave
6. Community service leave
7. Long service leave
8. Public holidays
9. Notice of termination and redundancy pay
10. Fair Work Information Statement

The revised request provides guidance on how the NES and modern awards are to interact. Essentially, a modern award cannot exclude the NES or any provision of the NES. However, a modern award can provide ancillary or incidental detail in respect of the operation of an entitlement under the NES, but not in a way which detracts from the protection of a standard. A modern award may also supplement the NES where the Commission considers it necessary to ensure the maintenance of a fair minimum safety net for employees covered by the modern award.

The request also directs the Commission to create a 'catch-all' modern award to cover employees who are not covered by another modern award and who perform work of a similar nature to that which has historically been regulated by awards. However, the request also emphasises that this is not intended to cover a class of employees, such as managerial employees, who because of the nature and seniority of their role, have not been traditionally award covered.

Further, the AIRC must ensure that all modern awards include an appropriate method or formula for automatically adjusting allowances when minimum wages are adjusted.

Clause 4 of the Minister's request indicates that the Commission is to make modern awards primarily along industry lines but may also create modern awards along occupational lines as it considers appropriate. The reference to industry awards is to awards based on the industry of employers. By contrast, the reference to occupational awards is a reference to awards based on the occupation or calling of an employee.

Clause 10 of the request directs the Commission to prepare a model flexibility clause *'to enable an employer and an individual employee to agree on arrangements to meet the genuine individual needs of the employer and the employee. The Commission must ensure that the flexibility clause cannot be used to disadvantage the individual employee'*. Each modern award is to include an appropriately adapted model flexibility clause.

Clause 20 of the Minister's request requires the Commission, to develop a priority list of industries and, in so doing, to have regard to those industries and occupations with high numbers of Australian Workplace Agreements (AWAs) and Notional Agreements Preserving State Awards (NAPSAs).

The First Decision

On 20 June, the AIRC released a decision relating to the award modernisation process: *Request from the Minister for Employment and Workplace Relations - 28 March 2006 - Full Bench - [2008] AIRC 550; [2008] AIRCFB 550 (20 June 2008)*. In this decision, the AIRC:

- identified the initial priority list of awards for modernisation;
- released the text of the model flexibility clause for inclusion in all modern awards; and
- prescribed a timetable for completion of the award modernisation process.

Priority List

In relation to the priority list, the AIRC took into account the statistical information available to it on the incidence of AWAs and NAPSAs, submissions of interested parties, as well as the size and importance of the industry and the desirability of including industries from across the spectrum of industrial enterprises.

The list of priority industries are:

- Coal Mining Industry
- Glue and Gelatine Industry
- Higher Education Industry
- Hospitality Industry
- Metal and Associated Industries
- Mining Industry
- Private Sector Clerical Occupation
- Racing Industry
- Rail Industry
- Retail Industry
- Rubber Plastic and Cablemaking Industry
- Security Industry
- Textile, Clothing and Footwear Industry
- Vehicle Manufacturing Industry

Model Flexibility Clause

On 29 April 2008, the President of the AIRC released two drafts of a model flexibility clause. The first draft was proposed by the ACTU and the second draft proposed by the employers. The second draft contained two options, one of which is supported by ACCI and the other by AiG. Other drafts were proposed during consultation. The AIRC received various submissions, with views differing on the following issues:

- whether the clause should provide for agreements between an employer and a majority of employees;
- the relationship between individual flexibility agreements and collective flexibility arrangements;
- whether the clause should permit a flexibility agreement to be made between a prospective employer and a prospective employee prior to the commencement of employment;

- whether agreements ought to be permitted in relation to all of the terms of an award or whether there should be some limitation;
- whether limits should be specified on the type of agreement that can be made in relation to particular award provisions;
- whether a union must be involved in the making of the agreement or be notified of an agreement;
- whether there should be a dispute settlement procedure for disputes over the making of an agreement and the operation of an agreement and if so the powers that should be available under the procedure; and
- the period for which an agreement should operate and the arrangements for termination.

The AIRC determined that the purpose of a model flexibility provision is to permit a reduction in one or more minimum award entitlements as part of an agreement which meets the genuine individual needs of the employer and the employee without disadvantaging the individual employee.

The model flexibility clause formulated by the AIRC is as follows:

1. An employer and an individual employee may agree to vary the application of certain terms of this award to meet the genuine individual needs of the employer and the individual employee. The terms the employer and the individual employee may agree to vary the application of are those concerning:

(a) arrangements for when work is performed;

(b) overtime rates;

(c) penalty rates;

(d) allowances; and

(e) leave loading.

2. The employer and the individual employee must have genuinely made the agreement without coercion or duress.

3. The agreement between the employer and the individual employee must:

(a) be confined to a variation in the application of one or more of the terms listed in sub-clause 1; and

(b) not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment.

4. For the purposes of sub-clause 3(b) the agreement will be taken not to disadvantage the individual employee in relation to the individual employee's terms and conditions of employment if:

(a) the agreement does not result, on balance, in a reduction in the overall terms and conditions of employment of the individual employee under this award and any applicable agreement made under the Workplace Relations Act 1996 (Cth), as those instruments applied as at the date the agreement commences to operate; and

(b) the agreement does not result in a reduction in the terms and conditions of employment of the individual employee under any other relevant laws of the Commonwealth or any relevant laws of a State or Territory.

5. The Agreement between the employer and the individual employee must also:

(a) be in writing, name the parties to the agreement and be signed by the employer and the individual employee and, if the employee is under 18 years of age, the employee's parent or guardian;

(b) state each term of this award that the employer and the individual employee have agreed to vary;

(c) detail how the application of each term has been varied by agreement between the employer and the individual employee;

(d) detail how the agreement does not disadvantage the individual employee in relation to the individual employee's terms and conditions of employment; and

(e) state the date the agreement commences to operate.

6. The employer must give the individual employee a copy of the agreement and keep the agreement as a time and wages record.

7. The agreement may be terminated:

(a) by the employer or the individual employee giving four weeks' notice of termination, in writing, to the other party and

the agreement ceasing to operate at the end of the notice period; or

(b) at any time, by written agreement between the employer and the individual employee.

8. The right to make an agreement pursuant to this clause is in addition to, and is not intended to otherwise affect, any provision for an agreement between an employer and an individual employee contained in any other term of this award.

Timetable

The following timetable was announced:

- with respect to pre-drafting consultations, all written submissions, draft modern awards and other proposals concerning the scope, content and transitional arrangements must be lodged with the Commission by 25 July 2008;
- pre-drafting consultations will then commence in the week following and continue until 12 August 2008;
- exposure drafts will be published by 12 September 2008;
- parties will then have until 10 October to lodge written submissions and suggestions in relation to the exposure drafts;
- the Full Bench will hold further public consultations on 16, 17, 20, 21 and 22 October 2008;
- the final date for publication of the priority modern awards will be 19 December 2008.

The AIRC also stated that a further list of industries/occupations will be announced on 10 October 2008, and that the list is likely to include but not be limited to the following:

- Agricultural
- Banking services
- Building, metal and civil construction industries
- Cleaning services

- Finance and investment services
- Graphic arts
- Health and welfare services
- Insurance
- Information and communications technology sector
- Private road transport