

EmploymentUpdate

“The Fairness Test”

August 2007

New Requirements for Agreements

Employers contemplating entering into Workplace Agreements under the federal *Workplace Relations Act 1996* (the Act) need to be aware of recent changes to the Act which provide that fair compensation must be afforded to an employee if “protected conditions” are modified or removed.

Prior to the enactment of the above changes to the Act the protected conditions listed below could be removed or modified if the applicable AWA or Collective Agreement made specific reference to such. In such circumstance it was not necessary for the Agreement to provide for any compensation for the loss or modification of protected conditions. This situation has been reversed by the recent amendment to the Act introducing what is called the “Fairness Test”.

What are “Protected Conditions”?

An employee will become subject to a Workplace Agreement either by making or approving a Workplace Agreement with an employer, or by taking up employment that is covered by a Workplace Agreement. Certain conditions of employment will be protected when employees become subject to Workplace Agreements.

These conditions are called ‘protected conditions’ and will be automatically included in a workplace agreement unless they are expressly excluded or modified.

Protected conditions are found in:

- **a federal award** – these awards generally cover employers who are named in the award or who are members of an employer association who is named in the award. For the purposes of protected conditions, it does not matter that the employment may have been subject to an Australian workplace agreement or certified agreement (which would have overridden the award).
- **a Notional agreement preserving State awards** – State Industrial Tribunals can make common rule awards that will apply to all employers in a particular industry (who are not covered by a federal award or agreement, or a state agreement). Any State award, if applicable to a constitutional corporation from 27 March 2006, is known as ‘Notional Agreement Preserving State Awards’.

- **a Preserved State agreement** – if the employer and employee had entered into a state employment agreement before 27 March 2006 then that agreement will become what is called a ‘Preserved State agreement’. The terms of that agreement are the terms of the state agreement (and also any state award term that applied and certain state or territory industrial laws).

Protected Conditions

The following are protected conditions:

1. rest breaks
2. incentive based payments and bonuses
3. annual leave loading
4. public holidays, or days substituted for public holidays and entitlements to employees to payment in respect of those days
5. days to be substituted for public holidays or a procedure for such substitution
6. monetary allowances (for employment expenses, skills, disabilities)
7. overtime or shift work loadings
8. penalty rates
9. outworker conditions
10. any other matter specified in the Regulations from time to time.

The Fairness Test

All workplace agreements (AWA's and Collective Agreements) lodged with the Workplace Authority (formerly the Office of the Employment Advocate) on or after 7 May 2007 are subject to an assessment by the Workplace Authority in circumstances where the workplace agreement modifies or deletes protected conditions.

The assessment to be made by the Workplace Authority is similar to the “No disadvantage test” which applied to agreements made prior to the implementation of Workchoices.

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