

Fairness Test for workplace agreements

On 7 May 2007 the Federal Government introduced the Fairness Test for workplace agreements. The stated aim of the test is to guarantee that protected award conditions, such as penalty rates and annual leave, are not traded off without adequate compensation.

Employers and employees who are currently making an agreement need to be aware of the Fairness Test, if they are considering removing or modifying any or all protected award conditions.

Only workplace agreements lodged on or after 7 May 2007 will be subject to the Fairness Test. The test will apply to all AWAs lodged for employees who would otherwise have been entitled to the benefit of protected award conditions, such as penalty rates under an industrial award, and are earning less than \$75,000 per year and to all collective agreements in industries covered by an award.

The current prohibition on reducing the special protections afforded to outworkers in the Workplace Relations Act 1996 (the Act) will remain unchanged.

An agreement will pass the Fairness Test where the newly renamed Workplace Authority (previously called the "Office of the Employment Advocate") is satisfied that fair compensation has been provided for modifying or removing any or all protected award conditions. These 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

Since the introduction of the Work Choices legislation on 27 March 2006 which, among other changes, abolished the No Disadvantage Test, these conditions have only been protected in the sense that they apply by default. In other words they only apply to the extent that a workplace agreement does not specifically override their operation. The rationale behind the fairness test is to prevent employers from implementing workplace agreements that strip employees of these otherwise applicable award entitlements without offering adequate compensation in return.

The assessment process

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.

All workplace agreements must still be lodged with the Workplace Authority and, as before, they will start to operate on lodgement.

Outlook

We expect the operation of the Fairness Test to be substantially similar to the pre-Work Choices No Disadvantage Test. The No Disadvantage Test used to determine whether, on the whole, an employee was no worse off under a workplace agreement as compared to his/her award. Our view is that what the Federal Government has essentially done is re-instated the No Disadvantage Test albeit under a different name for political expediency.

Employers should be mindful that there are a host of other issues to consider when examining their business' compliance with the new legislation and their employment situation in general. In particular, non-compliance with the legislation could not only expose your business to a fine of up to \$33,000 for each breach, but also to "wages and conditions" claims by disgruntled employees. The newly renamed Workplace Ombudsman (previously called the Office of Workplace Services) has the power to investigate both (i) your Work Choices compliance and (ii) wages and conditions claims by both current and former employees.

Warning

A common misconception among employers is that the reforms only apply to their business if they are an incorporated entity. This is manifestly incorrect and could end up costing you thousands. The Work Choices legislation, together with the recently (re)introduced Fairness Test apply to virtually all Victorian businesses, regardless of whether or not the business is incorporated or not. This is because Victoria referred its industrial relations powers to the Commonwealth in 1996 - meaning that the usual Constitutional limitation on the Commonwealth only being able to legislate in respect of companies does not apply in Victoria as far as industrial relations legislation is concerned.

As a firm with a wealth of Employment and Industrial Law expertise, Rosendorff Lawyers can assist your business with all aspects of compliance with the new industrial relations legislation and can take you through the entire agreement-making process from beginning to end.

About the Author

[David Natenzon](#) has gained extensive experience in different aspects of commercial, corporate, and litigation matters and manages Rosendorff's employment law division. He has developed an extensive knowledge of the WorkChoices legislation and is an Associate Member of the Law Institute of Victoria. David has written numerous resource papers on different aspects of corporate law. For more details, visit: www.rosendorff.com.au

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