

THE END LOOMS FOR *WORKCHOICES*

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The Federal Government has made some “transitional” changes to the Workplace Relations Act 1996 (Cth), but the substantial changes to the Act will be introduced later this year.

The Rudd Government’s first changes to *WorkChoices* recently passed both Houses of Parliament with Coalition support and took effect on 27 March 2008. The changes are significant in the history of workplace relations in Australia, not just because they begin the roll-back of *WorkChoices*, but because they mark a shift away from individually-bargained agreements (introduced by the Howard Government), and a return to enterprise-level bargaining. This includes agreements made with unions and those made directly with employees.

The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* is only the Government’s first, “transitional” change to the *Workplace Relations Act 1996*. The most substantial changes, concerning unfair dismissal provisions and the introduction of Fair Work Australia, will be introduced later this year.

The recent changes are nevertheless significant for employers, especially those who made use of Australian Workplace Agreements (“AWAs”). The most important changes are:

- the abolition of AWAs;
- the introduction of Individual Transitional Employment Agreements (“ITEAs”);
- the replacement of the Fairness Test with a new No-Disadvantage Test; and
- a process of award modernisation to be undertaken by the Australian Industrial Relations Commission (“AIRC”).

AWAs

From 27 March 2008, employers and employees will no longer be able to enter into AWAs. Yet despite proclamations that AWAs are “dead and buried”, AWAs made prior to 27 March 2008 will remain very much alive until terminated under the existing rules. Employees on AWAs that have passed the nominal expiry date will be able to vote on collective agreements and take part in secret ballots for industrial action.

ITEAs

ITEA is a new acronym, though its visit may only be fleeting. An ITEA is essentially another statutory individual agreement, like an AWA, and has been introduced for the benefit of employers who wish to continue to use individual statutory agreements, though they will only be available to employers who employed at least one employee on an individual statutory employment agreement, such as an AWA, as at 1 December 2007. ITEAs may only be made with existing employees on AWAs and new employees.

The latest nominal expiry date for an ITEA is 31 December 2009, however, the ITEA can continue to operate after its nominal expiry date until it is terminated or replaced. In theory this means that an ITEA could continue indefinitely, if both the employer and employee agree to that course.

No-Disadvantage Test

Workplace Agreements will no longer be required to pass the Fairness Test. The Fairness Test has been replaced by the No-Disadvantage Test.

The No-Disadvantage Test will be administered by the Workplace Authority, which must be satisfied that an employee will not suffer a disadvantage from new terms and conditions of employment under a Workplace Agreement. ITEAs will be compared against the applicable collective agreement or, if there is no collective agreement, with an applicable award and the Australian Fair Pay and Conditions Standard. A collective agreement will be compared with any applicable award and the Standard. If there is no award, the Workplace Authority can designate an award.

Termination of Workplace Agreements

After commencement, collective agreements may be terminated by agreement or, in the absence of an agreement, on application to the AIRC after the agreement's nominal expiry date. The AIRC must consider whether termination of the agreement would be contrary to the public interest. AWAs may still be unilaterally terminated after their nominal expiry date by giving 90 days' notice.

Award Modernisation

The AIRC is required to commence the process of modernising awards. Award modernisation will take place at the request of the Minister for Employment and Workplace Relations.

Modern awards may include terms about the following matters:

- minimum wages;
- types of employment, such as full-time, part-time, casual or shift work employment and the facilitation of flexible working arrangements;
- arrangements for when work is performed, such as hours of work and breaks;
- overtime rates;
- penalty rates;
- annualised wage or salary arrangements;
- allowances;
- leave entitlements, leave loading and leave arrangements;
- superannuation; and
- procedures for consultation, representation and dispute settlement.

The modern awards may be common rule awards, that is, binding all employers and employees in a particular industry or class. They will not bind employers who are already bound by an enterprise award.

Modernised awards will not take effect until 1 January 2010.

Fact Sheet

The present requirement to provide new and existing employees with a Workplace Relations Fact Sheet will be abolished. Employers will have a brief respite from this paperwork until 1 January 2010, when they will be required to provide employees with a 'Fair Work Information Statement'.

Further Reforms

Later legislation will introduce a new body, 'Fair Work Australia', into which the functions of the AIRC, Australian Fair Pay Commission, Workplace Authority, Workplace Ombudsman and Australian Building and Construction Commission will be combined. The Government also intends to introduce ten national employment standards, which will act as a safety net for all employees. These standards have been released for public consultation and comprise:

1. Maximum weekly hours of work;
2. Requests by parents 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; and
10. the Fair Work Information Statement.

Finally, the Government has made clear its intention to increase the scope of employees who are eligible to bring unfair dismissal claims on termination. This change, if implemented, will have important consequences for many businesses and is a key proposal to monitor.

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