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Implications for business – a new workplace relations landscape

The Rudd Labor Government introduced its *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (Bill) on 13 February 2008. The major changes proposed by the Bill include:

- **Abolishing Australian Workplace Agreements (AWAs)**

AWAs in force at the time the Bill becomes law will continue to operate for their term until terminated in accordance with the current Act.

AWAs that have passed their nominal expiry date can be terminated by either party on 90 days notice. An employee would then be covered by the collective agreement or award that applied in the workplace.

- **Establishing a new type of individual agreement – Individual Transitional Employment Agreements (ITEAs)**

ITEAs will only be available to employers that on 1 December 2007 employed an employee under an AWA, a pre-reform AWA, a preserved state agreement (old enterprise agreement), or an individual Victorian employment agreement. ITEAs must have a nominal expiry date of no later than 31 December 2009.

- **Amending provisions in relation to new and existing collective agreements**

Amongst other things, the Bill removes the right to unilaterally terminate collective agreements on 90 days written notice after their nominal expiry date. Instead, a party wishing to terminate an expired agreement will have to apply to the Australian Industrial Relations Commission (Commission). The Commission will have the power to terminate the agreement if it is satisfied that to do so is not contrary to the public interest. On termination, employees would fall back on whatever award or workplace agreement would have applied to them, but for the terminated agreement. Currently, employees revert to the Australian Fair Pay and Conditions Standard on termination of an agreement. The 90 day unilateral termination rule will still apply for AWAs or ITEAs that have passed their nominal expiry date, but employees will then fall back on the relevant agreement or, if none exists, the relevant award.

- **Changes to certified agreements made prior to the *Workplace Relations Act 1996 (Cth)* (Act)**
Under the Bill such agreements may be extended or varied for a maximum of 3 years on application to the Commission, which can only approve of the extension/variation if the parties genuinely agree, and they cannot do so if industrial action is threatened or organised by either party.

- **Replacing the Fairness Test with a new no-disadvantage test for collective agreements and ITEAs**

The Fairness Test will not apply to ITEAs and collective agreements. Under the new no-disadvantage test, a collective agreement must not result, on balance, in a reduction in the overall terms and conditions of employment compared to a relevant award and ITEAs must not disadvantage employees against an applicable collective agreement and the current Australian Fair Pay and Conditions Standard, or, in the absence of an agreement, the current Australian Fair Pay and Conditions Standard and the relevant award.

The new test will be conducted by the Workplace Authority, which will be required to ensure that an employee's overall terms and conditions are not reduced in comparison with a "reference instrument" - a relevant collective agreement (for ITEAs), an award (for collective agreements) or, if there is no award, the Workplace Authority can designate an award.

Collective union and non-union agreements and ITEAs for existing employees would only take effect after they pass the no-disadvantage

test and the Workplace Authority approves them.

- **Establishing new lodgement and approval requirements for workplace agreements**

Currently, workplace agreements take effect on the day on which they are lodged with the Workplace Authority. Under the Bill, ITEAs for existing employees and new collective agreements will commence operation when the Workplace Authority approves them (after applying the no-disadvantage test).

- **Award modernisation process**

The Commission will be required to undertake award modernisation, having regard to the Bill's 10 award matters which are as follows:

- minimum wages
- type of employment (ie full-time, part-time, casual and shift work)
- arrangements for when work is performed (ie hours of work)
- overtime rates
- penalty rates
- annualised wage or salary arrangements
- allowances

- leave, leave loadings and arrangements for taking leave
- superannuation, and
- procedures for consultation.

The award matters will supplement the 10 national employment standards (NES), which were released in draft format on 14 February – see below. The planned completion of award modernisation is 31 December 2009.

- **Extending the operation of notional agreement preserving state awards (NAPSAs) to 31 December 2009 (currently NAPSAs cease on 27 March 2009)**

This new extended time limit will take the NAPSAs to the end date of the other transitional arrangements intended by the Government such as the award modernisation process.

- **Abolishing Fact Sheet**

Once the Bill is in force, employers will no longer be required to provide existing and new employees with the Workplace Relations Fact Sheet. However, there will be a new requirement to give new employees the Fair Work Information Statement (see below).



Impact

The Bill, if enacted in its current form, will have a significant impact on employers using AWAs and entering into ITEAs and collective agreements. The Bill has been referred to the Senate Committee on Employment, Workplace Relations and Education for inquiry, with the Committee to report back to the Senate on 28 April 2008. Consequently, unless the Bill is “fast tracked”, it seems unlikely it will become law before that date.

Exposure draft of the NES

The exposure draft of the NES was released on 14 February 2008, following the introduction of the Bill. It is proposed that the NES will contain minimum legislative employment entitlements effective from 1 January 2010. As discussed above, it is intended that the NES be in addition to the 10 award matters to be used in the award modernisation process. The NES would, in effect, replace the Australian Fair Pay and Conditions Standard.

The purpose of the exposure draft is to seek public comment by 4 April 2008.



The 10 NES comprise:

1. **Hours of work** – a standard 38 hour week for full-time employees, plus reasonable additional hours. Reasonable hours will be determined by reference to factors such as health and safety, personal circumstances (including family responsibilities), compensation for overtime worked and the needs of the enterprise.
2. **Requests for flexible working arrangements** – an employee who has a child or child-caring responsibilities for a child under school age will have a right to request “flexible working arrangements”. These arrangements are not defined, but examples include reduction in daily hours or different span of hours. An employer would only be able to refuse on “reasonable business grounds” (not defined) and the employer has to respond to a request within 21 days.
3. **Parental leave** – parents will each be entitled to separate periods of 12 months unpaid leave, up to a total of 24 months. If one parent wants to take a further 12 months after they have taken the first 12 months, they must make a request to their employer who can only refuse on “reasonable business grounds”. Parents

are entitled to take 3 weeks of concurrent leave on the birth or adoption of a child. Other than this time, parents cannot take unpaid parental leave concurrently.

4. **Annual leave** – all full-time employees will be entitled to 4 weeks annual leave with shift workers receiving an extra week, as is currently the case. Part-time employees will receive a pro rata amount of annual leave and casual employees will not be entitled to annual leave.
5. **Personal/carer’s leave** – all full-time employees are to receive 10 days paid personal/carer’s leave, pro rata for part-time employees. If paid personal/carer’s leave has been exhausted, all employees (including casuals) will be entitled to 2 days of unpaid personal leave for “genuine caring purposes and family emergencies”. Employees will also be entitled to 2 days paid compassionate leave on the death or serious illness of a family member or a person whom the employee lives with.
6. **Community service leave** – employees will have a right to be absent from work to engage in prescribed community activities

(eg jury service and emergency relief service). This NES would also cover things such as reasonable travelling time associated with the activity and reasonable rest time following the activity before recommencing work. Other than jury service leave, where employees (other than casuals) will be entitled to make up pay, this leave entitlement will be unpaid.

an employer, as is currently the case. A new national redundancy entitlement will, however, come into being under this NES. It will apply to employers who employ more than 15 employees (excluding seasonal and casual employees) and they will be obliged to make redundancy payments to employees terminated on the ground of redundancy. The amount of redundancy payment payable will be by reference to a scale reflecting the federal award standard.

7. **Long service leave** – currently a State legislative entitlement, this NES will transition existing state-based long service leave laws to a national legislative standard. Existing long service leave entitlements will be preserved until a national uniform long service leave standard is achieved.
8. **Public holidays** – providing employees with a right to be absent from work on a day that is a public holiday and giving them the entitlement to payment for his or her ordinary hours of work.
9. **Notice of termination and redundancy pay** – prescribing a minimum period of notice of termination or payment in lieu of notice for employees based on their continuous service with

10. **Fair Work Information Statement (Statement)** – will be required to be given to all new employees as soon as practicable after they commence employment. The Statement will contain information about the NES, modern awards, agreement making, the right to freedom of association and the role of Fair Work Australia, a new authority to be established to administer the Government's reforms.

What do you need to do?

At this stage, employers should start considering what the proposed changes will mean for them in the long term. AWAs are likely to be

abolished by the middle of this year and, consequently, some employers will need to consider alternative workplace arrangements such as ITEAs and collective agreements. Whilst the NES mostly appear to reflect current standards in the Act, the introduction of legislative flexible work arrangements, new parental leave provisions and redundancy entitlements may have a significant effect on many employers who will have to start provisioning for these new entitlements, and update their employment contracts and policies and procedures once they become law.

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