



Law at Work Report

Devine Law at Work

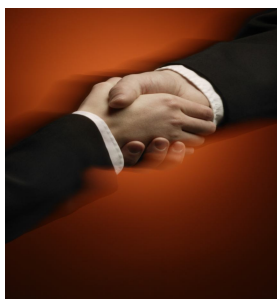
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Labor's Workplace Reforms Commence - Changes to Workplace Agreements and Awards

Stage 1 of the Labor Federal Government's reform plans commenced on **28 March 2008** when the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* took effect. This legislation focuses on three key areas:

1. the abolition of the option of making new Australian Workplace Agreements (AWA's) and the creation of Individual Transitional Employment Agreements (ITEA's);
2. the abolition of the Fairness Test method of assessing workplace agreements and the its replacement with a no-disadvantage test; and
3. the introduction of the 'modern award' and the method by which the Australian Industrial Relations Commission will modernise federal awards.



Workplace Agreements— What your options are now

AWA's were first introduced when the *Workplace Relations Act 1996* (the Act) commenced in 1996. AWA's involved the making of a workplace agreement between an employer and an individual employee. If properly made and approved by the then Employment Advocate, the AWA prevailed over any applicable award to the extent of common content.

Between 1996 and 2006 the approval of AWA's and other workplace agreements was subject to the agreement satisfying the 'no disadvantage test'. In broad terms this involved a comparison of the content of the AWA with the content of a relevant or designated award to determine whether or not the employee would be disadvantaged by entering into the AWA.

In March 2006 the method of approval of AWA's changed significantly with the introduction of what became known as the WorkChoices amendments to the Act. The no-disadvantage test was removed and the process of having AWA's approved by the Employment Advocate was simplified significantly.

The removal of the no-disadvantage test proved to be politically very unpopular and in May 2007 the then Federal Government introduced the 'Fairness Test' by which new AWA's and other workplace agreements would be assessed by the Workplace Authority Director (WAD), formerly known as the Employment Advocate. The Fairness Test involved consideration of whether the workplace agreement provided 'fair compensation' to the employee in lieu of the exclusion or modification of protected award conditions having regard to monetary and non-monetary forms of compensation. Ultimately the Fairness Test also proved to be unpopular

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Workplace Relations Fact Sheet abolished

Employers are no longer required to provide new employees with a Workplace Relations Fact Sheet.

*"At the last election
Australians voted to get
rid of WorkChoices.*

*Here we are today on its
anniversary marking the
beginning of the end".*

Minister for Employment and
Workplace Relations,
The Hon Julia Gillard, MP
27 March 2008



Having won the Federal Government election in November 2007, Labor has now implemented its policy of preventing any new AWA's from being made. This means that any AWA entered into by an employer and employee after 27 March 2008 will not be valid. Labor has also abolished the Fairness Test and reintroduced the no disadvantage test.

Rules applying to all new workplace agreements

All new workplace agreements made after 28 March 2008 will be the subject of the **no disadvantage test**. It is similar in nature to the test which applied to workplace agreements between 1996 and March 2006.

A workplace agreement made after 28 March 2008 will pass the no-disadvantage test if the WAD is satisfied that the ITEA does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employee whose employment is subject to the agreement under any reference instrument relating to the employee. A reference instrument can include a relevant collective agreement, or a relevant award or designated award and a Notional Agreement Preserving a State Award. A workplace agreement will be taken to pass the no disadvantage test if there is no reference instrument. The test will apply both when a new agreement is made and when any variation is made.



Agreements and variations to them are considered to be operable from the date they are lodged with the WAD, provided that procedural requirements are satisfied. If the WAD decides that an agreement or variations to an agreement passes the no disadvantage test then the agreement/variation will continue in operation. However if the WAD decides that the agreement/variation does *not* pass the test, the agreement/variation ceases to operate from the 7th day after the WAD issues a notice informing the parties that the agreement/variation does not pass the test.

The Australian Fair Pay and Conditions Standard (AFPCS) will continue to prevail over workplace agreements, unless the content of a workplace agreement is 'more generous' than the content of the AFPCS in respect of a particular condition of employment.

General **procedural requirements** regarding the making of a workplace agreement continue to apply. This includes the requirement for the employer:

- to provide a copy of the agreement to all eligible employees not later than **7 days** prior to the date of approval of the agreement;
- to provide an information statement to all eligible employees not later than **7 days** prior to the date of approval of the agreement—including information about: the time at which and the manner in which approval will be sought; bargaining agents; and any other information required by the WAD;
- to lodge the approved agreement with the WAD within **14 days** of its approval;
- to provide each affected employee with a copy of the receipt issued by the WAD in the case of a collective agreement within **21 days** of the receipt being issued—in the case of an ITEA the WAD will issue a receipt directly to the employee;
- in the case of an ITEA, to provide a copy of the agreement to the employee as soon as practicable after it has been lodged with the WAD.

The making of variations to agreements made after 28 March 2008 has similar procedural requirements.

New agreements may be terminated either by: approval, unilaterally after the nominal expiry date and with 90 days notice (ITEA's only plus collective agreements which include a provision permitting unilateral termination) ; or by the AIRC (collective agreements only).

Rules applying to ITEA's

An ITEA can only be made:

- by an employer and an individual employee;
- if at 1 December 2007 the employer employed at least one person whose employment was regulated by an AWA, or a pre-reform AWA, or a preserved individual State agreement;
- either:
 - the employee did not commence employment more than 14 days before the day on which the ITEA was made and had not previously been employed by the employer; or



- where the employee was previously employed by the employer, the reason why the employment ceased did not include the reason that the employer would re-employ the employee under an ITEA; or
- the employee is in an employment relationship with the employer and the employment is regulated by an ITEA or AWA.

ITEA's must expire no later than **31 December 2009**, however they may continue to operate after that date until they are terminated. Once the nominal expiry date has passed they can be terminated by either party on a unilateral basis provided that **90 days written notice** is provided.

Rules applying to existing AWA's

AWA's made prior to 28 March 2008 remain in place and enforceable. There are now two forms of AWA's: pre-reform AWA's (made prior to 27 March 2006); and pre-transition AWA's (made between 27 March 2006 and 27 March 2008).

Unless replaced by another workplace agreement, existing AWA's will continue to operate after their nominal expiry date until they are terminated. They can no longer be varied.

Existing AWA's may be terminated either by approval or unilaterally by either party (provided that 90 days notice is given *and* the AWA has passed its nominal expiry date).

Rules applying to existing collective agreements

Under the changes which took effect on 28 March 2008, pre-reform collective agreements (those made prior to 27 March 2006) can now be varied. This was not possible in the period 27 March 2006 to 27 March 2008. Variations to existing agreements can only be made by way of application to the AIRC. In order to consent to the proposed variation the AIRC must be satisfied that: the parties to the agreement genuinely agree to the changes; the employees will not be disadvantaged; and, that no party has taken or threatened to take industrial action or applied for a protected action ballot since 13 February 2008.

Existing collective agreements can only be terminated following application to the AIRC. In order for the AIRC to consent to the termination of the collective agreement, it must be satisfied that it is not contrary to the public interest.

Rules applying to NAPSA's

Notional Agreements Preserving State Awards (NAPSA's) came into being in March 2006 when the Work Choices amendments to the Act took effect and drew the State awards which applied to employees the subject of the federal industrial system into that system.

Under the Work Choices legislation NAPSA's were due to expire on 27 March 2009. However, the amendments made to the Act in March 2008 agreement. mean that NAPSA's will continue to operate until at least 31 December 2009 and possibly longer unless and until they are replaced with a collective agreement.

Modern Awards—What lies ahead

The early 1990's saw an important change in focus in industrial relations regulation, away from awards and towards enterprise bargaining resulting in workplace agreements. This shift in focus recognised the demands of business to be able to develop minimum terms and conditions of employment which were directly relevant to the particular enterprise.

The *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* has also introduced an award modernisation process which is outlined in the new Part 10A of the Act.

The making of awards has been the traditional core business of the AIRC and are made in settlement of industrial disputes. They outline the **minimum terms** of employment of the employees the subject of them.



Once very lengthy and complex, federal awards have been the subject of simplification processes for more than 10 years. Having been reduced to 20 allowable award matters in 1996 and to then to 15 in 1996, Labor is continuing the trend by reducing the number of items which may be included in a modern award to 10 key matters. Labor's simplification process has already begun and must be completed by the AIRC by the end of next year. We discuss what the AIRC will be considering and developing on the following pages.



The new simplification process

The recently commenced section 576A of the Act provides that modern awards:

- must be simple to understand and easy to apply, and must reduce the regulatory burden on business; and
- together with any legislated employment standards, must provide a fair minimum safety net of enforceable terms and conditions of employment for employees; and
- must be economically sustainable and promote flexible modern work practices and the efficient and productive performance of work; and
- must be in a form that is appropriate for a fair and productive workplace relations system that promotes collective enterprise bargaining but does not provide for statutory individual employment agreements; and
- must result in a certain, stable and sustainable modern award system for Australia.

The award modernisation process is to be conducted by the Australian Industrial Relations Commission (AIRC) in response to a **written request** made to the President of the AIRC by the Minister for Employment and Workplace Relations. The request made must specify the process to be carried out and the time frame in which it must be carried out, which must be not later than two years after the request is made. A request was issued by the Minister for Employment and Workplace Relations on 28 March 2008 and this is discussed on the next page.

The award modernisation process is to be undertaken by a Full Bench or Full Benches of the AIRC. The modern award made must be consistent with the Minister's request. It will not have the status of a legislative instrument. The AIRC may order a variation to a modern award provided that the variation is consistent with the Minister's request.

Matters for consideration in making modern awards

Under the new section 576A the AIRC must consider the following matters when making a modern award:

- promoting the creation of jobs, high levels of productivity, low inflation, high levels of employment and labour force participation, national and international competitiveness, the development of skills and a fair labour market;
- protecting the position in the labour market of young people, employees with a disability and employees to whom training arrangements apply;
- the needs of the low paid;
- the desirability of reducing the number of awards operating in the workplace relations system;
- the need to help prevent and eliminate discrimination on the grounds of race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion.

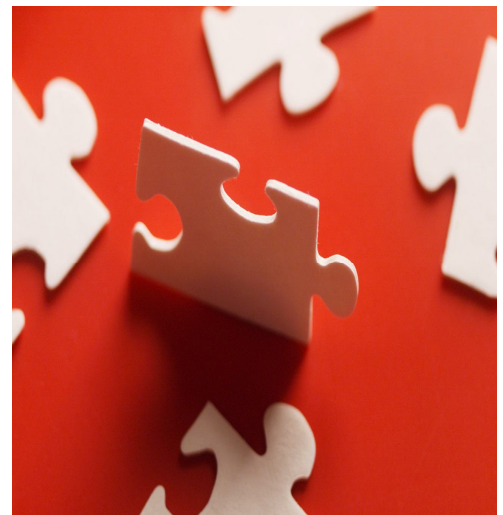
Terms to be included in a modern award

A modern award may include terms about any of the following matters:

- **minimum wages**, skill based classifications and career structures and incentive based payments, piece rates and bonuses;
- **type of employment**—full time, part time or casual, shift work—and the **facilitation of flexible working arrangements**, particularly for employees with family responsibilities;

KEY POINTS

- The Federal Government has shifted the focus of making industrial instruments away from individual workplace agreements back to awards.
- Awards are to be further simplified through a modernisation process conducted by the AIRC and which commenced with the issuing of a Minister's request on 28 March 2008.
- The award modernisation process must be completed by 31 December 2009 and will take effect on 1 January 2010.
- The award modernisation process will be undertaken by a Full Bench of the AIRC. This will be one of the last key responsibilities of the AIRC before it is rolled into Fair Work Australia from January 2010.
- All federal awards and Notional Agreements Preserving State Awards will be reviewed by the AIRC.
- Modern awards will contain 10 key matters only plus incidental and ancillary items.
- Modern awards will work together with National Employment Standards to provide minimum terms and conditions of employment to employees.





- arrangements for **when work is performed**, including hours of work, rostering, notice periods, rest breaks and variations to working hours;
- **overtime rates**;
- **penalty rates**, including those for employees working unsocial, irregular or unpredictable hours and for employees working on weekends or public holidays and for shift workers;
- **annualised wage or salary** arrangements that:
 - have regard to the patterns of work in an occupation, industry or enterprise; and
 - provide an alternative to the separate payment of wages, or salaries or other monetary entitlements; and
 - include appropriate safeguards to ensure that individual employees are not disadvantaged;
- **allowances**, including for the following:
 - expenses incurred in the course of employment;
 - responsibilities or skills that are not taken into account in rates of pay;
 - disabilities associated with the performance of particular tasks or work in particular conditions or locations;
- **leave, leave loadings and arrangements for taking leave**;
- **superannuation**;
- procedures for **consultation, representation and dispute settlement**.

Terms which must *not* be included in a modern award

A modern award can only include the terms referred to above. Further, a modern award must *not* include a term that:

- breaches freedom of association provisions of the Act;
- requires or authorises an officer or employee of an organisation to enter premises occupied by an employer or in which work to which the modern award applies is being carried out; or, inspect or view any work, material, machinery, appliance, article, document or other thing on such premises; or, interview an employee on such premises;
- discriminates against an employee because of, or for reasons including, race, colour, sex, sexual preference, age, physical or mental disability, marital status, family responsibilities, pregnancy, religion, political opinion, national extraction or social origin - a term will not be discriminatory for this purpose if it: discriminates on the basis of the inherent requirements of the employment; or if it discriminates in respect of the employment of a person in an institution that is conducted in accordance with the teachings or belief of a particular religion or creed on the basis of those teachings or beliefs and in good faith; or because it provides for minimum wages for juniors, or people with a disability or with particular training arrangements;
- refers to State or Territory boundaries and do not have effect in each State and Territory— despite this the Act award.

permits such clauses to exist for a period of 5 years from the date of the commencement of a modern award.

Minister's Request to the AIRC

On 28 March 2008 the Minister issued an award modernisation request to the President of the AIRC. This request outlines that the creation of modern awards is **not** intended to:

- extend award coverage to classes of employees (e.g. managerial employees) who have traditionally been award free, because of the nature or seniority of their role;
- result in high-income employees being covered by modern awards;
- disadvantage employees;
- increase costs for employers; or
- result in the modification of enterprise awards—modern awards will not bind an employer who is bound by an enterprise award in relation to employees the subject of that enterprise award.

The request makes it clear that the Federal Government intends that:

- modern awards are primarily to be created along industry lines rather than operational lines;
- the number of awards should be reduced;
- the overlap of awards is to be avoided and the number of awards which may apply to a particular employee or employer are to be minimised—where there is overlap there must be clear rules regarding which will apply;
- the AIRC will develop and include in each modern award a model flexibility clause to enable an employer and employee to agree on arrangements which meet the “genuine individual needs” of the employer and employee;
- the AIRC will engage in a consultation process with workplace relations stakeholders in developing each modern award;
- the AIRC will issue an exposure draft of each modernised award and engage in consultation with workplace relations stakeholders regarding its content;
- by 30 June 2008, the AIRC is to:
 - identify a list of priority industries or occupations (having regard to those which have high numbers of AWA's and NAPSA's);
 - develop a timetable for completing the award modernisation process; and
 - develop a proposed model flexibility clause;
- modern awards will operate in conjunction with National Employment Standards (NES) to provide a safety net of minimum entitlements for award employees—NES are a proposed set of 10 minimum entitlements of all employees the subject of the federal industrial relations system;
- each modern award is to include a specification as to what are ordinary hours of work for each classification of employee covered by a modern award;



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Devine Law at Work is in the business of *helping people work together for better results*. We are a law firm and consultancy which specialises in Australian workplace law and workplace relations.

We are a multi-disciplinary practice which integrates skill and expertise in: workplace law; legal education; communication (including negotiation, conflict resolution and facilitation); workplace systems and business development.

We provide services in: advice; legal representation; legal education; negotiation; conflict resolution; systems development; legal health checks and workplace investigations.

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- modern awards:
 - may cross reference a NES;
 - may replicate a NES only if the AIRC considers it is essential for the effective operation of the particular modern award provision;
 - cannot exclude a NES or operate inconsistently with a NES;
 - may include industry specific detail about matters in the NES, except in relation to long service leave;
 - may build on NES entitlements, except in relation to long service leave, where the AIRC considers it necessary to do so to ensure the maintenance of a fair minimum safety net for employees covered by the award, having regard to existing award entitlements;
- the award modernisation process is to be completed by the AIRC by **31 December 2009**.

A copy of the Minister's request can be accessed on the AIRC's website www.airc.gov.au

Conclusion

While Stage 1 of Labor's reforms mark a significant new step in the evolution of the Act, there will be very little change in workplace regulation for some time to come. The commencement of the most recent changes has brought a new layer of transitional provisions added to those which took effect in March 2006 and these are likely to cause a few headaches in Australian workplaces. While new AWA's cannot now be made, those made prior to 28 March 2008 will continue to exist for many years.

Labor is heading in the right direction by implementing an award simplification process which will eventually result in more relevant and less complex awards which, together with the proposed National Employment Standards, will hopefully make the process of compliance with minimum terms and conditions simpler.

No doubt the AIRC will be very busy in the next 21 months simplifying awards in line with the Federal Government's requirements. This is likely to be its 'last hurrah', as Labor plans to roll the AIRC's functions into its new one stop shop, Fair Work Australia, from 1 January 2010.

