

Forward with Fairness: The 1st Instalment

Implementation of Labor Amendments to Work Choices.

On 19 March 2008 the Federal Labor Government's "Forward With Fairness" transition bill passed through the Commonwealth Parliament. The legislation received Royal Assent on 27 March 2008. The legislation is now referred to as the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth)* ("the Act"), and has the effect of amending the *Workplace Relations Act 1996 (Cth)*, being main Federal industrial relations statute.

Whilst a number of the Federal Government's proposed reforms are not due to come into effect until 2010, the legislation introduces a number of important amendments worth noting, including:

- The banning of new Australian Workplace Agreements ("AWAs");
- The establishment of individual transitional employment agreements ("ITEAs");
- The replacement of the "Fairness Test" with a new No Disadvantage Test for ITEAs and collective agreements;
- A requirement that the Workplace Authority consults on a wider scale when designating awards for the purposes of the no disadvantage test.
- Enabling the Australian Industrial Relations Commission to commence the process of award modernisation.

Arguably the most important aspects of the Act revolve around the banning of new AWAs. The making of new AWAs was effectively banned upon the proclamation of the legislation on Thursday 27 March 2008. Those AWAs with terms of up to 5 years made before the commencement date of the Act and lodged within 14 days thereafter may operate until either terminated or replaced.

Another significant aspect of the Act is the establishment of ITEAs. It is important to note that ITEAs will only be available to employers who as at 1 December 2007 employed an employee under an individual agreement, such as AWA or pre-reform AWA, an individual preserved state agreement or an

individual Victorian employment agreement. The cessation date of ITEAs is 31 December 2009.

The Act also introduces the No Disadvantage Test which replaces the Fairness Test introduced by the previous Federal Government in 2007. The test will apply to both ITEAs and collective agreements. The basic premise of the test is that employers will be required to ensure that a worker's overall terms and conditions are in no way reduced in comparison to a relevant "reference instrument" such as an award or collective agreement. The Act also extends the previous expiry date of Notional Agreements Preserving State Award ("NAPSAs") from 26 March 2009 to 31 December 2009, in order that the old state awards may continue up to the end of the Government's transitional arrangement period. The Government anticipates that its simplified award system will come into effect on 1 January 2010.

The Act does not, however, address many of the areas that were canvassed in the Government's industrial relations "*Policy Implementation Plan*", which was released prior to the Federal election in 2007. Consequently, the implementation of the Act will have little impact on those employers who do not use AWAs in the conduct of their business. These employers will remain subject largely to the same industrial relations regime that has applied since the inception of the "Work Choices" legislation in 2006.

Set out below are details of the Government's proposed further amendments to the current legislative regime, which are expected to be introduced into Parliament later this year.

The 10 National Employment Standards (NES)

On 14 February 2008 the Government released an "exposure draft" of the National Employment Standards ("NES") which, together with its proposed simplified award system, is scheduled to come into effect from 1 January 2010.

Contents	Forward with Fairness: The 1st Instalment	1
	Directors and Manager Liable for OH&S Breaches	3
	Amendments to the Corporations Act 2001 Relating to the Protection of Unpaid Employee Entitlements on Insolvency	4

Forward with Fairness: The 1st Instalment (cont.)

The NES are:

1. **Hours of Work:** A standard 38 hour week for full-time employees, with provision for requiring employees to work additional hours (which must not be unreasonable additional hours).
2. **Parental Leave:** Provide parents with a right to take separate periods of 12 months unpaid leave, up to a total 24 months (if parents want one parent to take a further 12 months after they have taken the first 12 months, then they must make a request, with employers only able to refuse such requests on reasonable business grounds).
3. **Flexible Work for Parents:** Parents have a right to request flexible work arrangements until their child reaches school age, with employers only able to refuse on reasonable business grounds.
4. **Annual Leave:** Four weeks paid annual leave for full-time employees, pro-rata leave for part-time employees and an additional week's leave for shift workers.
5. **Personal/Carer's and Compassionate Leave:** 10 days paid personal/carers leave per annum for full-time employees (pro-rata for part-time employees), plus 2 days a year of paid compassionate leave on the death or serious illness of a member of the employee's family or household, plus 2 days unpaid carer's leave.
6. **Community Service Leave:** Paid leave for prescribed community service activities (eg: jury service), together with reasonable unpaid leave for emergency service duties.
7. **Public Holidays:** Guarantees 8 national public holidays, plus public holidays prescribed in State law and local public holidays.
8. **Provision of Information in the Workplace:** Employers to provide new employees with a Fair Work Information Statement.
9. **Termination of Employment and Redundancy:** Providing a statutory minimum required period of notice of termination to employees based on an employee's years of service. Significantly, employees in workplaces with 15 or more employees will also become entitled to severance payments if their position is made redundant (up to 16 weeks after 9 years service and 12 weeks after 10 years, being the standard from the 2004 Redundancy Test Case, which applied prior to Work Choices).
10. **Long Service Leave:** Entitlements will reflect provisions in current state legislation, however there is an expectation that transitional legislation will come into effect to make a nationally binding long service leave entitlement.

The Government is currently seeking feedback from employer, employee and community representatives on the exposure draft, which is expected to be completed by April 4, with the NES expected to be put before Parliament later this year (and expected to commence operation on 1 January 2010).

Unfair Dismissal

In its pre-election policy, the Government indicated that it would amend the current unfair dismissal laws and develop an "Unfair Dismissal Code". The Act does not contain any provisions in relation to unfair dismissal and accordingly, until substantive legislation is introduced by the Government (which is expected later this year), the current legislation as it applies to unfair dismissal will remain in effect. Under the existing unfair dismissal laws, employees are unable to lodge an unfair dismissal claim if they are:

- employed by an employer with 100 or fewer employees;
- serving a 6 month qualifying period of employment;
- dismissed for genuine operational reasons;
- serving a probationary period determined in advance;
- engaged on a seasonal basis;
- engaged under a contract of employment for a specified period or task;
- engaged under a traineeship agreement or approved traineeship for a specified period;
- engaged as a casual employee for a short period;
- not employed under an award or workplace agreement and earning \$101,300.00 per annum or above in remuneration; or
- pursuing other related termination proceedings.

In summary, unless you are an employer who has been using AWAs to employ your employees, the introduction of the Act will have a minimal affect on the conduct of your business. The proposals which will have a much greater impact on employers (the introduction of the NES, simplified awards and changes to unfair dismissal laws) are not anticipated to come into effect until 1 January 2010.

Directors and Manager Liable for OH&S Breaches

A recent decision of the Industrial Court of New South Wales highlights the importance of implementing safe systems of work and maintaining comprehensive records of training provided to employees in the course of the employment. In *Inspector Jelley v Dupond Industries Pty Ltd & Ors* [2007] NSWIRComm 316, the company was fined \$200,000 for contravening section 8(1) of the *Occupational Health & Safety Act 2000* ("the Act") following a workplace fatality in which an employee was crushed in a pallet stacking machine. The company's directors and its manager were found liable for the contravention of the Act by the company and were each fined \$25,000 by virtue of section 26(1) of the Act. The corporate defendant and the personal defendants pleaded guilty to the

The company had extensive policies and procedures and risk management and hazard identification systems in place. However, the company relied on verbal systems of training and supervision largely because its workforce had a high level of illiteracy. In order to resolve this difficulty, training had been provided by way of verbal instruction and demonstration. No records were kept of the training that was provided prior to the accident. In sentencing the company, his Honour Justice Staff stated that "the disadvantage with limited documented occupational health and safety systems is that there may not be a consistent approach adopted with oral training and instruction".

The exact cause of the accident was unclear and may have been attributable to the failure of an automated sensor causing the stacking machine to move whilst the employee was clearing pallets that had jammed. The evidence disclosed that the company was aware of this potential problem but considered that nothing could be done to rectify it. Although instructions had been provided to employees requiring that the stacking machine must be switched off before attempting to free jammed pallets, there was a lack of adequate guarding to prevent an operator from accessing the internal parts of the stacking machine. The Court stated that the relevant question to be asked was why was the employee exposed to such a risk and held that the company's failure was to ensure that the dangerous parts of the machine were adequately guarded at all times. With reference to the verbal system of work in which the employees had been trained, his Honour considered that there had been a "significant breakdown in the system".

Although there was no direct evidence that the employee had failed to follow safety instructions in operating the machinery, it is worth noting that if this had occurred, any such identifiable failure to follow procedures would not have absolved the company from liability under the Act. This point was reaffirmed in the recent decision of the Court in *Inspector Wayne James v Chek Ly & Ors* [2007] NSWIRComm 315 which involved a workplace injury sustained whilst the employee was carrying out cleaning maintenance on an embossing roller. During sentencing, it was submitted on behalf of the employer that the injured employee had acted carelessly and contrary to the training provided by the employer. The Court restated the established principle that the Act was "designed to protect against human errors including inadvertence, inattention, haste and even foolish disregard for personal safety as well as the foreseeable technical risks in industry"¹. It should be noted that the Court rejected the employer's submission and found that the employee had adopted standard operating procedures performing the maintenance.

The decisions referred to above underscore the fact that employers must remain on the offensive to search for and eliminate, as far as is reasonably practicable, any possible risks to health and safety in the workplace. This includes the obligation to ensure that procedures and instructions are formally documented and are actively and positively complied with by employees. The decision in *Chek* restates the principle that any failure by an employee to follow designated policies and procedures will not exculpate an employer from liability where injury occurs in the workplace.

¹See *WorkCover Authority (NSW) (Inspector Twynam – Perkins) v Maine Lighting Pty Limited (1995) 100 IR 248 at 257.*

Amendments to the Corporations Act 2001 Relating to the Protection of Unpaid Employee Entitlements on Insolvency

The *Corporations Amendment (Insolvency) Act 2007* received royal assent on 20 August 2007 and came into effect on 31 December 2007. It is the first major reform to the corporate insolvency laws since 1992 and contains, amongst other things, improvements to the protection of unpaid employee entitlements in the event of insolvency of an employer in the form of voluntary administration, receivership or liquidation.

Whilst the *Corporations Act* has always contained protection for unpaid employee entitlements in respect of the period of service of the employees up to the date when the insolvency administrator is appointed, there have been various anomalies which appeared to have been dealt with in this recent amendment.

The following represents a summary of the applicable amendments dealing with protection of employee entitlements:

1. Section 444DA(1) now requires all deeds of company arrangement (DOCAs) to contain a provision giving employees the same priority in respect of unpaid employee entitlements which apply in liquidation pursuant to Sections 556, 560 and 561 subject to variation at "eligible employee creditor" meetings or by court order: See Section 444BA(2). This compares to the previous position where a DOCA could exclude priority of employee entitlements if creditors overall voted to an approved deed. The amendment effectively gives the employee creditors the power to make this decision and excludes the other creditors from being involved in this decision.
2. Section 52 of the *Superannuation Guarantee (Administration) Act 1992* (SG Act) previously contained a separate regime granting priority of any superannuation guarantee (SG) Charge (the sum of the shortfall of contribution not paid by the required date together with interest and administration components) to the *Corporations Act*. Under Section 52 the SG Charge was only a priority in the event of liquidation and not in the event of any other type of insolvency administration. This section has now

been repealed and an SG Charge is now given the same priority as all other superannuation contributions and equally applies to DOCAs and receiverships. In addition the cap on priority payments of employee entitlements to Excluded Employees (being persons who are or were in the 12 months immediately before the Relevant Date directors, spouses or relatives of directors or spouses of the relevant company now applies to an SG Charge such that a maximum amount of \$2,000 is payable in respect of wages, superannuation contributions (other than SG Charge) and the SG Charge. This is a welcome amendment since the prior situation gave rise to significant anomalies whereby Excluded Employees were effectively entitled to priority creditor status in relation to SG Charge at the expense of other employees.

3. New Sections 553AB and 444(D3) permit insolvency administrators to reject double proofs of debt for the SG Charge. Under the previous situation because the SG Charge was regarded as a different type of debt to an unpaid employee entitlement because of the priority regime established under the SG Act, liquidators were faced with the prospect of having to make double payments if claims were made by employees and the Australian Tax Office in respect of the same amount of SG Charge. This prospect has now been removed.

Overall, these amendments should provide a higher level of security and certainty for employees in relation to unpaid SG Charge in the event that their employer becomes insolvent.

The Kemp Strang HUMAN RESOURCES BRIEF is intended to keep readers abreast of current developments in the field of human resources and employment law. It is not, however, to be used or relied upon as a substitute for professional advice. Before acting on any matter in the area, readers should discuss matters with their own professional advisers.

If you do not wish to receive further mailouts please email us at info@kempstrang.com.au or telephone Marianne Slocombe on +61 2 9225 2711.



MEMBER OF THE KENNEDY STRANG LEGAL GROUP

LEVEL 16, 55 HUNTER STREET SYDNEY NSW 2000 PO BOX 475 SYDNEY NSW 2001 DX 605 SYDNEY
P. +61 2 9225 2500 F. +61 2 9225 2599

www.kempstrang.com.au

Contact Details:
Human Resources/
Employment Law Group

Stephen Godding, Partner
Email: goddings@kempstrang.com.au
Tel: +61 2 9225 2512

Lisa Berton, Partner
Email: bertonl@kempstrang.com.au
Tel: +61 2 9225 2502