



Express law fast track information for clients

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New agreement-making framework under the *Workplace Relations Act 1996*

The Australian Government's first stage of reforms to the *Workplace Relations Act 1996*—the [*Workplace Relations Amendment \(Transition to Forward with Fairness\) Act 2008*](#) (the Transition Act)—commenced on 28 March 2008. The Transition Act begins the transition to the government's new workplace relations system, which is expected to commence in 2010.

Background

The Transition Act was enacted on 28 March 2008 and establishes a new agreement-making framework for employers and employees within the federal system. Most significantly, Australian Workplace Agreements (AWAs) may no longer be made under the *Workplace Relations Act*, and the fairness test has been repealed and replaced with the 'no-disadvantage test'.

Summary of significant amendments

No new Australian Workplace Agreements

As from 28 March 2008, an employer and employee may no longer make an AWA. However, AWAs lodged before the commencement of the Transition Act will not be affected by the changes, except that an existing AWA may be varied only in limited circumstances. This means that an existing AWA cannot be varied to increase an employee's salary; new workplace arrangements will need to be made.

New Individual Transitional Employment Agreement to be used

The Transition Act has created a new statutory individual agreement: the Individual Transitional Employment Agreement (ITEA). An ITEA may be made by an employer and a new or existing employee, where the employer employed at least one employee under a federal individual instrument on 1 December 2007. This means that individual agreement making cannot be introduced into a workplace that has not previously had that type of arrangement in place.

Like AWAs, an ITEA made with a new employee commences from lodgement with the Workplace Authority (as do greenfields workplace agreements—that is, agreements made before staff are employed). However, an ITEA made with an existing employee, and new collective agreements, now commence operation on approval by the Workplace Authority.

Generally speaking, ITEAs operate very similarly to AWAs. They may be terminated in the same ways, including by unilateral termination with 90 days' notice; the duress and

prohibited content rules apply; and an ITEA in operation excludes the application of an award. An ITEA may also transmit to bind a new employer on transmission of business.

New no-disadvantage test will apply to agreements

The fairness test has been replaced with the no-disadvantage test. The no-disadvantage test, applied by the Workplace Authority, ensures that a new ITEA or collective agreement will either cease to operate or not be approved (as the case may be) if the agreement would result in the 'overall reduction of the terms and conditions of the employee', or employees, bound by the agreement.

Similar to the no-disadvantage test that applied under the pre-reform Workplace Relations Act, the new test is a global one that considers the overall effect of the workplace agreement on the employee, as compared to the industrial instrument that would otherwise apply—for example, a pre-reform certified agreement or award. This is in contrast to the fairness test, which considered only whether the new workplace agreement provided adequate compensation to an employee in lieu of the exclusion or modification of protected award conditions.

The new test also takes into account an employee's long service leave entitlements under a state or territory law. This means, unlike under the fairness test, an employee cannot 'trade off' long service leave entitlements without compensation in return.

Award modernisation process to commence

The Transition Act has enabled the Australian Industrial Relations Commission to commence award modernisation. This process is intended to reduce the current number of federal awards and notional agreements preserving state awards (NAPSAs) and produce streamlined, simplified awards dealing with, at most, 20 allowable matters. One of the allowable matters is wages: wages will no longer be set by Australian Pay and Classification Scales.

Award modernisation is expected to be completed by the Australian Industrial Relations Commission by the commencement of the substantial reforms at the beginning of 2010.

Australian Fair Pay Commission's role reduced

The Transition Act has removed substantial powers from the Australian Fair Pay Commission. Most significantly, the commission can no longer make new pay scales, nor can it undertake wage reviews.

Pre-reform certified agreements and preserved collective state agreements can be varied or extended

The Transition Act allows for the variation and extension of pre-reform certified agreements and preserved collective state agreements—that is, collective agreements made before the Work Choices amendments. Variations made to these agreements must also pass the no-disadvantage test.

Other amendments

Before the commencement of the Transition Act, if an employee was bound by a workplace agreement and that agreement ceased to apply, the employee's terms and conditions would be determined by the Australian Fair Pay and Conditions Standard and any 'protected award conditions' until a new agreement was made.

Now, when an employee is no longer bound by a workplace agreement, the employee will 'fall back' to, for example, another workplace agreement, a pre-reform certified agreement or an award. Protected award conditions no longer exist.

This change has also been reflected in the transmission of business provisions. Now, at the end of the 12-month transmission period, a transferred employee can become bound by, for example, the new employer's existing pre-reform certified agreement or a NAPSA. This was not possible before the introduction of the Fairness Act.

Last, the Transition Act has extended the life of NAPSAs and transitionally registered organisations until 31 December 2009. Both would otherwise have ceased to apply on 27 March 2009.

Implications for clients

The Australian Government Employment Bargaining Framework, published in February 2008, sets out Australian Government policy for workplace relations arrangements within the Australian Public Service and provides that AWAs and ITEAs may not be offered to APS employees. This means that, even before the repeal of AWAs by the Transition Act, the use of individual statutory agreements for APS employees was restricted.

In the absence of AWAs, agencies must now consider alternative arrangements, such as individual common law contracts and determinations made under s 24(1) of the *Public Service Act 1999*, to determine terms and conditions of employment for employees who would have otherwise made AWAs. Agencies should seek advice on the implications of the new agreement-making framework in relation to their particular workplace practices.

It is also important to note that, although existing AWAs continue to operate, variations to the AWA may not be made. Further, when an employee ceases to be covered by an AWA, a collective agreement, a pre-reform certified agreement or the Australian Public Service Award 1998 may begin to apply to that employee.

Next step in federal workplace relations reform

The Australian Government has announced that it intends to substantially reform the workplace relations system by 2010. The next bill, anticipated for introduction into Parliament sometime early next year, is expected to reinstate the powers of the Australian Industrial Relations Commission, introduce 10 key minimum entitlements (the National Employment Standards), create modern, simple awards and overhaul the unfair dismissal regime.

AGS is again involved in the development of the reforms, with AGS lawyer Jenny Burnett outposted to the Department of Education, Employment and Workplace Relations to advise on the drafting of the new legislation.

AGS is currently presenting a series of Government Law Group seminars across Australia on the Transition Act and the APS bargaining framework. For further information on these seminars, please see the [AGS website](#).

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