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The Rudd federal government’s first round of amendments implementing the “Forward with Fairness” (FWF) policy became operative on 28 March 2008. The amendments are transitional, with a substantive Bill expected to be introduced in Parliament by the end of 2008. Although the amendments are transitional, a number of the fundamental changes relating to agreement-making, in particular the No Disadvantage Test (NDT) are expected to remain even after the substantive Bill has been passed.

The transitional amendments relating to agreement-making include the following:

- existing Australian Workplace Agreements (AWAs) to continue, but no new ones to be made (repeal of current s326);
- introduction of transitional individual agreements, called Individual Transitional Employment Agreements (ITEAs) (new s326);
- abolition of the Fairness Test and introduction of the new NDT for all new agreements registered after 28 March 2008 (repeal of Part 8 Div 5A);
- abolition of unilateral termination of collective agreements that have passed their nominal expiry date (repeal of s393, new s397A);
- individual statutory agreements - ITEAs and AWAs - still able to be unilaterally terminated after their nominal expiry date has passed (new s393 and new Schedule 7A);
- agreements with new employees to apply as of the date of lodgement, as is the current arrangement, but new agreements with existing employees not to operate until the Workplace Authority has assessed whether the agreement has passed the NDT (new Part 8 Div 5A, Subdiv C and D, ss346K to 346ZF).

**WORKPLACE AGREEMENTS: ITEAS AND COLLECTIVE AGREEMENTS**

The types of workplace agreements that may be lodged are principally the same, except for the prohibition on employers making new AWAs with employees, and the introduction of ITEAs. An ITEA may be made with an employee provided that the employee has been employed on an ITEA or an AWA. This AWA may be a pre-Work Choices agreement. ITEAs may be made with new or existing employees. With new employees, ITEAs must be made within 14 days of commencing employment. ITEAs can be made with previous employees who have returned to the workplace, provided the former employee’s employment was not brought to an end in order to re-engage that employee on an ITEA; new s326(2)(b)(ii). This provision was inserted after the March 2008 report of the Senate committee that examined the transition Bill. Employer groups had voiced concerns that the existing provisions did not allow employers to employ on ITEAs workers who had previously worked for them. Re-employment of the same workers is common in some industries with work of an itinerant nature, such as construction, retail, hospitality and the home and community care sectors. The nominal expiry date of ITEAs must be 31 December 2009: new s352(1)(aa).

Collective agreements, both union and employee, can still be made. Union and employer greenfields agreements may also be made, and the multiple business agreement provisions are also unchanged. However, they will now be assessed against the NDT, not the Fairness test.

**BARGAINING RULES**

During the transition period there is no obligation on employers to collectively bargain
with their workers if the workers desire a collective agreement. It also appears there is no legal compulsion on employers to negotiate with unions except under the bargaining agent rules in s355. Further, there is no duty to bargain in "good faith" during the transition period, although these provisions will be amended in the substantive legislation in accordance with the FWF policy.8

Employers must ensure, however, that they observe the freedom of association provisions during the bargaining process: s792-793. The transitional provisions do not amend the position established by the case law, which held that an employer does not breach the freedom of association provisions if they offer individual agreements (now ITEAs), and refuse to collectively bargain with those who decline to sign the individual agreements offered.9 However, from January 2010 this conduct may be a breach of the obligation to negotiate in "good faith".10 The provisions relating to coercion in relation to collective and ITEA agreements (s400(1) and (3)) and duress in relation to ITEAs (s400(5)) remain. It is not duress to require an employee to sign an individual agreement (now ITEA) "as a condition of engagement": s400(6).

NEW WORKPLACE LEGISLATION INTRODUCES A NUMBER OF FUNDAMENTAL CHANGES RELATING TO AGREEMENT MAKING, IN PARTICULAR, THE NO DISADVANTAGE TEST.

BY VICTORIA LAMBROPOULOS

THE 2008 NO DISADVANTAGE TEST

The big change is that all new agreements must now pass the NDT. This replaces the WorkChoices Fairness Test. The Workplace Authority has released a policy guide, which practitioners should read carefully prior to lodgement of their clients’ agreements.11 The NDT requires a global comparison between the conditions set by the particular "reference instrument" and the lodged agreement. The instruments that can be used as a "reference instrument" for ITEAs are different from those for collective agreements: see s346E. A reference instrument for an ITEA can be any relevant collective agreement; a reference instrument for a collective agreement is an applicable award, not an existing or previous collective agreement. The conditions are assessed from the employee(s’) perspective and an assessment must be made as to whether the employee(s) will be worse off under the agreement as compared to the reference instrument. This was the test by which all certified agreements and AWAs were assessed pre WorkChoices. An ITEA or a collective agreement passes the NDT if the agreement "does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees whose employment is subject to the agreement under any reference instrument relating to the employee (in relation to ITEAs) or relating to one or more of the employees (in relation to collective agreements)”: s346D(1) and (2).
There are some significant differences between the pre-WorkChoices test (s170XA) and the 2008 NDT. These differences narrow the test in relation to other relevant laws that may be used as a comparator for assessment of the employee(s)' overall terms and conditions in agreements. This may result in employees losing entitlements under state laws, in particular laws that can be excluded from workplace agreements under s17(2) of the Workplace Relations Act (WR Act).

The pre-WorkChoices provision (s170XA) included an additional comparison, other than a relevant award: the test was also assessed by reference to "any other law of the Commonwealth or State which (was) considered relevant". The 2008 provision does not extend the test as far as this. The omission will have no effect in relation to the Australian Fair Pay and Conditions Standard, as it is a guarantee that applies to all employees and it is assumed to be part of all workplace agreements. However, there may be other laws which will not be included required to have regard to the agreement or award only. This will only affect ITEAs, as (under s346E) the reference instruments that may be used for comparison for ITEAs include an existing WorkChoices collective agreement. These collective agreements can exclude entitlements to long service leave payments, and any other state laws not listed in s17(2) WR Act.

As noted above, the reference instruments for collective agreements are awards, not existing collective agreements. It is unlikely that pre-WorkChoices awards excluded long service entitlements, or other relevant state laws such as the Fair Pay Act 2000 (Vic).

On the other hand, collective agreements often provide benefits above the safety net of the relevant award. An employee engaged under an ITEA may in some cases fare better under the NDT assessment than employees under collective agreements. This is because the workplace may have a collective agreement that is more generous than the applicable award, and therefore the ITEA is assessed against a higher benchmark.

A further difference in the 2008 NDT is a new provision, s346J, which lists some matters that "must" be taken into account when assessing the NDT. Specifically, the Workplace Authority Director is to have regard to the work obligations of the employee(s), which would include rostering of particular shifts and other working patterns. This provision appears to address the confusion under the previous test when agreements were struck which gave generous wage rises, often at a flat rate, for increases in standard working hours. In these situations employees who worked traditional penalty hours under awards — being after 6pm and weekends — would often be worse off under the agreement than under the award. Under the old test the AIRC was, strictly speaking, required to disregard the way the agreement worked and simply look at the terms of the instrument.

As was the case pre-WorkChoices, a collective agreement is permitted to operate even if it does not pass the NDT, (s346D(3)(b)) in cases where it is "not contrary to the public interest". The 2008 section is worded differently and includes what appears to be a causative element: it must be "because of exceptional circumstances" that "approval of the agreement would not be contrary to the public interest". Public interest is not defined in the WR Act. There is little guidance given as to what type of exceptional circumstances will be considered, except in s346D(4), which provides an example of when s346D(3)(b) will be satisfied — a short term crisis to assist in revival of a business.

The test remains a point in time assessment, to be considered immediately after lodgement: s346F. However, there is some confusion as to how the test will apply, given that it must assess whether the overall terms and conditions of the agreement would result in a reduction of benefits to the employee(s). Given that agreements can still operate for up to five years, it is likely that there will be a degree of speculation in relation to the assessment of the test over the life of the agreement. The Workplace Authority policy guide also states that collective agreements will not pass the NDT if at least one employee is disadvantaged under the agreement. It is conceivable there will be different outcomes for different employees under the NDT in relation to collective agreements, mainly due to work patterns. According to the policy guide the collective agreement will fail the NDT if one of these employees is disadvantaged.

THE WORKPLACE AUTHORITY POLICY GUIDE ALSO STATES THAT COLLECTIVE AGREEMENTS WILL NOT PASS THE NDT IF AT LEAST ONE EMPLOYEE IS DISADVANTAGED UNDER THE AGREEMENT.

in the assessment as they are not part of the "reference instrument". Long service leave was included as a reference instrument (s346D(2A)) only after the Bill had been examined by the Senate; the NDT assessment includes the employees' long service leave entitlement as long as the particular long service laws applied to the employees prior to the lodgement of the agreement.

The inclusion of s346D(2A), however, does not close the gap, as was noted by Professor Andrew Stewart. If the reference instrument used as a comparison was the previous workplace agreement and it takes away or modifies the otherwise applicable long service entitlements, as is currently allowed under s17(1), then the long service entitlements would not be part of the NDT. It is clear from the reading of the Supplementary Explanatory Memorandum that this is the intended operation of the section: "Where, for example, an applicable award or collective agreement is the basis for the NDT and excludes a state or territory long service law, the Workplace Authority Director would be the applicable award, and therefore the ITEA is assessed against a higher benchmark.

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OPERATION OF AGREEMENTS

Workplace agreements with new employees will operate from the date of lodgement, as was the case under WorkChoices. However, agreements with existing employees will not operate until the Workplace Authority has assessed whether the agreement has passed the NDT. Employers must not dismiss or threaten to dismiss an employee if the agreement does not pass the NDT: s346J. This must be the "sole or dominant reason" for the conduct by the employer. The prohibition does not apply to conduct that falls short of dismissal, but may still be detrimental, such as reduction of hours for casuals or part-time employees. Further, there may be scope for employers to argue that the dismissal occurred because they could not afford to employ the worker on the terms demanded by the Workplace Authority. If an employer tried to argue this, it is advisable for them to be in a position to prove that they could not afford to pay the worker.
NO APPEAL

There is no right of appeal from a decision of the Workplace Authority. If a party does not agree with the Authority’s assessment of the NDT the only recourse available would be review by means of prerogative writ under s75(v) of the Commonwealth Constitution. The policy guide states that the Workplace Authority may decide to reconsider the application of the test in certain circumstances; however, this is not in the WR Act.19 The NDT is not an easy test to apply, and has received notable criticism.20 It is conceivable that errors will occur in application of what is a complex exercise. Before WorkChoices there was a right of appeal before a full bench of the AIRC for certified agreements that did not pass the test. The Rudd government has not provided for a right of appeal during the transition period and it is unclear whether this will be included in the substantive Bill.

CONCLUSION

The transition provisions relating to agreement-making are significant and will begin to mould workplace relations in Australia in line with the Forward with Fairness policy of the Rudd government. The NDT discussed in this article will survive the transition period, and thus the law and the difficulties in its application will need to be grappled with by labour lawyers and their clients beyond 31 December 2009.

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2. Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008 (Cth).
4. Legislative references are to the Workplace Relations Act 1996 (Cth) unless noted otherwise.
5. Pre-WorkChoices is the equivalent of the term "pre-reform" as used in the WR Act, being prior to 27 March 2006.
8. Note 1 above, p14.
16. This issue was also raised in the Senate Inquiry Report: see note 6 above, p47.
18. Senate Standing Committee Report, note 6 above, p63.