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THE RUDD IR REFORMS - Understanding the new 'No Disadvantage Test'

All workplace agreements made on or after 28 March 2008 must now pass the new 'No Disadvantage Test' (NDT).

The NDT replaces the Howard Government's 'Fairness Test' which operated from 7 May 2007 and still applies to agreements lodged before 11 April 2008. The NDT is only an interim measure as the proposed IR reforms include a new test from January 2010, the 'Better Off Overall Test'.

In the meantime, however, the NDT applies to all new workplace agreements and to any variations or amendments to existing workplace agreements.

Workplace agreements continue to be subject to the Australian Fair Pay and Conditions Standard - this Standard is also to be superseded in January 2010 by the National Employment Standards.

Workplace Agreements and the NDT

Workplace agreements include collective agreements (either employee or union agreements), greenfields agreements, multiple business agreements and Individual Transitional Employment Agreements (ITEAs).

The NDT applies to these agreements as follows:

- All new Collective Agreements are subject to the NDT;
- Existing Collective Agreements can be varied but all variations will be assessed against the NDT;
- New Australian Workplace Agreements (AWAs) may not be made. Existing AWAs cannot be varied except in limited circumstances;
- ITEAs may be made by employers who previously used AWAs. ITEAs will have a nominal expiry date of 31 December 2009 and will need to pass the NDT.

What is the NDT?

The NDT compares the terms and conditions of employment in a workplace agreement with the conditions that would otherwise apply (eg from an award). The workplace agreement must not reduce an employee's overall terms and conditions "on balance".

The key issues when considering the NDT are:

- With what do we compare the workplace agreement – i.e. what is the "reference instrument"?; and
- Have the "overall terms and conditions" been reduced "on balance"?

The Workplace Authority recently issued a Policy Guide addressing these issues.

The "Reference instrument"

The "reference instrument" could be:

- An award that applies;
- An award that is designated for the purpose of the NDT (if no award applies);
- A collective agreement that applies;
- A collective agreement and an award (that operate concurrently); or
- Any long service leave laws that apply.

If there is no reference instrument, the agreement automatically passes the NDT.

Applying the NDT

If an employer wishes to remove entitlements that would apply under a reference instrument (eg under an award), the employer must offer a new benefit as a counter-balance, so that "overall" terms and conditions are not reduced.

Examples of benefits could include:

- Mobile phone or laptop (with unrestricted personal use);
- Meal (instead of meal allowance);

- Increased annual leave.

However, there are some terms and conditions that will usually not be regarded as benefits, such as:

- Contingent benefits (eg increased sick leave, long service leave, redundancy payments and study leave), as they will only be paid in certain circumstances;
- Staff discounts, as the employee must pay money in order to receive the benefit;
- Induction, OH&S training, or training that is essential for the employee's role.

The Workplace Authority's Role

In order to compare entitlements under a reference instrument with conditions under a workplace agreement, the Workplace Authority ('the Authority') needs information about the particular roles and work patterns of the employees. It relies on a detailed employer declaration (a copy of which should also be given to the employees), setting out:

- Likely reference instruments;
- Salaries;
- Classifications of employees;
- Whether employees are permanent or casual;
- Details of any junior, trainee or apprentice employees;
- Typical working patterns (eg rosters, overtime details).

If the workplace agreement does not include pay rates, the Authority will assume that the minimum rate is being paid. Employers should ensure that workplace agreements do incorporate actual pay rates, so that any 'over-award' payments are taken into account as a benefit.

In most cases, the question of whether the benefit is sufficient to offset the removal of an entitlement will depend on the particular working patterns, needs and wishes of the employees. The Authority may contact the employees, unions or the employer for more information, as part of the process of determining whether a workplace agreement passes the NDT.

Consequences of assessment

ITEAs with new employees and greenfields agreements come into operation on lodgement. All other workplace agreements come into operation on approval by the Workplace Authority.

After it has assessed the workplace agreement, the Workplace Authority will notify the parties concerned. If the agreement passes the NDT, well and good. However, if it does not pass the NDT, the Workplace Authority will advise the parties how the agreement can be amended so as to comply with the NDT. If no variation is lodged, the reference instruments that would have applied had the agreement not come into operation, will apply.

Implications for employers

Employers who have existing workplace agreements or who are contemplating concluding a new workplace agreement:

- need to familiarise themselves with the NDT;
- should obtain advice on the applicable reference instruments; and
- should review the Workplace Authority's Policy Guide.

Although the complications associated with the NDT may deter employers from changing existing arrangements, employers should also be mindful that as of January 2010, modern awards and the Better Off Overall Test will come into operation. Given the uncertainties associated with the IR landscape in 2010, employers may prefer the certainty of locking in a new workplace agreement before then – in which event, understanding the workings of the NDT is imperative.

The Moores Legal Workplace Relations Team

For further advice and guidance on any employment issue and how it may impact your business and commercial operations, contact the Workplace Relations team at Moores Legal.

Tim Adam
Principal

Tel: (03) 9843 2105
Email: tadam@mooreslegal.com.au

Peter Andrew
Consultant

Tel: (03) 9843 2108
Email: pandrew@mooreslegal.com.au

Frances Anderson
Senior Lawyer

Tel: (03) 9843 2122
Email: fanderson@mooreslegal.com.au

Leanne Tully
Senior Lawyer

Tel: (03) 9843 2127
Email: ltully@mooreslegal.com.au

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MOORESLEGAL

9 Prospect St, Box Hill Vic 3128 PO Box 340, Box Hill Vic 3128
Lvl 10, 350 Queen St, Melbourne Vic 3000
Telephone: (03) 9898 0000 Facsimile: (03) 9898 0333
info@mooreslegal.com.au www.mooreslegal.com.au