

EXPLANATORY STATEMENT

Select Legislative Instrument 2008 No. 38

Issued by authority of the Minister for Employment and Workplace Relations

Workplace Relations Act 1996

Workplace Relations Amendment Regulations 2008 (No. 1)

Subsection 846(1) of the *Workplace Relations Act 1996* (the Act) provides that the Governor-General may make regulations, not inconsistent with the Act, prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act. In addition, other provisions of the Act provide that regulations may be made for certain purposes. These include paragraph 418(ea), which provides that regulations may be made setting out signature requirements for certain workplace agreements and clauses 30 and 55 of Schedule 8 to the Act, which provide that regulations may apply, modify or adapt the provisions of that Schedule.

The Regulations make changes to the *Workplace Relations Regulations 2006* (the Principal Regulations) consequential to amendments made to the Act by the *Workplace Relations (Transition to Forward with Fairness) Act 2008* (the Transition Act). The Transition Act amends the Act to:

- prevent the making of new Australian Workplace Agreements (AWAs);
- create a new transitional workplace agreement called an Individual Transitional Employment Agreement (ITEA) for limited use during the transition period;
- replace the fairness test with a new no-disadvantage test;
- repeal the requirement on employers to provide a Workplace Relations Fact Sheet to their employees;
- enable the Australian Industrial Relations Commission to begin the process of award modernisation; and
- confine the functions of the Australian Fair Pay Commission to those necessary to ensure the maintenance of minimum wages.

The Transition Act amends the definition of ‘workplace agreement’ to exclude AWAs and replaces references to ‘AWA’ with ‘ITEA’. The Regulations make similar amendments to the Principal Regulations. The Transition Act also creates Schedules 7A and 7B to the Act.

Schedule 7A to the Act provides for transitional arrangements applicable to existing AWAs, and AWAs made before the commencement of the Transition Act and lodged within 14 days of that commencement. It provides for the continuation of these AWAs under most of the provisions of the Act in force just before the commencement of Schedule 7A (the ‘pre-transition Act’). Schedule 7A also preserves the operation of the Principal Regulations in relation to these AWAs.

Schedule 7B to the Act sets out transitional arrangements for existing collective agreements and collective agreements made before commencement of the Transition Act and lodged within 14 days of that commencement. These agreements are described in the Schedule as ‘pre-transition collective agreements’. Schedule 7B preserves the operation

of the fairness test and related provisions and the Principal Regulations for pre-transition collective agreements.

The Transition Act requires copies of signed workplace agreements and variations to workplace agreements to be lodged. The Regulations amend the Principal Regulations to reflect this requirement.

The Regulations also:

- remove provisions relating to the Workplace Relations Fact Sheet;
- remove the requirement to publish award rationalisation requests; and
- update the type of instrument that applies when a preserved State agreement is terminated;
- ensure that any terms in preserved State agreements or notional agreements preserving State awards about outworker conditions continue to operate despite any less favourable terms of a workplace agreement; and
- make other minor technical amendments consistent with the Transition Act.

During its development the Transition Act (to which the Regulations are consequential) was subject to extensive consultation, including through the National Workplace Relations Consultative Council and its Committee on Industrial Legislation, and State and territory workplace relations officials. The legislation was the subject of a Senate inquiry, and a number of amendments were made to the Bill as a result of that process.

A Regulation Impact Statement (RIS) was prepared for the Transition Act and is included in the Explanatory Memorandum to the Bill as introduced. As the Regulations are consequential on amendments to the Transition Act a separate RIS has not been prepared for the Regulations.

Schedules 1-7 of the Transition Act commence on a date to be set by proclamation – 28 March 2008. As the Regulations are consequential on the Transition Act, the Regulations commence on commencement of Schedule 1 to the Transition Act.

Details of the Regulations are set out in the [Attachment](#).

The Regulations are legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

The Regulations will commence on 28 March 2008 on the commencement of the Transition Act.

ATTACHMENT

Details of the *Workplace Relations Amendment Regulations 2008 (No. 1)*

Regulation 1 – Name of Regulations

This regulation sets out the name of the Regulations as the *Workplace Relations Amendment Regulations 2008 (No. 1)*.

Regulation 2 – Commencement

This regulation provides that these Regulations commence at the same time as Schedule 1 to the *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (the Transition Act). The commencement of Schedules 1-7 of the Transition Act is on a date fixed by proclamation.

Regulation 3 – Amendment of *Workplace Relations Regulations 2006*

This regulation provides that Schedule 1 to the Regulations amends the *Workplace Relations Regulations 2006* (the Principal Regulations).

Schedule 1 – Amendments

Item [1] - Chapter 1, regulation 1.3, paragraph (a) of the definition of Act

The current definition of ‘Act’ refers to the *Workplace Relations Act 1996* (the Act) as amended by the ‘Work Choices Act’ (a reference to the *Workplace Relations Amendment (Work Choices) Act 2005*). This item updates the definition of ‘Act’ to ensure that the reference to the Act in the Regulations is the Act in force as from time to time other than Schedule 1 to the Act and its regulations.

Item [2] - Chapter 2, Part 5, Division 3A

The Transition Act repeals the provisions that required employers to provide the Workplace Relations Fact Sheet to their employees. Division 3A sets out the manner in which an employer could satisfy the obligation to provide a Workplace Relations Fact Sheet to an employee. This item therefore removes Division 3A as the Transition Act makes it obsolete.

Item [3] - Chapter 2, regulation 5.6, Note

The Transition Act repeals subsection 167A(7) and substitutes a new provision which prohibits a workplace official disclosing to the Minister information relating to a decision by the Workplace Authority Director as to whether a workplace agreement passes the no-disadvantage test.

This item substitutes the note following regulation 5.6 to reflect the change to the Act.

In relation to AWAs, current regulation 5.6 is preserved by clause 2(3) of Schedule 7A to the Act. For pre transition collective agreements, current regulation 5.6 is preserved by clause 2(2) of Schedule 7B to the Act.

Item [4] - Chapter 2, regulation 8.12, heading

Item [5] - Chapter 2, regulation 8.12

Item [6] - Chapter 2, subregulation 8.12(2)

Regulation 8.12 sets out requirements for persons who witness signatures on workplace agreements. These items amend regulation 8.12 to clarify that the requirements also apply to a variation of a workplace agreement.

These items also substitute references from 'AWA' to 'ITEA' in regulation 8.12 to reflect the amendment of the Act by the Transition Act to prevent the making of AWAs and the creation of ITEAs.

Subclause 2(3) of Schedule 7A of the Transition Act preserves the operation of most provisions of the current Act and regulations in relation to AWAs lodged before the commencement or made before commencement and lodged within 14 days after commencement of the Transition Act. Subclause 2(2) of Schedule 7B preserves the operation of the fairness test and related provisions, and regulations, for pre-transition collective agreements made before commencement.

Item [7] - Chapter 2, subregulation 8.13(5)

The Transition Act introduces a requirement that for lodgement of a workplace agreement to be effective it must meet specified signature requirements. Current subregulation 8.13(5) provides that the validity of a workplace agreement is not affected even where it has not been signed in accordance with the existing signature requirements under subregulations 8.13(1) and (2). This item removes subregulation 8.13(5) to ensure consistency with the Transition Act.

Item [8] - Chapter 2, after regulation 8.13

The Transition Act inserts a new paragraph 418(ea) into the Act to enable the making of regulations that prescribe signature requirements for variations to workplace agreements.

This item inserts a new regulation 8.13A which prescribes signature requirements for variations to workplace agreements, similar to those in existing regulation 8.13 for workplace agreements.

An employer party to a workplace agreement is required to obtain the following:

- the employer's (or employers') signature;
- where the agreement is an employee collective agreement, the signature of a representative of the employees bound by the variation or a bargaining agent appointed under section 335;
- for a union collective agreement, the signature of the organisation or organisations of employees with which the employer made the variation;

- for a union greenfields agreement, the signature of the organisation or organisations of employees with which the employer made the variation;
- where the agreement is an employer greenfields agreement, the signature of a representative of the employees bound by the variation or a bargaining agent appointed under section 335.

The Note following paragraph (d) relating to variations to employer greenfields agreements clarifies that the signature of a representative of the employees is required if any employees are employed under the employer greenfields agreement at the time it is varied. However, if no employees are bound by the employer greenfields agreement at the time it is varied, only the employer need sign the variation, as required under subregulation (2).

Subregulation (4) provides that a signature to the variation must be accompanied by the full name and address of each person signing the variation and explain the person's authority to sign the variation. The legislative note at the end of the subregulation states that the requirements for the signing of a variation to an ITEA are contained in section 373 of the Act.

Subregulation (5) applies strict liability to the physical elements of subregulations (2) and (3). However, it is a defence to a contravention of these criteria in the case of a collective agreement that has not been signed by a party (other than the employer) because of the person's failure or refusal to sign the variation to the agreement. It is not be a sufficient defence for an employer to argue that the person failed to sign the agreement if the employer had never sought nor attempted to seek the person's signature.

Item [9] - Chapter 2, Part 10, Division 4

The Transition Act repeals Division 4 of Part 10 of the Act, which set out the mechanism for award rationalisation, which was to be initiated by an award rationalisation request made by the Minister to the President of the Australian Industrial Relations. No award rationalisation request was made.

This item removes regulation 10.6 of Chapter 2 consequential on that repeal.

Item [10] - Chapter 2, regulation 21.4

The Transition Act repeals all provisions relating to the Workplace Relations Fact Sheet. This regulation extends the obligation to provide the Workplace Relations Fact Sheet to employers in Victoria that are not constitutional corporations. This item therefore deletes this regulation consequential on the repeal of the Workplace Relations Fact Sheet provisions by the Transition Act.

Item [11] - Chapter 5, regulation 2.2, heading

Item [12] - Chapter 5, subregulation 2.2(1)

This item is consequential on a number of changes introduced by the Transition Act.

The Transition Act repeals section 354, which set out the circumstances in which 'protected award conditions' (such as penalty rates and overtime loadings) apply in

relation to employees. Essentially, these conditions applied unless a workplace agreement modified or excluded them.

- New Schedules 7A and 7B to the Act preserves the concept of ‘protected award conditions’ for AWAs and pre-transition collective agreements.

The Transition Act also repeals section 399. That provision prevented an award (or earlier agreement) applying to an employee on the termination of their workplace agreement but ‘revived’ the operation of any applicable protected award conditions that may have previously been excluded or modified.

The effect of the repeal of section 399 is that where an award or other instrument ceased to operate in relation to an employee because it was replaced by a workplace agreement, it will operate again if the replacement agreement is terminated.

Section 15A of the Transition Act makes clear that such instruments revive only if a workplace agreement is terminated on or after commencement, and that any protected award conditions applying immediately before commencement of the Transition Act continue to apply after that commencement, until a new workplace agreement commences operation.

Clauses 25A and 52 of Schedule 8 to the Act operated in a similar way to section 354, setting out the way in which protected preserved conditions and protected notional conditions (such as penalty rates and overtime loadings derived from a state award or industrial law) apply.

Under the amendments made by the Transition Act, clauses 25A and 52 of Schedule 8 will only apply in relation to AWAs and pre-transition collective agreements.

The effect of regulation 2.2 of Chapter 5 is similar to that of section 399 of the Act and provides that an employee whose preserved State agreement (PSA) is terminated is covered by protected preserved conditions. Consistent with the repeal of section 399 and transitional arrangements, this item continues the operation of any protected preserved conditions in respect of employees whose PSAs were terminated before, but not after, the commencement of the Transition Act.

Under amendments made by the Transition Act, an employee whose individual PSA is terminated after commencement will be covered by a collective PSA or a notional agreement preserving State awards (NAPSA), and employees whose collective PSAs are terminated can be covered by a NAPSA.

Item [13] - Chapter 5, after regulation 2.2

The Transition Act repeals section 354 of the Act, which deals with protected award conditions, but amends section 349 of the Act to ensure that any terms in awards about outworker conditions continue to operate despite any less favourable terms of a workplace agreement.

Subclause 15G(2) of Schedule 8 to the Act currently has the effect that a PSA ceases to operate when a workplace agreement comes into operation. However, a PSA may include terms derived from a state award or industrial law about outworker conditions.

Consistent with the amendments made by the Transition Act to section 349 of the Act, this item modifies the operation of subclause 15G(2) of Schedule 8 to the Act to ensure that any PSA conditions relating to outworkers continue to operate despite any less favourable terms of a workplace agreement or a workplace determination. This item also provides that the definition of ‘outworker conditions’ has the same meaning as under section 349 of the Act.

The Note following this item clarifies that this item modifies the Act as permitted by clause 30 of Schedule 8 to the Act.

Item [14] - Chapter 5, Part 3, before Division 3

This item is similar to item 13 and is consistent with amendments made by the Transition Act to section 349 of the Act.

Item 14 modifies the operation of subclause 38A(2) of Schedule 8 to the Act to ensure that any outworker conditions in a NAPSA continue to operate despite any less favourable terms of a workplace agreement.

This item also provides that the definition of ‘outworker conditions’ has the same meaning as under section 349 of the Act.

The Note following this item also clarifies that this item modifies the Act as permitted by clause 55 of Schedule 8 to the Act.

Item [15] – Schedule 8, Part 1, item [3], inserted subclause 2 (2), after paragraph (s)

Item [16] – Schedule 8, Part 2, item [6], inserted subclause 3 (2)

Subsections 5(1) and 6(1) of the Act define the terms ‘employee’ and ‘employer’ respectively.

Subsections 5(2) and 6(2) of the Act provide that, in addition to their constitutionally linked meaning under subsections 5(1) and 6(1), the terms ‘employee’ and ‘employer’ can have their ordinary meaning in specified circumstances.

Clauses 2 and 3 of Schedule 2 to the Act provide a list provisions in the Act in which references to the terms ‘employee’ and ‘employer’ have their ordinary meaning. Subclause 5(1) of Schedule 2 provides that these lists in the Act may be amended by regulations. Such amendments are set out in Schedule 8 to the Regulations (regulation 1.1 of Chapter 4 of the Regulations).

These items have the effect that, for the purposes of new section 576R of the Act, references to ‘employee’ and ‘employer’ have their ordinary meaning, by adding section 576R to the lists in Schedule 8 to the Regulations.

The Transition Act inserts new section 576R into the Act which provides that a modern award must not include a term that requires or authorises an officer or employee of an organisation to enter premises for the purposes listed in the section eg inspecting or

viewing work performed on premises of an employer bound by the award, or interviewing an employee.

Section 576R is modelled on existing section 518 of the Act. References to ‘employee’ and ‘employer’ in existing section 518 of the Act have their ordinary meaning.

To ensure that section 576R would have the same scope as existing section 518, these items amend Schedule 8 to the Regulations to provide that references to ‘employee’ and ‘employer’ in section 576R also have their ordinary meaning.

Item [17] - Further amendments — references to AWAs

To give effect to the Government’s policy to prevent the making of AWAs and provide for the creation of individual transitional employment agreements (ITEAs), the Transition Act amends the definition of ‘workplace agreement’ to replace references to ‘AWA’ with ‘ITEA’.

This item updates the following references in Chapter 2 of the regulations from ‘AWA’ to ‘ITEA’ consequential on the amendment of the Principal Act by the Transition Act:

- Part 5, Division 3, heading
- regulation 5.3, heading
- subregulation 5.3 (1)
- paragraph 8.7(3)(b)
- subregulation 8.10 (1)
- subregulation 8.13 (2), Note
- subregulation 9.9 (2)
- regulation 9.25, heading
- regulation 14.2, heading

As mentioned above, subclause 2(3) of Schedule 7A of the Transition Act preserves the operation of the current Act and regulations in relation to AWAs. Subclause 2(2) of Schedule 7B preserves the operation of the fairness test and related provisions, and regulations, for pre-transition collective agreements.

This item also substitutes references to ‘AWA’ and ‘AWAs’ in the Note to subregulation 8.5(8B) with ‘workplace agreement’ and ‘workplace agreements’ to ensure consistency with the wording in subregulation 8.5(8B).