



The Association of Professional Engineers,  
Scientists and Managers, Australia

## **WORKPLACE RELATIONS ACT AMENDMENT (A STRONGER SAFETY NET) BILL 2007**

### **SUBMISSION OF THE ASSOCIATION OF PROFESSIONAL ENGINEERS, SCIENTISTS AND MANAGERS, AUSTRALIA TO THE SENATE STANDING COMMITTEE ON EMPLOYMENT, WORKPLACE RELATIONS AND EDUCATION**

#### **INTRODUCTION**

1. The Association of Professional Engineers, Scientists and Managers, Australia (APESMA) is an organisation registered under the Workplace Relations Act 1996 (the Act) representing over 25,000 professional engineers, scientists, veterinarians, surveyors, architects, pharmacists, information technology professionals, managers and transport professionals throughout Australia. We are the only industrial association representing exclusively the industrial and professional interests of these groups.
2. APESMA represents professional and managerial employees employed under a range of industrial instruments and in both the public and private sectors. These include Australian Workplace Agreements (AWA's), common law contracts and collective agreements.
3. Historically, professional employees have enjoyed the protection of the award safety net. However, whilst there is some award coverage for managerial employees many are award free.
4. APESMA notes that the Minister in his second reading speech states that the fairness test *"will allow employers and employees to modify or exclude award conditions but only where employees are fairly compensated"*. Further in respect of protected award conditions the Minister states that; *"It was never the intention that it may become the norm for protected award conditions and penalty rates to be traded off without proper compensation."*
5. Protected Award Conditions that are contained in awards that are applicable to professional and managerial employees include , depending on the particular award, such matters as;
  - Rest breaks;
  - Annual leave loading;
  - Monetary allowances;
  - Observance of and payment for public holidays;
  - Overtime and shift loadings; and Penalty rates

#### **INCOME THRESHOLD**

6. APESMA notes that it is intended in accordance with section 346E(c) of Subdivision B of Schedule 1 – The Fairness Test, that the proposed Fairness Test will only apply to employees earning less than \$75,000 per annum. It is submitted that this exclusion will deny many professional and managerial

employees the benefits of the legislation. As a consequence it is submitted that these employees may continue to lose their Protected Award Conditions without fair compensation.

7. APESMA estimates that looked at in its totality that up to 70% of technology based professionals covered by awards will be excluded in this way. Some of those excluded would be relatively junior employees. For instance the *June 2007 Professional Engineer Remuneration Survey Report* shows that based on years of experience that Professional Engineers with only 3 to 5 years experience can earn a base salary beyond \$75,000 per annum. (*Professional Engineer Remuneration Survey Report, June 2007, Table 5.2, P50*). In this regard the Association considers that the exclusion of junior employees is particularly inappropriate.
8. APESMA submits that all employees should be protected by the Fairness Test regardless of remuneration level. At the very least all those employees who could be covered by a classification in a relevant award should have access to the benefits of the legislation.
9. In this regard it is important to note that most industrial awards that apply to professional and managerial employees do not contain exclusions on the basis of salary. By way of illustration in most of the awards to which APESMA has been a respondent there are at least 4 responsibility levels. Where work is excluded it is usually because the duties and responsibilities are beyond the scope of the classification structure.

## **THE FAIRNESS TEST**

10. In respect to the Fairness Test itself APESMA has concerns regarding both the process of its administration and its application.
11. According to Section 346(6) the Workplace Authority Director "*may inform himself or herself in any way he or she considers appropriate including (but not limited to) contacting the employer and the employee, or some or all of the employees, whose employment is subject to the workplace agreement*". Further there does not appear to be any review mechanism if one or other of the parties is aggrieved by a particular outcome.
12. Accordingly, APESMA is very concerned that the application of the Fairness Test will lack transparency and will potentially result in determinations that will lack consistency and will not be accountable. APESMA would support the establishment of an appropriate appeal mechanism whereby the parties may seek a review. Such a procedure would by necessity need to be carried out expeditiously and allow for representation rights.
13. APESMA notes that an Australian Workplace Agreement (AWA) will pass the Fairness Test if it provides "fair compensation" to the employee in lieu of the excluded or modified protected award conditions. In

the case of collective agreements it is understood that these will pass the Fairness Test if, on balance, it provides fair compensation in its overall effect on employees.

14. Further, APESMA also notes that in its assessment of an agreement the Workplace Authority Director must have regard to monetary and non-monetary compensation; the employees' personal circumstances, particularly their family responsibilities; and in exceptional circumstances, and provided it is not contrary to the public interest, have regard to the industry, location, or economic circumstances of the business, or the employees employment circumstances.
15. APESMA is concerned that the discretion thus given to the Workplace Authority Director in the application of the Fairness Test is far too great to allow the concept of what constitutes "fair compensation" to be imbued with a readily understandable meaning. Whilst it may be possible to assign a value to both monetary and non-monetary compensation there will be the potential for considerable subjectivity when taking into account an employee's personal circumstances. In any event APESMA would submit that it is inappropriate to do this in the context of a Fairness Test.
16. Most industrial awards already contain provisions which require employers not to require employees to work unreasonable overtime. When arriving at a definition of what constitutes "unreasonable hours" one of the criteria is "the employee's personal circumstances including any family responsibilities". APESMA submits that the extension of the principle to its use as part of the Fairness Test should not be in the context of offsetting existing benefits but should be in addition to them. This would be consistent with the intention behind inserting these provisions into industrial awards. There is concern that this particular provision may be misused.
17. APESMA is also concerned about the use that may be made of "exceptional circumstances" as a justification for the removal of Protected Award Conditions. This area will be particularly problematical and the lack of transparency in the process of the administration of the Fairness Test will allow for highly for highly subjective decision making.

#### **NO DISADVANTAGE TEST**

18. In conclusion APESMA calls for the restoration of a proper No Disadvantage Test that will result in employees being no worse off overall. This would allow for sufficient flexibility in the structuring of an individuals' remuneration package but with the assurance of a genuine safety net.
19. APESMA would be available to appear before the Senate Committee in order to expand upon the submission or to provide additional further information.

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