JOBWATCHING
Employment Rights Legal Centre
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Goodbye AWAs, Hello ITEAs – Moving Forward With Fairness

The Labor Government's *Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008* (The Act) was passed by Parliament on 19 March 2008 and commenced on 28 March 2008 (almost 2 years to the day since the bulk of the WorkChoices amendments came into force).

The Act amends the *Workplace Relations Act 1996* and provides for transitional arrangements until the beginning of the Government's substantive workplace reforms which it plans to bring into effect on 1 January 2010. The Government intends to set up a "one-stop shop" for industrial relations matters called Fair Work Australia and with the cooperation of the States, introduce a national uniform industrial relations system.

In a long awaited victory for workers, the Act abolishes AWAs as of 1 December 2007. However, in order to allow business time to adjust, the Act replaces AWAs with new transitional individual statutory contracts called Individual Transitional Employment Agreements (ITEAs) which must pass a revamped "no-disadvantage test" before being approved by the Workplace Authority.

As part of the Government's planned reforms, there will be a legislated set of 10 National Employment Standards (NES), which will replace the current Australian Fair Pay Commission (AFPC) Standard. The NES will set out minimum standards for all employees regarding:

> Hours of work

> Parental leave

> Flexible work for parents

> Annual leave

> Personal, carers and compassionate leave

> Community service leave

> Public holidays

> Information in the workplace

> Notice of termination and redundancy

> Long service leave

Awards will undergo a process of modernization by the Australian Industrial Relations Commission (AIRC) over the next two years and the following will be the only allowable award matters:

> Minimum wages

> Type of employment (permanent, casual, shift work, flexible working arrangements etc.)

> Arrangements for when work is performed (hours of work, notice, rest breaks, variations to rostered hours)

> Overtime rates

> Penalty rates

> Annualised wage or salary

> Allowances

> Leave, leave loadings and arrangements for taking leave

> Superannuation

> Procedures for consultation, representation and dispute settlement

The AIRC must ensure that terms are only included to the extent that they provide a fair minimum safety net.

The AFPC will continue to operate until the end of 2009 but its role will be severely reduced. It will continue to undertake annual minimum wage reviews, but will not be able to make any new pay and classification scales.

In April 2008, JobWatch made submissions to the Department of Education, Employment and Workplace Relations regarding the NES. In its submission, JobWatch called for, among other things:

> A statutory entitlement to a period of paid parental leave and that any period of parental leave (paid or unpaid) should count as service for the purpose of accruing entitlements.

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Executive Director Editorial

Review of the Victorian Equal Opportunity Act

In October last year, Julian Gardner was appointed by the Victorian Government to conduct an independent review of the Victorian *Equal Opportunity Act 1995.*

The review has considered options for reducing red tape involved in bringing and defending discrimination complaints, as well as encouraging compliance with equal opportunity laws and strengthening enforcement of those laws. The governance of the Victorian Equal Opportunity and Human Rights Commission was also a focus of the review.

As part of the review process, a Discussion Paper was released in November 2007 and an Options Paper in March 2008. Submissions were received in response to the two Papers (approx 160 in total) and a final report incorporating all recommendations shall be submitted to the Deputy Premier and Attorney General, the Hon. Rob Hulls MP by the end of June 2008.

As an Advisory Committee Member, it has been an exciting opportunity to participate in the development of the proposed new Equal Opportunity Scheme and the reform initiatives to achieve the objectives of the new Scheme. This has particularly been the case in the context of historic legislative change to Victoria's human rights landscape with the enactment of the Charter of Human Rights and Responsibilities in 2006.

We look forward to the Victorian Government's consideration and response to the report.

Zana Bytheway
Executive Director

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Goodbye AWAs, Hello ITEAs –

> Redundancy/severance pay under the NES should not be subject to a small business exemption and long term casual employees and apprentices should be afforded the same notice and severance pay entitlements as permanent employees.

> Individual employees as well as Fair Work Australia to have standing to pursue breaches of the NES in a court or tribunal of competent jurisdiction.

> The "right to request" flexible working arrangements to be extended to include parents and carers of primary school age children given that, for example, the ordinary primary school day ends at 3:30pm. The Government's proposal only covers parents and carers of children up to school age.

In recent news, the UK's "right to request" provisions – the model for the flexibility regime for school-aged children proposed by the Government - are about to be extended to cover parents of children up to 16 years old. JobWatch would support any move by the Government to match the UK proposal.

JobWatch looks forward to playing a continuing role in providing information and assistance to Victorian workers under the Government's new uniform national industrial relations system.

Nominal Expiry Date – ITEAs & AWAs

The nominal expiry date of an ITEA that is made or varied must be no later than **31 December 2009.** An ITEA or AWA that has passed its nominal expiry date will continue to operate until it is terminated or replaced.

JobWatch is concerned that many employees on AWAs or ITEAs will be unaware that they have a right to unilaterally terminate their ITEA or AWA by giving their employer 90 days notice and, in doing so, return to the pay and conditions of the applicable award or collective agreement (if any). Prior to the commencement of the Act, if an AWA was terminated by the employer or employee, the employee fell back on the 5 minimum conditions in the AFPC Standard.

JobWatch proposes to undertake an awareness campaign leading up to 2010 so that workers on ITEAs and AWAs may become aware of their rights including potentially a right to better pay and conditions.

Moving Forward With Fairness

Goodbye AWAs Hello ITEAs

AWAS and ITEAS: The details

Australian Workplace Agreements (AWAs) Abolished

As of 28th March 2008, employers may no longer offer AWAs to their employees. Existing AWAs will continue to apply if made before 28 March 2008, even if not yet lodged, as long as the employer lodges them with the Workplace Authority within 14 days of 28 March 2008.

Individual Transitional Employment Agreements (ITEAs) Introduced

Eligible employers may instead now enter into an ITEA with certain employees. An ITEA is an individual workplace agreement, and so is generally subject to the same rules as other workplace agreements (such as collective agreements) however not all employers will be eligible to offer ITEAs.

ITEA Eligibility

To be able to enter into an ITEA with an employee, an employer must have had at least one employee covered by an individual workplace agreement (such as an AWA or pre-Workchoices AWA) as at 1 December 2007.

The employer may only offer an ITEA to:

1. **New employees,** whether previously employed or not but no later than within 14 days of commencing the employment.

   However, where the employee was previously employed, employment must not have ceased for the reason, or for reasons including that the employer would re-employ the employee under an ITEA.
2. **Existing employees** regulated by an ITEA, AWA or other individual agreement.

No disadvantage test

The "no-disadvantage test" applies to all workplace agreements, including the variation of existing workplace agreements. The Workplace Authority must test each lodged agreement and lodged variation for compliance with the no disadvantage test.

When does an agreement pass the no-disadvantage test?

A workplace agreement passes the no-disadvantage test if the Workplace Authority Director is satisfied that:

"it does not result, or would not result, on balance, in a reduction in the overall terms and conditions of employment of the employee whose employment is subject to the agreement under any reference instrument relating to the employee(s)."

The Workplace Authority may consider the work obligations of the employee under a workplace agreement and can take necessary steps to inform itself (eg. by contacting the employer, employee or a bargaining agent).

Importantly, if an ITEA fails the no-disadvantage test and no variation of the Workplace Agreement is lodged by the employer or the variation also fails the no-disadvantage test, the employee may be entitled to compensation in the form of back pay.

Additionally, an employer must not dismiss, or threaten to dismiss an employee, for the sole or dominant reason that a workplace agreement fails, (or may fail) the no-disadvantage test. An employer who does so may incur a penalty and have to pay compensation to the employee.

Termination of Workplace Agreements

The ways in which workplace agreements can be terminated have changed. The following table sets out how workplace agreements can be terminated:

Type of Agreement	Term. By Agreement?	Term. Unilaterally?	Term. By AIRC?
ITEA	Yes	Yes (after NED, 90 days notice, or according to termination provision in ITEA if included)	No
Collective Agreement	Yes	Yes, (after NED, only if termination provision in agreement allows it)	Yes on application (after NED, if AIRC satisfied not contrary to public interest to terminate)
Existing AWAs	Yes	Yes (after NED, 90 days notice or before if allowed for in AWA)	No

Employment Activity Discrimination – a new attribute

As of 31 March 2008, discrimination based on "employment activity" is prohibited under the Victorian Equal Opportunity Act. This new attribute covers two types of activity by an employee in their individual capacity:

1 Making a reasonable request to their employer for information regarding their employment entitlements. For example –

- **What is my rate of pay?**
- **How many holidays have I accrued?**
- **Do I have an entitlement to maternity leave?**
- **Have I been paid for the extra hours I worked?**
- **Will I be able to take my annual leave next month?**

2 Communicating to their employer a concern that they have not been, are not being, or will not be given some or all of their employment entitlements. For example –

- **I am worried that I have not been paid overtime.**
- **Why am I not being paid at the correct rate of pay?**
- **Someone has told me that the company is going under and I will not be paid my redundancy pay.**

Meaning of 'employment entitlements'

'Employment entitlements' will include rights and entitlements under: an award or agreement; State and Commonwealth legislation; and a contract for service (ie contractors).

Examples of employment entitlements include:

- Rates of pay – including penalty rates and overtime
- Leave entitlements (recreational, sick, maternity, carers etc)
- Meal, uniform and travel allowances
- Superannuation entitlements
- Workers Compensation
- OH&S rights and responsibilities
- And potentially an employees rights under equal opportunity legislation.

Note, the attribute is not intended to extend to questions unrelated to an employee's employment entitlements and does not provide a mechanism for enforcing employment entitlements or negotiating a pay rise or more generous entitlements.

Furthermore, requests for information must be reasonable and made in a reasonable manner and at a reasonable time. For example, a request would not be made in a reasonable manner or at a reasonable time if it was made in a violent or threatening manner or outside normal working hours. It would also be unreasonable to request confidential or unduly complicated information that employers could not readily access.

Given the specific use of the terms 'employee' and 'employer' within the definition of the attribute it is unlikely that a job applicant could make a complaint about employment activity discrimination. For example it is unlikely that they could complain about not getting a job after they asked in the interview about the employment entitlements relevant to that job.

Case examples

In the 2 months since discrimination based on employment activity commenced operation Job Watch has received nearly 70 enquiries that we have referred to the Victorian Equal Opportunity and Human Rights Commission.

Currently the Victorian Equal Opportunity and Human Rights Commission is investigating 2 complaints.

Case Studies

Shona's son Jason was supposed to be working as an apprentice hairdresser. He discovered that he was being paid incorrectly and informed his employer. Jason was told by his employer to take a week off. After the week had passed Jason was terminated over the phone by his employer on the basis that they couldn't afford to pay him the correct rate of pay.

Bruno was working as a quarry worker on a casual basis. He discovered that he was being underpaid and was not being paid overtime. Bruno approached his employer and set out in a letter what his rates should have been. His employer said he would not pay it and asked Bruno to resign.

Colin had been working as a service technician for over 2 years on a full time casual basis and was offered a permanent position. He raised an OH&S issue at work and shortly after, the permanent position offer was retracted and he was told that he had to become a contractor.

More Information

Please contact JobWatch (9662 1933) for more information; or the Victorian Equal Opportunity and Human Rights Commission (9281 7100) if you wish to make a complaint.

Slavery and human trafficking in Australia

Did you know…?

> It is estimated that there are between 1,000 and 3,000 trafficked persons in Australia.

> Globally, there are an estimated 12.3 million people in forced labour, bonded labour, forced child labour, and sexual servitude at any given time.

> Between 600,000 and 800,000 people are trafficked across national borders every year.

> Approximately 80 percent of these people are women and girls, and up to 50 percent are minors.

> The majority of these women are trafficked into commercial sexual exploitation.

There is no ‘quick fix’ to the global problem of slavery and human trafficking. One of the ways that Australia is combating this issue is by modernising Australia’s laws about slavery, for example, the recent amendments to the *Criminal Code Act 2005* (Cth) (‘Criminal Code’). Previously, the laws in Australia about slavery were derived from 19th century Imperial Acts based on concepts of slavery that are now outdated.

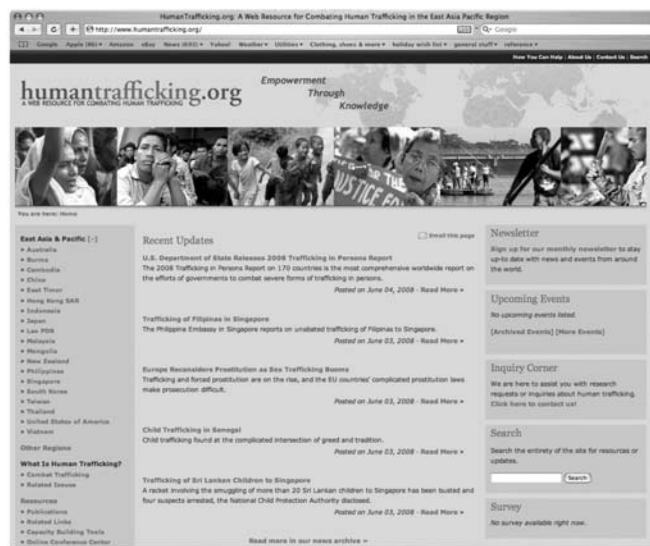
The High Court of Australia is currently considering the meaning of the new slavery offences in the Criminal Code in the case of *R v Wei Tang* (‘Tang’).

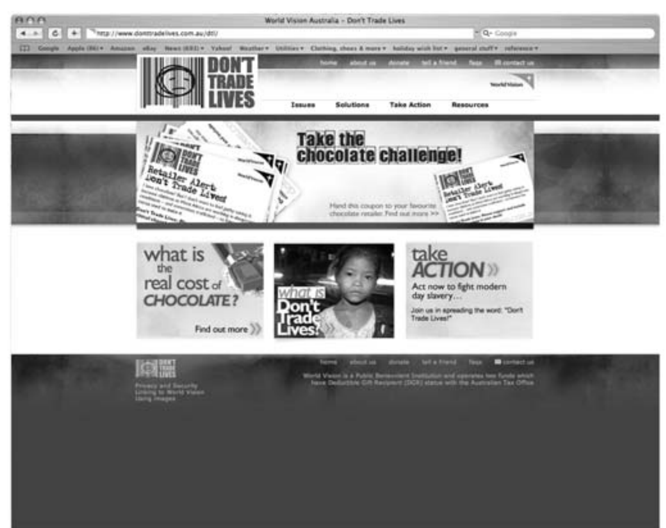
Tang was arrested for allegedly possessing slaves – five Thai women who Tang had brought to Australia to work in her licensed brothel. On arrival in Australia, the Thai women were told that they each had incurred a “debt” of up to $45,000 which they were required to repay by working in Tang’s brothel. The Thai women's passports tickets were withheld, they were denied freedom of movement and were not paid for their work, other than to reduce the “debt”. Tang argued that she believed that she was in a contract of employment with the women.

The County Court of Victoria found Tang was guilty of five counts of possessing a slave and five counts of exercising a power of ownership over a slave pursuant to section 270.3 of the *Criminal Code Act 2005* (Cth) (‘Criminal Code’). Tang was sentenced to a minimum of 6 years in prison. On appeal to the Court of Appeal, the decision was quashed and a re-trial ordered.

The Court of Appeal decision was subsequently appealed to the High Court. The High Court is yet to hand down its decision. The Tang case will provide guidance about the circumstances in which a person is considered to be enslaving another under Australian law.

Further information on human trafficking and slavery may be found at: www.humantrafficking.org www.antislavery.org.au www.donttradelives.com.au





JobWatch receives positive response from Victorian workers

"It's a really useful resource for people unsure of their rights. My daughter found it for me on the internet. I was really surprised how helpful it was."

Findings from a client satisfaction survey of Victorian workers conducted by JobWatch show an overwhelming positive response to JobWatch's telephone information and referral service.

Approximately 87% of callers surveyed rated the assistance provided by JobWatch's telephone service as very good or good. Over 93% of callers said they would use JobWatch again and recommend it to other people respectively.

The survey was conducted in December and involved contacting all callers to JobWatch's telephone service over a period of a week. A total of 194 callers participated in the survey, which represented a response rate of 59%.

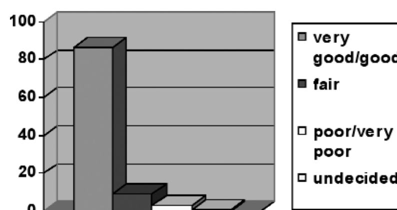
Just over 50% of those surveyed were women, and more than three quarters came from metropolitan Melbourne. The age of respondents varied, with over one-third aged 45 and over.

About one-fifth of callers rang up about termination of employment issues and nearly 10% about non-payment of entitlements.

A number of respondents made suggestions as to how JobWatch could improve its service such as employ more staff and increase awareness about JobWatch in the community.

Overall the survey demonstrated an appreciation by callers of the assistance provided to them by JobWatch, and the invaluable service it provides to the Victorian community.

JobWatch client survey



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