

**WESTERN
AUSTRALIAN
GOVERNMENT**
Gazette

4647



PERTH, FRIDAY, 13 SEPTEMBER 2002 No. 165 SPECIAL

PUBLISHED BY AUTHORITY JOHN A. STRIJK, GOVERNMENT PRINTER AT 3.45 PM

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INDUSTRIAL RELATIONS ACT 1979

**INDUSTRIAL RELATIONS
COMMISSION AMENDMENT
REGULATIONS (No. 2) 2002**

**INDUSTRIAL RELATIONS
(APPROVAL OF REPRESENTATIVES)
(FORMS) ORDER 2002**

**INDUSTRIAL RELATIONS
(EEA INFORMATION STATEMENT)
ORDER 2002**

**EMPLOYER EMPLOYEE
INFORMATION STATEMENT AND
GUIDELINES**

Industrial Relations Act 1979

Industrial Relations Commission Amendment Regulations (No. 2) 2002

Made by the Chief Commissioner of the Western Australian Industrial Relations Commission after consultation with the members of the Commission.

1. Citation

These regulations may be cited as the *Industrial Relations Commission Amendment Regulations (No. 2) 2002*.

2. Commencement

These regulations come into operation on the day on which section 4 of the *Labour Relations Reform Act 2002* comes into operation.

3. The regulations amended

The amendments in these regulations are to the *Industrial Relations Commission Regulations 1985**.

[* Reprinted 24 March 1998.

For amendments to 5 September 2002 see 2001 Index to Legislation of Western Australia, Table 4, p. 176 and Gazette 2 August 2002.]

4. Part XVA inserted

After regulation 110 the following Part is inserted —

“

Part XVA — Applications and appeals under Part VID Division 9 of the Act

Division 1 — Applications

110A. Establishing that proposed representative is qualified and consents to an application under section 97WV or 97XM

- (1) Where an application is made under section 97WV or 97XM of the Act the Registrar is to meet with the person sought to be approved as a representative for the purpose of satisfying himself that the person —
 - (a) fulfils the requirements of section 97WY; and
 - (b) consents to the application being made.

- (2) The consent of the person that forms part of the application is to be signed by him in the presence of the Registrar and the Registrar is to sign an attestation on the application form that this has occurred.
- (3) The person must also supply such information and evidence for the purposes of subregulation (1)(a) as the Registrar may request.

110B. Notice of application for approval to be given to employer

- (1) If an application under section 97WV of the Act identifies a person who will be the employer of the person with a mental disability if a proposed EEA takes effect, the Registrar must give notice in writing to that prospective employer of the making of the application.
- (2) If an application under section 97XM of the Act identifies a person who —
 - (a) is the employer of the person with a mental disability under an EEA; or
 - (b) will be the employer of the person with a mental disability if a proposed EEA takes effect,

the Registrar must give notice in writing to that employer or prospective employer of the making of the application.

- (3) A notice under subregulation (1) or (2) is to be given within 7 days after the application is filed.

110C. Application to Guardianship and Administration Board for revocation of approval

- (1) An application to the Guardianship and Administration Board for a revocation order under section 97XI of the Act is to be made in accordance with this regulation, and not otherwise.
- (2) A completed application in accordance with Form 38 is to be lodged in the office of the Registrar.
- (3) The Registrar is to send to the Guardianship and Administration Board —
 - (a) the application referred to in subregulation (2);
 - (b) the Registrar's file relating to the making of the order that is sought to be revoked; and
 - (c) any other document in the possession of the Registrar that he considers relevant.
- (4) The Registrar is to ensure that the documents referred to in subregulation (3) are received by the Guardianship and Administration Board not later than

the fifth day after the application was lodged on which the office of the Registrar is open to the public for the transaction of business.

- (5) The application is made to the Guardianship and Administration Board when it receives the documents referred to in subregulation (3).

110D. Notice of application for revocation of approval to be given to employer

- (1) If an application under section 97XI of the Act identifies a person who is the employer of the person with a mental disability, the Registrar must give notice in writing to that employer of the making of the application to the Guardianship and Administration Board.
- (2) A notice under subregulation (1) is to be given within 7 days after the Registrar is informed that the application has been received by the Board.

110E. Notice of order or refusal to make order to be given to employer

- (1) If notice of an application was required to be given to an employer or a prospective employer under regulation 110B or 110D, the Registrar must give notice in writing to that employer or prospective employer of —
 - (a) the making of an order under section 97WZ(1), 97XK(1) or 97XN(1) on the application; or
 - (b) a refusal under section 97XA, 97XK(3) or 97XP to make an order on the application.
- (2) A notice under subregulation (1) is to be given within 7 days after the order is made or refused.

Division 2 — Appeals

110F. Appeal against refusal to give approval

An appeal to the Commission under section 97XB or 97XQ is to be commenced by the filing in the office of the Registrar of an appeal notice in the form of Form 39.

110G. Service of appeal notice

- (1) If an appeal notice is filed the Registrar is to serve a copy of the notice on each of the following persons (“an interested person”) —
 - (a) the person with a mental disability if he is not the appellant;

- (b) the applicant in the application to which the appeal relates if he is not the appellant;
 - (c) the proposed representative; and
 - (d) an employer or a prospective employer to whom notice of the application to which the appeal relates was given.
- (2) The appeal is not to be listed for hearing until each interested person has been served with a copy of the appeal notice.

110H. Person served entitled but not required to be heard

- (1) An interested person is entitled to be heard at the hearing of the appeal, but it is not necessary for him to file any document in the proceedings or to appear or be heard at the hearing unless he wishes to do so.
- (2) If an interested person wishes to be heard at the hearing of the appeal he must —
- (a) file a notice of intention to be heard; and
 - (b) serve a copy of the notice on the appellant and any other interested person,
- within 14 days after he is served with a copy of the appeal notice.
- (3) An interested person who has not given notice under subregulation (2) is not to be heard at the hearing of the appeal without leave of the Commissioner hearing the appeal.

110I. Registrar to provide records to Commissioner

Where an appeal is brought against the refusal of the Registrar to approve a representative, the Registrar is to give to the Commissioner hearing the appeal the Registrar's file relating to the application to which the appeal relates.

5. Schedule amended

The Schedule is amended by inserting after Form 37 the following forms —

Form 38

[r. 110C]

Industrial Relations Act 1979

Part VID — Employer-employee agreements

section 97XI

**APPLICATION FOR AN ORDER REVOKING THE
APPROVAL OF A REPRESENTATIVE [AND REQUEST FOR
APPROVAL OF NEW REPRESENTATIVE]¹**

¹ delete words in brackets if approval of a new representative is not sought

To the Guardianship and Administration Board

SECTION A: APPLICATION

1. I HEREBY —

- (a) APPLY for an order under section 97XK of the Act revoking the order made —
- by the Registrar on under section [97WZ(1)] [97XN(1)] of the Act;
 - by the Guardianship and Administration Board on in exercise of the power in section 97XK(2) of the Act, approving the representative specified in Section D to act for [the represented person specified in Section E] *or* [for me]; and
- (b) ²REQUEST the Guardianship and Administration Board to exercise its jurisdiction under section 97XK(2) to appoint a new representative [for the represented person] *or* [for me].

2. I am making this application as the represented person.

OR

I am making this application on behalf of the represented person; and my relationship with him/her is

OR

³I am making this application as a person having a sufficient interest in the matter, *namely*

.....
(*set out the nature of the interest*)

and accordingly I ALSO APPLY for a determination under section 97XI(2)(b) that I have a sufficient interest to make this application.

3. ⁴I [have] [have not] informed the represented person that I am making this application.
4. The represented person [supports] [does not support] this application.
5. ⁵The consent of the person proposed for approval as the new representative is attached.
6. The person proposed for approval is —
- (a) the spouse of; or
 - (b) closely associated with⁶,
- the represented person specified in Section E.
- OR (*if application is made by the represented person*) —
- The person proposed for approval is —
- (a) my spouse; or
 - (b) closely associated with me⁷.

7. I certify that the information and details given in this application are true and correct.

Signature of applicant

² delete if approval of a new representative is not sought

³ this paragraph does not apply if the application is made by the represented person or a person acting on his or her behalf

⁴ delete this and the following paragraph if the application is made by the represented person

⁵ delete if a request is not made under paragraph 1(b)

⁶ paragraph (b) only applies if the proposed representative —

(a) regularly provides or arranges for domestic services or support to; or

(b) maintains a close personal relationship with,

the represented person (see s. 97XN(1)(d)(i) and 97WY(1)(b) and (2) of the Act)

⁷ see footnote 5

SECTION B: GROUND(S) AND REASONS⁸

1. The application for a revocation order is made on the following ground(s)⁹ —
 - (a) that [the represented person is] *or* [I am] no longer a person who is in general incapable, because of a mental disability, of making reasonable decisions on matters pertaining to an employer-employee relationship;
 - (b) that the representative has failed to act in [the best interests of the represented person] *or* [my best interests];
 - (c) that it is for some other reason no longer in [the interests of the represented person] *or* [my best interests] for the representative to act on [his or her] *or* [my] behalf.
2. The reason(s) for my belief that the ground(s) exist(s) (is) are — ¹⁰

⁸ see section 97XI(3) of the Act

⁹ delete any provision(s) that is (are) not applicable

¹⁰ state the reason(s) briefly and attach relevant documents if desired

SECTION C: DETAILS OF APPLICANT

Full name

Address

Date of birth¹¹

Tel no Fax no

Email address

¹¹ only required if the represented person is the applicant

SECTION D: DETAILS OF REPRESENTATIVE

Full name

Address

Tel no Fax no

Email address

SECTION E: DETAILS OF REPRESENTED PERSON¹²

Full name

Address

Date of birth

Male/female

Tel no Fax no

Email address

¹² delete this section if the application is made by the represented person

SECTION F: DETAILS OF PROPOSED NEW REPRESENTATIVE¹³

Full name
Address
Date of birth
Male/female
Tel no Fax no
Email address

¹³ delete this section if approval of a new representative is not sought

SECTION G: DETAILS OF EMPLOYER¹⁴

Full name
Address
Tel no Fax no
Email address

¹⁴ delete if there is no EEA in force

SECTION H: DETAILS OF ANY OTHER INTERESTED PERSON¹⁵

Full name
Address
Tel no Fax no
Email address
Relationship to the represented person
Have you informed the person of this application? yes/no
Does the person support the application? yes/no/don't know

¹⁵ this applies to any other person who has an interest in or close involvement with the represented person so that the Guardianship and Administration Board can consider if the person should receive notice of the hearing before the Board; if there is more than one such person attach a separate sheet

Form 39

[r. 110F]

Industrial Relations Act 1979
Part VID — Employer-employee agreements
sections 97XB and 97XQ

In the Western Australian Industrial Relations Commission

No. of 20

APPEAL AGAINST REFUSAL OF APPROVAL

To the Western Australian Industrial Relations Commission

I,
(name of appellant)

HEREBY APPEAL to the Commission against the refusal of the Registrar on
the day of 20

to approve
(full name of proposed representative)

to act as [my representative] [the representative of
]
(full name of person with a mental disability)

for the purposes of Part VID Division 9 of the Act.

This appeal is brought on the following grounds —

.....

(State the grounds relied on in support of the appeal; attach a separate page if necessary;

THE GROUNDS MUST BE RELATED TO, AND ADDRESS, THE REASONS GIVEN BY THE REGISTRAR FOR THE REFUSAL).

..... Date:
(signature of appellant)

A copy of this appeal notice is to be served on the following persons under regulation 110G of the *Industrial Relations Commission Regulations 1985* —

- the person with a mental disability named above¹
-²
(name of applicant in the application to which the appeal relates)
- the proposed representative named above
-
(name of any [prospective] employer who was given notice of the application to which the appeal relates)

¹ delete if the person with a mental disability is the appellant

² delete if the person who applied for approval is the appellant

.....
 Registrar

”.

Dated the 11th day of September 2002.

W. S. COLEMAN, Chief Commissioner,
 The Western Australian Industrial Relations Commission.

Industrial Relations Act 1979

Industrial Relations (Approval of Representatives) (Forms) Order 2002

Made by the Registrar of the Western Australian Industrial Relations Commission under sections 97WX(1) and 97XM(6).

1. Citation

This order may be cited as the *Industrial Relations (Approval of Representatives) (Forms) Order 2002*.

2. Commencement

This order comes into operation on the day on which section 4 of the *Labour Relations Reform Act 2002* comes into operation.

3. Forms prescribed

- (1) Forms 1 and 3 in the Schedule are prescribed for the purposes of section 97WX(1) of the Act.
- (2) Form 2 in the Schedule is prescribed for the purposes of section 97XM(6) of the Act.

Schedule — Forms

[cl. 3]

Form 1

Industrial Relations Act 1979

*Part VID — Employer-employee agreements
section 97WX(1)*

Application for approval of representative

Application Number

Application

by.....
(full name of applicant)

of.....
(full address)

.....
(postcode)

for the making of an order by the Registrar approving

.....
(full name of proposed representative)

of

(full address)

.....
(postcode)

to be the representative of

.....
(full name of person with a mental disability)

of

(full address)

.....
(postcode)

Application

1. I HEREBY APPLY to the Registrar for an order as described above.
2. The relationship between the proposed representative and the person with a mental disability is that of —
 - spouse *(copy of marriage certificate to be attached)*
 - close associate *(show details on the reverse or attach a separate statement)*
3. A certificate in the prescribed form signed by

.....
(name of medical practitioner)

is attached.

4. ¹The person with a mental disability has the prospect of being employed under an EEA by

.....
(name and address of the prospective employer)

..... Date:

(Signature of applicant)

¹*delete this paragraph if there is no particular prospective employer*

Consent

I, the proposed representative named above, consent to this application being made.

.....

Signed by the proposed representative in my presence —

.....

Registrar

Date:

Official use

Notice sent to —

- Guardianship and Administration Board on
- prospective employer (if any) on

REVERSE SIDE OF FORM 1

Details to be supplied where proposed representative is closely associated with the person with a mental disability

- (a) if the proposed representative regularly provides or arranges for domestic services and support to the person with a mental disability set out details below (or attach a separate sheet) —

.....

.....

.....

.....

.....

- (b) if the proposed representative maintains a close personal relationship with the person with a mental disability set out details below (or attach a separate sheet) —

.....

.....

.....

.....

.....

Form 2

Industrial Relations Act 1979

*Part VID — Employer-employee agreements
section 97XM(6)*

Application For Approval Of Representative In Place Of A Former Representative

Application Number

Application

by
(full name of applicant)

of
(full address)

.....
(postcode)

Signed by the proposed representative in my presence —

.....
Registrar

Date:

Official use

Notice sent to —

- Guardianship and Administration Board on
- [prospective] employer on

REVERSE SIDE OF FORM 2

Details to be supplied where proposed representative is closely associated with the person with a mental disability

- (a) if the proposed representative regularly provides or arranges for domestic services and support to the person with a mental disability set out details below (or attach a separate statement) —

.....

- (b) if the proposed representative maintains a close personal relationship with the person with a mental disability set out details below (or attach a separate statement) —

.....

Form 3

Industrial Relations Act 1979

*Part VID — Employer-employee agreements
section 97WX(1)*

Certificate in respect of person with a mental disability

I,
(full name – if handwritten use block letters)

of
(full address)

a medical practitioner registered under the *Medical Act 1894*,

HEREBY CERTIFY that —

1. I have examined
(full name of person concerned)
for the purposes of an application under section 97WV of the *Industrial Relations Act 1979* for the approval of a representative to act on his/her behalf in relation to an employer-employee agreement.
2. In my opinion he/she is in general incapable, because of a mental disability, of making reasonable decisions on matters pertaining to an employer-employee relationship.

.....
(signature of medical practitioner)

Date:

Dated the 11th day of September 2002.

J. SPURLING, Registrar of the
Western Australian Industrial Relations Commission.

Industrial Relations Act 1979

Industrial Relations (EEA Information Statement) Order 2002

Made by the Registrar under section 97UI of the Act.

1. Citation

This order may be cited as the *Industrial Relations (EEA Information Statement) Order 2002*.

2. Form of EEA information statement

The information statement that is to be given to employees under section 97UG(2)(b) of the Act is to be in the form set out in Schedule 1.

Schedule 1 — EEA information statement

Industrial Relations Act 1979

Section 97UI

EMPLOYER-EMPLOYEE AGREEMENT

INFORMATION STATEMENT

This EEA Information Statement as prescribed by the Registrar of the Western Australian Industrial Relations Commission, must be given by an employer to an employee prior to the making of an Employer-Employee Agreement. This statement does not and does not intend to, change the relevant provisions of the Industrial Relations Act. It is merely an information statement.

What is an Employer-Employee Agreement (EEA)?
97UA

An Employer-Employee agreement (EEA) is a formal, legally binding, written agreement between an individual employee and an employer, covering employment conditions which is registered by the Registrar of the WA Industrial Relations Commission (WAIRC). The agreement may cover any industrial matter that the employee and employer agree on, subject to meeting certain requirements outlined later.

No Disadvantage test

Before an EEA can be registered it must pass a “no disadvantage test” which means it must have provisions, which when judged overall, are not less than a comparable award.

<p><i>What is the effect of signing an EEA?</i></p> <p>97UE</p>	<p>When an employer and employee sign an EEA, and it is registered, the provisions of any relevant award, including an award that comes into operation after the EEA takes effect, do not apply, unless the EEA provides for them to do so. An EEA will also apply in lieu of an EBA (industrial agreement) that comes into effect after the EEA.</p> <p>An EEA forms part of the ordinary common law contract of employment, but any provisions less favourable than those prescribed in the Minimum Conditions of Employment Act have no effect.</p>
<p><i>Bargaining Agent</i></p> <p>97 UJ.</p> <p>97UK</p>	<p>Employees and employers may both choose to appoint bargaining agents to act on their behalf for the making and operation of an EEA, as well as representing the parties in disputes, including arbitration proceedings under EEA dispute settlement provisions.</p> <p>Special provisions allow employees with mental disabilities to appoint a representative to make an EEA. A representative may also choose to have a bargaining agent.</p> <p>A bargaining agent must be appointed in writing and a copy of the appointment given to the other party to the agreement. Any person can be appointed as a bargaining agent and an appointed bargaining agent must be accepted by the other party</p>
<p><i>When can an EEA be made?</i></p>	<p>Employers and employees can make an EEA in any employee-employer situation in WA, whether an award applies or not. However, an EEA cannot be made if an industrial agreement (an EBA) applies, including an EBA that has passed its term but continue in effect, or the employment is covered by federal arrangements.</p> <p>There is limited exemption for employees with disabilities to make EEAs whilst an EBA (industrial agreement) applies.</p>

<p><i>Choice of Employment Arrangements</i></p> <p>97XZ 97Y 97YA</p> <p>97YB(2)</p> <p>97YF</p>	<p>EEAs are voluntary arrangements and employees cannot be required to sign an EEA to gain employment, be transferred or promoted, or continue in employment.</p> <p>An employer must not advertise or offer employment or offer to promote or transfer a person, conditional on them agreeing to the making of an EEA. There is limited exemption with regard to employment of persons with disabilities.</p> <p>If an employer does offer employment, promotion or transfer on the basis of an EEA then they must also offer the employee the choice of employment or continued employment under an award or enterprise order (if any applies) or offer to include the same proposed EEA provisions in a common law contract of employment.</p> <p>An employer must not dismiss, refuse to promote, refuse to transfer or disadvantage an employee who refuses to enter or cancel an EEA. A penalty may be imposed if a person threatens or intimidates someone to enter or cancel an EEA.</p>
<p><i>Commencement and Expiry of an EEA</i></p> <p>97UQ 97UR</p> <p>97US</p> <p>97UT</p> <p>97UW</p>	<p>For a new employee, an EEA can commence on the day employment starts even before it is registered, but it must be lodged for registration within 21 days of signing in order to remain in effect. For existing employees, an EEA does not take effect until the day after the day the EEA is registered, unless the EEA has a later date.</p> <p>An EEA must specify an expiry date (maximum 3 years).</p> <p>When an EEA expires it does not, by that expiry alone, end the employment contract. At expiry of an EEA the employment continues, regulated by any relevant award or industrial agreement that may apply or, if neither are applicable, by a common law contract containing the same provisions as were in the EEA, except the term and dispute settling procedures.</p> <p>An EEA will automatically come to an end when the employment contract ends but the employment does not automatically end when an EEA expires or is cancelled.</p>
<p><i>Varying an EEA.</i></p> <p>97UU & 97UV</p>	<p>An EEA cannot be varied but it may be cancelled at any time if the parties agree to do so in writing.</p>
<p><i>What Must Be Included in an EEA?</i></p>	<p>An EEA must be in writing and must:</p> <ul style="list-style-type: none"> • Name both parties to the agreement • Specify if the employment is full time; part time; or casual

<p>97UL 97UM 97UN</p>	<ul style="list-style-type: none"> • Be signed by the employer and the employee or the employee's representative • Have the signatures witnessed by person over 18 , who is not a party to the agreement • For employees under 18, be countersigned by a parent or guardian, • Include an expiry date (an EEA has a maximum life of 3 years) • Contain a dispute resolution procedure • Have provisions not less than the minimum conditions of employment as prescribed by the Minimum Conditions of Employment Act 1993
<p><i>Dispute Resolution Procedure</i></p> <p>97UN 97UO 97UP</p>	<p>EEAs must contain dispute settlement procedures to deal with any question, dispute or difficulty that arises in the course of employment under the EEA. The dispute settlement procedure must nominate an arbitrator, or allow for an arbitrator to be nominated who is empowered to resolve the dispute. The arbitrator can be the WAIRC. Any settlement orders of any other arbitrator can be made enforceable if the arbitrator, on request of one of the parties, lodges them with the Commission. Neither the WAIRC nor any arbitrator can enforce an entitlement – that is a matter for the industrial magistrate.</p> <p>Model dispute resolution procedures will be included in the Industrial Relations (Employer-Employee Agreements) Regulations 2002.</p>
<p><i>Provision of Documents and Information by Employer</i></p> <p>97UG</p>	<p>Employers are required to provide specific information to an employee as part of the EEA making process. It is the employer's responsibility to provide an employee with:</p> <ul style="list-style-type: none"> • the proposed EEA • the EEA Information Statement (this statement) • a copy of any relevant award (or summary of the award approved by the Registrar) or any relevant order. "Relevant Orders" will be displayed on the Commission's website at ww.wairc.wa.gov.au <p>The above information must be provided at least:</p> <ul style="list-style-type: none"> • 5 days before the EEA is signed for new employees, and • 14 days before the EEA is signed for existing employees. <p>If the employer does not provide this information within the prescribed time frames, the EEA cannot be registered.</p>

Further Information:	<p>For further information on award entitlements and information regarding EEA's;</p> <p>Industrial Relations Division Department of Consumer and Employment Protection 2 Havelock Street WEST PERTH WA 6005</p>	
	<p>Wageline telephone enquiry service Department Telephone Fax Internet</p>	<p>1300 655 266 (08) 9222 7700 (08) 9222 7777 www.docep.wa.gov.au</p>
	<p>For specific lodgement and registration related issues, contact:</p> <p>Registry The Western Australian Industrial Relations Commission 111 St Georges Terrace PERTH WA 6000 on</p>	
	<p>Telephone Fax Internet</p>	<p>(08) 9420 4444 (08) 9420 4500 www.wairc.wa.gov.au.</p>

For advice (as opposed to information) on these matters you will need to consult a professional in the area as neither the Department mentioned, nor Commission officers can provide advice.

Industrial Relations Act 1979

Employee – Employer Agreements

REGISTRATION REQUIREMENTS CHECKLIST

An EEA can be considered for registration if

- It has been lodged with the Registrar of the WA Industrial Relations Commission no later than 21 days after it was signed by the parties
- No industrial agreement (EBA) applies
- It names the employer and employee
- Specifies if the employment is full time; part time; or casual
- It is signed by both parties and witnessed by an independent person (18 years of age or over)
- It is countersigned by parent or guardian if the employee is under 18 years of age
- It contains an adequate dispute resolution procedure
- It contains an expiry date not more than 3 years from date of effect
- The employer has provided the specified information to the employee and in the appropriate time frames
- It provides conditions no less favourable than those provided by the Minimum Conditions of Employment Act 1993
- It passes the No Disadvantage Test
- The employer did not offer employment or intimate to a new employee that he/she would be employed only if they agreed to the employment being under an EEA
- The employer did not offer an employee a transfer or promotion or intimate to the employee that he or she would be transferred or promoted only if he or she agreed to the employment being under an EEA
- Each party appears to understand their rights and obligations under the EEA
- No party or representative was persuaded by threats or intimidation to enter into the EEA
- Each party genuinely wishes to have the EEA registered

(Note: Some of the foregoing may be different for an EEA involving a person with a disability.)

Date: 19 August 2002

Registrar, Western Australian Industrial Relations Commission

WESTERN AUSTRALIAN INDUSTRIAL RELATIONS COMMISSION
INDUSTRIAL RELATIONS ACT, 1979

COMMISSION IN COURT SESSION**14 August 2002**

CORAM Chief Commissioner W S Coleman
Senior Commissioner A R Beech
Commissioner J F Gregor

SECTION 97VX

In accordance with section 97VX of the Industrial Relations Act 1979, as amended, the Commission in Court Session hereby issues the instrument setting out:

Guidelines and Principles for the Registrar to follow in determining whether an Employer Employee Agreement (EEA) passes the No Disadvantage Test (NDT)

1. Subject to the other requirements for registration of an EEA being in order pursuant to the terms of S.97VB and Schedule 4 of the Act, in applying the NDT the Registrar must in the first instance examine the EEA to see if:
 - (a) it confers on the employer a power to change any term or condition of the employment without the consent of the employee; and
 - (b) the employer could exercise the power in a way that would result, on balance, in a reduction in the overall entitlements of the employee.

The EEA is taken to disadvantage the employee if (a) and (b) are the case and no further consideration is necessary (S.97VS(3)).

The provisions in (a) and (b) above cannot be offset or in any way overcome by a written undertaking given by the employer.
2.
 - (a) In the absence of the impediment set out in Clause 1 the Registrar shall determine the award or relevant order that would otherwise extend to the employee.
 - (b) The award or relevant order in subclause 2(a) is that which but for the operation of the EEA would apply to the employee in his or her employment with the employer (S.97VS(4)).
 - (c) There may be an award which covers the employee's employment by operation of common rule. For the purpose of ss.97VS (2) and (4) in ascertaining whether this is the case the Registrar shall have regard to the scope of an award which covers the kind of work performed by the employee, ascertained by reference to the major and substantial duties of the employee and the purpose of his or her employment.
 - (d) The provisions of subclause 2(c) also apply for the purpose of the determination of the Registrar pursuant to S.97VT of the Act.
 - (e) A determination by the Registrar under S.97VT(2) is binding on the Registrar for the purpose of applying the NDT when the EEA concerned is lodged for registration, unless the Registrar considers that the circumstances existing at the time the determination was made have changed in a material way (S.97VT(3)).
 - (f) For the purpose of ss.97VS(2) and (4), there may be a relevant order as prescribed by the regulations which covers the employee's employment. This is to be determined by ascertaining whether the employer is a party to the order that covers the work performed by the employee.
3.
 - (a) If the Registrar is satisfied that there is no award that would otherwise extend to the employee in Clause 2 above, then any award, including an award under the Commonwealth Act, that the Registrar determines to be a comparable award and relevant order applies for the purpose of applying the NDT to see if the EEA disadvantages the employee.
 - (b) If in accordance with S.97VT(2) the Registrar has already determined that there is a comparable award or relevant order, that comparable award or relevant order will be relevant for the purposes of S.97VS.

A determination of a comparable award or relevant order by the Registrar for the purpose of applying the NDT when the EEA concerned is lodged, is binding on the Registrar for the purpose of applying the NDT unless the Registrar considers that the circumstances existing at the time when the determination was made have changed in a material way.
 - (c) In determining a comparable award the Registrar shall;
 - (i) look to awards of this Commission which cover the same kind of work being performed by the employee, ascertained by reference to the major and substantial duties of the employee and the purpose of his or her employment.

In this regard the Registrar shall look to awards with common rule application.
 - (ii) if a comparable award cannot be ascertained on the basis set out in (i) then there is recourse to enterprise awards. However, caution should be exercised in identifying an enterprise award which covers the kind of work performed by the employee, party to the proposed EEA.

In determining whether such an award should be a comparable award for the purpose of identifying the same kind of work, the Registrar shall take into account the industry and environment in which the work is undertaken and the context within which work is performed.

- (iii) In determining an award or comparable award, including an award under the Commonwealth Act, the Registrar shall not have regard to whether or not the award or comparable award has been varied for all safety net wage adjustments or variations to allowances, available under the National Wage Case or State Wage Case decisions.

Likewise for the purposes of determining an award or comparable award under the Commonwealth Act the Registrar shall not have regard to whether or not the award or comparable award has undergone award simplification pursuant to S.89A of the Workplace Relations Act (Commonwealth).

- (iv) However, if the Registrar considers that for the kind of work for which the employee is engaged, there is more than one award which may be determined to be a comparable award for the purposes of the NDT, the Registrar shall determine that award which has been varied for safety net adjustments and variations to allowances, in line with the State Wage Case decision or the National Wage Case decisions, as the case may be.

4. If the Registrar is unable to determine an award which would otherwise apply or an award, including an award under the Commonwealth Act, as a comparable award or relevant order either under S.97VS or S.97VT, the EEA is to be taken not to disadvantage the employee in relation to the terms and conditions of his or her employment.

5. (a) In comparing the entitlements of an employee under an EEA to the entitlements that would otherwise apply to the employee under an award, comparable award or a relevant order in the application of the NDT, the Registrar must take into account all relevant benefits, whether in the form of money or otherwise (S.97VU).

The relevant benefits may include:

- (i) Wages, allowances, entitlements and protections under an award, comparable award or relevant order.
 (ii) Training, promotional wage scales, wage or salary progression and competency based vocational training under an award, comparable award or relevant order.

- (b) The relevant benefits under an award, comparable award or relevant order to be taken into account for the purpose of applying the NDT are those which apply under the award, comparable award or relevant order over the same period as the term of the proposed EEA.

- (c) The relevant benefits are those which are ascertained by reference to the award, comparable award or relevant order and do not include any over award entitlements or benefits that accrue or may accrue to the employee under employment prior to the proposed EEA having effect.

6. (a) An EEA passes the NDT if it does not disadvantage the employee in relation to the terms and conditions of his/her employment. (S.97VS(1)).

For the Registrar to determine whether an EEA disadvantages an employee, the Registrar must ascertain "on balance" whether the overall entitlements have been reduced by referring to an award, comparable award or relevant order. (S.97VS(2)).

The Registrar is required to satisfy himself or herself that the EEA is no less favourable than the award, comparable award or relevant order to the employee when considered as a whole.

An EEA should not fail the test merely because a particular benefit, entitlement or protection is reduced, provided that on balance the overall package of terms and conditions is not reduced.

This will be a global rather than "line by line" approach. However, in considering whether the overall package of terms and conditions disadvantages the employee, a "line by line" assessment of terms and conditions may be necessary to form a judgement whether all increases and reductions, on balance, result in an overall disadvantage.

- (b) In applying the NDT it may be necessary for the Registrar to compute payments the employee would otherwise be entitled to under the award, comparable award or relevant order and compare those payments with payments that employment under the EEA would attract, having regard to the pattern of work on which the employee is engaged or would be engaged.

In this regard the Registrar shall inform himself or herself as to the pattern of work for the purpose of applying the NDT and shall take into account such matters as the hours of duty, the frequency and duration of overtime and the nature and incidence of allowances.

- (c) Any undertakings as to payments that are not a term of the EEA are not to be taken into account by the Registrar in the application of the NDT.
 - (d) In applying the NDT the Registrar shall not give separate consideration to matters of public interest but shall ensure that in balancing the overall package as a whole, the EEA has not sought to compensate for matters in a way which would derogate from the principal objects of the Act set out in section 6 and/or the rights of third parties.
Furthermore the Registrar shall satisfy himself or herself that particular terms and conditions of the award, comparable award or relevant order to apply for the purpose of the NDT are not less than particular terms and conditions set down in the Minimum Conditions of Employment Act. If this is the case, the term(s) and condition(s) under the Minimum Conditions of Employment Act shall operate in lieu of the particular term(s) and condition(s) in the award, comparable award or relevant order in applying the NDT.
 - (e) Where entitlements, benefits and protection of an employee under an award, comparable award or relevant order are being offset under the terms and conditions of employment of an EEA, the Registrar should satisfy himself or herself that if matters going to award standards, such as accrued sick leave or employment protection are involved, that in balancing the overall outcome the Registrar must take into account:
 - (i) the value of those benefits, entitlements and protections to the employee;
 - (ii) the costs of those benefits, entitlements and protections to the employer; and
 - (iii) community wage movements generally,to establish the value of the benefit, entitlement or protection being forgone or reduced.
 - (f) In most instances it will be necessary for the Registrar to have completed work sheets setting out computations and calculations involved in comparing the value and the outcome of matters taken into account, for the purpose of applying the NDT.
 - (g) If the award, comparable award or relevant order does not make provision for part time or casual employment, the EEA that regulates employment on that basis shall not fail the NDT for that reason alone.
7. In accordance with the terms of section 97VV of the Act, an EEA does not disadvantage an employee in relation to his or her employment by reason only of a reduction of the employees wages if:
- (i) the employee is eligible for the Commonwealth Supported Wage System; and
 - (ii) the EEA provides for the payment of wages to the employee at a rate that is not less than the rate set in accordance with that system for persons of a class that includes the employee.

COMMISSION IN COURT SESSION



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