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'Forward with Fairness' – a summary

The new federal Labor government has announced that one of its first tasks will be to legislate a transitional bill as the first part of its changes to the Work Choices legislation. The government hopes to have this transitional legislation in place by early 2008, but this will depend on the Senate – still in Coalition hands until July 2008 – being cooperative.

Overview

For employers, the big question is whether to make changes to the structure of your employment relationships now, or wait to see whether the changes in fact reflect what we have been told so far. Critical issues, once Labor legislates, include:

- it will generally not be possible to make new AWAs once the transitional legislation comes into operation (though there will be some short-term exceptions). Existing AWAs can continue until at least the end of 2010, or perhaps 2012
- employees will have the right to request new collective agreements, the parties will have to bargain in 'good faith', and agreements will have to pass a test rather like the old 'no-disadvantage test'
- there will be a larger list of minimum conditions applying to all employees (10 rather than 5), plus a wider list of issues which can be covered in awards. However, awards will be simpler and theoretically more flexible – meaning that there may be less need in some workplaces for enterprise agreements, and
- employees earning more than $100,000 will be outside the award system, which means that (subject to employers providing the 10 minimum conditions) they can be employed on common law contracts, even without the protection of AWAs.

If you would like assistance thinking through your strategic options, please contact a member of our employment and industrial relations law team.

Set out below – for those who want to engage with the detail – is a summary of the new government's plans for the industrial relations system, including the machinery of Fair Work Australia, the new safety net, the system of industrial agreements, and the dismissal claims system. Our summary is based largely on the policy documents that Labor published before the election, as well as public announcements since, and is also informed by recent discussions with Ron McCallum AO, recently retired Dean of the Faculty of Law and Chair of Industrial Relations Law at the University of Sydney.

It is clear that – although it wants to change some significant features of the Work Choices system – Labor intends to continue in the previous government's footsteps in relying on all available Constitutional powers to legislate national industrial relations laws. The government's aim in this area of law is to achieve nationally consistent industrial relations laws for the private sector – either through State Governments referring powers, or through other forms of cooperation (perhaps as was done with the Companies Code which preceded the Corporations Act). State governments, however, are to remain free to determine the industrial relations arrangements of their own employees and local government employees.

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employment brief

Fair Work Australia

Before focusing on the substance of the changes, it helps to understand Labor's proposed procedural/enforcement machine: Fair Work Australia. This is intended to be a 'one stop shop' to:

(a) provide practical information, advice and assistance (for example, it will have special responsibility for promoting working arrangements that assist work-family balance)

(b) settle grievances, and

(c) ensure compliance with laws.

Fair Work Australia will replace the AIRC, Australian Fair Pay Commission, Workplace Authority, Workplace Ombudsman and eventually the Australian Building and Construction Commission. Fair Work Australia will have offices throughout Australia, including regional centres. Fair Work Australia will include an inspectorate and hearing division – and presumably other separate internal divisions, but the details are still unclear.

It is intended that Fair Work Australia will act informally and, in most cases, lawyers will not be necessary.

The new safety net

Components of the proposed safety net include:

(a) 10 legislated national employment standards (similar to the AFPCS introduced with Work Choices)

(b) a further 10 minimum employment standards to be included in awards, and

(c) minimum wage setting by Fair Work Australia.

10 NATIONAL EMPLOYMENT STANDARDS

Some of the 10 standards are either the same as or very similar to the conditions currently set under the AFPCS; others are quite new, at least at federal legislative level. In summary, they are:

1 ordinary working hours of 38 hours of work (same as Work Choices)

2 parental leave:

- both parents to have the right to separate periods of up to 12 months of unpaid leave, and
- where families prefer one parent to take a longer period of leave, that parent will be entitled to request up to an additional 12 months' unpaid parental leave; employer may only refuse the request on reasonable business grounds (as per the Family Leave Test Case of 2006)

3 right for parents to request flexible work arrangements (it is somewhat unclear what this might mean) until their child reaches school age; employer may only refuse the request on reasonable business grounds (as per the Family Leave Test Case of 2006)

4 annual leave: four weeks' paid, plus one additional week for shift workers (same as Work Choices)

5 personal, carer's and compassionate leave (same as Work Choices):

- 10 days' paid personal and carer's leave each year
- two days' paid compassionate leave, and
- two days' unpaid personal leave

6 community service leave - for example:

- paid leave for jury service, and
- reasonable unpaid leave for emergency services duties

7 public holidays (as gazetted in each state) – right to be paid penalty rates 'or other compensation' as set out in awards

8 employers must provide all new employees with a Fair Work Information Statement, with prescribed information about rights and entitlements, including the right to join a union

9 termination of employment and redundancy:

- minimum period of notice of termination in accordance with scale (1-5 weeks depending on service and age) (same as Work Choices), and
- redundancy pay for employees employed in workplaces with 15 or more employees, calculated in accordance with the 2004 Redundancy Test Case (4-16 weeks' pay depending on service), and

10 long service leave – nationally consistent entitlements.

AWARDS

Awards are to build on and provide industry specific details for the 10 legislated minimum standards. Awards may only contain a further 10 minimum employment standards:

employment brief

1 minimum wages (including classifications and bonuses)

2 type of work performed (eg full-time/part-time/casual; flexible arrangements)

3 arrangements for when work is performed (hours, meal breaks, etc)

4 overtime rates

5 penalty rates

6 provisions for minimum annualised wage or salary arrangements as alternative to penalty rates

7 allowances

8 leave (including loadings)

9 superannuation, and

10 consultation, representation and dispute settling procedures.

Awards must also contain 'flexibility clauses' allowing for individual flexibility agreements between employers and employees for specific work situations.

Award coverage will not be extended to cover those who are historically award free, such as management employees. Further, employees earning more than $100,000 (indexed) will be award-free from 2010, but continue to be covered by the 10 National Employment Standards. It is unclear at this stage whether this will only apply to new employees, or will include existing employees as at the commencement date of the new system.

In settling and adjusting awards, Fair Work Australia will be required to:

(a) ensure awards are simple to understand

(b) promote efficient performance of work, and

(c) encourage work-family balance.

Fair Work Australia is to review awards every four years to ensure they remain relevant.

MINIMUM WAGES

Fair Work Australia will review minimum wages in an 'open and transparent' annual process. Fair Work Australia is to publish updated wage rates for all awards by 1 July each year, with the new rates to take effect from the first pay period on or after 1 July each year.

'Fairness, choice and representation at work'

Labor has pledged generally to give effect to:

(a) collective bargaining

(b) freedom of association

(c) right to representation, information and consultation in the workplace

(d) protection against unfair treatment (there is no guidance in the policy documents as to what this might mean)

(e) access to effective procedure to resolve grievances and disputes

(f) freedom from discrimination, and

(g) equal remuneration for work of equal value.

Rights of entry provisions will remain as under Work Choices. Between this and the retention of the laws relating to industrial action (see below) it seems unlikely that unions will be greatly empowered by the proposed changes.

COLLECTIVE AGREEMENTS

There will be no AWAs or other statutory individual contracts under the national system. The transitional arrangements are intended to provide certainty about existing AWAs, including:

(a) existing AWAs to continue until the end of their term, and

(b) Individual Transitional Employment Agreements (ITEAs) will be able to be utilised for new employees who join a business that currently utilises AWAs or to extend AWAs that have expired. ITEAs will only be able to be used until 31 December 2009.

The government envisages collective bargaining 'without excessive government rules and regulations'. The rules that will exist include:

- employer and union with coverage in a workplace will be able to voluntarily agree to bargain together
- employer and employees who are not union members will be able to voluntarily agree to collectively bargain together
- more than one employer and their employees or unions with coverage in the workplaces will be able to voluntarily agree to collectively bargain together for a single agreement
- if an employer commences a genuinely new business or undertaking and has not yet engaged

any employees, employer and a relevant union may bargain for a collective greenfields agreement for the new business. Alternatively, employees may be employed on or above the safety net

- for the first time in Australia, if the majority of employees want to bargain collectively, the employer will be required to bargain collectively with them in good faith. Employees and employers will be free to choose who represents them in collective bargaining. If the majority of employees at a workplace want to collectively bargain and 'this choice is not respected by their employer', Fair Work Australia will be able to determine the level of support for collective bargaining amongst employees, and
- bargaining must be conducted in good faith. This condition has never been imposed on all collective bargaining in Australia before, and it remains to be seen how it will impact on the process of agreement-making in practical terms.

Bargaining participants will be free to reach agreement on whatever matters suit them, the only requirements being that:

- terms of agreements must be lawful
- agreements must contain a 'flexibility clause' allowing for individual flexibility arrangements, and
- employees covered by an agreement must be better off overall against the safety net (collective agreements will not need to comply with every condition in the relevant award) (probably the same as the old 'no disadvantage' test).

An agreement will not be able to be made unless approved by a majority of employees voting (likely to be a simpler process than under Work Choices).

Collective agreements are to be approved by Fair Work Australia within seven days, 'on the papers'. Once approved, a collective agreement can operate for up to four years. Once in place, an agreement must be complied with, and there can be no industrial action during its term.

Industrial disputes

Where an agreement cannot be reached, bargaining participants will have a range of options including:

- agreeing to walk away
- jointly requesting Fair Work Australia to help them reach agreement or determine particular matters, or
- in certain circumstances, taking protected industrial action.

As under Work Choices, protected industrial action (approved by employees in a mandatory secret ballot) will only be available during good faith collective bargaining. If industrial action or threatened industrial action is causing or may cause significant harm to the wider economy or to the safety or welfare of the community, Fair Work Australia will have the power to end the industrial action and determine a settlement.

Similarly to Work Choices, it will remain unlawful for employers to pay employees strike pay. However, there will be no minimum four hour period.

Unfair dismissals

Labor plans to expand eligibility to bring an unfair dismissal claim so that:

- employees, employed by an employer of 15 or more employees, who have been employed for six months
- employees, employed by an employer of fewer than 15 employees, who have been employed for 12 months, and
- employees, whose employment is not covered by an award, earning annual remuneration of less than $101,300 (to be indexed)
- will be able to access unfair dismissal remedies.

There will no longer be the exemption from unfair dismissal remedies for an employer who terminates an employee's employment for 'operational reasons', except for employers of less than 15 employees.

A claim for unfair dismissal must be usually made within seven days of dismissal.

Fair Work Australia will review the application and call the parties together for a conference to determine the matter. There will be no formal written submissions, no cross examination and no hearing. If an employee has been dismissed unfairly, the remedy will be reinstatement, unless this is not in the interests of the employee or the employer's business. In those circumstances, compensation may be ordered – subject to a cap. One question arising from this proposal is whether it will result in a quicker process, and whether

matters are more or less likely to be settled for monetary compensation than at present – only time will tell.

The government is to develop, in consultation with small business, a Fair Dismissal Code. If a small business employer has genuinely complied with Code, dismissal will be considered fair. This is similar to a measure introduced by the Blair Government in the UK in 1999. In practice, in the UK, compliance with the code has also become a relevant consideration for large employers when defending unfair dismissal claims. If they can show that they have also complied with the code, the termination has generally been found to have been fair.

The transition period, and a timetable for change

The table on the following page is based on a timetable published by Labor in its 'Policy Implementation Plan' in August 2007, with additions based on recent announcements. There are a number of unresolved issues, on which we comment below (in italics).

The transition period, and a timetable for change

Late 2007	Transitional bill to be introduced, abolishing AWAs and making other transitional arrangements; expected to be implemented early 2008. *Will this have retrospective operation? Julia Gillard has said no, but unions have said they will put pressure on the government to change this view.* AWAs can be signed until transitional bill passes through parliament and run up to five years. These AWAs will be assessed under the fairness test. AWAs that expire during the two-year award simplification process can be replaced by ITEAs. *Given that new AWAs will be subject to the current Fairness Test, what will be the impact of the Workplace Authority's backlog in assessing agreements against this test? Employers may experience considerable delay before they have any certainty about their arrangements.* *Will Labor make other changes through amendments to the Regulations under the* Workplace Relations Act*? The power to do so – particularly in the area of prohibited content (for the purposes of agreement-making) and the exclusion of state laws (such as the unfair contracts jurisdiction of the NSW IR Act) – is considerable.*
Early 2008	Transitional legislation to become operational. Award simplification process begins – to take two years. *How will the simplification process affect employers whose employees' employment is still governed by NAPSAs and PSAs – the preserved state awards and agreements?*
2008-2009	Minister to consult with business advisory groups *(and others?)* before drafting legislation. Government to release draft of legislation for public comment. *What will happen to NAPSAs and PSAs in this period? Currently, they are due to expire on 26 March 2009 – will Labor extend that period, or change the rules in some other way?*
31 December 2009	Last possible date for ITEAs to expire. Awards cease to apply to (*new?*) employees earning over $100,000.
1 January 2010	New industrial relations system operational, including new simplified awards, safety net and Fair Work Australia.
31 January 2010	ABCC subsumed into Fair Work Australia.
31 December 2012	Last possible date for AWAs to expire. *Or is it 2010? In our view, either date is possible, based on recent statements on behalf of the government.*

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