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The changing landscape of industrial relations law in Australia – Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

Workplace advisory

February 2008 heralded a significant step in the new Labor government's workplace relations reform program as their *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (Cth) (Bill) was fast tracked through Parliament.

The Bill phases out elements of the WorkChoices system in preparation for the full implementation of the ALP's Forward with Fairness policy. A Senate enquiry will report back to Parliament by 17 March 2008, allowing the legislation to be passed by 20 March when Parliament rises for the Easter break.

The Bill

The Bill foreshadows various changes to the agreement-making options available in Australian workplaces. Further, it launches the ALP's award modernisation programme intended to create a new safety net of 'modern' awards, by requiring the Australian Industrial Relations Commission (AIRC) to consolidate existing awards and award content.

Key implications:

Agreement-making

- Agreements will again be subject to a no-disadvantage test (NDT) against relevant awards and most will not operate until they have been approved by the Workplace Authority Director (WAD).
- There are no timeframes for the WAD to approve agreements. This may cause initial delays as the WAD will be expected to process a large volume of new agreements and apply the NDT for the first time.
- Termination of collective agreements will be subject to a public interest test by the AIRC, resurrecting the system that prevailed pre-WorkChoices.
- Australian Workplace Agreements (AWAs) are replaced by Individual Transitional Employment Agreements (ITEAs), which may only be used in restricted circumstances.

Award modernisation

- New, modern awards will be created by consolidating existing awards and award content, and will predominantly operate on an industry-wide basis.
- Resolving different levels of benefit between awards that are to be consolidated may create tension. State-based differences in awards will also be removed within five years.
- The industry coverage rule creates the capacity for awards to apply to workplaces that are presently award-free.

Individual agreement-making options

From the date of passage of the Bill, employers will not be able to make new AWAs. AWAs that are already in operation, including those that were made before the commencement of the Bill or lodged within 14 days of the new legislation taking effect, can run their course unless terminated or replaced.

ITEAs provide a temporary option for those currently using AWAs to make a new individual statutory agreement. ITEAs will only be available to employers who, on 1 December 2007, employed at least one worker on a registered individual industrial agreement such as an AWA, a pre-WorkChoices AWA or a preserved state individual agreement. ITEAs will only operate until 31 December 2009.

Workplaces currently regulated by an individual bargaining strategy must assess the options open to them after this time, which are: common law contracts that comply with award conditions; or collective agreements.

No-disadvantage test (NDT)

The current Fairness Test will be replaced by the NDT, which will apply to all workplace agreements.

Unlike the Fairness Test, the NDT will be administered by the WAD rather than the AIRC. While the WAD can request any information that it considers appropriate, the process that the WAD uses to conduct the test is not mandated. Perhaps strangely, given the ALP's criticism of this issue under WorkChoices, the Bill does not require a hearing or consultation with the parties, nor is there an obvious avenue to appeal adverse findings. Further, while the Fairness Test calculated only monetary benefits, the NDT requires an overall assessment of monetary and non-monetary conditions, which is more subjective.

In order for an instrument to pass the NDT, the WAD must be satisfied that it would not result, on balance, in a reduction in the employees' overall terms and conditions of employment under any reference instrument relating to the employee(s), including a relevant collective agreement (for ITEAs) or an award (or if there is no award, the WAD can designate an appropriate award). Again, the parties do not have a right to be heard by the WAD in relation to the potential designation of an award to their industry for NDT purposes.

Operation of agreements

Most agreements will operate only after the WAD approves that it passes the NDT, including:

- employee collective agreements;
- union collective agreements; and
- ITEAs with existing employees.

The difficulty with this proposed arrangement is that there is no time limit mandated for the WAD to approve the agreement. Employers must be alert to potential difficulties if they follow the common practice of promising to backdate pay increases under the agreement, but suffer delays in receiving the benefit of the agreement.

In contrast, the following agreements will operate from the date of lodgement:

- ITEAs for new employees and those who have been employed for 14 days or less;
- employer greenfields agreements; and
- union greenfields agreements.

However, these agreements will cease to operate if they later fail the NDT and employers may be liable to pay compensation.



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Termination of agreements

Unilateral termination of collective agreements will no longer be permitted. Collective agreements will only be terminated by the AIRC on application, provided that the termination would not be contrary to the public interest. This reinstates the pre-WorkChoices position on this issue, which caused lengthy cases and delays in bargaining disputes. In addition, while awards will not apply during the operation of workplace agreements, they will be reinstated if the agreement is terminated.

Award modernisation

Under ALP policy, the safety net will be made up of minimum legislated terms and conditions called the National Employment Standards (NES) and 'modern awards' that will supplement the NES by providing additional content for particular industries.

The Bill substantially reinstates the position of awards and, significantly, the NDT makes awards the benchmark for agreement-making. Thus, it is important that the award safety net is properly calibrated to ensure there is capacity to achieve flexible arrangements through bargaining. The Minister will take an active role in directing the AIRC regarding the awards that are to be modernised, how this is to be implemented and the content that should be considered.

This process will replace the 'award simplification' and 'award rationalisation' process begun by the Coalition, and allows for a broader range of terms to be included in awards. Of course, the award modernisation process will encounter many of the same challenges that have been a feature of past attempts to achieve similar reform particularly in relation to reconciling the many different levels of benefit in existing award content. The award modernisation process is due to be completed by 31 December 2009.

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