

# Industrial Relations & Employment Alert

May 2007

## Labor's plan for a new workplace relations system

ALP Leader Kevin Rudd and Deputy Leader Julia Gillard have announced Labor's plan for a new workplace relations system. The plan is entitled "Forward with Fairness" and contains a mixture of measures which seek to undo some of the changes introduced by Work Choices, fundamentally alter particular aspects of the existing regime (not altered by Work Choices), and preserve the status quo in other respects.

### Big points to note

Labor will retain the current general structure of a unitary national system with a legislated safety net of minimum conditions able to be overlaid with collectively bargained agreements at enterprise level. Industrial action will remain lawful where associated with enterprise bargaining but will otherwise not be permitted. Minimum wages will be the subject of something like annual national wage cases. Unfair dismissal remedies will be available across the board subject to a 12 month qualifying period for small businesses and a six month qualifying period for others.

Things to notice particularly include:

- The Australian Industrial Relations Commission, the Australian Fair Pay Commission, the Australian Building and Construction Commission, the Office of the Employment Advocate and the Office of Workplace Services are all to go, and are to be replaced by a multi-faceted body called Fair Work Australia. Fair Work Australia will apparently have arbitral and administrative functions plus an independent judicial arm. The personnel of Fair Work Australia is unclear but is likely to include selected current AIRC and State industrial tribunal members.
- Collective union and collective employee enterprise agreements will be retained. So too will union greenfields agreements.

- AWAs will be abolished.
- Agreements will not be limited by the current rules around prohibited content. There will apparently be no limits on content, although it is unlikely that this will be literally true.
- Awards will be reinvigorated and will supplement the legislated safety net.
- Union representation, organising and bargaining rights will be enhanced.
- Parties will be able to be compelled to bargain in good faith for a collective agreement. This idea is likely to bring with it a body of processes and law developed in the USA. An obligation to bargain in good faith, for example, can bring an obligation to open the books to the other party so that it will understand the employer's finances.
- Intractable disputes will be amenable to settlement by compulsory arbitration.
- Speedy unfair dismissal remedies of reinstatement or monetary compensation – apparently to be dispensed in administrative conferences with no formal hearings – will be available across the board.

### What important things have not been mentioned?

Aspects of the current and former systems which have been important, but about which

## In brief

- Labor's plan for a new workplace relations system is entitled "Forward with Fairness".
- There are six key parts as presented by Labor. These are: there will be a unitary system; a new safety net of national employment standards, awards and minimum wages; freedom of association and the role of unions; introduction of collective agreements as a fundamental aspect of the system but no AWAs; creation of a new body called Fair Work Australia to replace current tribunals and agencies; and a revised unfair dismissal system.
- We set these out as well as commenting on aspects which are likely to be important but about which Labor has not yet commented.

Labor's announcements are silent, include the following:

- rights of entry for union officials in workplaces;
- preference for unionists in awards and agreements;
- capacity to include payroll deduction provisions for union fees in awards and agreements;
- the unlawful boycott provisions in sections 45D, 45DB, etc, of the *Trade Practices Act 1974*;
- the capacity to bring actions in tort against unions and union officials without a prior cooling off period or some certificate having first been obtained from an industrial tribunal;

- whether a “conveniently belong” or similar test will operate where unions seek registration or a change in eligibility rules;
- whether a bias towards industry rather than craft unions will be restored in the regulation of organisations;
- whether Fair Work Australia will have powers to resolve demarcation disputes between unions;
- anything about unfair work contracts or the recently enacted *Independent Contractors Act 2006*.

## Key aspects of the Labor plan

There are six key parts, as the ALP sees it, to the Labor plan.

### 1. A unitary system

Labor will work with the States to develop a uniform national industrial relations system for the private sector. Unspecified transitional arrangements will be put in place so that those currently covered by State industrial relations systems will not be disadvantaged as a result of the creation of a uniform system. Current arrangements for the public sector and local government will continue to apply (ie many such employees will continue to be covered by State industrial relations jurisdictions).

### 2. A new safety net

Labor will introduce a new safety net comprised of national employment standards, awards and minimum wages.

#### National employment standards

Labor will introduce 10 legislated national employment standards which will apply to all Australian employees. These minimum standards will be:

- **Hours of work** – The standard working week will be 38 hours. Employees may still be required to work reasonable additional hours.
- **Parental leave** – Both parents will have a right to separate periods of up to 12 months of unpaid

parental leave. One parent may request up to a further 12 months of unpaid parental leave (such requests only to be refused on reasonable business grounds).

- **Flexible work for parents** – Parents will have a right to request flexible work arrangements until their child reaches school age (such requests only to be refused on reasonable business grounds).
- **Annual leave** – All full-time non-casual employees will be guaranteed four weeks paid annual leave each year (part-time employees will have a pro-rated entitlement). Shift workers will be guaranteed five weeks paid annual leave each year.
- **Personal, carers and compassionate leave** – All full-time non-casual employees will be entitled to 10 days paid personal and carers leave each year (part time employees will have a pro-rated entitlement); two days paid compassionate leave on the death or serious illness of a family member or household member; and two days of unpaid personal leave where required for genuine caring purposes and family emergencies.
- **Community service leave** – Employees will be entitled to leave for prescribed community service activities (eg, paid leave for jury service; unpaid leave for emergency services duties).
- **Public holidays** – Employees will be entitled to the usual suite of national public holidays, and prescribed State public holidays. Where an employee works on a public holiday, he or she will be entitled to an appropriate penalty rate or alternative compensation (to be set out in the applicable award).
- **Information in the workplace** – Employers must provide all new employees with a prescribed “Fair Work Information Statement”. This statement will include information about employee rights and entitlements including the right to choose whether or not to be a member of a union and where to go for information and assistance.

- **Termination of employment & redundancy** – All employees will be entitled to notice of termination of between one and five weeks, depending on length of service and the age of the employee. Employees who are retrenched due to redundancy will also be entitled to redundancy pay of between zero and 12 weeks pay, depending on the employee’s length of service, provided the employee is employed in a workplace with 15 or more employees.
- **Long service leave** – Employees will have the benefit of new national long service leave entitlements. Transitional arrangements will be implemented to ensure that employees are not disadvantaged – ie long service leave entitlements contained in State laws or federal awards and agreements will continue to apply during the transitional period, and entitlements accrued under such instruments will be protected.

#### Awards

A further 10 minimum employment standards will be included in awards. These standards may be tailored to the needs of the industries, occupations or enterprises they cover, but may only deal with the following matters:

- Minimum wages including classifications and career structures, incentives and bonuses, wage rates and other arrangements for apprentices and trainees.
- Employment types – eg, permanent or casual, and details regarding flexible arrangements such as job-sharing.
- Work arrangements including hours of work, rostering, rest and meal breaks.
- Overtime rates.
- Penalty rates – eg, for work performed on weekends or public holidays, and shift work.
- Annualised wages and salary arrangements as an alternative to penalty rates, provided there are appropriate safeguards to

ensure individual employees are not disadvantaged.

- Allowances – eg for higher duties.
- Leave, leave loadings and leave arrangements.
- Superannuation.
- Consultation, representation and dispute settling procedures.

Award coverage will not be extended to historically award-free employees, such as managerial employees.

### Minimum wages

Fair Work Australia will review minimum wages once each year. Any adjustments to minimum wages will take effect from the first pay period on or after 1 July each year.

## 3. Freedom of association & the role of unions

### Freedom of association

All workers will continue to have the freedom to decide whether or not to join and be represented by a union, or participate in collective activities.

It will continue to be unlawful for anyone to try to stop a worker from exercising this freedom by threats, pressure, discrimination or victimisation.

It will continue to be unlawful to discriminate against a worker due to the nature of the industrial instrument which covers his or her employment.

Fair Work Australia will have the power to make orders to ensure freedom of association is protected.

### The role of unions

An employee will have the right to seek advice, assistance and representation from his or her union in the workplace. Workplace delegates will be able to represent their colleagues in the workplace.

## 4. Collective agreements

Collective agreements will be a fundamental aspect of the proposed new industrial relations system. Australian workplace agreements will not be part of the new system.

Neither will employer greenfields agreements. Unspecified transitional arrangements will be implemented.

### Types of agreements

Collective bargaining will be at the level of an “enterprise”, which may include a single business or employer; a group of related businesses operating as a single business; or a discrete undertaking, site or project. For example, an agreement might cover employees at a warehouse, a chain of shops, a manufacturing plant or a major construction project.

Collective agreements may be made by an employer (or employers) and a union with coverage in a workplace, or an employer (or employers) and employees in a workplace who are not union members.

Where a majority of employees wish to make a collective agreement, but the relevant employer does not, Fair Work Australia may require the employer to bargain with the employees in good faith.

An employer and a relevant union may negotiate a collective greenfields agreement.

Fair Work Australia may facilitate multi-employer collective bargaining for low paid employees or employees who have not historically been covered by collective agreements (eg, workers in the cleaning industry).

### Requirements

A collective agreement may only be made with the approval of a valid majority of employees.

Collective agreements must meet or exceed (it is not yet clear which) the safety net, and satisfy what is, in effect, a “no disadvantage test” as against the relevant award. Whether an agreement satisfies these requirements will be determined by Fair Work Australia.

Bargaining participants will be able to reach agreement on whatever matters they wish. It appears that parties will not be constrained by matters pertaining to the employment relationship or the existing set of “prohibited content”.

Bargaining must be conducted in “good faith”. This means that participants must attend and participate in meetings at reasonable times; disclose relevant information where commercially appropriate; respond to proposals; give genuine consideration to the needs of the other parties and provide reasons for responses; and refrain from capricious or unfair conduct, or conduct which undermines freedom of association or collective bargaining. Fair Work Australia may assist parties to bargain in good faith, and will have the power to make orders where parties are not bargaining in good faith.

Where participants cannot reach agreement, they can either walk away, request assistance from Fair Work Australia, or take protected industrial action.

### Approval process

Collective agreements will be approved by Fair Work Australia, on the papers, within seven days. Fair Work Australia will not approve a collective agreement if it determines that the agreement does not make employees better off overall, or was not genuinely agreed to by the workforce.

### Effect of agreements

Collective agreements will operate for up to four years. Collective agreements will override award entitlements.

Collective agreements must be complied with and there may be no industrial action during the term of an agreement.

### Industrial action

Industrial action during the life of a collective agreement, or in support of an industry wide agreement, or outside good faith bargaining processes, will not be protected.

Further, industrial action must be approved by employees via a secret ballot (to be supervised by Fair Work Australia) in order to be protected.

It will continue to be unlawful for an employer to pay strike pay.

Employers may take protected industrial action, including lock

outs, in response to industrial action by employees. It is not clear whether an employer may *only* take industrial action in response to employee industrial action.

Fair Work Australia will have the power to end industrial action and determine a settlement between the parties where such action is causing significant harm to the bargaining participants or is causing or may cause significant harm to the wider economy or the safety or welfare of the community.

## 5. A new body – Fair Work Australia

A new independent body called Fair Work Australia will be created. There will be offices in suburbs and regional centres, and workplace visits will be available.

The role of the Australian Industrial Relations Commission and State industrial tribunals, it appears, will be subsumed within that of Fair Work Australia.

The Australian Building and Construction Commission will be abolished.

Other bodies apparently to be discontinued include the Australian Fair Pay Commission, the Office of the Employment Advocate and the Office of Workplace Services.

Fair Work Australia will be responsible for a range of functions, including:

- assisting parties to resolve workplace grievances;
- resolving unfair and unlawful dismissal claims;

- facilitating collective bargaining and enforcing good faith bargaining;
- reviewing and approving collective agreements;
- settling, reviewing, simplifying and reducing the number of awards (to be reviewed every four years);
- adjusting minimum wages and award conditions;
- monitoring compliance with and ensuring the application of workplace laws, awards and agreements;
- regulating registered industrial organisations;
- conducting inquiries and recommending changes to the national employment standards where appropriate; and
- developing guidelines and giving practical advice to assist employers and employees to implement family friendly work practices.

Fair Work Australia's inspectorate will have specialist divisions to focus on persistent or pervasive unlawful behaviour in particular industries or sectors. The first divisions will be for the building industry and hospitality industry. However, the same rules and penalties will apply across all industries.

Fair Work Australia will include a *separate judicial division*, ie a court, to hear and determine unlawful dismissal claims, matters relating to the national employment standards and freedom of association.

## 6. Unfair dismissal

An employee will be able to bring an unfair dismissal claim only if he or she:

- is employed by an employer which employs 15 or more employees, and has been employed by that employer for six months or longer;
- is employed by an employer which employs fewer than 15 employees, and has been employed by that employer for 12 months or longer;
- earns less than \$98,200 per annum (to be indexed), if he or she is not covered by an award.

An employee must lodge an unfair dismissal claim within seven days of the dismissal.

Fair Work Australia will determine unfair dismissal claims and any appropriate remedies by way of a conference with the parties. There will be no hearing. Formal written submissions will not be required. The parties may have a representative or support person present at the conference; however, the parties will be required to respond directly to questions from Fair Work Australia.

A Fair Dismissal Code will be developed for small businesses. Where a small business has dismissed an employee in accordance with the Code, the dismissal will be considered to have been fair.

The remedy for an unfair dismissal will be reinstatement, or compensation (with an unspecified cap) where reinstatement is inappropriate.

Unlawful dismissal claims – eg those based on unlawful discrimination or other such prohibited grounds – will be heard and determined by the judicial division of Fair Work Australia.

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