

november
2007

workplace
relations

lawbulletin

□ ELECTION ISSUES

Forward with Fairness v WorkChoices: Will we see a brave new world or more of the same?

With an election upon us, clients have asked what a change of government will really mean for workplace relations? While there are no dead certainties in politics, it is clear that once the rhetoric is peeled away, an ALP government will not lead a new revolution in our workplaces.

An ALP victory...

The ALP policy is called "Forward with Fairness". Labor policy is to stick with the basic WorkChoices structure while constructing "fairer" restraints around some of the more controversial aspects of last year's reforms. They have signalled an intention to broaden the Workplace Relations Act significantly with a view to covering sole traders and partnerships currently exempt from WorkChoices.

Main features

1. Fair Work Australia (FWA)

FWA will be the new "one stop shop" for workplace relations. It will exercise all of the functions of the numerous federal government departments currently involved in the area. These include the Workplace Ombudsman, the Workplace Authority, the Office of Employment Advocate and the Australian Building and Construction Commissioner. FWA would enforce awards and legislative entitlements, performing the investigations and prosecutions. It would also provide advice and assistance to employees and employers and facilitate the approval and lodgement of workplace agreements.

In addition, FWA will incorporate a body not unlike the Australian Industrial Relations Commission. It would handle disputes, hear unfair dismissal applications and interpret awards and agreements. FWA will also be responsible for reviewing wage movements every 12 months in July.

2. Awards and Agreements

Labor will double the Australian Fair Pay and Conditions Standard to ten National Employment Standards. These will be:

- (i) A 38 hour week plus reasonable additional hours.
- (ii) 12 months unpaid parental leave with the ability to request an additional 12 months.
- (iii) The right to request flexible work for parents.
- (iv) 4 weeks annual leave per annum.

continued on page 2 >

in this issue

Forward with Fairness v WorkChoices: Will we see a brave new world or more of the same? **1**

Industrial relations in the building and construction industry **3**

A Coalition victory... **3**

in profile



Alice DeBoos has more than eight years experience in employment and industrial relations law. She has previously held roles inhouse for a major construction company and a trade union. Alice provides strategic advice in all aspects of employment law and industrial relations and is also a litigator with experience in the state and federal industrial jurisdictions as well as the civil jurisdictions and other tribunals including the Anti Discrimination Board and HREOC.

Alice's background in the construction industry has given her wide exposure to the complex range of laws which effect employment structures. The application of the National Code of Practice and recent legislative changes is an area where Alice has a particular focus. She has also developed a skill in providing training to clients in the various areas of her expertise.

forward with fairness > from page 1

- (v) Personal, Carer's and Compassionate Leave.
- (vi) Community service leave
- (vii) Guaranteed public holidays
- (viii) Information statement
- (ix) Notice and Redundancy Pay
- (x) Long Service Leave.

Awards

The ALP policy retains the current simplified award system. There will be 10 allowable matters and minimum wages will be returned to awards. This spells the end of the Australian Pay and Classification Scales.

Importantly, it is proposed that awards will contain flexibility provisions allowing for individual agreements to be made. In addition, awards will not apply to employees earning more than \$100,000 per year after 1 January 2010.

Agreements

The main features of the policy on agreement making are:

- All agreements will be subject to a "no disadvantage" test against the relevant award conditions.
- Collective agreements will contain a "flexibility arrangement" allowing an

employer and employee to reach a separate agreement.

- Employers may be compelled to negotiate with a union if one or more of its employees request it.

AWAs

AWAs will be abolished under a Labor government. They have consistently argued that the "flexibility arrangement" clauses in agreements and awards will provide the necessary scope for individual arrangements. What will happen to current AWAs?

- They will run their full nominal term.
- Transitional agreements will be available for employers using AWAs until 1 January 2010.

Unfair dismissal

The ALP policy is designed to enable more employees to access a remedy. However, this does not signal a return to the pre WorkChoices system.

Employees who have been dismissed can make a claim to FWA if:

1. They have been employed for more than 6 months by an employer with more than 15 employees; or
2. They have worked for more than

12 months for an employer with less than 15 employees.

A single conference will be held as soon as possible after a claim is lodged. This must be done within 7 days of termination. At this conference, FWA will try to settle the claim and if it cannot, a decision will be made on the spot. The remedy will be reinstatement.

At this hearing, there will be no cross examination or formal submissions and they have made it clear they do not want lawyers involved. While this may sound appealing, the hearing will be high risk for employers with only one opportunity in an informal setting to escape a reinstatement order.

Industrial action

There are no great changes in this area. It seems that all the current provisions will remain in place with the exception of the obligation to deduct a minimum of four hours for periods of industrial action. While the process to secure a secret ballot may change, the requirement to do so will remain, signalling a dramatic change from previous ALP policy.

How and when will the changes happen?

The ALP has released some details on how all these changes will happen. The fly in the ointment will be Senate. If the ALP wins control of the Senate in its own right state Senators do not start their term until 1 July 2008. The Government will need all its powers of persuasion to get any transitional bills through the Senate before then.

Assuming the ALP wins control of the Senate, its plan looks like this:

Early 2008	Transitional Bill introduced to Parliament. This will abolish AWAs and put transitional arrangements in place.
Late 2008–2009	A draft bill will be released and eventually make its way into Parliament.
1 January 2010	FWA commences New simplified awards commence Employees over \$100,000 exempt from awards
31 January 2010	ABCC will merge into FWA and the Building and Construction Improvement Act will cease.
All in time for the next election to be held before the end of 2010.	

□ ELECTION ISSUES

Industrial relations in the building and construction industry

The construction industry has copped the lion's share of industrial relations regulation over the past couple of years. It is fair to say that it is also the industry that has seen the most dramatic changes on the ground. The doomsayers have been busy saying that everything will go back to the 'bad old days' in the event of a Labor victory. In our view, this cannot be supported when the policy is examined. Building in a 'Rudd factor' contingency may be prudent risk management but it is likely to be money saved in the long run.

Key issues that will assist in maintaining the current environment include:

1. The Office of the Australian Building and Construction Commissioner (ABCC) will be around until 2010 and will remain a specialist unit within Fair Work Australia.
2. The current industrial action provisions will be maintained.
3. The Building and Construction Industry Improvement Act will continue until January 2010.

Significant questions remain

1. What will happen to the current prohibitions on project and industry agreements?
2. Will a Labor government abolish the National Code of Practice for the construction industry?

The Code has wielded significant changes in the industry. While the ALP has not said what they will do about it, they have not made any secret of their disapproval of the manner in which the current Government has used it.

It will not be unexpected to see a shift in atmosphere in the industry if there is change of government. This is particularly so in some traditionally more militant states such as Victoria and Western Australia.

However, with a very similar legal framework in place, maintaining peaceful construction sites will rely heavily on cooperative relationships and the continued vigilance of the ABCC.

□ ELECTION ISSUES

A Coalition victory...

The Coalition has released its election policy on industrial relations, confirming that it remains committed to the changes implemented by WorkChoices. At the heart of its policy remains the continual development of simplified federal awards to replace NAPASAs (Notional Agreement Preserving State Awards).

The Coalition policy has identified a number of new 'family friendly' initiatives. These include:

- providing both parents with the ability to take up to 52 weeks unpaid parental leave, rather than the period being split between the parents;
- employees being able to double their annual leave entitlement at half pay, with their employer's agreement;
- grandparents being able to take one week of unpaid leave on the birth of a grandchild; and
- grandparents being entitled to 52 weeks unpaid leave upon the birth of a grandchild if they work in a business with more than 100 employees.

The Coalition's industrial relations policy also provides for increases in the funding for the Workplace Authority and the Office of the Australian Building and Construction Commissioner (ABCC). In the construction industry, the Coalition also intends to require union officials to notify the ABCC when they wish to visit construction sites.

The wash up

This is an election where workplace relations is front and centre. The dramatic nature of the changes wrought by WorkChoices has guaranteed the continued focus on the workplace right up to the campaign.

continued > page 4

a coalition victory > from page 3

However, despite being a big-ticket item, an ALP government would retain much of the WorkChoices system including federal coverage for all workers, industrial action restrictions, simplified awards and guaranteed minimum standards. Far from overturning WorkChoices, Labor looks like it will build on its foundation and soften some of its blows.

Whatever happens on 24 November, this is an area to watch. We will continue to keep you updated of developments and proposals. Ebsworth & Ebsworth has developed information sessions covering the detail of policy changes and the likely impact on your business and industry.

Alice DeBoos Senior Associate
e: adeboos@ebsworth.com.au

If you would like more information on anything we have discussed in the Bulletin, please contact Alice DeBoos, Senior Associate, t: 61 2 9234 2430.

For more information, please contact a member of our workplace relations team:

Paul Gordon Partner	e: pgordon@ebsworth.com.au	t: 61 7 3303 8824
Alice DeBoos Senior Associate	e: adeboos@ebsworth.com.au	t: 61 2 9234 2430
Jonathan Hadley Senior Associate	e: jhadley@ebsworth.com.au	t: 61 7 3303 8905
Peter Kennedy Partner	e: pkennedy@ebsworth.com.au	t: 61 2 9234 2376
Andrew Saxton Partner	e: asaxton@ebsworth.com.au	t: 61 2 9234 2311
Ross Williams Partner	e: rwilliams@ebsworth.com.au	t: 61 7 3303 8882

sydney melbourne brisbane

Ebsworth & Ebsworth Lawyers respects your privacy and allows only limited use and disclosure of personal information. A copy of our privacy policy is available on our website. This publication is not legal advice. Professional advice should be sought before applying the information to your particular circumstances. We regularly produce publications to keep our clients up-to-date with important legal developments. If you do not wish to receive this publication in the future or if you would like to receive other publications, please email: publications@ebsworth.com.au. This information may not be reproduced in whole or in part, copied or distributed in any form without the express written permission of the firm. The content may only be reproduced for personal use or as otherwise prescribed under the *Copyright Act 1968*. To obtain permission to use this material for other purposes, email publications@ebsworth.com.au © Ebsworth & Ebsworth Lawyers 2007