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Employment Alert

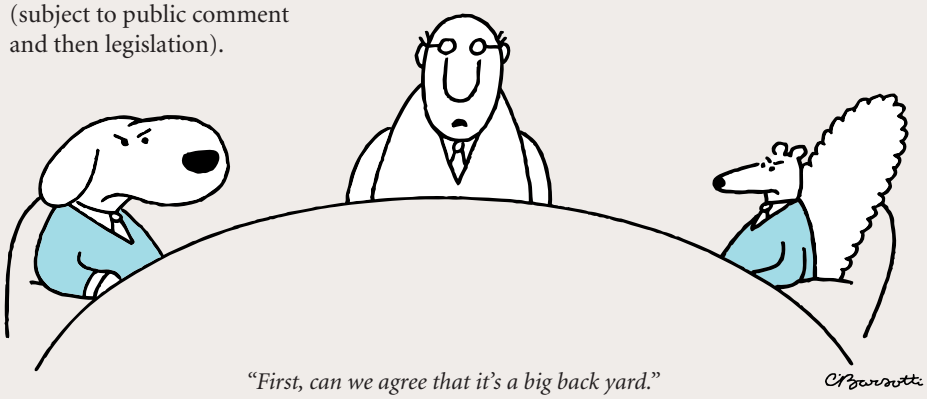
FEBRUARY 2008

Government introduces transitional workplace laws and announces details of national employment standards

THE RUDD LABOR GOVERNMENT HAS INTRODUCED ITS TRANSITIONAL WORKPLACE LAWS AND ANNOUNCED DETAILS OF THE INTENDED NATIONAL EMPLOYMENT STANDARDS, AS THE FIRST STEPS IN IMPLEMENTATION OF ITS *FORWARD WITH FAIRNESS* POLICY (SEE OUR MAY, AUGUST AND NOVEMBER 2007 EMPLOYMENT ALERTS AT WWW.BLAKEDAWSON.COM).

The Minister for Employment and Workplace Relations, Julia Gillard, introduced into Parliament on 13 February 2008 the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008* (Cth) (Transition Bill) which makes key amendments for the phasing out of Australian Workplace Agreements (AWAs), the creation of new transitional individual agreements, the establishment of a no-disadvantage test for new workplace agreements and arrangements for the award modernisation process. The transitional arrangements will remain in place until 31 December 2009 when they will be replaced with the new "Forward with Fairness" regime.

On 14 February 2008, the Minister announced details of the ten national employment standards that will form a new statutory safety net of conditions applicable to all employees effective from 1 January 2010 (subject to public comment and then legislation).



"First, can we agree that it's a big back yard."

New workplace agreement laws

AWAs AND ITEAs

- New AWAs cannot be made once the Transition Bill commences, now likely to be not before mid 2008. AWAs made before then will be able to continue to operate under the current AWA laws, subject to some exceptions.
- The Government has also announced that it will not make any AWAs within the Australian Public Service from 13 February 2008.
- A new type of individual agreement called an "individual transitional employment agreement" (ITEA) will become available to an employer who employed at least one person on an AWA (or other statutory individual agreement) as at 1 December 2007. If this requirement is satisfied then the employer may make an ITEA with a new employee (who has never previously been employed by the employer) or an existing employee who is employed under an AWA (or other statutory individual agreement). ITEAs can be made until 31 December 2009 and must have a nominal expiry date no later than 31 December 2009, although would continue to operate after this until terminated. An ITEA can be made with a new employee before the employment commences (ie as a condition of employment) or within 14 days of the employment commencing.

NO-DISADVANTAGE TEST AND APPROVAL PROCESS

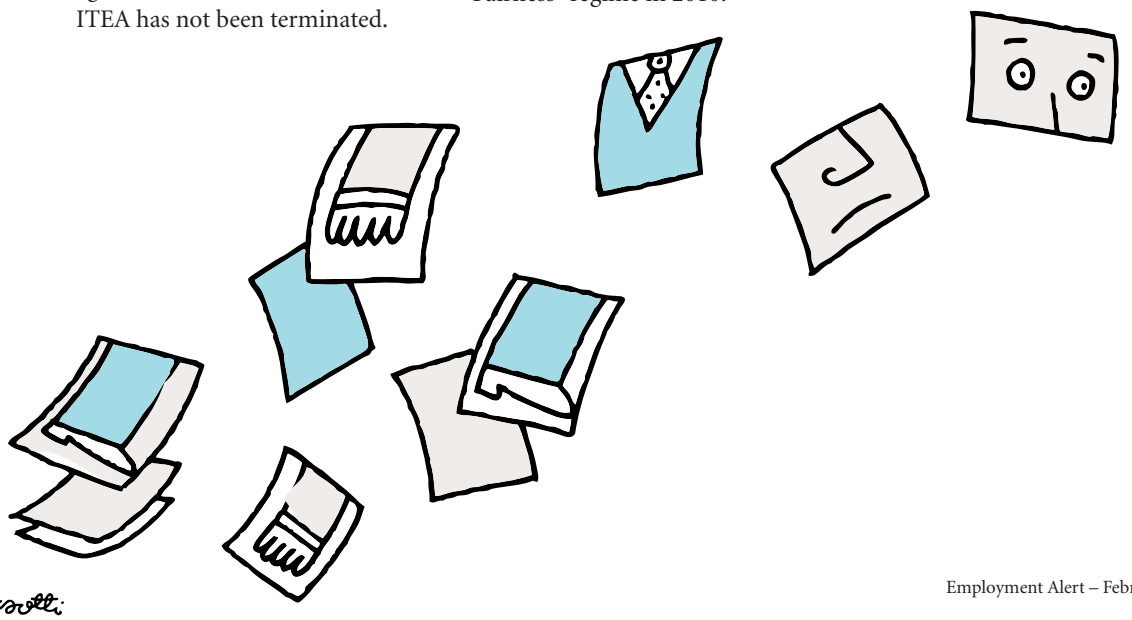
- A new "no-disadvantage test" will apply when making any collective workplace agreement or an ITEA. The no-disadvantage test replaces the current "fairness test" and is assessed by the Workplace Authority Director. For a collective agreement to pass the test, the Workplace Authority Director must be satisfied the agreement would not on balance reduce employees' terms and conditions of employment when compared to the applicable award or if there is not one, an appropriate designated award. The no-disadvantage test is potentially higher in the case of an ITEA because the comparison is made against an otherwise applicable collective agreement, or if there is not one, the applicable award or an appropriate designated award.
- New collective agreements and ITEAs for existing employees will only come into operation seven days after the Workplace Authority Director has approved them, having been satisfied they meet the no-disadvantage test. Until approved the previous applicable industrial instrument would continue to apply. ITEAs for new employees and greenfields agreements (employer and union) would commence operation when lodged; however compensation may be payable to employees covered by these agreements if they subsequently fail the no-disadvantage test.
- The Workplace Authority Director may approve a workplace agreement which fails the no-disadvantage test where there are exceptional circumstances (such as part of a business recovery) and where it is not contrary to the public interest. The Workplace Authority Director must publish reasons when making such a decision. A maximum nominal term of two years applies in this case.
- The Workplace Authority Director must notify the parties if the workplace agreement fails the no-disadvantage test, and provide advice on how the workplace agreement may be varied to meet the test. For employer greenfields agreements that fail the no-disadvantage test, an employer may lodge a written undertaking rather than a variation.

VARIATION, EXTENSION AND TERMINATION OF AGREEMENTS

- Collective agreements (current and future) will not be able to be unilaterally terminated after the expiry of their nominal term, but may be terminated by the Australian Industrial Relations Commission (AIRC) upon application by a party and following a hearing. The AIRC may terminate an agreement if it would not be contrary to the public interest.
- AWAs will continue to be able to be unilaterally terminated on 90 days' notice after expiry of their nominal term, and this will also apply to ITEAs. Employees on an AWA or ITEA that has passed its nominal expiry date will be able to participate in the approval process to be covered by a new collective agreement or variation to a collective agreement, even if the AWA or ITEA has not been terminated.
- AWAs will not be able to be varied once the Transition Bill commences.
- The Transition Bill repeals current provisions preventing an award or previous workplace agreement applying to employees when the current workplace agreement (including AWAs) is terminated.
- The AIRC has been given the power to vary or extend the nominal expiry date (by up to three years) of a pre-reform certified agreement, upon application, where there is agreement between the parties and where no industrial action has been organised, threatened or engaged in, nor application made for a secret ballot order, after 13 February 2008. The no-disadvantage test applies to variations to agreements. This is designed to allow a single transition to the "Forward with Fairness" regime in 2010.

OTHER CHANGES

- The Transition Bill will repeal restrictions on workplace agreements incorporating terms from other industrial instruments.
- The Transition Bill removes the concept of "protected award conditions" because of the broader no disadvantage test.
- Notional agreements preserving State awards (NAPSAs) will now remain in operation until 31 December 2009, or later date prescribed by regulation. NAPSAs were previously to cease operating on 27 March 2009.
- The Transition Bill will repeal the requirement for employers to provide a copy of the Workplace Relations Fact Sheet to employees.



Award modernisation

- Awards will be modernised to include new industry specific content to supplement the legislated safety net of ten national employment standards. The Transition Bill will repeal the current provisions concerning award rationalisation and simplification.
- The AIRC will be given the task of modernising awards by 31 December 2009. The President will be required to establish one or more Full Benches to undertake the modernisation process, and may delegate certain tasks to individual members.
- The Full Bench is to consult with employers and unions on the types of industries and/or occupations to be covered by modernised awards, and the priority of those awards. Priority is to be given to industries/occupations with significant coverage by AWAs and NAPSAs. The President is to release a timetable for the award modernisation process by 30 June 2008.
- Arising out of the award modernisation process, awards are to cover ten allowable award matters, namely minimum wages, types of employment, hours of work and rest breaks, overtime rates, penalty rates, annualised wages or salaries, allowances, leave and leave loadings, superannuation and procedures for dispute settlement. Modernised awards may also include industry specific detail about the ten national employment standards, but may not exclude or operate inconsistently with the standards.
- The Transition Bill prohibits certain terms from being included in modernised awards, including terms which contravene freedom of association provisions, authorise right of entry, are discriminatory, or contain State-based differences (although there is a five year transition period for the latter). Long service leave provisions must not be included as it is intended, subject to consultation with the States, that the national employment standards will provide for a national long service leave standard.
- The Commission is required to develop an award flexibility clause for inclusion in all awards. A proposed clause is to be developed by July 2008.
- The new award system will be confined to employees who earn less than $100,000 per annum (guaranteed ordinary earnings). Where an employee earning more than $100,000 per annum (as at 1 January 2010) is covered by an award, the employee will be able to choose whether to stay under the award or negotiate with the employer and effectively opt-out of the award.
- The Minister's proposed award modernisation request to the AIRC states that the creation of new awards is not intended to extend award coverage to managerial or other senior employees who have traditionally been award free, result in high income employees being covered, disadvantage employees, increase costs for employers nor result in the modification of enterprise awards.

National Employment Standards

THE GOVERNMENT INTENDS TO INTRODUCE A NEW STATUTORY SAFETY NET OF TEN NATIONAL EMPLOYMENT STANDARDS APPLICABLE TO ALL EMPLOYEES. THESE WILL REPLACE THE CONDITIONS CONTAINED IN THE CURRENT AUSTRALIAN FAIR PAY AND CONDITIONS STANDARD. THE GOVERNMENT HAS RELEASED DRAFT STANDARDS FOR PUBLIC COMMENT (SUBMISSIONS ARE SOUGHT BY 4 APRIL 2008). THE STANDARDS ARE:

HOURS OF WORK

The standard working week will be 38 hours. Employees may still be required to work reasonable additional hours; however employees will have the right to refuse unreasonable additional hours. Whether an employee is entitled to receive overtime payments is specified as a relevant factor, amongst others, in determining whether the additional hours are reasonable. Averaging of hours may be dealt with in an award.

PARENTAL LEAVE

Both parents will have a right to separate periods of up to 12 months of unpaid parental leave (with three weeks able to be taken at the same time immediately after a birth/adoption). One parent may request up to a further 12 months of unpaid parental leave. Such requests are only to be refused on reasonable business grounds. The employee is guaranteed a return to her/his original position, or if it is unavailable, to an available one nearest in status and pay for which the employee qualified.

FLEXIBLE WORK FOR PARENTS

Parents will have a right to request flexible work arrangements until their child reaches school age. Such requests are only to be refused on reasonable business grounds, with reasons provided to the employee in writing.

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) calculated at base rate of pay. Shift workers will be guaranteed five week paid annual leave each year. An employer must not unreasonably refuse to agree to a request by an employee to take paid leave. An award may deal with the cashing out of annual leave or requiring employees to take annual leave in certain circumstances (eg an annual closure).

PERSONAL, CARER'S AND COMPASSIONATE LEAVE

All full-time non-casual employees will be entitled to 10 days paid personal and carer's leave each year (part time employees will have a pro-rated entitlement) calculated at base rate of pay; two days paid compassionate leave on each occasion of the death or serious illness or injury of a family or household member; and two days of unpaid personal leave, on each occasion, where required for genuine caring purposes and family emergencies.

COMMUNITY SERVICE LEAVE

Employees will be entitled to leave for prescribed community service activities, including paid leave for jury service; reasonable unpaid leave for emergency services duties and other community service as prescribed by regulation.

PUBLIC HOLIDAYS

Employees will be entitled to the usual suite of national public holidays, and prescribed State public holidays. An employer may require an employee to work on a public holiday if the request is reasonable; however the employee may reasonably refuse such a request. Factors to determine "reasonableness" are provided in the standard.

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 national employment standards, modernised awards, agreement making, freedom of association and the role of Fair Work Australia.

NOTICE OF TERMINATION OF EMPLOYMENT AND 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 16 weeks pay, depending on the employee's length of service, provided the employee is employed in a workplace with 15 or more employees. Employees are not entitled to redundancy pay in transmission of business situations.

LONG SERVICE LEAVE

The Government is developing a new national long service leave entitlement. Until this is finalised, transitional arrangements will be implemented to ensure that employees are not disadvantaged. 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.

"Damn, I think I ate Plan B."

Australian Fair Pay Commission

The Transition Bill limits the role of the Australian Fair Pay Commission (AFPC) to conducting annual minimum wage reviews only, and then adjusting the Federal Minimum Wage rate and rates in existing Australian Pay and Classification Scales. The national employment standards and award modernisation process are intended to replace the Australian Pay and Classification Scales. From 2010 the role of the AFPC will be undertaken by a new statutory body, Fair Work Australia. Reviews underway on pay and classification scales and junior rates will be discontinued.

Progression of Transition Bill and National Employment Standards

The Coalition will continue to control the Senate until July 2008 when the Senators elected at the November 2007 election will commence their terms. Whilst the Labor Government is seeking to press its "mandate" for workplace reforms and pass the Transition Bill before July 2008, the Senate has referred the Transition Bill to a Senate committee to review the proposed laws and report back by 28 April 2008.

The Transition Bill may therefore be delayed until after 30 June 2008. It may also be amended.

The national employment standards are currently in exposure draft for public consultation. The Government intends to finalise the standards by June 2008 to provide them to the AIRC to undertake the award modernisation process. The standards will come into force in 2010 when the Forward with Fairness laws are intended to commence.

The Government intends to introduce its substantive workplace relations reforms into Parliament later in 2008. An extensive consultation program is proposed.

Key points for employers

The progress of the Transition Bill will depend on the positions taken by the Coalition and minor parties/independents in the Senate, and may not be passed (with or without amendments) until after 1 July 2008.

AWAs will not be able to be made following the commencement of the Bill, although a new type of individual agreement (ITEA) will be available for some employers. A no-disadvantage test will apply to new collective agreements and ITEAs made or varied after the commencement of the Transition Bill.

Employers need to consider the impact of the Transition Bill in offering AWAs or making collective agreements prior to the Bill being passed.

Employers subject to pre-reform certified agreements may consider varying and extending their operation for up to three years, so as to have them continue until after the introduction of the 'Forward with Fairness' laws in 2010.

The AIRC is to undertake the award modernisation process by 31 December 2009. For employers with industrial arrangements that rely upon awards (Federal and NAPSAs), other than enterprise awards, appropriate steps need to be taken to protect their interests in the award modernisation process.

The national employment standards have been released by the Government as an exposure draft for public comment. Employers should consider whether the standards would result in any unintended consequences.

Whilst the national employment standards once finalised will not come into force until 2010, employers need to consider their contents when developing workplace agreements, employment contracts and policies.

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