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Employment Matters

PIPER ALDERMAN'S EMPLOYMENT RELATIONS SECTION SPECIALISES IN ASSISTING EMPLOYERS TO DEAL WITH EMPLOYMENT AND INDUSTRIAL ISSUES. WE HOPE THAT YOU WILL FIND THE ARTICLES IN EMPLOYMENT MATTERS RELEVANT TO YOUR BUSINESS.

Forward with Fairness: Labor's First Steps

Having campaigned successfully against the Work Choices reforms at the 2007 federal election, the Rudd Government has begun the process of moving towards its own proposed new system of workplace regulation. In the new Parliament's first sitting week, two significant initiatives have been unveiled.

One is the Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008. As the name makes clear, it is a Bill to amend the *Workplace Relations Act 1996* (WR Act). If there is to be a complete new Act, that will come later in the year when the Rudd Government introduces the rest of its proposed reforms. Those reforms will include the restoration of unfair dismissal rights, the imposition of new obligations of good faith in bargaining, and the creation of the "one-stop" agency Fair Work Australia.

The other new arrival is a draft of Labor's proposed new National Employment Standards (NES), which will ultimately replace the existing Australian Fair Pay and Conditions Standard in providing basic statutory conditions for all federal system employees.

The Transition Bill

The Transition Bill is a lengthy one, running to 125 pages, and it is accompanied by a 99-page Explanatory Memorandum. That makes for a lot of detail through which to pore. But at first blush there seem to be no real surprises.

As widely foreshadowed, the main objectives of the Transition Bill are to:

> preclude the further offering of Australian Workplace Agreements (AWAs);

> allow employers who had been using AWAs to offer Individual Transitional Employment Agreements (ITEAs), but only until the end of 2009 and subject to a no-disadvantage test (NDT);

> reinstitute the NDT for collective agreements;

> commence what is expected to be a 2-year process of reviewing and simplifying awards; and

> abolish the requirement on employers to distribute the Workplace Relations Fact Sheet to new employees (the NES will ultimately impose a requirement to provide a Fair Work Information Statement, but not until 2010).

There are a number of proposals or features which go beyond what had previously been announced, though they are consistent with the broad thrust of the policies Labor took to the 2007 election. Some emerged in response to the process of consultation that the government undertook with employer groups, unions and the States.

The following is a brief summary of some of the main features of the Bill.

Abolition of AWAs

As soon as the Bill is passed and takes effect, federal system employers will be barred from offering or making any further AWAs. Agreements made before that date will still be able to operate until terminated, but it will not be possible to vary them by consent.

ITEAs

Employers will only be able to offer an ITEA if, as at 1 December 2007, they employed at least one employee on an AWA or a preserved individual State agreement.

Assuming that requirement is satisfied, they will be able to offer an ITEA to any new employee. Indeed, just as with AWAs, they could make signing an ITEA a condition of getting a job. But an existing employee could only be offered an ITEA if they were already covered by some form of statutory individual agreement.

An ITEA will not be allowed to have a nominal expiry date any later than 31 December 2009. But as with other workplace agreements, it could continue to operate after that expiry date until it was terminated.

The no-disadvantage test restored

The Bill proposes the abolition of the fairness test introduced last year by the Howard Government. Instead, agreements will have to satisfy a new NDT, to be administered (at least for the time being) by the Workplace Authority. As with the fairness test, there appears to be no provision for any appeal against a decision given by the Authority.

For a collective agreement, the Authority would have to be satisfied that the agreement "would not result, on balance, in a reduction in the overall terms and conditions of employment of the employees under any reference instrument relating to one or more of the employees".

That instrument might be an award or NAPSA (notional agreement preserving State awards) that would otherwise have applied to the employee. In the absence of such an instrument, the Authority would have to designate an appropriate federal award, though not an enterprise award.

A similar test is proposed for ITEAs, except that the concept of a "reference instrument" is broadened to include a collective agreement that might otherwise apply to the employee.

Just as with the pre-Work Choices NDT, the Authority will be able to approve union or employee collective agreements that do not satisfy the basic test, provided there are "exceptional circumstances" and approval would not be contrary to the public interest. But the nominal term of such an agreement will be limited to two years. There is no provision for an ITEA or greenfields agreement to be approved on such a basis.

When agreements take effect

For a new employee, an ITEA will be able to take effect as soon as it is lodged with the Authority, though if it subsequently fails the NDT it will cease to operate and compensation may be payable. The same will be true of greenfields agreements.

By contrast, union collective agreements, employee collective agreements and ITEAs offered to existing employees will not be able to take effect unless and until approved by the Authority.

Content of agreements

The rules restricting workplace agreements from "calling up content" from other instruments will be abolished. However, the prohibited content restrictions will continue, at least for now.

Termination of expired agreements

Where a "pre-transition" AWA reaches its nominal expiry date, it will still be possible for either party to terminate it unilaterally by giving 90 days' notice. The same will apply in relation to an ITEA.

But unless such a right is provided in the agreement itself, this will no longer be possible in relation to a collective agreement. Instead the pre-Work Choices process will apply, where an application must be made to the AIRC.

When an agreement is terminated, the whole of any relevant award will apply, not just the "protected conditions" in that award. The concept of such conditions is to be abandoned.

New rules for pre-reform certified agreements

Parties to pre-reform (ie, pre-Work Choices) certified agreements will now be able to agree, with the permission of the AIRC, to vary the content of their agreement. They will also be able, again subject to the AIRC's approval, to extend the nominal expiry date for up to three years from the date of the AIRC's order.

Award modernisation

The government might have chosen to pursue its plans for the reform of federal awards through the existing (but never used) provisions about award rationalisation and simplification in Part 10 of the WR Act. Instead, they are to be repealed and replaced by new provisions relating to award "modernisation".

Despite the change in language, the new process will essentially be the same as that envisaged by the current Act. It will be commenced by the making of a formal request by the Minister to the President of the AIRC. A draft of such a request appears in the Explanatory Memorandum to the Bill.

On the basis of that request, coupled with the new provisions, it is apparent that the government intends that:

> there should be many fewer awards than at present, though enterprise awards are to be left untouched;

> it will be possible for "modern awards" to operate by way of common rule;

> award coverage is not to be extended to managerial or other classes of employees who have historically been award-free;

> modern awards will still be able to contain "State-based differences", but only for the first five years of their operation;

> the new awards are to contain flexibility provisions that allow employers and individual employees to vary the operation of selected provisions, provided no employee is disadvantaged;

> there is to be a particular freedom for employees earning at least $100,000 a year to contract out of awards, though there does not yet appear to be any legislative provision to that effect.

As far as timing is concerned, the government envisages the AIRC having identified by the end of June 2008 certain priority industries or occupations for award modernisation. Ideally, modern awards should have been made for those sectors by the end of this year, with all other awards to be reviewed by the end of 2009.

The government has also indicated its intention that, as far as possible, the modernisation process should not either disadvantage employees or increase costs for employers. Whether it is possible to hold to those objectives and achieve anything meaningful remains to be seen.

Content of "modern awards"

Modern awards will once again be able to regulate minimum wages, though for the time being the Fair Pay Commission will continue to be responsible for adjusting those rates. Other permissible inclusions will be provisions relating to:

> types of employment;

> arrangements for when work is performed;

> overtime and penalty rates (including for shiftworkers);

> annualised wage or salary arrangements;

> allowances;

> leave and leave loadings;

> superannuation (the 30 June 2008 cut-off provision for existing award terms will be removed);

> procedures for consultation, representation and dispute settlement; and

> pay and conditions for outworkers.

Awards will also be able to provide "industry-specific detail" in relation to the new National Employment Standards that are discussed below. But provisions relating to union rights of entry will continue to be barred, as will any terms that breach the freedom of association provisions in Part 16 of the WR Act.

Extension of NAPSAs

NAPSAs (notional agreements preserving State awards) will now be able to last until the end of 2009, where under the current WR Act they are due to expire in March 2009.

This will give the AIRC more time to make new federal awards to cover the large number of federal system employees (including for instance many clerical or shop workers) who used to be covered by State awards.

What will happen to the Bill

The immediate fate of the Transition Bill is in the hands of the Liberal and National Parties, who retain control of the Senate until July. They are insisting on the Senate conducting an inquiry, which is not scheduled to report until the end of April. On present indications, the Coalition (and indeed probably the Democrats) will ultimately accept most of the Bill, but insist on the retention of AWAs.

In that event, what the government will need to decide is whether to hold out until the new Senate sits in July and then seek to negotiate with the Greens, Family First and SA independent Nick Xenophon. Such a delay would have particular implications for the government's plans for the modernisation of awards, which are already on a tight timetable. Its alternative would be to make a deal with the Opposition to retain AWAs for now, but subject to a no-disadvantage test.

The Draft National Employment Standards

The government is seeking to consult over the new NES, which it hopes to finalise by June 2008. They are not intended to take formal effect until 1 January 2010.

It has released a discussion paper, which can be accessed at http://workplace.gov.au/workplace/Publications/WorkplaceRelations/DiscussionpaperonNationalEmploymentStandards.htm Comments are sought by 4 April 2008.

The proposed NES will deal with four of the five matters covered by the existing Standard: that is, maximum working hours, annual leave, personal leave and parental leave. Minimum wage rates, on the other hand, are to be left to awards. Whether there will remain any general minimum wage for award-free workers is unclear at this point.

The NES will also cover requests for flexible working arrangements, community service leave, long service leave, public holidays, notice of termination and redundancy pay, and the Fair Work Information Statement.

Maximum working hours

The maximum will remain 38 hours per week, plus "reasonable additional hours". But unlike the current Standard, there will be no provision in the legislation for averaging of the 38 hours over a period greater than a week. Awards will be able to include averaging provisions, but it will remain necessary to ensure that the total hours worked in any given week are not unreasonable.

Requests for flexible working arrangements

Employees will be able to request such arrangements to assist them in caring for pre-school age children.

Employers will be permitted to refuse, but only if they have "reasonable business grounds". The discussion paper states that no such arrangements will be forced on employers, but it is unclear what sanctions (if any) will apply in the case of an unreasonable refusal.

Parental leave

The minimum entitlements to unpaid parental leave will remain much as they are at present. Two spouses will each be entitled to take a year of leave at separate times; alternatively, one spouse can ask for an extra year's leave, a request that can only be rejected on reasonable business grounds.

Annual leave

The basic entitlement will remain four weeks' leave. Any provision for shiftworkers to receive an extra week will have to be specified in an award, rather than appearing in the legislation itself. Likewise, any arrangements for the cashing out of leave, or for employers to direct employees to take leave at certain times, will depend on the terms of each applicable award. Presumably, therefore, cashing out will effectively be prohibited for non-award employees, except on termination of employment.

Personal leave

The current entitlements are for ten days' paid personal/carer's leave per year, plus two days' paid compassionate leave and two days' unpaid carer's leave as needed. These will remain, but with far less specification as to details such as notification and justification. Once again, awards will be allowed to provide industry-specific detail.

Community service leave

In the first instance, this will cover two rights: to unpaid leave for any reasonable absence associated with voluntary emergency management activities (such as firefighting); and leave for jury service. Where a non-casual employee is absent on jury duty, their employer will have to make up any difference between their ordinary pay and any compensation they may receive from the government. The discussion paper indicates, however, that some exemption may be made for small businesses in this regard.

Long service leave

The government is committed to working with the States and Territories to develop a new national standard on long service leave. For the time being, the draft NES simply states that employees must receive whatever entitlement is specified in an applicable award or NAPSA, though that will not generally apply where a workplace agreement is in place.

Public holidays

The basic entitlement will be the same as at present — that is, an employee will be entitled to a day off on a public holiday, unless their employer has reasonable grounds for requesting them to work. One change is that there will be a statutory right to be paid for any absence on a public holiday, at least at the employee's ordinary rate of pay.

Notice of termination and redundancy pay

The notice of termination standard will be the same as that currently specified in section 661 of the WR Act. For the first time, however, at least at the federal level, there will be a universal entitlement to redundancy pay — subject to the usual exclusions for casuals, those on fixed term contracts, those who transfer to a new employer with continuity of service, etc. There will also be an exemption for businesses with less than 15 employees. The entitlements will be as specified by the AIRC in the 2004 Redundancy Case, with a maximum of 16 weeks' pay.

Fair Work Information Statement

As proposed, this will contain basic details as to the NES, awards, agreement-making, the right to freedom of association and the role of Fair Work Australia.

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