



Law at Work Report

Devine Law at Work

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Workplace Law Reform — The Year Ahead

Having been the subject of significant change in the past two years, Australian workplace law is set for further change in the near future following the election of the Rudd Labor Government late last year.



What appears in this Law at Work Report is a guide to what Labor is proposing in respect of each of the key components of federal workplace relations law. Given the ideological banter from both parties in the past two years, you may be surprised to find that many of the changes introduced by the then Howard Coalition Government, both in 1996 with the introduction of the *Workplace Relations Act 1996* (the Act) and then in 2006 with the *Work Choices* amendments, will either be retained by Labor or changed minimally. The most notable examples of what will *not* change include:

- the retention of a national industrial relations system;
- a simplified approach to making workplace agreements;
- the simplification of awards;
- restrictions on industrial action; and,
- standard conditions for all employees, with the 5 conditions introduced in 2006 retained and another 5 added to them.

The areas of most significant change will apply to:

- Australian Workplace Agreements (“AWA’s), first introduced in 1996, will be abolished going forward;
- unfair dismissal (not only in terms of eligibility but also in terms of how claims are determined); and
- the creation of a one-stop workplace relations shop, Fair Work Australia, with independent administrative and judicial functions—the election of the Rudd Labor Government appears to be the end of the line for the Australian Industrial Relations Commission, with the absorption of what remained of its functions after the Work Choices amendments into Fair Work Australia.

Labor is seeking to make changes to federal industrial legislation in its first 100 days of Government. However to achieve this goal it must first face the challenge of a Senate dominated until 30 June 2008 by Coalition Senators. The extent to which the Coalition Senators will impede Labor in achieving its goal is yet to be seen. Labor may find that achieving its goal of harmonising industrial and related laws across Australia is a little easier, making the most of the significant opportunity presented by the fact that, for now, all Governments are now held by the Labor Party.

On the following pages we will discuss each of the key components of Labor’s reform policy ‘Forward with Fairness’.



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National System

The Work Choices changes of March 2006 saw the large majority of Australian employers drawn into the federal system. Sole traders and partnerships were *not* included in the federal system. Labor will seek to extend this to all private sectors Australian employers via cooperation with the State and Territory Labor governments, either in the form of referral of powers or through harmonisation of laws.

Australian Industrial Relations Commission

The Australian Industrial Relations Commission is likely to be rolled over into a new government authority, Fair Work Australia.

Awards

Labor will introduce the following minimum standards for each federal award:

- **Minimum wages** – including classifications, career structures, incentive based payments, bonuses, wage rates, other arrangements for apprentices and trainees.
- **Employment status** (e.g. permanent, casual) **and facilitation of flexible work arrangements.**
- **Hours** – when work is performed, including hours, rostering, rest and meal breaks.
- **Overtime rates.**
- **Penalty rates** – for employees working “unsocial”, “irregular or unpredictable” hours, on weekends, public holidays or as shift workers.
- **Minimum annualised wage or salary arrangements** as an alternative to penalty rates, having regard to occupation, industry or enterprise patterns of work.
- **Allowances**, including reimbursement of expenses, higher duties and disability based payments.
- **Leave, leave loadings** and the arrangements for taking leave.
- **Superannuation.**
- **Consultation, representation and dispute settling procedures.**

Apart from these 10 conditions, awards will only be permitted to include content which builds on and provides industry detail on the legislated minimum conditions: *see Standard Conditions*. Awards will be reviewed every 4 years.

Government authorities and an independent umpire

The Fair Pay Commission (wages), the Workplace Authority (workplace agreements), the Workplace Ombudsman (regulator) and the Australian Industrial Relations Commission (judicial) will be rolled into one central agency, Fair Work Australia. Labor is proposing that Fair Work Australia will have separate and independent administrative and judicial divisions.



Further, it will: provide information and advice to employers and employees; undertake formal and informal dispute resolution; contain an inspectorate to monitor compliance; and, contain a judicial division.

Industrial Action

Protected industrial action, during a period of negotiation for a workplace agreement, subject to notification and other procedural requirements, will remain. The prohibition against industrial action other than in these circumstances will remain.

Fair Work Australia will be empowered to terminate any industrial action which is held to be causing or threatening to cause significant damage to the Australian economy.

The requirement for secret ballots on whether industrial action should be taken will not change and strike pay will continue to be prohibited.

Annual Leave

There will be no change to this entitlement to 4 weeks annual leave per year for a full-time employee and five weeks for a shiftworker.

Community Service Leave

Employees will be entitled to leave for prescribed community activities. For example, paid leave for jury leave and reasonable unpaid leave for emergency services duties.

Compassionate Leave

The entitlement to 2 days paid leave on each occasion that a family or household member is ill or the subject of an emergency will not change.

Long Service Leave

Historically an entitlement sourced from State and Territory legislation and a leave entitlement which was *not* drawn into the *Workplace Relations Act 1996* (Cth) when the Work Choices amendments of March 2006 took effect (unlike annual, personal and parental leave), Labor proposes to work with the State and Territory governments to develop nationally consistent long service leave entitlements.

Parental Leave

The entitlement to take up to 12 months unpaid parental leave will not change. However, under Labor, each parent of a child



will be entitled to a separate period of leave of 12 months, in place of the current entitlement to share up to 12 months.

Where parents decide they would prefer one parent to have up to two years unpaid parental leave, that parent will have the right to request his/her employer to extend his/her entitlement from 12 months to two years. An employer will only be entitled to refuse such a request on reasonable business grounds.

Labor will also introduce the entitlement to request flexible work arrangements until an employee's child reaches school age.

Personal Leave (Sick and Carer's)

A well established award entitlement which was drawn into the Act when the Work Choices amendments took effect in 2006, this entitlement will remain unchanged.

Maximum Ordinary Hours

The Work Choices amendments of March 2006 mandated 38 hours per week plus "reasonable additional hours".

Under the Labor Government the standard working week will be 38 hours. While an employer will be permitted to require an employee to work additional hours, they will be prohibited from requiring an employee to work "unreasonable additional hours".

Public Holidays

The entitlement to have paid leave on a public holiday will not change. Employees who work on a public holiday will be entitled to a penalty rate or other compensation.

Standard Conditions

The Work Choices amendments of March 2006 introduced five standard conditions to apply to *all* employees. The Labor Government will make some changes to the current five standard conditions and extend the standard conditions to 10 in all.

The 10 conditions which will apply to *all* employees will be:

- hours of work;
- parental leave;
- flexible work for parents;
- annual leave;
- personal, carers and compassionate leave;
- community service leave;
- public holidays;
- information in the workplace;
- termination of employment and redundancy;
- long service leave.

Mandatory Employee Information

The Workplace Relations Fact Sheet introduced by the then Coalition Government in May 2007 will be replaced by a Fair Work Information Statement.

OH&S and Workers Compensation

Labor will see to harmonise Federal and State OH&S legislation and workers compensation legislation; particularly with respect to definitions and procedural and reporting requirements. Unions are likely to resume a more significant role in consultation.

Labor will establish a new national body to oversee workplace safety.

There will be a moratorium on private sector employers seeking a licence to self-insure under federal workers compensation legislation and becoming subject to the federal OH&S legislation.

Redundancy/ Severance Pay

The original Termination, Change and Redundancy ("TCR") cases in 1989 established the entitlement of award employees to severance pay in the event of the termination of their employment following the making redundant of the position held by them, provided that they were employed by employers with 15 or more employees. In 2004, in the third TCR case, the AIRC extended the entitlement to severance pay to all award employees, regardless of the size of their employer. In March 2006 the Work Choices amendments saw the entitlement to severance pay wound back to award employees of employers with 15 or more employees.

Labor will make no changes to this entitlement. The Work Choices 'correction' to the entitlement will remain intact.

Unfair Dismissal

The Work Choices changes of March 2006 reduced eligibility to employees of employers with fewer than 100 employees. Labor will restore the remedy to those excluded from it in March 2006.

Under Labor, eligibility for this remedy will apply to:

- an employee of an employer who has 15 or more employees who has been employed for 6 or more months;
- an employee of an employer who has 15 or fewer employees who has been employed for 12 or more months;
- if the employee is not covered by an award, the employee must be earning less than the remuneration threshold applicable at the date of dismissal.



Unfair dismissal claims will be determined in the course of a conference conducted by Fair Work Australia.



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There will be no formal submissions, no cross examination and no hearing.

Reinstatement will remain the primary remedy where it is held that a dismissal is unfair.

Unlawful Termination

This remedy, which prohibits termination of employment of an employee for a prohibited reason (e.g. race, sex, disability, age, trade union membership) will remain. However claims will be determined by Fair Work Australia and not the Federal Court or Federal Magistrate's Court.

Wages

Fair Work Australia will determine wages, replacing the Australian Fair Pay Commission. A wage decision shall be made each year. Fair Work Australia will publish updated wage rates for all awards by 1 July each year.

Workplace Agreements

AWA's (individual workplace agreements) are to be abolished, subject to transitional provisions. Existing AWA's will run their course.

Workplaces which need a transitional period to move away from individual workplace agreements may be permitted to make Individual Transitional Employment Agreements (expiring on 31 December 2009).

Collective agreements will continue, whether made with unions or employees. Where a majority of employees want a collective agreement an employer may be required by Fair Work Australia to negotiate same. The Fairness Test, which was introduced in May 2007 by the then Coalition Government, will be replaced with a test which determines fairness of proposed agreement by reference to relevant award. To be approved, the conditions in the workplace agreement must result in the employees covered by it being better off overall.

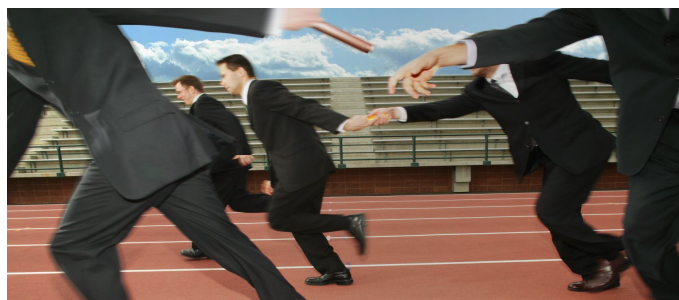
In addition to the requirement that the employees be better off overall, the only other requirements for a collective agreement to be approved are: the terms are lawful; bargaining is conducted in good faith; and, the majority of employees vote in favour of the agreement.

Fair Work Australia will approve collective agreements within seven days and will make its decision 'on the papers'.

Pattern bargaining will remain prohibited. However there will be some scope for multiple-employer agreements to be entered into.

Recent Developments

The Minister for Employment and Workplace Relations, The Hon Julia Gillard MP, introduced the *Workplace Relations Amendment (Transition to Forward with Fairness) Bill* into the Federal Parliament on **13 February 2008**.



The objects of the Bill include:

- the abolition of AWA's;
- the reinstatement of a no-disadvantage test for workplace agreements; and
- the establishment of an award modernisation process.

It is unclear at this stage when this Bill will be passed, in its current or an amended form, as much depends on how it is received by the Senate which, for the time being, retains the influence of the Coalition parties.

The other legislative changes proposed by Labor will be contained in a more substantive Bill to be introduced later this year.

Conclusion

The process of further change in Australian workplace law has begun and is likely to continue for the next few years.

On the one hand, there will be a distinct change in focus away from individual workplace agreements, which have been in place since 1996, towards collective agreements and awards. In this way Labor will be restoring the regulatory environment which existed immediately prior to introduction of the Act 12 years ago, at least with respect to industrial instruments.

On the other hand, while it may not openly admit to doing so, Labor clearly has found some merit in the approach to industrial regulation which characterised the Howard Government. In particular, Labor is adopting the Howard Government's priorities with respect to:

- a national system of industrial regulation;
- reducing the role of AIRC;
- reducing the influence of unions, in particular through the strict limits placed on industrial action;
- standard conditions for all permanent employees; and
- simplification of awards.

While AWA's will soon be gone, many other features of industrial regulation will remain relatively intact. Labor is continuing down the path of a streamlined and relatively straightforward system of workplace regulation and that can only be a good thing for employers and employees the subject of the federal system.



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