Forward with Fairness - Implications for employers

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The industrial landscape has been subject to large pendulum swings with each change of Government for the last 60 years. Each time the laws are changed the Government spends huge amounts of tax payer funds to justify and/or educate the public about the changes, and lawyers make huge amounts of money explaining and exploiting the changes. This process of continual change causes lots of heart ache for the real users of our industrial system, employers and employees. Changes to the structure of the system are not always accompanied by increases in productivity.

From 1 July 2009, and for the third time in less than 20 years we will have a substantially new industrial relations system.

So what will be the implications for employers?

At this point I need to point out I am a member of the Committee on Industrial Relations which is a subcommittee of the National Workplace Relations Consultative Committee comprising of representatives of peak employer and union bodies. As a COIL 'crash test dummy' I recently reviewed the draft legislation over coffee and pizza for a period of 10 days from 7 to 17 October in Canberra. As part of the COIL process I had to execute a confidentiality agreement. Whilst I only got a quick read before I signed my life away the bit about breaching the Crimes Act did stick in my memory.

I would like to stress at this point my paper today is based solely on publications and comments made on the public record.

Fortunately there is considerable information about the content of the new legislation on the public record.

We have the Forward with Fairness Policy, the Forward with Fairness Implementation Plan, the National Employment Standards, Julia Gillard's National Press Club Speech of 17 September 2008, the Fact Sheets, the 10 October 2008 Government Submission to the AIRC Award Modernization Process, Senate Estimate discussions and some recent print and electronic media commentary.

In respect of the recent speculation on the content of the Bill, I am sure that you will understand that I am not in a position to comment on the accuracy of media reports.

Today I will make some general comments about the forthcoming legislation, and then look at the impact of the National Employment Standards, modern awards, agreement making provisions including bargaining in good faith, agreement content as well as the review into the proposal to axe the Australian Building and Construction Commission.

General Comments

I expect that the new system may be more bug free than WorkChoices. WorkChoices was the subject of continual amendment; you will recall when the Government decided to make the minimum standards retrospective and when the new fairness test replaced the previous no disadvantage test.

The contrast between the consultation process undertaken by the previous Government in respect of WorkChoices and this Government's approach to the Forward with Fairness legislation is like chalk and cheese.

Deputy Prime Minister Julia Gillard is a grand master of the art of consultation and that, combined with her knowledge of industrial relations, enables her to engage stakeholders with an understanding that few other Workplace Relations Ministers could hope to achieve.

However as every workplace relations practitioner knows only too well consultation does not mean agreement.

The Deputy Prime Minister is alive to the need to ensure that the Forward with Fairness policy is implemented without collateral damage of the type experienced under WorkChoices, like when the stringent record keeping requirement meant that a multinational CEO would have to clock on if he or she took a work phone call after hours.

In April 2008 after being confronted with claims that the ALP IR reforms might adversely affect the capacity to operate mines on a fly-in-fly-out basis, the Deputy Prime Minister quickly hosed down the issue acknowledging that Fly-in-Fly-out is vital for the mining industry. She stated, and I quote: "*People work on historically accepted roster patterns; that's part of the mining industry. Workers work those patterns, they are use to working those patterns; many of them enjoy working those patterns and those patterns of work will be available to the mining industry under our workplace relations reforms."*

This level of understanding and commitment gives the mining industry much comfort in the face of impending change.

So where will the change be of most impact?

National Employment Standards

The core of the new system will be the National Employment Standards which will apply to all employees from the most recently appointed junior clerical assistant to the CEO of Telstra.

Many of the national standards (such as hours of work, reasonable additional hours, annual leave, carers leave and parental leave) exist under the present legislation but some changes have been made including the provision of the capacity to request up to 2 years parental leave, flexible work arrangements for workers with school age children, community service leave and jury service.

AMMA supports the use of legislated national standards to provide base conditions of employment for all employees. AMMA is concerned however where the national standards restrict the capacity for current operational flexibilities to continue.

One area where proposed National Employment Standards may reduce flexibility is the restrictions on averaging ordinary hours over a period exceeding one week. In industries like mining the hours of work are not evenly spaced and worked Monday to Friday 9am to 5pm. In our remote FIFO operations even time rosters are common place.

In some places a five week on, five week off, 12 hour shift roster is worked. The capacity to average the hours of work over periods greater than a week allows employers to meet operational requirements.

Under WorkChoices these arrangements were able to be determined under an award, agreement or contract of employment subject only to a limit of 52 weeks.

Under the Forward with Fairness proposals, the default averaging period is one week, with access alternative averaging periods limited by the provisions the AIRC chooses to include in modern awards, or in the case of award free employees a maximum of six months.[1] This does not provide the flexibility we need to run our current operations.

The same can be said of access to provisions which allow the cashing out of annual leave. In the drilling industry employees commonly work a roster which gives them 6 months per year off - traditionally the practise has been to cash out the annual leave and increase their salary. The same practice occurs in the sea going employees in the oil and gas industry.

Such arrangements will not be possible under modern awards unless specifically provided for. At this point in time the AIRC has rejected calls for this type of flexibility and according to the Governments Fact Sheets award free employees can only cash out accrued leave in excess of four weeks.[2]

AMMA contends that current levels of flexibility ought to be included in the NES to allow access for all employees.

Awards

The award modernisation process is moving forward at a rapid pace as it needs to in order to be completed by the end of next year. The AIRC should be congratulated for its efforts in ensuring the deadline set by the Deputy Prime Minister will be met.

[1] http://www.workplace.gov.au/NR/rdonlyres/D1985F1D-649A-4059-B356-AE9BCDD56FE4/0/WRfactsheet_03.pdf
[2] http://www.workplace.gov.au/NR/rdonlyres/D1985F1D-649A-4059-B356-AE9BCDD56FE4/0/WRfactsheet_03.pdf

One of the key criticisms of the existing award system is its inflexible prescriptive nature, with different arrangements in the many State and Federal Awards. This was the prime reason resource sector employers adopted statutory individual agreements under the Western Australian then Federal industrial relations system.

The goal of a national, flexible, safety net award system is one that eluded the previous Government. The current Award Modernisation process, time consuming as it is for all participants, will be a welcome improvement if it provides for flexible outcomes, particularly in the absence of AWAs.

AMMA's experience in creating a modern Mining Industry Award (as currently framed) to replace a myriad of State regulation has been a positive one, with the real prospect of achieving a concise, flexible, simple modern award – this can be contrasted against the proposed modern Metal Industry Award with its old fashioned casual conversion clauses and a dispute training leave provision which looks awfully like the trade union training leave provisions of yesteryear.

The award modernisation process will result in an expansion of the award system. The modern award system will cover the majority of Australian workers except for historically award free employees and high income. Industries which may have been award free in one state will be covered if a modern award is made for that industry or occupation.

After the modern catch all award is made we expect that only managerial and supervisory employees will escape the net. This has implications for the Union right of entry provisions.

Right of Entry

The Government has advised the Australian Industrial Relations Commission[3] that modern awards will 'cover' employers and their employees if the work performed falls within the scope of a modern award. Awards will continue to cover an employer and its employees even if an enterprise agreement is made (although the award will not apply).

A union's right of entry for discussion purposes will be linked to modern award coverage. This represents a massive expansion of union right of entry.

Presently unions can only enter workplaces for discussion purposes if there is an award or collective agreement that the Union is a party to. Unions are not party to AWAs, ITEAs or employee collective agreements, accordingly workplaces covered by those agreements were not subject to union entry for discussion purposes.

The impact of having modern awards 'cover' workplaces even if another agreement applies will open the door to greater union access. Businesses can expect unions to be knocking on their doors in 2010. And if recent speculation in the print and electronic media is correct the unions will be entitled to access non-member records if it suspects that a breach of the Act has occurred.[4]

Under the present law if a Union wishes to inspect a non-member record it must apply to the Australian Industrial Relations Commission for authorisation. The Commission is required to be satisfied that the order is necessary in the circumstances.[5] The removal of this protection could see unions access the personal information on non-members.

[3] http://www.airc.gov.au/awardmod/databases/mining/Submissions/CthGovt_submission_ed.pdf
[4] AFR 20 October 2008
[5] S748(9)

Misuse of this information could result in non-union members being intimidated. Only this week Federal Magistrate Burchardt fined the CFMEU and an organizer Jason Deans $24,775 and $12,000 respectively in respect of breaches of the Workplace Relations, including clear and outrageous breaches of freedom of association provisions in pursuit of a 'no ticket no start' policy.[6]

Good Faith Bargaining

Under the current agreement making arrangements parties have to be genuinely seeking agreement in order to take industrial action. According to the Government's Bargaining in Good Faith fact sheet this requirement will be codified.

Under the new system bargaining will begin when the parties agree to start negotiations, or in the absence of an agreement, when Fair Work Australia determines there is majority employee support.[7]

Employees will be free to choose a bargaining agent. A union can only act for persons who fall within its eligibility rules.

Whilst the Government's Fact Sheet indicates that union members will be entitled to have their union represent them, recent media reports have speculated that the union will be the default bargaining representative for its members, with members who do not wish to be represented by the union having to notify the union in writing. If this position is true this represents a significant enhancement of union power.

Bargaining participants will be required to bargain in good faith.

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[6] http://services.thomson.com.au/cpdnews/docs/Workforce/WF1657_2.pdf

[7] http://www.workplace.gov.au/NR/rdonlyres/40BB341A-6AEE-4897-B7CA-3BE12B2FFA27/0/WRfactsheet_06.pdf

From an employer perspective this means employers will be required to attend and participate in meetings, disclose relevant non-confidential information, genuinely consider proposal and provide a response.

The requirement to provide information is expected to result in Unions undertaking fishing expeditions, demanding information from employers about future commercial projects, mergers and acquisitions. Employers will be embroiled in disputes over what is confidential and its relevance to the bargaining process.

The policy does not require employers to make concessions or reach agreement. There appears to be a dichotomy between the obligation to genuinely consider and respond to proposals whilst not being required to make concessions.

The Government's fact sheet gives some examples of action which could be characterized as bad faith, including employees not being prepared to consider new work methods to improve productivity.

If an employer refused to consider proposed changes because they did not want to reach agreements would they be acting in bad faith and subject to order by Fair Work Australia which would be enforceable in the Federal Courts?

Will an employer who repeatedly contends that they do not want to reach an agreement be fined by the Court for a breach of the Act?, or worse still will the employer be compelled to consider a proposal when they don't want to reach agreement?

Enterprise Agreements

Access to AWAs has already disappeared.

The ITEA is the new AWA albeit with a revised no disadvantage test and a requirement (except for new employees) for the agreement be approved by the Workplace Authority before it commences. On that note, there is much work to be done on the approval process,

AMMA continues to receive member complaints about processing delays and ill-considered decisions rejecting agreements. More recently the ASU was publically complaining that six month processing delays were preventing employees from receiving improved terms and conditions.

The substantive legislation will remove access to new ITEAs.

The only type of statutory agreement available will be a collective one. Collective agreements will be able to be made with a single enterprise, a group of related businesses or a discrete undertaking, site or project.[8] Greenfield agreements will be restricted to agreements with a union.

AMMA accepts that statutory individual contracts will not be a feature of the new system. However, the modern award (as currently framed) in our industry is flexible and together with access to individual flexibility agreements under the award this may indeed be a workable substitute for AWAs subject to the NES flexibility concerns I raised earlier.

Whilst this option will not protect employers from industrial action in pursuit of bargaining, however employers who are engaged with their employees, have effective internal dispute resolution processes and provide well paid and

[8] Forward with Fairness. P12

rewarding employment may find that their employees do not have a desire to bargaining collectively.

For those who choose to bargain collectively, agreement content will expand under Forward with Fairness. The existing restrictive content rules will be relaxed and agreements will be able to include matters that pertain to the relationship between the employer and the employees, and the relationship between the employer and the union.

Some have speculated that agreements will be able to reduce the notice required to be given by unions to access the premises under right of entry provisions. In the recent Senate Estimates Hearings a DEEWR representative came close to agreeing that such a clause would be permissible.

AMMA is concerned that expanding agreement content in this manner could open the flood gates for full time paid shop stewards, union picnic days and nominated labour, none of which will improve productivity.

One area of major concern is the media speculation that all existing agreements will cease to exist on a 'drop dead' date.[9] In all the time since enterprise agreements became available, agreements have continued to operate after their expiry date until terminated in accordance with the Act or replaced.

The ALP's election policy contained in its Forward with Fairness Policy Implementation Plan said that AWAs made prior to the implementation date of Labor's Transition Bill will remain in force and may only be terminated in accordance with current rules.

The unilateral termination of all existing agreements would force all employers to bargain to retain existing operational flexibilities (subject to any restrictions

[9] AFR 20 October 2008, Senate Estimates 23 October 2008

imposed by the National Employment Standards) and conversely employees will need to bargain to preserve above award wages. What productivity improvement would result from this approach? Such a move would be the equivalent of a dirty bomb.

ABCC

Whilst all this is going on we have the spectre of the Wilcox Review of the Australian Building and Construction industry and the recently released discussion paper by retired Federal Court Justice Wilcox.

Justice Wilcox is looking for real evidence of the lawless culture of the building and construction industry. The real evidence has already been gathered by the Cole Royal Commission.

The Cole Royal Commission found the Australian building and construction industry was characterised by intimidation, coercion, unlawful action and union interference. Without fear of repercussion, unions exerted significant control over projects, dictating who companies could employ, which subcontractor to engage and which workplace arrangements to enter into.

The introduction of tougher laws concerning unlawful industrial action by the Howard Government in 1996 together with the monitoring and enforcement role of the Australian Building and Construction Commission has proved to be a successful combination.

In the time since the tough cop has been on the beat, productivity has improved 10 percent, end user costs have reduced by 4 percent and lost time due to industrial disputes has plummeted. Econtech recently valued the ABCC's contribution to the economy at $5.1 Billion; whilst this statistic is hotly debated

there is no doubt that the ABCC has made a significant contribution to the success of the building and construction industry.

The improvements are much welcomed by the resources sector, which is investing tens of billions of dollars in minerals and energy construction projects.

AMMA contends that the Wilcox review is unnecessary, the ABCC is only three years old and ought to be allowed to continue for another 5 years, at that time a review might be justified.

The decision on the powers and resources of the specialist division of Fair Work Australia that will replace the ABCC is a political one. The union movement wants to disarm the tough cop by allowing witnesses to refuse to co-operate and allowing documentary evidence to be withheld.

The business community wants to see cultural change in the building and construction industry which has not yet occurred. What we need from the Government is a tough cop, not a transition to a toothless tiger.

The business community wants Julia Gillard stare down the recalcitrant's in the CFMEU and retain the current ABCC powers and functions in the specialist division of Fair Work Australia.

Conclusion

In concluding my review of the impacts of Forward with Fairness, as a industrial relations practitioner we live in interesting times. Within 4 weeks we should know if the Government has genuinely listened to the feedback it has received through its extensive consultation process and acted upon it.

Subject to the vagaries of the parliament, the new system will commence on 1 July 2009 with the commencement of bargaining framework, unfair dismissal and associated protections. The balance will operate from 1 January 2010.

The Government has committed to getting the balance right and achieving both fairness and flexibility. The detail of the new workplace relations system will reveal if the Government is serious about insulating Australia from the economic failures of other nations by improving productivity, or if it has given the ACTU a Christmas present in an attempt to revive an ailing union movement, whose membership has declined every year since Australia ratified the 1949 ILO convention on freedom of association.

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