

Forward With Fairness: The ALP Industrial Relations Policy

This paper offers an overview of the Labor Party's "Forward with Fairness" policy, and how this policy is likely affect the current state of employment relations. It will also examine some of the reasons why the policy was adopted in its current form, and where it is likely to be changed in the future.

The overwhelming view of the policy, and the implementation guidelines is that it is an intensely political document. Both in terms of the contents but also in terms of the timetable for the big ticket changes that the policy suggests will be introduced.

The Big Ticket Changes proposed by the ALP

AWAs already lodged or in place:

AWAs that have been lodged with the Workplace Authority will be not be affected by the changes announced by the Labor Party. All AWAs will be able to operate until their nominal expiry date. It is proposed that existing AWAs will continue to operate under the WorkChoices regime, meaning AWAs may only be terminated by agreement between the parties during the term of the AWA or by one party providing 90 days notice to the other after the nominal expiry date of the agreement.

What about new Employees?

New or existing employees can enter into an Individual Transitional Employment Agreement (ITEAs) if their employer uses AWAs to govern the employment terms and conditions at the place of employment. To all extent and purposes these are AWAs under the proposed Labor policy.

ITEAs will be required to have a nominal expiry date no later than 31 December 2009. The ITEA must not disadvantage the employee against the Fair Pay and Conditions Standard, collective agreement or applicable award. That is, Labor's transitional arrangements will be compared with the 5 'Guarantees' and the award. In short, the fairness test introduced from 7 May 2007, will extend to 31 December 2009 for AWAs or ITEAs.

While an AWA or ITEA remains in operation Awards and Collective agreements cannot override them.

The new national employment standard:

Labor proposes introducing 10 national employment standards from 1 January 2010.

Current Standard	Labor Standard
1) Basic rates of pay and casual loadings	1) Hours of Work
2) Maximum ordinary hours of work	2) Parental Leave
3) Annual leave	3) Flexible work for parents
4) Personal Leave	4) Annual leave
5) Parental Leave	5) Personal, Carers and Compassionate Leave
	6) Community Service Leave
	7) Public Holidays
	8) Information in the Workplace
	9) Notice of Termination and Redundancy
	10) Long Service Leave

Below is a break down of each of Labor's National Employment Standard:

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- Hours of work: the current standard of a 38 hour week for full-time employees plus reasonable additional hours will be maintained.
- Parental leave: the current standard of 12 months unpaid parental leave for each parent will be maintained.
- Flexible work for parents: this additional standard guarantees a right to request flexible work arrangements until children reach school age which may only be refused on reasonable grounds.
- Annual leave: the current standard of 4 weeks paid annual leave for full-time employees (pro-rated for part-time employees) and 5 weeks paid annual leave for shift workers will be maintained.
- Personal, Carer's and compassionate leave: the current 10 days paid personal/carers leave per annum for full time employees (pro-rated for part-time employees), and 2 days per instance for compassionate leave will be maintained.
- Community Service leave: this new standard allows for paid leave for prescribed community service activities such as jury service and emergency service duties.
- Public Holidays: this new standard allows for all gazetted public holidays or the right to be paid appropriate penalty rates or other compensation when an employee is required to work on a public holiday.
- Provision of information in the workplace: this new standard requires employers to provide employees with information regarding their rights and entitlements at work.
- Termination of employment and redundancy: this new standard requires employers to give employees up to 4 weeks notice of termination of employment based on years of service, and a statutory entitlement to redundancy pay for employees working for businesses that employ 15 people or more.
- Long Service Leave: This new standard provides for a national standard for long service leave. Current state and territory legislation will apply until a new national standard is established.

An important point to note when comparing the 2 sets of standards is that Labor does not include basic rates of pay and casual loadings in their standard. Under Labor Policy rates of pay will be put back in the award system. This removes the notion of a legislated Federal Minimum Wage below which no adult employee can be employed, regardless of whether or not the employer is covered by a federal award.

Employees earning a "guaranteed income" of over \$100,000:

Employees who earn over \$100,000 will be free to agree to their own pay and conditions without reference to an award, however they will be covered by the national employment standard. The \$100,000 threshold will be based on guaranteed ordinary earnings, that is pay received for ordinary hours of work, guaranteed overtime and any other monetary allowances that are guaranteed.

Modernising and Simplifying Awards:

Labor has outlined a policy to modernise and simplify awards. Awards will be modified and simplified to cover just 10 matters:

1. Minimum wages: this includes skill based classifications, career structures, incentive based payments, bonuses, wages and apprentices and trainee arrangements.
2. Type of work performed: this includes permanent, casual, and using flexible work arrangements or job sharing.
3. Arrangements for when work is performed: this includes hours of work, rostering, rest breaks and meal breaks.
4. Overtime rates for long hours.
5. Penalty rates: for employees working unsocial, irregular or unpredictable hours or on weekends, public holidays and as shift workers.
6. Annualised wage or salary arrangements: which have regard to the patterns of work in an occupation, industry or enterprise as an alternative to the payment of penalty rates.
7. Allowances: this includes reimbursement of expenses, higher duties and disability payments.
8. Leave and leave loading
9. Superannuation

10. Consultation: this includes representation and dispute settling processes

If the ALP is returned, this will be the third serious attempt to “Modernise and Simplify” Awards in the last 10 years. This highlights the essential problem of awards in a modern and deregulated economy. Awards are the result of an arbitrated settlement to apply across an industry. This contrasts with the ALPs position on ‘banning’ pattern bargaining which is a negotiated settlement that might apply across an industry.

Protected Industrial Action:

Labor will maintain the current legislation regarding the limits on protected industrial action. Industrial action will only be protected when it is taken during a bargaining period and is authorised by a mandatory secret ballot.

The current legislation allowing recourse to the courts for secondary boycott action and remedies dealing with unprotected industrial action will also remain. Restrictions on industrial action in pursuit of pattern bargaining for registered agreements (as opposed to awards) will continue to apply.

Right of Entry Provisions:

Labor’s policy maintains the existing right of entry provisions which allows a union official to enter an employer’s premises without necessarily obtaining consent for the purposes of:

- Holding discussions with employees if they (the union) are a party to a registered workplace agreement
- Investigating suspected breaches of industrial relations legislation, awards or agreements, if they are a party to the agreement or the award.
- Investigating a suspected breach of occupational health and safety legislation, in accordance with the relevant State OHS legislation.

Rights of Unions to be involved in a Collective Agreement:

Under Work Choices, unions can’t access for discussion or negotiation purposes workplaces that are covered by AWAs or non-union collective agreements. Unions will remain locked out of workplaces that are operating on a non-union agreement until the nominal expiry date of the agreement, whoever wins office.

Under the proposal if an employer has a single employee that is a Union member, then the Union will have a right to become involved in negotiations. Therefore under Labor’s proposals, a business could employ 500 workers, including only one holding union membership, and the union would have a right to be involved in pay negotiations.

If the employer and the union can not agree on the terms of any replacement collective agreement, then they may be subject to arbitration by Fair Work Australia. Fair Work Australia may impose an outcome that both the employer and 499 employees don’t necessarily want.

If Labor wins and Employers are considering entering into a new non-union collective agreement, they should be aware that if they have union member employees then they could be subject to union involvement, regardless of whether or not those union members even want the union involved. That is, the union will have an institutional role in the negotiations. This is a throwback to the Enterprise Flexibility Agreements that were so manifestly unsuccessful in the Keating years.

Unfair Dismissal and Redundancies:

More employees will have access to unfair dismissal claims under Labor’s policy. The exemptions to businesses that employ fewer than 100 employees will no longer apply, and the Labor Party has said that it will remove the provisions for termination for genuine operational reasons.

There will only be exemptions for businesses that employ fewer than 15 employees. Under Labor’s policy an employee will have to be employed by the business for 12 months before they can make a claim for unfair dismissals.

Under the proposal employees can be dismissed in cases of redundancy, however small businesses are excluded from Labor’s National Employment Standard for redundancy payments. This means that a small business with less than 15 employees will not be obligated to make a redundancy payment as a result of a statutory provision. We note that if a company has in place a workplace agreement, then this agreement is likely to contain a redundancy provision that would still continue to apply regardless of the ‘guarantee’ in the legislation. There has been no change (read diminution) in the scope of what will constitute a redundancy.

Fair Dismissal Code:

As well as the changes to the unfair dismissal laws scope and definitions, Labor also proposes introducing a Fair Dismissal Code. If a business complies with the code the dismissal will be deemed as fair. If the code

has been breached the employer and former employee will meet at the request of Fair Work Australia for a conference.

Detail on what is contained in the code and how an employer may assure themselves that they have complied with this code have not been produced. We would imagine that the code will require the application of a 'reasonableness test', similar to the current common law in this area.

An interesting side note in the policy implementation plan, is that an employee will also be excluded from making a claim if they have been reported to the police by their employer for stealing, fraud or violence. The plan makes no mention that this claim has to be based on anything other than the employer's 'hunch', and as far as we can see there is no further requirement on the employer other than making an allegation. That is, there is no detail that the allegation has to be based on the reasonable suspicion of a relevant person.

How will this effect Employers:

For employers with less than 100 employees, there will be a reinstatement of the old unfair dismissal regime. The body responsible for overseeing this body will no longer be the AIRC but will be a new body, Fair Work Australia.

For employers with greater than 100 employees, not much will change, except that employers will be able to dismiss employees 'fairly' if they make an allegation to police. The allegation does not have to be founded only reported. This is a big get out of jail free card for employers wanting to get rid of an employee without risking having an unfair dismissal claim made against them. We expect that this type of provision will not be included in any Bill that is put before the Parliament.

Labor also 'guarantees' that reinstatement will not be ordered where it is not in the best interests of both parties, but there is no attempt in the proposal to define what this means.

What does this really mean?

As we said at the outset, this is an intensely political document in its scope and in its timing. Even if Labor wins the next election and gains control of the House of Representatives, it is unlikely that they will have control of the Senate and the ability to automatically introduce these changes. What position the coalition takes on the proposed changes, in the event that they are before the Senate, will be very interesting to watch. Our best guess is that the coalition may be tempted to only pass those areas that the ALP have a genuine mandate for (including the exemptions from unfair dismissals if you report an employee to the police), and rejecting anything that is new. In short, returning to the 1990s and requiring the government of the day to negotiate, in good faith of course, with the minor parties. We are not convinced that the minor parties will even hold the balance of power in the Senate.

In our opinion Labor could threaten a double dissolution to get these laws passed, laws that it has clearly placed before the electorate as part of its electoral manifesto. The timing for the introduction of these reforms also points to this as a possibility. However we believe that the overwhelming reason for the long term of the reforms is that it will allow the ALP to campaign on WorkChoices all over again at the next election, regardless of whether or not the coalition allows these laws to be passed.

Labor has adopted a more conservative centralised policy than was expected. They have maintained the 'takeover' of the State industrial relations systems on the basis that to revert to the Arbitration and Conciliation power would be akin to getting an egg out of an omelette. They have also quite cleverly tried to pick the eyes out of the coalition IR reforms to keep onside with business. Clear evidence of this is the decision to maintain the Independent Contractors Legislation and the Trade Practice sanctions for secondary boycott action. We note in passing that the increased reliance on the 'corporations' power, and the acceptance by the ALP of the legitimacy of this head of power to regulate the employment relationship could have very serious implications for trade unions under trade practices law and corporations law.

We have been critical of the present Government's giving so much power to ministerial discretion, now this will allow the Labor Party to vary legislation by regulation. Therefore a great deal will be able to be done by the Labor Party without necessarily amending the legislation. This is not directly canvassed in the policy implementation plan, but it would allow a number of the ALPs policies to be implemented in the event that there is no way through for them in the Senate.

The political nature of the policy is most evident in the timing of:

- the introduction of the 10 National Employment Standards in 2010;
- the transfer of power from the ABCC in January 2010 and the introduction of new simplified awards;
- the end of Individual Transitional Employment Agreements at the end of 2009.

This is more of a political timetable than a real redrawing of Australian industrial relations laws.

We take from our reading of this policy that the Labor Party believes the upcoming election is “in the bag” and they have designed the timing of issues in this policy to allow them to fight the next election (2010) on an anti-WorkChoices platform all over again. There have been no single term federal governments in this country since the end of the second war, and this positioning of the IR agenda should allow labor to campaign for at least two elections on the mess that is WorkChoices.

By keeping the secondary boycott provisions the Labor Party has reinforced the current trend in employment relations as a branch of contract law rather than a separate species all to itself. This is likely to see a further withering of specific industrial tribunals and courts (such as the AIRC) and an increasing reliance on the tenets of contract law and the regulation of corporations. The bipartisan abandonment of the Conciliation and Arbitration power means, in our opinion, that the State systems will continue to die and that regulation of employment will become a branch of the regulation of the corporation. This will be particularly important over the mid to longer term.

This policy offers both good news and some bad news for Trade Unions. The good news for them is that they will now have a right to become involved in collective bargaining negotiations if they have membership at an organisation, this should (in theory) halt the decline in union membership and even drive increasing union membership. The bad news for them is that individualised bargaining will continue, at least until the end of 2009, and Labor by keeping the reliance on the corporations power has potentially created a new jurisdiction, the ACCC which may shine the torch into the darker corners of union activities.

Labor has decided to retain the current right of entry provisions for both industrial matters and occupational health and safety matters. In our opinion such restrictions will result in an increased use of alleged breaches of OH&S laws to gain right of entry in places of work that do not have union members.

There is a significant “leap of faith” imbedded in this policy, and that is that the Unions, having massively funded the anti-Howard advertising campaign of the last two years, will now have to wait for a few more years to get their rewards.

How that particular issue works itself out will be both interesting and particularly dangerous to employers, the Australian economy, and especially to the Australian Labor Party.