

Federal Labor Unveils Industrial Relations Policy

Following the announcement of its “*Forward with Fairness*” workplace relations policy in April, Labor released its “*Policy Implementation Plan*” on 28 August 2007, which provides further details of Labor’s proposed industrial relations regime. We have summarised below the primary features of the policy, and emphasise that it should not be taken to reflect the content of any actual legislation that would need to be implemented in order to give effect to the policy.

1. Transitional arrangements

Labour has indicated that, if elected, it will legislate for a “Transition Bill” to accommodate the transition to Labor’s new industrial relations system. The Transition Bill will contain:

- Labor’s 10 “National Employment Standards” (discussed under heading 2) which will come into operation on 1 January 2010, also being the date that Labor’s new “simplified” awards will come into operation (discussed under heading 3).
- The following transitional arrangements with respect to Australian Workplace Agreements (AWAs):
 - AWAs made prior to the Transition Bill will remain in force and may only be terminated in accordance with the current legislation, which permits termination prior to the nominal expiry date of the AWA only with the agreement of both parties, or termination after the nominal expiry date by one party providing the other party with 90 days’ written notice.
 - Employers who currently have employees on AWAs will be able to enter into “Individual Transitional Employment Agreements” (ITEAs) during the two-year period of Labor’s proposed award simplification process. These ITEAs may have a nominal expiry date of no later than 31 December 2009.

2. Employees earning over \$100,000

Labor will legislate to confine the application of Labor’s new award system to employees who earn less than \$100,000 per year when the new award system commences, which is estimated to be on or about 1 January 2010. Employees who earn above this amount

will be covered by Labor’s 10 “National Employment Standards”.

(1) Hours of work

Standard working week for a full time employee of 38 hours, plus reasonable additional hours. This is consistent with the current legislation.

(2) Parental leave

Current legislation provides for 12 months of unpaid parental leave for eligible employees. Labor proposes that both parents will have a right to separate periods of up to 12 months of unpaid leave associated with the birth of a baby. Where families prefer, one parent can take a longer period of leave, that parent will be entitled to request up to an additional 12 months of unpaid parental leave from their employer, which may only be refused on reasonable business grounds.

(3) Flexible work for parents

Parents will have a right to request flexible work arrangements until their child reaches school age, which may only be refused on reasonable business grounds.

(4) Annual leave

Unchanged from the current legislation, full-time, non-casual employees will be entitled to four weeks paid annual leave per annum, and part-time employees will be entitled to a pro-rata entitlement. Shift workers will be entitled to an additional paid week of annual leave.

(5) Personal, carer’s and compassionate leave

The entitlement to these types of leave is unchanged from current legislation.

(6) Community service leave

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

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(7) Public holidays

Employees will be entitled to take a day off on recognised public holidays and will be entitled to an appropriate penalty rate or other compensation pursuant to any applicable award if they are required to work on a public holiday.

(8) Information in the workplace

Employers will be required to provide new employees with an information statement setting out their rights and obligations, as is required under current legislation.

(9) Termination of employment and redundancy

Consistent with the current legislation, all employees will be entitled to a statutory minimum required period of notice of termination. Furthermore, in a significant proposal, all employees who are made redundant and who are employed in workplaces with 15 or more employees will be entitled to a severance payment in accordance with the scale determined by the AIRC in the 2004 Redundancy Test Case.

(10) Long service leave

Labor will liaise with the States to develop national and consistent long service leave entitlements.

In circumstances where an employee is earning over \$100,000 and is currently subject to an industrial award, Labor provides that this coverage will continue following the commencement of its new award system but such an employee will be entitled to choose whether to negotiate with his or her employer about the employee's future terms and conditions of employment or to remain on the existing terms and conditions.

3. Award system

Labor has indicated that its awards will contain only 10 matters and will provide industry-relevant detail about Labor's 10 National Employment Standards.

The 10 matters that will be dealt with under Labor's awards are:

1. minimum wages;
2. the type of work performed;
3. arrangements for when work is performed;
4. overtime rates;
5. penalty rates;
6. provisions for minimum annualised wage or salary arrangements that have regard to the patterns of work in an occupation, as an alternative to the payment of penalty rates;
7. allowances;
8. leave and leave loadings;
9. superannuation; and
10. consultation, representation and dispute settling procedures.

Furthermore, every award will contain a "flexibility clause" which permits the negotiation of certain terms and conditions, adapted for each industry. For example, the parties may negotiate an arrangement to allow the employees to start and finish work early to enable them to

collect their children from school without the employer paying additional penalty rates for the early start.

4. Collective agreements

Labor will support collective enterprise bargaining regardless of whether an employee chooses to negotiate through a union or without a union. Unions will not have an automatic right to be involved in collective enterprise bargaining and employees can make a genuine non-union collective agreement.

All collective agreements will be required to contain a flexibility clause which provides that an employer and an individual employee can make a flexibility arrangement, provided that the collective agreement, as a whole, is better off overall than the relevant award.

5. Small business and unfair dismissal

Labor has indicated that it will amend the current unfair dismissal laws to remove the current exemptions which apply in respect of employers employing fewer than 100 employees, and employees who have been terminated for "genuine operational reasons". Labor's proposed system for determining who can bring an unfair dismissal claim will be based on three circumstances:

- an employee who is employed by an employer who employs 15 or more employees must have been employed for six months;
- an employee who is employed by an employer who employs fewer than 15 employees must have been employed for 12 months;
- if the employee is not covered by an award, the employee must be earning annual remuneration of less than \$101,300 (to be indexed).

Labor's policy provides that a dismissal which has occurred because of a genuine redundancy will not be an unfair dismissal. "Small businesses" (employers with less than 15 employees) will be excluded from the requirement to make redundancy payments under Labor's 10 National Employment Standards.

Labor has indicated that it will develop, in consultation with small business, a "Fair Dismissal Code". The purpose of the Code will be to provide small business owners with an understanding of their rights and obligations with respect to dismissal of employees. A dismissal will be considered a fair dismissal where an employer has complied with the Code. Labor has suggested in its policy documents that the entitlement of an employer to summarily dismiss an employee who has committed serious misconduct will be preserved. Furthermore, the law on "unlawful dismissal", that is, dismissal on certain prohibited grounds (e.g. family responsibilities, pregnancy, disability, race, trade union activity, etc) will be preserved. "Fair Work Australia" (being the new statutory body established by Labor) will include a separate division with jurisdiction to hear and determine unlawful dismissal claims (such claims will no longer be dealt with in the Federal Court or Federal Magistrates Court).

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6. Industrial Action

Labor has indicated that it will require that, for industrial action to have the protection of the law, it must be approved by employees seeking protection in a mandatory secret ballot. The remedies to deal with unprotected industrial action, set out in the existing legislation, will remain.

Furthermore, the existing right of entry rules will also remain.

We reiterate that the above information is a summary of Labor's policy at the present time and are of the view that there is considerable likelihood that it may be amended in the lead up to the Federal election. Beyond that, it remains to be seen whether, if elected, any legislation proposed by Labor will give effect to the policy in its current form.

Company Policies Can be Contractually Binding

The Federal Court has confirmed on appeal that company policies can provide employees with enforceable contractual entitlements, which in the event of breach, could entitle them to damages.

In *Goldman Sachs J B Were Services Pty Limited v Nikolich* [2007] FCAFC 120; The Court considered the "Working with Us" policy of Goldman Sachs J B Were Services Pty Limited. It determined the policy contained terms which were contractual in nature and distinguished these contractual terms from "aspirational statements", which it found were not contractually binding.

In the case at hand, the Federal Court held that the following statement was contractually binding:

"J B Were will take every practical step to provide and maintain a safe and healthy work environment for all people"

Black CJ stated it would be "seen as an exercise in hypocrisy" were the Court to hold this was no more than an "aspirational representation imposing no obligation on the maker".

The employee, Mr Nikolich, alleged he suffered psychological injury consequent upon the failure of his employer to respond effectively and in a timely manner to complaints about the removal of certain clients away from him and subsequent personal attacks including insults.

The Court accepted Mr Nikolich's allegations and found the company breached its contractual obligations to take all practical steps to provide a safe and healthy work environment. The Court did not accept that grievance procedures contained within the "Working with Us" policy were contractual terms, holding they were aspirational statements and essentially guidelines only.

The damages awarded were in excess of \$500,000.00.

What is clear from the decision is that there can be a fine line between aspirational statements and contractual statements, and employers need to take care in formulating their policies.

On a practical level, employers should review all company policies and written practices.

Statutory obligations should not be repeated in policies. To provide in a policy for instance that "we will ensure the health and safety of employees", adds a contractual obligation to an already existing statutory obligation and provides employees with contractual rights that they would not otherwise have.

Employers must also realise that if they convey messages in their policies such as that they are an employer of first choice, they may be contractually bound to ensure that is the case in all respects. This is an onerous task.

Any employer who wishes to continue to include positive obligations in their policies, should take steps to ensure compliance and minimise the risk of breach.

Employers may also wish to specifically detail in their contracts of employment that policies do not form part of the contract of employment and that the terms of such policies are not contractually binding. We do caution that this type of clause has not been reviewed by the Courts in this context and may not be effective if certain policies are truly contractual in nature.

Occupational Health and Safety – Directors Duties Clarified

A recent decision of the Industrial Court of New South Wales provides an interesting divergence from a developing line of legal authority in which liability has been imposed on company directors in New South Wales as a consequence of the deeming provision contained in section 26(1) of the *Occupational Health and Safety Act 2000* (NSW) (“the Act”).

In *Inspector Wayne James v Sunny Ngai & Ors* [2007] NSW IR Comm 203 (17 August 2007) the Industrial Court held that two directors of ABC Tissue Products Pty Ltd (“the Company”) were not in a position to influence the Company’s contravening conduct of the Act and further, the Court applied an objective test as to whether the directors had any capacity to control the Company’s conduct. The Court found that the directors had no real control over the Company’s conduct and therefore there was a lack of complicity in respect of the offences.

The prosecution arose as a consequence of the failure by the Company to adequately guard a paper manufacturing machine which resulted in a worker sustaining serious injuries. The Company was found to have contravened section 8(1) of the Act by failing to ensure the health, safety and welfare of the employee. Section 26(1) of the Act provides that directors *and managers* are deemed to have contravened the same breach of the Act by the company subject to the statutory defences available in section 26(1)(a). Section 26(1)(a) of the Act places an evidentiary onus on a director to satisfy the Court that he or she was not in a position to influence the conduct of the corporation or alternatively, that he or she used all due diligence to prevent the contravention by the company.

In the judgment, Justice Staff undertook an analysis of the actual roles that the defendants had in the Company’s occupational health & safety systems. Relevantly, the evidence showed that one defendant resided in Hong Kong in the period 1993 – 2004 and was also overseas at the time that the accident occurred. His Honour, referred to earlier decisions of the Full Bench of the Industrial Relations Court and opined that the central issue was whether the defendants, as directors, were in a position to influence the conduct of the Company in relation to its breach

of the Act being persons “concerned in the management of the Corporation” for the purpose of the statutory defence. His Honour found that the managing director of the Company had been appointed pursuant to the Company’s Articles of Association to exercise the powers of the Company and to also exercise control over all other directors. His Honour held that the two directors were not, because of the limitations imposed by the Articles of Association, in a position to influence either the conduct of the managing director or the Company because they could only discharge such powers and duties as had been conferred on them by the managing director.

Importantly, Justice Staff held “there is no basis for assuming that every director of a Corporation is in the same position to influence the relevant conduct of the Corporation”. His Honour then stated that the defences available in section 26(1)(a) are designed to avoid a situation where persons are punished simply by reason of holding the office of director. The evidence established that the defendants were not complicit in the Company’s contravention of the Act because of the defined roles, duties and responsibilities provided to them by the managing director.

Whilst this decision may not be of general application because of the unusual factual matrix, it does provide guidance as to the objective test that the Court can apply when assessing the culpability of a director or a manager for the purposes the section 26 (1)(a) statutory defences.

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