

Briefing notes on Workplace Relations Amendment (Transition to Forward with Fairness) Bill 2008

Purpose

This document has been prepared by Dr John Buchanan to inform his oral testimony to the Senate Workplace Relations Sub-Committee hearings in Sydney on the above Bill.

Summary of key issues contained in the Bill

Status of the Bill: merely initial Bill beginning the implementation process.

- Gillard: this is not going back to an earlier era either of IRAct 1993 or WRA 1996

Issues covered

- . AWAs
 - no more new AWAs, especially in APS
- . ITEAs
 - already need AWAs
 - can only run until 31 Dec2009
 - suggest to 'no disadvantage test'
- . new commencement dates for agreements
- . termination of agreements
 - even after a collective agreement expires, it can only be terminated where the parties agree. But note AIRC's capacity to over ride this on the basis of public interest.
 - these rules don't apply to AWAs as workers ought have the right to revert to superior award conditions
- . AWA/ITEA employees – participation in collective bargaining
 - overcomes anomaly where their AWA has expired
- . Workplace Relations fact sheet
 - now terminated
- . Pre-Work Choices Collective Agreements
 - will be able to run longer than previously so can be renegotiated on basis of FWF principles and avoid having to be renegotiated under *Work Choices* principles
- . other matters
 - end restriction on incorporating other instruments by reference to them
 - Wp Authority can accept sub-standard agreements in 'exceptional circs'
 - Wp Authority to consult more widely when identifying the relevant reference award
 - Extend operation of 'transition' period until 31 Dec to ensure they don't lapse and then reappear in FWF laws. Examples include:
 - o NAPSAs (Notional Agreements Preserving State Awards)
 - o Old IR agreements
 - o Removal of super as an allowable matter
 - o Transitional reorg of organisational arrangements
 - o Ends HERRs and similar laws on linking TAFE funding to offering AWAs

Award modernisation

- new modern awards are be created during this transition
- key feature summarised (page 10)
- 'As part of the award modernisation process the AIRC will be required to develop an award flexibility clause for inclusion in all awards. This clause will, in combination with a simple, modern award arrangements enable employers and individual employees to make arrangements to meet their genuine individual needs so long as the employee is not disadvantaged.' (p10 of 2nd reading speech and para 10, page78 of Ex Mem)
- Exclude those earning in excess of \$100,000
- New empowering provision for AIRC re the modernisation process
- New prohibitions wrt contravening freedom of association as well as extra limits on the right of entry

National Employment Standards

- exposure draft was release the next day 14 Feb

Key issue to consider: provisions dealing with Award Modernisation.

Explanatory memorandum on Award Modernisation (page76 – 81)

Overview: the provisions here are administratively prescriptive, but apart from the requirement that a 'proposed model award flexibility clause' be devised, has few substantive strictures. What is implicit in this section is a naïve understanding of how 'the number of awards can be reduced' by first starting off with a list of 'priority industries and occupations'. The categories 'industry' and 'occupation' are not self-evident. It is these categories that will play a critical role in structuring the 'modernisation' process. The Commission, potentially, has a major leadership role to play in characterising 'industries' and 'occupations'. This may not be realised, however, because of the need to:

- (a) 'have identified a list of priority industries or occupations' by 30 June and completed their 'modernisation' by 31 December 2008 (paras 20, page79)
- (b) Complete the process for all other awards by 31 December 2009 (para 19 page 79)

Guidance as to what is meant by industry and occupation is limited:

'4. When modernising awards, the Commission is to create modern awards primarily along industry lines, but may also create modern awards along operational lines as it considers appropriate. ... the Commission must have regard to the desirability of reducing the number of awards operating in the workplace relations system.' (page 78)

...

'8. The Commission will identify the type of work, industry and/or occupation covered by a modern award and application of each award.

'9. The Commission is to have regard to the desirability of avoiding the overlap of awards and minimising the number of awards that may apply to a particular employee or employer. Where there is any overlap in the coverage of modern awards, the Commission will as far as possible include clear rules that identify which award applies.' (page 78)

Comment. The concern is quantitative, not with the quality of industrial instruments: fewer awards, it is assumed, are 'better'. There is only dim recognition that it is devising awards with 'appropriate coverage' that is the critical issue. Here a notion of key job or vocational families with associated 'parents' and 'siblings' would be a useful guiding concept. It would be especially helpful in bringing more coherence in to the skill formation system as well.

Implication. The AIRC needs to be given the time, financial resources and access to outside support (eg from the ABS and labour market researchers) to help it grapple with this critical issue. The strength and the weakness of the award system is that it follows the contours of the labour market. These are social not natural artefacts. In defining standards in the future we need to be more thoughtful about the categories that are used to define labour market coverage. And this will be a continuous process – As the ABS finds with industry and especially it's occupational categorical systems – this adjustment process needs to occur more often than in the past. So the challenge is not to think about a one off 'modernisation' process. Rather, there is a need to grapple with how to keep awards regularly in touch with constantly changing labour regularities.

Given the complexity and controversy of this task this matter won't be solved quickly. As the Commission goes about its work with modernising awards, however, there needs to be some sensitivity about this matter. Maybe it could look at some key areas, such as 'care work' or 'customer service work' and examine how related awards could be put on a path of closer integration or greater consistency with the passing of time. This could be done by making full use of para 12 of the Section dealing with 'Award modernisation process'

'The Commission may include transitional arrangements in modern awards to ensure the Commission complies with the objects and principles of award modernisation set out in this award modernisation request'. (page 78)

Recommendations

1. That greater support be given to the AIRC in conducting the Award Modernisation Process. In particular, it will need considerable additional resources in the form of finances, time and research support to devise an effective ways of ensure coherent coverage arrangements of award are settled. The development of such arrangements may not be fully achieved by 31 December 2009. A clear process for achieving this should well in train by that time.
2. To help guide and empower the Commission to grapple with the complex issue of improving the labour market coverage of awards, consideration should be given to making the following additions to the Bill.

New para in *positive Objects* at page 76;

- (f) must be regularly reviewed to ensure that they remain relevant to the rapidly changing structures of work and the labour market

New para in *negative Objects* at page 77

- (f) create an unduly rigid set of categories around which the coverage of different part of the labour market is defined.

New para in the section dealing with **Performance of functions by the Commission** at page 77

- (k) give due recognition to the need for a coherent set of categories for grouping together like classes of work to help ensure consistency in defining employment rights and obligations and to help provide a framework for defining common skill requirements.

Additional words to opening para in **Awards modernisation process** at page 77.

At end of para 4 add:

- (a) ... Modernisation of award is not simply meant to result in fewer awards, it is also intended to create a set of awards which, by clustering together like classes of work, provide more consistent and relevant ways of defining the reach of employment rights and obligations.'

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