HERBERT SMITH FREEHILLS

# ALP INDUSTRIAL RELATIONS POLICY

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Legal Briefings – By **Anthony Longland**

## A BOLD, TRANSPARENT PLATFORM

The Federal Opposition has published significant detail about the full range of policies it will take to the next election. By any measure, it is a bold and transparent platform for change.

Like taxation and other areas of business regulation, the industrial relations platform seeks to fundamentally alter the current policy settings. As one would expect, it does not contain precise details of future legislation, but it leaves no doubt about the narrative which will guide an ALP government.

My colleagues at HSF will publish a series of articles in the coming weeks to examine the likely impacts of the key components of the platform.

Politicians will debate the policy, and the underlying narrative, as we approach the election. Our hope is that we can simply illuminate some of the practical implications for business in the event of an ALP election victory and promote thinking on how to prepare for the changes in the event of an ALP victory.

In this article we examine the overarching narrative.

## THE OBJECTIVE IS SURE AND CERTAIN

In one sense the current environment is not unfamiliar. Just like in 2007, we have a disciplined and ambitious ALP which, after multiple terms in opposition, has a clear narrative, backed by a slick public campaign, driving its agenda towards government. It is important to realise, however, that in 2019 the platform comes from a significantly different perspective than the policy taken to the 2007 election.

The “Your Rights at Work” campaign arose from objections to the Work Choices legislation passed by the Howard government after obtaining control of both houses of the parliament at the 2004 election. Specific aspects of that legislation drove the campaign. The removal of a no disadvantage test for enterprise agreements, the further development of the individual contracts stream with lighter touch rules for Australian workplace agreements, and the significantly reduced access to unfair dismissal laws, were three of the main measures that drove the campaign.

In 2019, the “Change the Rules” campaign arises in the context of industrial legislation which is

almost exclusively the work of Kevin Rudd's ALP government in 2009. With the possible exception of the regulation of the construction industry by the Australian Building and Construction Commission, the policy objectives driving the ACTU campaign do not arise from the government's policies or its legislation. The essential narrative is far broader, relating predominantly to the ALP's beliefs about the rate of wage growth, income distribution and non-permanent forms of employment.

The platform is geared to those objectives. Be in no doubt, wages will increase, and the rate at which they do so will quicken. Use of the labour hire employment model will reduce substantially and casual employment will likely reduce. To its credit, the ALP has been abundantly clear about these things.

Bill Shorten told CEDA, in a speech on 25 June 2018, that:

> *'I believe that getting wages moving, wages growing, is a first order priority for the nation and for the government. I think it's the right and fair thing to do for people and it's essential for growing our economy and growing the confidence of people.'*

More recently, he has this week described the election as a 'referendum on wages.'

It is the manner in which these objectives are to be achieved which is interesting. No new IR system is planned. The broad architecture of the existing system will remain, but the dials will be turned hard on almost every aspect of it.

## TWENTY SIX YEARS YOUNG

In 1993 Paul Keating and Laurie Brereton fundamentally altered wage fixation by taking responsibility away from the central tribunal and establishing a new system which placed the primary means of wage determination in the hands of employers and employees, through agreements voluntarily entered at the workplace level. They created a new, market-driven system, allowing the forces within the labour market to play the central role in determining appropriate wage outcomes.

To facilitate this, the role of the central tribunal needed to be significantly curtailed to the maintenance of a safety net only, against which these market based outcomes would be measured. The level and scope of the safety net was reduced through successive processes introduced by governments of both persuasions; notably, 'award simplification' by the coalition government in the late 1990's and 'award modernisation' by the ALP in 2010.

Since then workplace bargaining has been the manner in which wages are determined within the IR system. There is scope for arbitration, but it is limited, typically triggered when negotiations cause or threaten significant damage to the economy or welfare of the population.

The broad architecture of the 1993 system was replicated in 1996, 2006 and 2009. And on the story will go if the ALP forms government.

## BUT CAN BARGAINING DELIVER?

At first blush, this is something of a surprise. The most sure and certain way to improve wage growth would be empowering the tribunal to arbitrate wage rises. As the legislation is now based on the Corporations power, orders increasing wages and related matters can have an immediate and widespread effect. Recent media comments suggest this will be utilised to turbo charge the minimum wage, but that will not impact the great majority.

Whilst the platform doesn't identify reasoning at this level, it seems clear there is still a desire to enable market forces to have some impact in the process. And for outcomes to be tailored for individual workplaces. Hence the maintenance of workplace bargaining.

Of course, this objective won't work where employers can simply refuse to bargain, or refuse to agree to an outcome. The ACTU campaign has referred repeatedly to its desire to remove the choice from employers not to participate in bargaining. In a speech this week, Mr Shorten drew attention to the same issue.

The 2009 reforms included some measures designed to force bargaining outcomes – enabling a majority of workers to compel an employer to bargain, and empowering the tribunal to make "good faith bargaining orders." But it seems these were light touch measures, compared to what is now proposed.

## TURNING THE DIALS

So if the overriding narrative is to increase wages and to prevent recourse to what are perceived as less secure forms of employment, then how is that to be achieved in a system with agreement making at its centre? This is where things get really interesting.

The platform refers to a suite of measures which will really turn up the heat and increase pressure for outcomes in bargaining. Some of the key changes will be:

- Industry bargaining – the ability to simultaneously press claims upon multiple employers across an industry or a sector of an industry – will be permitted. It appears clear that protected industrial action will also be available to support or advance such claims. Whilst some public comments suggest this will be limited to low paid sectors, the platform leaves open the possibility it be available in any sector in which bargaining has not occurred or hasn't given rise to enterprise agreements containing wage increases. This will be a very powerful tool for unions seeking wage increase;

- When bargaining is underway, the employer parties must have a "genuine intention to make an agreement". It will be interesting to see how this is reflected in legislation (how does one regulate intent?), and what sanctions will be created for employers who do not have such an intention. Perhaps easier access for unions to arbitration will be the outcome?

- What is called "truth in bargaining" will be "assisted by a disclosure framework for information relied upon in denying a workforce claim". This promises to be a significant addition to the existing good faith bargaining requirements which will perhaps make recourse to the tribunal a more powerful tool in bargaining. On the whole the tribunal has not played an interventionist role in bargaining and there is certainly scope for the GFB provisions to be more heavily utilised. There are aspects of the Platform which suggest this intent.

- Enterprise agreements will not be able to be terminated without the consent of all parties. This is also significant. It seems to confirm the intention is not for wages to move with the market, but that 'the only way is up.'

- Changes will be made to the protected industrial action regime. It's pretty clear that taking protected industrial action will become easier, and potentially defending against it somewhat harder.

There is more detail here of course which will be examined in specific articles later in this series.

## LABOUR HIRE AND CASUALS

Enterprise agreements have always had a nominal term, at various times the maximum permitted has been 3, 4 and 5 years. There has always been a power in the tribunal to terminate them after this period, in theory taking the employees back to the underlying award safety net.

The theory here is that parties ought to be encouraged to bargain at frequent intervals, and that one agreement shouldn't necessarily be the same as the last. They should reflect the particular conditions prevalent at the time they are made. In good times wages will move quickly, and in lean times not so much.

But the tribunal has never grasped the nettle here. It has approached its task with a caution that in practice shows reluctance. Hence, deals entered in good economic times simply never end. They continue to operate past their nominal expiry date.

So what behaviour does this drive? Faced with the need to cut costs when the good times end, businesses look for opportunities to change, to become more flexible and more efficient. Here we have seen frequent recourse to part time and casual employment, contracting and labour hire.

That explains the many measures in the platform aimed at labour hire and casual employment. It requires, for example, that labour hire employees working side by side with employees of the host must receive the same terms and conditions as the host's employees. These situations are ubiquitous across numerous sectors. This change alone could significantly increase wages for many thousands of employees.

Other measures include the establishment of a national labour hire licensing scheme (likely to be similar to the schemes recently introduced in Queensland and Victoria). The platform contemplates extending responsibility for compliance with workplace laws to corporations who are the economic decision makers, including franchisors and along the supply chain.

## CONCLUSION

The overall message is clear: while the broad architecture of our IR system will remain, its features will be significantly changed. The changes will be directed at increasing wages and decreasing the use of casual, labour hire and other forms of employment perceived to be less secure.

So expect the politicians and various commentators to argue vociferously about the underlying rationale and the various pros and cons of the measures themselves. There will be claims and counter claims, and no doubt sound and reasonable arguments will be advanced from different directions.

But at the end of the day, if the ALP is elected, its platform makes clear what it will do. And it won't be timid or half hearted.

Hold on to your hats!

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