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Circular No. 110/2008

JF:jf

To: All affiliates
Industrial Legislation Committee

From: Cath Bowtell
Senior Industrial Officer

Date: 18 September 2008

Re: Industrial Relations Legislation Update and ILC meeting

A meeting of the Industrial Legislation Committee will be held prior to the award modernisation sub committee on **Monday, 22nd September at 12.30pm**. The meeting will be held at the ACTU (room to be advised).

Attendance can be by phone or in person. The phone numbers for dial-in attendance are:

Adelaide: 08.8220.0695 Brisbane: 07.3811.0695

Canberra: 02.6210.0695 Darwin: 08.8989.0695

Hobart: 03.6240.0695 Melbourne: 03.8414.5110

Perth: 08.9460.0695 Sydney: 02.9696.0695

ALL participants are to use this PIN: 5385#

Please advise Joel (jfetter@actu.asn.au; 03 9634 7386) of your attendance at this meeting.

The meeting will hear a report from the WAG group and consider the announcements made by Julia Gillard at yesterday's Press Club Speech (copy attached). A summary of the key announcements and new policy areas is attached.

PRESS CLUB SPEECH ANNOUNCEMENTS

1. Timing

The legislation will be in the parliament before the end of the year and if passed by the Senate the bargaining and unfair dismissal provisions will commence 1 July 2009.

2. Fair Work Australia

FWA will perform the traditional functions of the AIRC and will have a separate inspectorate to take over the roles of the Workplace Ombudsman. There will be Fair Work divisions of the Federal Court and Federal Magistrates Court (which will be able to deal with small claims of up to \$20,000). Importantly, employment contracts will be able to be enforced in respect of matters covered by the NES or an award.

3. Safety Net

The only new detail announced is that to be exempt from an award, the employee must be guaranteed to earn \$100,000 in advance and in writing. However, the limit includes non-monetary benefits, provided they are similarly guaranteed.

4 Minimum Wages

FWA will set a minimum wages and casual loading. These will apply to employees not covered by an award, or by the general award. The minimum wage and award wages will be reviewed annually and adjustments will take effect o 1 July each year.

The minimum wage criteria will be

- The performance and competitiveness of the Australian economy including productivity, inflation and employment growth
- Achieving social inclusion through increased workforce participation
- Relative living standards and the needs of the low paid
- Providing a comprehensive range of fair minimum wages to junior employees, employees to whom training arrangements apply and employees with a disability

We have obtained a guarantee that pay equity will be considered, but the wording so far is not clear and the ACTU will continue to pursue this.

The new laws will provide for a 7 member Minimum Wage Panel drawn from within FWA and external members.

The process will be open and transparent, and the parties will be able to test the evidence.

5. Freedom of association and protection from unfair treatment

The new Act will consolidate and streamline all the unfair treatment provisions. The Act will make it unlawful for a person to take adverse action against a person because the person has a workplace right, including rights under workplace agreements award or laws. Adverse action will include dismissal, discrimination, refusal to employ, and prejudicially altering the position of a person.

The Act will cover the usual forms of discrimination as well as sham contracting.

6. Good faith bargaining

The Act will set out the good faith obligations in FwF. These are:

- Attending and participating in meetings
- Disclosing information
- Responding to proposals
- Genuinely considering proposals
- ‘refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining’

FWA will be able to make orders, enforceable by the Court, that ensure the integrity of bargaining. Examples of a lack of good faith include unfair conduct towards a delegate, preventing the delegate or organiser consulting the employees, unfair selection of the “bargaining unit”, and pursuing unlawful claims (see below) or claims that could not pass the BOOT test. The requirement for a bargaining notice will be removed, and the good faith obligation will be enlivened immediately bargaining starts.

Where a union has a member, it will be entitled to be at the bargaining table.

7. Low paid bargaining

The announcement provides some detail about how multi-employer bargaining will work for low-paid employees and those who have not traditionally had access to enterprise bargaining. The government has not announced details of:

- How multi-employer bargaining *by consent* will work; or
- How ‘single business’ will be defined (to effectively allow multi-employer bargaining for projects, sites, related corporations, franchises(?))

A union will be able to make application to FWA to bring named employers within this stream of facilitated bargaining. FWA will have the discretion to exclude certain named employers, and decide if multi-employer bargaining is in the public interest.

Once multi-employer bargaining has commenced, FWA will have a broader range of powers, including:

- Ordering a 3rd party to the table (eg funder or head contractor); and
- Making non-binding recommendations on the merits of the claim.

8. Approval and content of bargaining

Process

For an agreement to be approved, *both* bargaining parties will have to lodge a statutory declaration, and the agreement will have to ensure that *every* employee is better off overall. While approval will normally be on the papers, the parties will have the ability to be heard. While the BOOT test will apply at the time the agreement is made, the wage rates in agreements cannot fall below the award minimum wages for the entire life of the agreement.

Mandatory content

Agreements will have to contain a DSP, a requirement to consult employees where there is significant workplace change, and a right for employees to be represented during consultation or in a dispute. Agreements will also have to contain a flexibility clause. The parties to design each of these as they see fit, however if the agreement is silent, a model clause will be deemed to apply. This model clause will be based on whatever the AIRC puts into the 'general' award as the DSP.

Bargained content

Agreements will be able to deal with:

- Matters pertaining to the employment relationship
- Matters pertaining to the relationship between the employer and the union
- Deductions from salary to a third party
- Terms dealing with the operation of the agreement.

Matters that do not fall within the above definition will be able to be included in agreements (that is FWA will not scrutinise agreements and remove the offending terms) but such terms would not be able to be enforced.

Taking industrial action in pursuit of a matter that is not within scope would not be protected. No detail is yet available about how this will be given effect in the Bill.

The following matters have been held to not pertain to the employment relationship:

- Prohibitions on the use of contract or labour hire work
- Pyramid subcontracting
- Prohibitions on opening or closing plants
- Prohibitions on extending trading hours
- Requirements to procure Australian-made products (unless a link can be made on safety or other grounds)

Unlawful content

Agreements will not be able to be approved by FWA if they contain terms that:

- Breach freedom of association
- Provide for bargaining fees
- Are discriminatory; or
- Provide a shorter qualifying period for unfair dismissal than the statutory scheme.

9. Unfair dismissal

The government has announced that it will remove the exclusion of seasonal and fixed-term employees from bringing unfair dismissal claims. The only employees who will not be able to bring claims will be persons serving a qualifying period of 6 months (12 months for small business). Casuals will be subject to the same qualifying period as permanent employees.

The government has published its 'Fair Dismissal Code', for small business, and accompanying checklist. The Code provides that an employer may summarily dismiss an employee in cases of theft, fraud or violence and serious breaches of OH&S. It will be 'sufficient, though not essential' for the employer to report such cases to the police, in order to avail themselves of the shield provided by the Code. In cases of underperforming employees, the employee must be warned, and given a chance to improve. In all instances, employees can be represented by another person (except a practising lawyer).

10. Industrial Action

Protected action

Protected action must be authorised by secret ballot, conducted by the AEC. Unions will continue to be required to apply to FWA for a ballot. Employees taking protected strikes must have their pay docked for the actual time taken off work (ie no 4 hour rule). If employees take protected bans, the employer can choose to:

- Pay the full wage
- Lock the workers out (and pay no wage); or
- Issue a partial work notice (and pay an appropriate percentage of the wage).
These notices can be challenged.

Unprotected action

Unprotected action must be stopped by FWA within 48 hours. Pay must be docked for a minimum of 4 hours.

Unlawful action

The government says that industrial action will be unlawful if taken in support of 'pattern bargaining'. No further details are provided.

Ending action

There are very few details about when FWA can stop protected industrial action. However, if industrial action is stopped, and FWA arbitrates, FWA will take into account the merits of the case, the interests of the parties, the public interest and whether the outcome will improve productivity at the workplace.