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What will the new govt mean?

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Business as usual does not mean no significant public sector industrial relations reforms are on the agenda

Kieran Pender and John Wilson

HAD Peter Dutton been elected prime minister earlier this month, we would be facing turbulent times ahead on the public sector industrial relations front - with job cuts and an end to work-from-home arrangements imminent.

The return of the Albanese government means no drastic changes. But business as usual does not mean there are no significant reforms on the agenda.

So what can we expect from the Labor government in the years ahead when it comes to public sector employment matters?

IR reform

The last term of government was a busy one when it came to major industrial relations reform. An overhaul of the independent contractor/employee distinction, landmark changes to bargaining, prohibitions on multiple consecutive fixed-term contracts, improved protections for casual workers, the right to disconnect and more - industrial relations was a field of frenetic activity for the ALP.

This term of government is not expected to be as busy on the employment law front. With the structural changes enacted, it is likely the years ahead will see a focus on bedding down the existing reform. It may be that in some of the more novel areas, such as the right to disconnect, amendments are made to reflect the practical experience - which is only beginning to be seen now. The government has also flagged new laws to prevent the Fair Work Commission cutting penalty rates in modern awards.

The conclusion of enterprise bargaining across the APS was another milestone

for the Albanese government, with agency-specific enterprise agreements (albeit containing many APS-wide common terms) now operational from 2024 to early 2027. With almost two years remaining on the agreements, there is unlikely to be major industrial agitation within agencies for some time.

Restraint of trade prohibitions

One area of IR reform highlighted by Labor in their pre-election budget, and now to be implemented in the year ahead, is a prohibition on non-compete clauses for workers below the high-income threshold (presently \$175,000).

While these restraint of trade clauses have long been common in specialist sectors, and are limited by the common law (which will invalidate unreasonable restraints), they have increasingly spread across the economy. Overly broad non-competes can have a chilling effect on workforce mobility, because they might be complied with even where a court would strike it down - due to the financial and personal toll of litigation. Labor's proposed ban will prevent employers being able to rely on non-competes in their employment contracts, except for high-earning staff.

While public sector employment contracts do not contain non-compete clauses, the ban may have an impact on those who contract or consult to government, including through labour hire arrangements. Where contracting or consulting firms have non-compete clauses in their standard contracts, to prevent staff moving to competitors, those clauses will need to be reviewed - as and when the legislation is enacted.



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Whistleblowing reform

Another area of expected reform is whistleblower protections. In June 2023, the Albanese government enacted initial changes to the Public Interest Disclosure Act 2013, the law that provides protections for federal public sector whistleblowers. The government also commenced a major review of the PID Act, with a view to more substantial changes of a law once described by a federal court judge as "technical, obtuse and intractable".

That review is ongoing, and reform is likely to be pursued in the coming term. Treasury is also currently reviewing private sector whistleblower protections, in the Corporations Act 2001; the two processes may allow the government to pursue greater harmonisation and consistency across the whistleblowing landscape.

There have also been calls for improved practical support and assistance for whistleblowers. The Senate Legal and Constitutional Affairs Committee is presently examining a bill introduced by the cross-bench at the end of the last parliamentary term, which would establish a whistleblower protection authority. Together, these three reviews will provide a platform for significant reform to better protect whistleblowers; a good thing for ensuring integrity and transparency in the public sector.

Electoral participation

Finally, a perennial bugbear of ours: overly draconian limitations on the free speech and political activity of public servants. We were heartened to learn that, during the recent campaign, the Australian Public Service Commissioner issued a memo to agency heads to clarify that most public servants can undertake political activity in

their personal time. The memo advised:

"Where employees wish to undertake volunteer campaign activities outside work hours such as phone banking; doorknocking; manning stalls at public events; handing out how to vote cards" in public places; or putting up campaign signage (including displaying such signage at their home); it is not reasonable to expect or require employees to discuss with their managers or otherwise notify their agencies before they do so. These activities, when conducted outside work hours and where employees do not wear anything that identifies them as an APS employee, are low risk and unlikely to raise conflict concerns."

This is eminently sensible guidance. But we know from experience that the official position of the Australian Public Service Commission and the on-ground reality for many public servants can vary. We would encourage the Commission to consider issuing revised formal guidance, including practical examples, to provide greater clarity for public servants. This is an issue that crops up every election; clear, accessible guidance can only be good for our democracy.

While the forthcoming term of Albanese government may be less frenetic on the IR front, there will no doubt be many developments for public servants to stay informed about. We will endeavour to continue providing our employment law perspective in these pages in the years ahead.

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The right to disconnect was one of a number of IR reforms from the Albanese government's first term. Picture Shutterstock