

WHAT IS AHEAD IN 2021? THE TOP FOUR ISSUES FACING AUSTRALIAN EMPLOYERS THIS YEAR

18 January 2021 | Insight
Legal Briefings - By **Natalie Gaspar and Anthony Wood**

We explore four issues that will define Australian workplaces through 2021. Includes tackling harassment and employers' post-Covid responses.

After the annus horribilis that was 2020, it's already clear that COVID-19 won't cease to be an issue for individual workplaces and our economy for some time yet. And while most of us are just hoping for a respite from the challenges of keeping our workplaces safe from the coronavirus, employers will continue to face a number of new and recurring challenges in 2021.

To start off the new year, the 13 partners and more than 60 lawyers from the Australian Employment, IR and Safety team at Herbert Smith Freehills contributed their thoughts about the likely big ticket items in 2021. Here's the list of the top four issues we identified, and what you need to know to prepare your business.

1. UNDERPAYMENTS AND 'WAGE THEFT'

In 2020, many high profile employers either self-reported instances of underpaying employees or faced investigation and/or prosecution by the Fair Work Ombudsman (**FWO**). Last year began with the FWO, Sandra Parker, imploring business that compliance with awards, enterprise agreements and the Fair Work Act was not negotiable. She was quoted in the AFR as saying: *"I am calling on boards to seek assurance from their chief executive officers that wages are being paid to employees in accordance with the law. The buck ultimately stops with the chair."*

Our practical experience is that the FWO is adopting a more aggressive approach against underpaying employers – even those who self-report possible breaches to the regulator – and we have every expectation that this will continue in 2021. And don't be surprised to see the FWO pursuing penalties against individual directors and senior executives.

Whilst there has been a constant stream of media releases published by the FWO about underpayment investigations and prosecutions, our experience suggests that this is still just the tip of the iceberg, with many employers still mid-phase of internal investigations into their compliance. Although the reasons for underpayments are wide-ranging and defy simple categorisation, one inescapable takeout is that employers have underinvested in payroll compliance over many years. This is consistent with the anecdotal evidence that overpayment errors are frequently identified in payroll audits.

So, what of 2021? Employers that have not yet commenced internal auditing of their payroll compliance are taking a big risk. The FWO and unions are likely to continue their robust pursuit of recalcitrant employers. Media interest in the issue is unlikely to subside and the reputational risk of noncompliance is elevated in the current climate where specific wage theft laws are on the state government agenda. Victoria leads the way here, and by mid-2021 it will become a crime to dishonestly withhold an employee's wages or other entitlements. Whilst these criminal laws are unlikely to apply to most underpayments, the issues will no doubt be conflated and the reputational risk of noncompliance will remain high.

2. THE COVID-19 HANGOVER ... AND OPPORTUNITIES

With the rollout of a vaccine not scheduled to commence in Australia until mid-February 2021, and with periodic interruptions likely to continue arising from localised COVID hot-spots, employers and employees will need to be agile. COVID will continue to impact communities, employers and sectors of the economy in random and sporadic ways. Some businesses may never recover, while others will flourish with new opportunities.

One thing already seems fairly likely: the trend towards remote work and an agile workforce seems unstoppable.

The proliferation of video calls may have been a novelty at first, but the impact is profound. Employers face the challenge of engaging and energising their workforce and to foster collaboration and team culture at the same time. Businesses that can embrace this new flexibility and expectations of a talented and increasingly agile workforce will inevitably prosper.

In the meantime, here is a list of COVID and post-COVID issues that employers will be confronting this year:

- **Health and safety considerations:** all employers need to take reasonably practicable steps to maintain a workplace that is safe. How can they do this where social distancing is problematic, especially where remote working is not feasible?
- **Testing and vaccinations:** can employers lawfully demand that employees attend work on the condition that they can prove they are either negative to COVID-19, or have received a vaccination? What if an employee refuses a vaccination? And what about employees who don't feel safe to return to work in face of an employer's demand that they do so? These issues will affect most employers, but especially those in particularly vulnerable sectors like health, aged care and hospitality.
- **Modern awards and enterprise agreements:** Although the Fair Work Commission did make temporary changes to some awards in 2020 to introduce certain flexibilities, the instruments are blunt tools which can't be readily customised to the needs of individual workplaces. Many workers who are award-covered remain subject to rules which were created in a different era and do not accommodate the mutual interests of employers and employees for whom remote and flexible work is preferred. The FWC retains the role as custodian of awards and it should be prepared for applications to vary awards to provide for the flexibility demanded by the expected long term changes that have arisen from the pandemic. But unless this happens, employers need to manage their legal risks by monitoring the working hours of award covered staff and complying with the required record keeping obligations.
- **'Never waste a crisis':** this is a catchphrase that successful employers will be acting upon. Employers should be planning now on how to prevent a similar situation in the future from having a debilitating impact on their business. Over the past year, employers should be aware of what they have already been able to achieve in a crisis, and how they can capitalise on the changes for the long term. The pandemic has made many employers aware of how their business can flex labour up and down to respond to hotspots, implement stand downs, and remove artificial demarcations. Some of our clients are already varying employment contracts or enterprise agreements with these issues in mind.

3. IR REFORMS TO THE FAIR WORK ACT

The Attorney General and Minister for Industrial Relations, the Hon. Christian Porter MP, introduced a relatively modest suite of industrial relations reforms into federal parliament in the final sitting week of 2020. We summarised and provided our analysis of those proposals [here](#).

The reforms proposed by the *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* reflect the obvious political constraints that have existed at least since Coalition government's WorkChoices overreach in 2005. As such, we expect that there will continue to be debate about the proposals in federal parliament once the Senate committee reports on the package of reforms in March this year.

Independent of the impact of the reform package, the anticipated political debate justifies our assessment of this as one of the big employment issues for 2021.

Undoubtedly the two most important changes in the bill address enterprise bargaining and casual employment.

(a) In relation to bargaining, the bill seeks to introduce greater flexibility in the agreement making process and relaxes the strict process obligations that have seen the Fair Work Commission (**FWC**) reject some agreements despite the approval by a majority of employees. There are also some important changes to the operation of the Better Off Overall Test (**BOOT**). When analysing an agreement for BOOT purposes, the FWC will only be permitted to have regard to patterns or kinds of work which are actually being performed at the workplace concerned, or are 'reasonably foreseeable'. In other words, hypothetical possibilities that are not within the contemplation of the parties are not relevant to the test.

Second, the FWC will be required to 'give significant weight to the views of the parties who are covered by' the agreement, on the question of whether it passes the BOOT. These changes make clear that both financial and non-financial benefits in an agreement must be weighed equally in comparing its impact against the underlying award. In other words, it's aimed at ensuring that the *better off overall* aspect of the BOOT is given more significance and will dissuade the strict 'line by line' analysis that has attracted the ire of many employers. It's still too early to tell if these reforms (if passed by parliament) will rescue the death spiral of enterprise bargaining, but they will certainly be welcomed by most employers.

(b) The casual employment changes are likely to be the most impactful. They are also the most controversial. The bill creates a new definition of 'casual employment', being the acceptance by an employee of an offer of employment which makes 'no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person'. On the other hand, the bill requires employers to offer conversion to permanent employment - either full-time or part-time - after 12 months from the date the employment started, provided the employee has worked a regular pattern of hours for at least 6 of those months which, without significant adjustment, could continue. This right to conversion will become a 'workplace right' and hence protected by the general protections provisions.

Amongst the other changes to casual employment is a new attempt to permit any casual loading to be offset against NES-type benefits that would otherwise be payable to permanent employees. By overcoming the double-dipping outcome that arose following the Federal Court's *WorkPac v Skene* and *WorkPac v Rossato* decisions, this aspect of the reform bill will be overwhelmingly supported by employers.

4. SEXUAL HARASSMENT, BULLYING AND WORKPLACE CULTURE

The federal Sex Discrimination Commissioner's [Respect@Work: Sexual Harassment National Inquiry Report](#) was released in March 2020. The report concluded that Australia lags behind other countries in preventing and responding to sexual harassment, and that one in three people experienced sexual harassment at work in the past five years. The Commissioner made the following plea: *'I call on all employers to join me in creating safe, gender-equal and inclusive workplaces, no matter their industry or size. This will require transparency, accountability and leadership. It will also require a shift from the current reactive model, that requires complaints from individuals, to a proactive model, which will require positive actions from employers.'*

The likely outcome of the Report is a variety of legislative reforms to the federal *Sex Discrimination Act*. Foremost will be the expected creation of a new positive duty on employers to eliminate workplace sexual harassment, mirroring the obligation that currently only exists in Victoria. Employers should expect that the proposed reforms will generate renewed attention and greater expectations on employers to adopt an employee-centric approach to addressing the issues identified in the report. Employers of choice are already implementing programs in anticipation of government reforms in this space.

But putting aside changes to the law, employers should expect even greater scrutiny of their workplace culture by employees, unions, government regulators (like the FWO, ASIC, WorkSafe/Comcare), institutional investors, shareholder activists and, obviously, the media. Throughout last year there were multiple high profile examples of behaviour by senior business leaders, judges and politicians which attracted ongoing media attention. Plaintiff law firms are also becoming more frequently active in this space. And whilst legal claims can always be settled, reputations can be harder to repair. Because of this, we recommend that Boards should be carefully monitoring the executive management and ensuring that workplace safety, culture and bullying receive ongoing attention.

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