

AWARD SIMPLIFICATION - WE'D LIKE TO DO IT, BUT WE JUST CAN'T WORK OUT HOW

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Legal Briefings - By **Anthony Wood and Shivchand Jhinku**

The Prime Minister in his address to the National Press Club on 26 May 2020 identified that the current industrial relations system was not 'fit-for-purpose'.

His solution was to get everyone 'back in the room.' By everyone, it turns out he meant the 'IR Club' - its back in business - employer associations, unions and government.

These groups were asked to put aside their (century old) differences to find co-operative solutions to specific problems. The Working Group tasked with considering award simplification comprised:

- **Employer organisations:** Australian Chamber of Commerce and Industry, Ai Group, Council of Small Business Associations of Australia, Australian Hotels Association and National Retail Association.
- **Unions:** Australian Council of Trade Unions, United Workers Union, Australian Workers Union and Shop Distributive and Allied Employees Association.

Assuming that the public commentary is correct, its most unlikely this latest award simplification process will make any meaningful or widespread changes.

After all, we have experienced long and drawn out rationalisation, simplification and modernisation processes over decades. The most recent one, ironically called the 'four yearly review' has been ongoing for more than 6 years - and still no end is in sight.

Somehow, awards have continued to survive.

Although an impressive reduction from more than 3,500 to just 122 awards through the last 'simplification' process was a considerable achievement, the process was incapable by its design of addressing the chief grievance: awards by their very nature are blunt instruments of dispute resolution. They are not borne out of a meticulous process of identifying what will work best for the economy, including the labour market of the 21st century.

The reality is that awards are often seen, including by those using them on a daily basis, as overly prescriptive, arbitrary, inconsistent and inflexible. They can be overwhelming for people without specialist experience to interpret correctly. And there are not infrequently different views taken even by the members of the FWC, which makes them!

Media reports of the progress made by the Working Group have suggested that there was no consensus on even the most elementary premise behind the review, namely whether the current award system requires simplification at all. But is that really surprising when the composition of the group is considered?

HOW DID WE GET HERE?

Awards have been the mainstay of Australia's unique IR system, surviving for over 100 years despite the enormous structural changes to our economy and the introduction of enterprise bargaining and the National Employment Standards. At the time they were introduced, they were probably useful tools in resolving disputes which arose across a variety of workplaces, and helped to provide stability and certainty - especially in an era when there was no other safety net or access to enterprise bargaining.

However, it is clear that the economy and business - and indeed the lives all our communities now enjoy - have moved on, and a regulator given the fresh opportunity to manage issues would approach the matter entirely differently.

One obvious issue that comes to mind is to deal with working from home arrangements for staff and the span of hours where employees may decide that it suits them better to take time out of 'traditional' working hours and perform work at other times. All parties want flexibility, but are seriously constrained by the increased costs that flow from award mandated span of hours provisions. What kind of behaviour does this drive? Certainly not solutions focussed, innovative or productive behaviour. Nor does it suit the needs of many employees who actually want to work more flexibly to juggle work with their family and personal matters.

Confusion over award entitlements is common, especially for employers who are implementing annualised pay arrangements. It's frequently difficult to know whether employees are award-covered or not, or even to assess which award might apply. Again, there are numerous conflicting decisions on that score from the FWC itself.

Award conditions vary wildly, and often inexplicably, based on nothing more than historical custom and practice.

If you're a clerk covered by the Private Sector Clerks Award, you might be entitled to different wages and conditions of employment than clerks in other sectors. And work value assessments have been conducted to determine how much a tradesperson should earn, compared to, say, an engineer, an academic or a scientist, and so on.

This is to be contrasted with the development of the National Employment Standards (NES). While the NES entitlements have been entrenched and expanded by successive Labor and Liberal governments, awards have survived with, in many cases, added complexity.

On the one hand, the NES (and its predecessor the Australian Fair Pay and Conditions Standard) ensures that Australian workers receive minimum conditions of employment: a 38 hour week, a national minimum wage, four weeks' paid annual leave, sick and personal leave, and so on.

It's fair, well respected and easily understood. Yet awards are complex, and create a dilemma for many employers aspiring for seamless, integrated operations, but having to grapple with differing classifications, benefits, pay periods and so on.

The award system stymies those who seek new to establish industries, and pioneer different ways of working. It forces our enterprises to fit into rigid, and often outdated industry and occupational classifications, whether or not they work for the enterprise and the (increasingly international) markets in which it seeks to compete and thrive.

The contrast is quite stark.

ONE SIZE MAY NOT FIT ALL - A SOLUTION FOR SMALL BUSINESS?

Small business in particular has been vocal about the complexities and limitations imposed by awards. It has been reported that:

- the Council of Small Business proposed new schedules to replace the complex award terms for small business, especially in retail and hospitality, to make it easier to engage people on a single 'loaded' rate for the week (and another rate for weekends);

- this loaded rate would take into account the relevant pay rates, applicable penalty rates and the multiplicity of allowances that might otherwise apply; and
- it was proposed that there would be a solution to the current limitations on award conditions that pay part-time employees overtime for hours worked beyond their set roster, but currently discouraged employers from offering extra hours.

THE BENEFITS OF CHANGE

These changes may make it easier for small businesses to hire new staff.

Of course, the obvious question is if this is good enough for small business, why shouldn't it apply across the board?

Again, based on media reporting, this has been one of the sticking points in the Working Group, meaning that agreement has not been able to be achieved. The indications are that the government, whilst initially being attracted to these ideas, may be unable to progress them. Such are the realities of a potentially hostile Senate.

ARE THERE OTHER OPTIONS?

So, where to from here? The overall objects of the FW Act are to provide a fair, flexible, accessible system. Those objects are expected to remain unaltered by the government's 2020 reform proposals. So, what changes are desirable, and what can be expected?

If progress cannot be made in simplifying awards, that may not be due to a lack of willingness of the relevant players to work collaboratively. It might simply be a case that awards are no longer the best vehicle for regulating aspects of modern workplaces. A quick look at some of the major sectors of the Australian economy that generate significant wealth, for example, mining, oil and gas, banking and finance and education are relying less upon awards, and more on 'market conditions' to determine pay and conditions.

Perhaps taking the NES further and expanding the legislated safety net is a discussion worth having. The existing ten NES conditions could be expanded, with appropriate exclusions for high income earners, allowing awards to be redundant. But if that is a pie in the sky dream, here are some alternatives:

- pare down the over one hundred industry and occupation awards to just a handful, thereby avoiding the confusion over which award/s apply;
- prevent the application of more than one award to a single workplace by providing that an award applying to the majority of a workforce will prevail; and

- remove prescriptive award content and encourage individual flexibility agreements.

These are fairly humble goals, but any changes designed to reduce the prescription and confusion caused by the modern award system would be welcomed by most employers.

[Please click here to return to our Australian IR reforms showcase page](#)

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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