

IRONY AND THE OPPORTUNITY FOR GENERATIONAL REFORM OF AUSTRALIA'S WORKPLACE LAWS

29 May 2019 | Australia
Legal Briefings - By **Anthony Wood**

There is some irony that the party which entered the 2019 federal election campaign with no IR policy now has the chance of a generation to make enduring and significant change to improve Australia's IR system for employees and employers alike.

Whilst the Fair Work Act has many commendable features - for example, the comprehensive safety net constituting the National Employment Standards, and the exclusion of industrial action during an in-term enterprise agreement, its problems have been widely chronicled by many critics from business and unions alike.

Many now share the view that enterprise bargaining has become a meaningless charade over the past few years: on the one hand, it's not delivering productivity improvements for business; on the other hand, workers are bemoaning low wages growth. There is a barely penetrable minefield of pointless processes and legalities that frustrate everyone: how can a system be taken seriously when an agreement which has been endorsed by employees is submitted to the Commission for approval, only to be delayed for six or more months before it is even discussed with the parties, let alone formally approved? The participants are deserting the system in droves.

The Fair Work Act and the actions taken by the Commission frequently tend towards over-prescription and technicality. Case in point: the Commission only recently released proposed changes to the standard award annualised salary provisions and the solution looking for a problem is more bureaucracy which will undoubtedly create confusion. There are countless other examples of this associated with a complex jurisdiction which on the one hand eschews lawyers (see s.596 of the Act), but on the other hand can't operate without them.

The Commission is required by the Act to perform its functions quickly, informally and avoiding unnecessary technicalities (see s.577 of the Act), yet this is hardly the case often enough. In fact, it's surprising that we have an IR system that works at all given that it owes its current status to such a diverse lineage as Peter Reith, Tony Abbott, Julia Gillard and Bill Shorten.

Few people expected Labor would not win the 2019 election. Herbert Smith Freehills had previously described Labor's reforms as 'bold and transparent'. And although business had hardly signed-on to Labor's agenda, they had largely resigned themselves to finding ways to deal with the inevitable changes that might follow. With its electoral defeat, the key pillars of Labor's policy – restoring penalty rates; regulation of labour-hire and the gig economy; abolishing the ABCC; and de-casualising the workforce – may become historical relics. Or will they resurface again in Labor's next policy package?

If the Morrison government can shake off the ghost of the Work Choices over-reach, they have a generational opportunity to advance the case for a modified system underpinned by the objective of making workplaces more productive and less combative. It must be possible to incorporate the principles of fairness and simplicity without resorting to the largely piecemeal and prescriptive changes that we've seen over recent years.

The new IR minister, Christian Porter combines his new portfolio with his role as Attorney General. As a West Australian, he will be familiar with the CFMMEU's disruptive impact on that State's economy. As a senior member of cabinet, and the newly appointed leader of the government in the House, his new portfolio should be given some prominence in the new Parliament. As AG, he was the minister responsible for cutting red tape in government bureaucracy, ideally placing him to address the absurd inefficiencies in our IR system.

Opportunities to improve our IR system arise infrequently, and consensus is even rarer. But a list of priorities and initiatives which reflected the following approach would be worthy of consideration.

- Set an objective of achieving more productive and profitable workplaces which deliver better job security and wages outcomes.
- Take a serious look at the Productivity Commission report from November 2015 which advocated a number of sensible areas for reform which were mostly ignored at the time.
- Make another objective that the current complexity and prescriptive nature of workplace regulation must be eradicated. This includes taking out the uncertainty associated with unfair dismissal cases, where inconsistent outcomes create confusion and cost. Not surprisingly, the ACCI has already called for this reform in responding to the new ministry appointments.
- Convene a summit of employers, unions, politicians, academics and lawyers to canvass

options to achieve these objectives. It doesn't need to replicate the Hawke government's 1983 Wages accord, but an open and transparent approach will garner more credibility than the background musing of the Productivity Commission. And the stark lesson from WorkChoices is that successful policy reform requires greater community engagement. But don't waste time on those with vested interests who want to preserve the status quo or garner a selfish protected position.

- Be prepared to consider and give credit to proposals, even if they came from the Labor side. For example, Labor's pre-election proposal for greenfield agreements to endure for the life of the project is truly worthwhile and would significantly enhance investment and productivity.
- Be open to new ideas and be prepared embrace the new economy. A simple, less prescriptive system shouldn't mean that worker exploitation is tolerated as an unfortunate by-product. (The government will face a challenge here to protect workers while still preserving the benefits of not messing with the established definition of 'employees'.)

The new IR minister should be looking at many initiatives that will focus on positive system outcomes. Reform opportunities abound, and the timing is opportune.

[Please click here to return to the Australian Federal Election Reforms Hub](#)

KEY CONTACTS

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



**ANTHONY
LONGLAND**
PARTNER, PERTH

+61 8 9211 7273
Anthony.Longland@hsf.com



KIRSTY FAICHEN
PARTNER, BRISBANE

+61 7 3258 6492
Kirsty.Faichen@hsf.com



ROHAN DOYLE
PARTNER,
MELBOURNE

+61 3 9288 1099
Rohan.Doyle@hsf.com



ANTHONY WOOD
PARTNER,
MELBOURNE

+61 3 9288 1544
Anthony.Wood@hsf.com



NATALIE GASPAR
PARTNER,
MELBOURNE
+61 3 9288 1091
Natalie.Gaspar@hsf.com



SHIVCHAND JHINKU
EXECUTIVE COUNSEL,
SYDNEY
+61 2 9225 5228
Shivchand.Jhinku@hsf.com



WENDY FAUVEL
SENIOR ASSOCIATE,
BRISBANE
+61 3 9288 1732
wendy.fauvel@hsf.com



CATHERINE PASE
SENIOR ASSOCIATE,
MELBOURNE
+61 3 9288 1668
catherine.pase@hsf.com

SUBSCRIBE TO STAY UP-TO-DATE WITH LATEST THINKING, BLOGS, EVENTS, AND MORE

[Close](#)