

# PEOPLE: INDUSTRIAL RELATIONS REFORM IN 2020? HERE WE GO AGAIN... (AUSTRALIA)

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Legal Briefings - By **Anthony Longland**

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It is ironic that on 26 May, almost precisely one year after the 2019 Federal Election, the PM made important announcements about Australia's industrial relations (**IR**) system.

The irony of course arises from the quite radical IR proposals which were taken to the election by the Australian Labor Party (**ALP**). Much preparation was undertaken in anticipation of them being implemented.

The election result effectively repudiated IR reform, and saw a continuation of the status quo under a re-elected coalition government. On any measure, the government proposed no meaningful IR reform at all. Indeed, many of its own supporters have lamented its inaction in the area over successive parliaments.

But that's all changed with COVID-19.

The national economic damage wrought by the pandemic has forced the government to look both sides squarely in the eye, and demand consensus for material change to the IR system.

You will have read about the developments. This article examines the process in light of some of the broader issues which have arisen, outside of the COVID-19 policy response, which will impact what is happening.

The first point to note of course, especially for those weary of promises of 'IR reform' is Scott Morrison's language. It leaves no room for doubt that 'fundamental change' is on the cards. It's language not heard from a Liberal leader since John Howard. Its significance cannot be underestimated.

He said:

*"Our current system is not fit for purpose, especially given the scale of the job's challenge that we now face as a nation."*

*"Our industrial relations system has settled into a complacency of unions seeking marginal benefits and employers closing down risks, often by simply not employing anyone."*

He said that employers and unions had at times *"succumbed to tribalism, conflict and ideological posturing"*.

He described the system as *"sclerotic"*.

He directed *'both sides'* to *"put down their weapons"*.

What a difference a year makes!

As you will have read, there are two phases which the Government has set upon:

- The first one of wide consultation, undertaken through five 'working groups', directed to achieving consensus for real change. The process will likely conclude at the end of September.
- The second is legislating changes to the Fair Work Act. The IR Minister Christian Porter has stated recently that he sees 1 February 2021 as the date by which legislation ought to be introduced to parliament.

Clearly agreements reached, or common positions adopted by the parties in the first phase, will guide the legislative changes in the second.

The IR Minister hopes each working group will be able to reach consensus on "the best way forward" that the Government can implement via legislation or regulation.

But Scott Morrison has made clear that there will be legislative changes in phase two nonetheless. The strength of the language he employed on 26 May, makes it very difficult to foresee a minimalist approach being adopted, or indeed reform being avoided.

Just like the work that was done planning for the changes promised by the ALP last year, so too will all businesses impacted by the IR system need to be attentive to developments through this process, and analyse opportunity and risk.

Ten members have been appointed to each working group. Each is a union or employer organisation. They will commence their meetings next week. The IR Minister will chair the first meeting of each group. He says that "*several third party organisations and individuals will also be invited to present to or advise the groups*" to provide "*expert experience and real-world perspectives on relevant issues*".

The five working groups are:

## 1. CASUALS

Almost as if on cue, the Full Federal Court released its decision in the *Rossato* case on 20 May. The employer, WorkPac, has this week announced its intention to appeal to the High Court.

The Court has doubled down on its 2019 decision in the *Skene* case.

That is to say, it has powerfully confirmed that in most situations, casual employees, even if they are in receipt of casual loadings, will be entitled to annual leave if they have a firm advance commitment of work. Estimates of the liability to business as a result, run to the billions.

So, one expects there will be consideration of a legislative definition of 'casual' which can be applied with some certainty across the economy. I can't imagine anyone will argue against formulating a legislative definition, the problem is what it will say.

The union side might find it difficult to accept the traditional 'engaged and paid as such' definition; and the employer side might regard a definition which excludes any employee who has 'a firm advance commitment of work' to be far too narrow.

How that question is resolved will have a major impact on the labour market. The issues raised by the cases on the point, and the numerous class actions which have followed, suggests material change is likely. It is not an issue which can be avoided.

Another aspect of the *Rossato* case that is of concern, was the approach taken to offsetting liability for annual leave against payments said to include casual loadings. The issue is complex, but again, both sides will have different views. How past liability is treated will also have a major impact on the market.

## 2. AWARD SIMPLIFICATION

Once again, the timing here is impeccable. Some 6 years after commencing its 'four yearly review' of modern awards, the Fair Work Commission (FWC) has, during the latter part of 2019 and the first half of 2020, implemented extensive variations to the award system. Incredibly, the process is still ongoing.

The unions and employer associations participating in this working group will have invested significant resources over some years into that process.

But the prevailing view from many quarters is that the system remains overly complex. The IR Minister has publically questioned the complexity in the Hospitality Industry Award.

The well-publicised under payment - or 'wage theft' - cases involving some of Australia's best known corporations, have also served to propagate the notion that the awards are overly complex.

Those who have been around as long as me will recall the tribunals awards being reviewed many times: 'rationalisation' in the early 1990's, 'simplification' later that decade, 'modernisation' from 2008 to 2010 and the 'four yearly review' processes which have been ongoing since 2014.

That's four processes whose scope included the review of all of the awards, undertaken over nearly 30 years. Yet the awards are still said to be overly complex.

Needless to say, the output from this group will be extremely interesting. It is difficult to see legislation which directs the FWC to undertake yet another award review process. History suggests that will be a lengthy process, and one which the same parties making rounds and rounds of submissions on the same issues which have occupied them over the last six years.

## 3. ENTERPRISE AGREEMENT MAKING

The failure of the enterprise bargaining system to deliver wage increases was a primary argument supporting the ALP's policy before the last election. Throughout 2018 the ALP consistently said the system was broken.

In substance, the PM's comments, and the formation of this working group, accepts the central thread of that ALP campaign - that the system is broken.

*A cursory examination of the sharp reduction in the number of enterprise agreements approved in recent years, and experience with the rapidly increased complexity and delay attending their approvals, tends to support that view. And is likely the reason employers typically don't engage in enterprise bargaining if it can be avoided.*

But the historical backdrop here is the Paul Keating and Bill Kelty reforms in 1993. All of the major planks of the architecture set up at that time, remain in the current system. Consider the removal of any public interest test; protected industrial action; awards recast as 'safety net' instruments with significant limitations on their variation; finite nominal periods of operation. There are many more.

Both sides of politics have maintained this infrastructure since 1993. Yet, whether serious reform can be achieved in this area might well determine whether the statutory enterprise bargaining system can survive.

## **4. COMPLIANCE AND ENFORCEMENT**

One only needs to go back to 2017 to recall the last major changes in this area.

The Fair Work Act was significantly amended to introduce the notion of 'serious contraventions' and increase maximum penalties by a factor of 10. Those changes were coalition policy at the 2016 election.

Subsequently we have seen 'wage theft' enquiries in a number of different states, and legislation criminalising under payment of employees emerging from the Victorian parliament.

The environment here is febrile, and calls for criminal sanctions are likely to dominate discussion in this group.

## **5. GREENFIELDS AGREEMENTS FOR THE LIFE OF MAJOR PROJECTS**

This is one of those old chestnuts, which has been sought by major employers for more than a decade. And of course was recommended by the Productivity Commission. There is very good sense in being able to lock in labour costs and arrangements at the commencement of a major project, for the duration of its construction.

The twist here is that the issue featured prominently in the ALP campaign ahead of last year's Federal election. The ALP adopted the proposal as part of its policy with much fanfare at a speech in Perth during the very week of the election.

The 'Job Maker' projects being fast tracked to bring the economy back add more pressure to an outcome on this issue.

What will be fascinating to see is how this group grapples with an issue that has apparently been sought after and supported by both sides of the political divide. That might well make this group the one where consensus is most achievable. But as with all matters of IR reform, it wouldn't be wise to place any bets!

We will follow developments closely, and when firm news emerges, report that news and some analysis of its impact for Australian business.

## 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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