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09 December 2020 | Australia
Legal Briefings – By **Anthony Longland**

FAIR WORK ACT CHANGES FOR THE COVID RECOVERY

Following a gestation of seven months, the Workplace Relations Reform: *Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020* has finally reached the Federal Parliament.

In the cold light of day, and relative to the size and scope of the matters considered by the working groups, it reveals small changes. It certainly doesn't present as a comprehensive response to a once in a century economic crisis.

But the changes proposed are important nonetheless. They turn the dial somewhat on delivering a little extra flexibility into the labour market, and some desperately needed certainty on a very difficult problem of engaging and managing casual employees. Indeed, the resolution of that difficult issue is undoubtedly the highlight for business.

In Parliament however, the battlelines have been drawn. Even before it saw the light of day this morning, the union movement and the ALP have been critical. As ever, the crossbench senators will be very popular indeed.

Perhaps the most surprising proposal is not included in this bill at all, but a separate bill to amend the *Fair Work (Registered Organisations) Act* to enable the demerger of unions in a wider set of circumstances than is currently permitted.

The media has reported this as being directed at the war currently raging inside the CFMMEU. Which seems obvious enough.

But that change has a much wider operation. Whilst we haven't heard it yet, increasing the democratic control that members have over their unions is actually more consistent with various ILO Conventions concerning freedom of association, or at least the interpretation of those conventions which the Labour movement has been pressing since 2009. Perhaps that's one reason why it seems this bill will pass both houses without significant opposition.

In our post-COVID workplace series, my colleagues have examined the expected reforms by reference to the five topics covered by the government's working groups. That remains a convenient way to examine the full contents of this bill.

1. CASUAL EMPLOYEES

This is by far the most impactful change. It is also the most controversial.

BACKGROUND

A casual employee has been defined, for many decades and across the whole of the labour market, as one who is '*engaged and paid as such'*.

That's the test which was adopted by industrial tribunals last century, and the words which feature in literally thousands of industrial instruments. It's an objective test because it focusses upon the agreement reached by the employer and the employee when the employment commenced, and whether the employee receives a casual loading.

It is fair to say that definition withstood the test of time. It provoked very few disputes.

That changed in 2019 when the Federal Court decided the *WorkPac v Skene* case. The court didn't focus especially on the agreement of the parties, but more on their later conduct, during the course of the employment.

FIRST CHANGE – A NEW DEFINITION

So that's where the first change comes in. A new definition of 'casual employment', is created, 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'*.

Hence the focus is firmly back to the engagement itself, not how it has subsequently worked out.

The bill identifies a series of factors guiding the application of this definition. They are the only factors to which the court may have regard. They are:

a. whether the employer can elect to offer work and whether the employee can elect to accept or reject such work;

b. whether the employee will work only as required;

c. whether the employment is described as 'casual employment'; and

d. whether the employee will be entitled to a casual loading, or a specific rate of pay for

casual employees contained in the offer or an industrial instrument.

Again, these matters focus on the offer of employment which is accepted by the employee, rather than any subsequent conduct of either party. The bill says so expressly. And it addresses the *Workpac* cases head on by providing, '*to avoid doubt',* that a regular pattern of hours does not of itself indicate a firm advance commitment of continuing and indefinite work.

Thus, these changes will create certainty, because they focus on what was agreed between the parties at a particular time. The status of an employee's engagement cannot vary from time to time (as it can now), based on a court's assessment of the conduct of the parties, independently of their intention, or even their knowledge. The status can only change as a result of conversion under the Act, or the acceptance of an alternative offer of employment.

In that sense, the changes are sensible and workable. They provide much needed certainty.

SECOND CHANGE – CONVERSION

But that does not mean that once a casual employee is engaged, they shall remain casual forever more. As speculated, 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.

Indeed, this right to conversion will become a 'workplace right' and hence protected by the general protections provisions.

But there is an exception. Employers are not obliged to make the offer to convert, where 'there are reasonable grounds' not to do so, based on facts that are known or reasonably foreseeable at the time. Various examples are given of what might constitute reasonable grounds, for example where the role will cease in the coming 12 months.

Employees have 21 days to respond to the offer. No response is taken to decline the offer.

There is also a right for employees to make a request to convert to permanent employment. It's subject to some conditions, notably that the employee has not refused an offer to convert by the employer during the previous 6 months. Requests can be made each 6 months, subject to the same conditions.

Employers are required to provide a written response, and cannot refuse the request unless they have consulted with the employee, and have reasonable grounds for doing so based upon facts which are known or reasonably foreseeable.

There are new provisions about disputes arising from conversion offers or requests, including a power for the FWC to hear such disputes, but not to arbitrate them unless the parties agree.

There is an obligation to provide new casual employees with a 'Casual Employment Information Statement' as soon as practicable after they start, which presumably will explain all of these new rights.

THIRD CHANGE – DOUBLE DIPPING

In the event these requirements are not complied with (eg the statutory definition is not satisfied for any particular period), casual employees may still make claims to access permanent employment entitlements.

If claims are determined in the employees' favour, however, and they are awarded access to permanent employment entitlements, there is a mandatory deduction from any court order of any identifiable casual loading already paid. The wording here is quite unequivocal and will not suffer the same fate as the double-dipping regulation, which was dismissed as ineffective by the Full Federal Court in the second *WorkPac* case.

IMPACT FOR BUSINESS

There are really two pieces of work which immediately present as being worthwhile. A look at the current arrangements with casuals to determine the nature and extent of any risk that claims for permanent entitlements for the past might be made. The double dipping changes will help to quantify this risk.

Next, a new system needs to be devised for the engagement of casuals in the future. The tools to do so with certainty and without risk, will certainly be in place if this bill passes. Careful drafting of offers of employment will be critical, as will a system to ensure compliance with the conversion obligations. In doing so, attention should be paid to any existing enterprise agreement obligations to ensure employers have access to the protections against double-dipping.

2. AWARDS

By comparison, the changes in this area are very modest. There is nothing in the bill which will address the complexities complained about when this reform process was announced.

FIRST CHANGE – SIMPLIFIED ADDITIONAL HOURS AGREEMENTS

Part-time employees who are engaged to work a minimum of 16 hours per week will be permitted to reach agreements with their employers to work more hours (up to 38 per week) at their ordinary rate of pay. Each period of additional hours must be at least 3 hours.

In such cases the part-time employee's entitlement to overtime pay will be restricted to hours worked outside of, or in excess of, the ordinary hours specified in the Award.

Either party may terminate the agreement by giving written notice of 7 days.

However, these agreements will only be available to parties covered by a dozen named modern awards. They are those which you would expect, covering parts of the economy most harshly hit by the pandemic. The Minister is given the power to increase the number of awards on the list by regulation.

An interesting feature is an express provision that these parts of the Act will operate to displace any inconsistent provision in an award. That's a really interesting development, in that the Parliament is displacing the FWC's award making powers to that extent. It's not a significant extension presently, but one feels a precedent will be set if these changes get through, and future parliaments may feel unconstrained about overriding the FWC's awards.

SECOND CHANGE – FLEXIBLE WORK DIRECTIONS

These changes are also restricted to parties covered by the same dozen awards. They only operate for 2 years.

Employers are empowered to give 'flexible work directions' requiring different duties, including at different locations, provided such directions are reasonable, safe and necessary as part of a reasonable strategy to revive the relevant business.

The directions are required to be in writing and subject to prior consultation.

Disputes over these directions will become subject to the dispute resolution processes under the relevant modern award. These processes do not provide for compulsory arbitration of disputes, but conciliation only, and arbitration by consent of both parties.

There are base rate of pay guarantees entitling the employee to the greater pay applying to their former role, or the new role directed.

IMPACT FOR BUSINESS

One expects these changes will help – especially small business, and other businesses impacted by the pandemic.

But they are restricted in their operation to those covered by 12 designated modern awards. And there is a good deal of compliance required.

3. ENTERPRISE AGREEMENTS

These changes are practical and will make enterprise bargaining somewhat more simple for those businesses who engage with the process.

They don't seem sufficiently significant to 'revive' enterprise bargaining, in that they do not appear to include any incentives for businesses not already bargaining to change course and decide that they will do so.

It is convenient to group the changes as either substantive, procedural or machinery provisions.

SUBSTANTIVE CHANGES

Genuinely agreed by employees

The present legislation requires assessment of whether the employer has taken '*all reasonable steps to ensure that'* the terms of an agreement, and their effect, are explained to relevant employees.

On its face, such a requirement focuses on the conduct of the employer. But that is not how the FWC has come to apply it. For all manner of reasons, in many cases, the FWC goes beyond the efforts of the relevant employer, and looks instead to the particular detail of the explanation provided, closely scrutinising the documents provided in search of any error or incomplete information.

Where the substance of the explanation does not meet the FWC's satisfaction, the employees are deemed not to have 'genuinely agreed' to the agreement.

The changes in this bill are significant and interesting. It creates a broad requirement for the employer to '*take reasonable steps to give employees a fair and reasonable opportunity to decide whether to approve the agreement*'.

The employer will be taken to have done that if they provide the agreement and any incorporated documents, notify voting details, and explain the terms of the agreement and their effect. So it is the fact of the explanation itself which ought to satisfy the Act. No doubt this is an effort to fundamentally alter the FWC's present approach.

The BOOT

In analysing the agreement, 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'.

This is an obvious response to the growing practice of the FWC to consider any working arrangement which is hypothetically possible under the terms of an enterprise agreement in making its comparison against the relevant Award.

It is a common sense change, which will make a difference.

It clearly reflects the traditional policy desire of enabling employees and employers at the workplace to determine the appropriate terms and conditions. Where working patterns or arrangements are irrelevant at the workplace, it is unsurprising that the parties do not expressly say so in their enterprise agreement. Understandably, they focus instead on what is currently happening and what is reasonably foreseeable in the life of the agreement.
This change compels the FWC to apply to apply the BOOT in the same way.

Another interesting change requires the FWC 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. This is interesting because it will clearly impact on the determination of what is or is not ‘reasonably foreseeable’ into the future.

It seems to create the clear implication that if the parties to the agreement themselves did not regard something as foreseeable, then the FWC should give significant weight to that fact.

Further, the 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.

The legislation presently allows approval of agreements which do not pass the BOOT where, because of exceptional circumstances, approval will not be contrary to the public interest.

The present legislation gives an example of an exceptional case, being one where the agreement is part of a reasonable strategy to deal with a short-term crisis in, and to assist the revival of, the business.

Perhaps unsurprisingly, given its post-pandemic recovery objectives, that exception is built upon. The reference to ‘exceptional circumstances’ has been removed, so that the FWC can approve agreements that do not pass the BOOT, where it is not contrary to the public interest to do so, taking into account the following matters:

a. the views of the parties to the agreement;
b. their circumstances, and those of any unions seeking to become bound by the agreement;
c. any impact of COVID-19 on the enterprise; and
d. the extent of employee support for the agreement.

These changes are significant in that they open up a broader discretion to approve agreements which do not pass the BOOT. But the discretion is for the FWC to consider, in any given case.

EA variations to cover franchisee employers

Where an enterprise agreement covers multiple employers within the same franchise then a new franchise operator may request its employees to vote to vary the agreement so that it will cover that new employer.

This will be an efficient way for new franchisors to achieve agreement coverage when they commence operations. The employees who must be given an opportunity to vote are just those employees of the new franchisor at the time.

Old agreements to terminate without action of parties

Certain collective agreements which were made before the Fair Work Act commenced operation will automatically cease operation on 1 July 2022.

The rationale for this change is not clear, specifically because the operation of those agreements has been preserved through successive amendments to the legislation. Whilst there are not many such agreements in operation, employers who were party to them will need to begin planning on dealing with the impact of this change.

PROCEDURAL CHANGES

The FWC will be required to determine agreement approval applications within 21 working days of them being filed. Where this cannot be done, the FWC will be required to provide written reasons explaining why.

It is difficult to see this driving materially different outcomes. The FWC already has its own internal benchmarks which require approval applications to be dealt within set timeframes. Frequently they are not. Other than the obligation to provide written reasons, there seems to be no sanction or other consequence if the application has not been determined within this timeframe.

Applications to terminate enterprise agreements, where the parties do not agree, can only be made three months after the normal expiry date of the agreement. It is difficult to see this change having any material affect. Applications to terminate agreements are rare, and where they are contested are almost never determined within three months.

The timeframe for the provision of a Notice of Employee Representational Right has been extended. It is presently 14 days from the date upon which the employer agrees to bargain. That period has been extended to 28 days.

In an apparent effort to make it more difficult for parties who have not been involved in negotiations to torpedo agreement approval applications, the FWC is restricted, when considering such applications, to inform itself only:

- by the use of publicly available information;
- by receiving submissions only from persons identified in the Act – these are mostly restricted to the parties actually involved in the bargaining; and

- parties not involved in the bargaining are only able to make submissions in ‘exceptional circumstances’.

These changes will signal a firm basis for a departure from much of the recent jurisprudence which has enabled this requirement to be used by unions who have missed out on being influential in bargaining, to torpedo agreement approval applications.

Finally, in exercising all of its powers in connection with enterprise agreements, the FWC is required to ‘recognise the outcome of bargaining at the enterprise level’. This is an interesting change, which no doubt compliments some of the substantive changes.

MACHINERY PROVISIONS

Finally, the bill introduces some mechanical provisions which will impact enterprise agreements and enterprise agreement making. They are:

a. agreements must contain a model term that explains their interaction with the NES. No doubt this is a response to the growing practice of the FWC to seek undertakings from parties which merely restate provisions already in the Act to the effect that the terms of an enterprise agreement cannot deprive employees of benefits in the NES.

b. Employees who voluntarily transfer between associated entities may do so without the transfer of business provisions meaning that they take enterprise agreements with them. This change has the potential to facilitate the creation of [new] businesses within existing corporate structures.

c. There is additional clarity around which casual employees must be given the opportunity to vote in agreement making ballots. Only those causals who performed work at any time during the access period are required to be given an opportunity to vote.

IMPACT FOR BUSINESS

Clearly much thought has gone into a package of measures which are directed at freeing up what has become an extremely difficult process. Approval applications have in many cases become fraught and protracted, and there is little doubt this is an important reason why bargaining is ceasing to occur in many places. Much of course will depend upon the way these changes are applied by the FWC. There seems to be enough there, especially on the explanation obligation, to lead to materially different results, and return to a time where the outcome negotiated by the parties at the workplace was given due recognition and weight.

4. LIFE OF PROJECT – GREENFIELDS AGREEMENTS

In a widely expected development, the bill makes specific provision for enterprise agreements for ‘major projects’.

These are defined as projects involved in a capital expenditure of at least $500 million. Smaller projects down to $250 million can also be regarded as ‘major projects’, upon the declaration of the Minister. In deciding to make such a declaration, the Minister must consider the national or regional significance, and contribution to job creation of the project.

Unfortunately such agreements cannot operate for the life of the project. The proposal is merely one which extends maximum duration of such agreements to eight years. Whilst it’s true that that duration ought to cover most major projects, it is unfortunate that the most significant projects, which might run to 10 or more years, will not get the benefit of the security provided by these lengthier agreements.

One development of significance though is that the duration does not commence running until after the agreement commences operating. That date can be specified in the agreement itself. So the agreement might for example provide that it commences operation when construction of the project actually commences (when the builder ’turns the soil’).

This will assist project planning by enabling labour costs to be locked in ahead of the commencement of actual work.

The only substantive change with respect to such agreements is that they must provide for at least an annual increase to the base rate of pay for each employee covered by the agreement during its normal term of operation.

These agreements will only apply to the ‘construction’ of the relevant projects. Attention will need to be paid to testing, hook-up’s and commissioning and other works undertaken at the end of the main construction activities and before the project is delivered.

Much has already been done throughout the period the Government has been pumping money into the economy to aid the post pandemic recovery, to identify projects that will help rebuild. If these changes make it through the Parliament, they ought to materially support efforts to get such projects off the ground.

5. COMPLIANCE AND ENFORCEMENT

Much like developments in Victoria and those being discussed in Western Australia, the bill introduces criminal offences. They will relate to underpayments and sham contracting. They involve higher penalties and potential imprisonment.

Numerous changes are also made concerning the pursuit of underpayment claims.

A criminal offence of ‘dishonestly’ engaging in a systemic pattern of underpaying employees is created. For a corporation the maximum penalty is $5.6 million per contravention and for individuals $1.1 million and/or four years imprisonment. It will be recalled that the concept of a systemic pattern of underpayment was introduced after the 2016 election in changes which took effect in 2017. Adding an element of dishonesty to this offence is a significant change.

There are further increases in the penalties which relate to a number of ‘remuneration related contraventions’ which include ‘serious contraventions’ involving underpayments and sham contracting.

The small claims procedures for recovery of underpayments are to be reformed, with additional powers given to the FWC to conciliate, and where parties agree, to arbitrate such matters.

There are some miscellaneous changes giving the FWC broader powers to dismiss applications it finds are misconceived, lacking in substance or otherwise an abuse of process and even to order a person whose application is dismissed for such reasons not to make further applications to the FWC.

These changes do not appear to fit neatly under any of the areas looked at by the working groups and it is not clear what practical drivers are behind them. It is of course a serious matter to order the person’s legal rights to seek relief in the Commission in the future are dismissed.

6. CONCLUSION

So that’s a wrap for now. The bill will be referred to the relevant Senate committee, and no doubt significant pressure will be bought to bear upon the cross bench senators. What eventually passes might be materially different to what has been introduced this morning.

We will keep you updated through that process.

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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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