HERBERT SMITH FREEHILLS

THE ‘ATTACK’ ON ‘INSECURE WORK’ – PROTECTION FOR VULNERABLE WORKERS OR ANOTHER AGENDA ALTOGETHER?

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Legal Briefings – By **Kirsty Faichen and Wendy Fauvel**

A key element of the ALP industrial relations platform is to ‘reduce the incidence of insecure work’, being a focus predominantly on casual employment and labour hire arrangements.

Those reading will know that this ‘attack’ on ‘insecure work’ is nothing new. Businesses legitimately using casuals and labour hire, and the numerous employees who enjoy the flexibility these arrangements can bring, are the ones set to be the most affected by proposed changes. Those businesses have, for some time, been responding to the rhetoric caused by the unlawful behaviour of a small few unscrupulous employers. Many of the concerns about ‘insecure work’ appear to be coming from those who feel challenged by the way in which workplaces have evolved, and continue to need to evolve, to remain competitive on the global platform and to encourage economic growth and investment in Australia.

It is safe to say that no-one on either side of the political debate wants to see workers suffer at the hands of employers acting unlawfully. But the ALP’s proposal to reduce the incidence of casual employment and labour hire arrangements, raises questions. How will this play out for the casual employees who prefer the higher pay and flexibility of being casual, rather than full-time or part-time? What about the impact on labour hire employers who ‘do the right thing’? Time will tell as to whether the measures that are proposed to ‘attack’ these arrangements provide the protection to workers that the ALP is seeking, or result in a loss of workplace opportunities.

LABOUR HIRE ARRANGEMENTS

There are many reasons why businesses utilise labour hire: to cover projects (short and long term), sessional work, contingencies, resourcing peaks and troughs, or where there is a need for a specialist workforce which the business cannot otherwise access.

However, a series of labour hire inquiries commissioned by some State Governments in recent years has uncovered 'rogue' labour hire operators particularly in the horticulture, meat and cleaning industries. Flowing from those inquiries, labour hire licensing legislation now operates in Queensland and Victoria. Despite the Victorian inquiry recommending that the Victorian scheme be limited to the horticulture, meat and cleaning industries (and then later expanded if necessary), the scheme is as broad as the Queensland scheme, applying to all industries in that State.

In the lead up to the Federal election, the ALP and the Coalition have each proposed to introduce a national labour hire licensing scheme. The Coalition's scheme will be limited to four high risk industries identified as such in the Migrant Workers' Taskforce Report – horticulture, meat processing, cleaning and security. However, the ALP's scheme will apply to all industries to 'ensure that minimum legal standards are met'.

Labour hire employers, just like the businesses who engage them, are employers who have obligations under the Fair Work Act and other legislation. Those obligations require them to pay their employees in accordance with industrial instruments, and to provide other minimum entitlements under the National Employment Standards. The Act also enables employees to pursue remedies against employers if the employee is unfairly dismissed, if adverse action is taken against them, or if they are underpaid. Regulators can, and do, investigate breaches of legislation. Labour hire employers are not 'exempt' from these legal standards. Indeed, employees and their union representatives can (and do) enterprise bargain with them and benefit from all of the bargaining infrastructure in the Fair Work Act in doing so. So the initial question really is, why does there need to be another layer of bureaucracy which is peculiar to labour hire employers at all?

If the ALP's proposed scheme is akin to the Queensland and Victorian schemes (and there is no indication it will not be), it will capture a broader array of businesses than just traditional 'labour hire' employers. The starting point for whether a business needs a licence in those schemes is whether the business supplies 'workers' to perform work in and as part of the undertaking of the 'user' (unless an exemption applies). If implemented, almost every business in many sectors is likely to be impacted by the scheme in some way, whether as a 'user' or a 'provider'. It is additional regulation that all businesses will need to be cognisant of, and alter their arrangements to comply with, even though the scheme is apparently intended to target the behaviour of a relatively small number of unscrupulous employers.

For some, particularly small business, complexity and the severe consequences of failing to maintain a licence, has the risk of introducing too much red tape – putting those businesses at risk along with the jobs of those they employ. Is it appropriate to punish businesses at large for the sins of a small number, whose sins are already contrary to existing law? Why isn't the answer merely to enforce the existing law?

It seems that the *real* concern about labour hire is less about regulation and more about its availability and use across industries. The ACTU and ALP's focus is on guaranteeing that labour hire workers receive the 'same pay' as directly employed workers doing the same work. In many industries, bargaining outcomes for 'same pay' contractor clauses in enterprise agreements (that are hard fought by unions) means that this is already the norm for some employers.

However, the ALP's current proposal is to expand the notion of 'same pay' for the 'same work' to *all* employers in *all* industries as a minimum standard. This raises a number of questions including how one determines what 'same work' is.

Notwithstanding the potential for confusion to arise, the ALP's 'same pay' proposal is likely to result in significantly increased wages for many thousands of labour hire employees. However, taken together with the proposed labour hire licensing scheme, the 'same pay' proposal may also achieve what perhaps is not intended – to make labour hire employment for those thousands of employees less secure, and risking increased unemployment.

CASUAL EMPLOYMENT

A pendulum is swinging in Australian politics and in workplaces on the use of casual employment. It is yet to rest.

On the one side, the ACTU and ALP's view is that casual employment should only be used for short term ad hoc work, and must not be utilised for regular and systematic work (where full-time employment should prevail). Following *WorkPac v Skene*, this tension is playing out. We are seeing an increase in 'regular and systematic' casual employees alleging that they are in fact permanent employees and claiming back payments for entitlements such as annual leave.

On the other side, the view is that an employee and an employer should be able to voluntarily agree for the employee to be a casual. While there is general acceptance that there are some disadvantages to casual employment (such as a lack of guaranteed hours and greater difficulties to access loans and mortgages), these disadvantages do not affect everyone. There are many for whom the casual role is a second job, or a vacation role, or a training opportunity. And of course, there are a number of advantages. Employees often prefer the 25% casual loading to the largely contingent benefits it replaces. They also enjoy the flexibility of deciding when to make themselves available for work and to schedule their own 'down time'. Indeed, we have seen a number of employers running casual conversion campaigns with their workforce, only to find that there is minimal take up by employees (if at all), because the arrangements suit individuals' circumstances.

If the arrangement no longer suits the employee, there are mechanisms in place that give the employee the option of requesting to convert to permanent employment. The Fair Work Commission included a model casual conversion term in modern awards from 1 October 2018. This has had a flow on impact to many enterprise agreements, which now include a similar casual conversion term (and many included such a term prior to this decision). Additionally, the Government has introduced a Bill to provide casual employees with the right to request casual conversion in the National Employment Standards (but this has not yet been passed).

However, the ALP's proposal goes one step further by taking the choice about casual status out of the hands of the employer and the employee. The ALP has stated that it intends to remove the concept of 'permanent casuals' by setting an objective test for determining when a worker is a casual. Workers will be casual employees if they are engaged to cover peaks and troughs created by sessional work, and work which is temporarily replacing permanents. An employee who is working indefinitely, year in year out will never be classified a casual under this test.

If casual employment can only be used for short term ad hoc work, the key question is what will it be replaced with to address the needs of employers and employees and retain the flexibility that casual employment gives them?

One thing is certain – the flexibility offered by innovative arrangements such as those in the gig economy are unlikely to be the answer. If the ALP follows the proposals suggested by various Senate Committees to expand the legal definition of 'employee' to cover all workers in the gig economy, once again, businesses and their workers will be pushed inexorably towards the forced permanency of full-time employment. This has the potential to reduce flexibility of work for those that wish to operate with greater autonomy, and begs the question – what will Australia's future be if we are unable to move forward in developing and utilising innovative ways of working?

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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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