THE POST-COVID WORKPLACE: IR REFORM

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Legal Briefings – By **Anthony Longland**

Announcements will shortly be made about changes to the Fair Work Act. They will have wide ranging impacts on all workplaces throughout Australia.

In May 2020 the Prime Minister described the reforms as necessary to enable the Australian economy to rebuild from the Covid-19 recession. Shortly thereafter the Treasurer said industrial relations reform was “the first cab off the rank” in the Government’s effort to stimulate job creation in the post Covid economy.

Over the next couple of weeks Herbert Smith Freehills’ team will release a series of short articles to prepare you for these reforms. Understanding their nature and scope will be important, not simply for compliance, but to maximise any advantage they might provide to your workplace.

TIMING

The aim seems to be to introduce a bill to Parliament in the week of 7 December 2020. Comments made by the opposition in the period since May, and the reported lack of consensus between the major parties, suggests that when the bill reaches the senate it will be referred to a Senate Committee Inquiry.

History tells us that process could delay the passage of a bill by up to 12 months.

Given it won’t likely reach the Senate until February 2021, and the budget sittings will return to their customary timing in 2021, it is perhaps likely that June 2021 might be the earliest time at which these changes might commence.

PROCESS

Many of you will have read over the last six months about the “working group” process established by the Minister for Industrial Relations, immediately after the Prime Minister’s May announcement. Membership of the working groups was restricted to unions and employer associations, and their deliberations were confidential.

Media reports throughout this period indicate that very little consensus was reached.

The ACTU Secretary has been quoted as saying that consensus was restricted to:

- creating a right for casual employees to request conversion to permanent employment after nine months;
- small businesses being subsidised to install payroll software to prevent underpayments; and
- employers receiving immunity from penalties where underpayments are shown to result from innocent errors and are immediately rectified.

That is a remarkably small area of consensus given the breadth of the subjects considered by the five working groups. The Minister has recently been reported as describing the process as “a helpful process to narrow disagreements and find common problems”.

The Opposition Spokesman has repeatedly identified the Opposition’s position as “not to let Scott Morrison use Covid-19 to rob workers of job security, pay and conditions”.

Hence, it seems inevitable that we are heading for a contentious bill whose passage through Parliament is not likely to be a quick one.

SUBSTANCE

The following snapshot, taken from media reporting and industry discussion, identifies what to expect.

CASUAL EMPLOYMENT

The problem here is easy to identify, and seems to be accepted by all parties: the Federal Court has found that exemptions in NES entitlements for ‘casual employees’ do not apply to those who have a firm advanced commitment to hours of work. That will apply to almost anyone who works to a roster which is determined in advance.

The solution will need to have two distinct parts:

- The first is what to do about past liability. Employers have not planned for it. Commentators have suggested there is a latent liability across the economy in the order of $5 to $10 billion. The “double-dipping” problem remains, because the Federal Court has significantly reduced the scope of the regulation which was passed to deal with it.

  So what is proposed with respect to this historical latent liability will be critical for business. It is obviously not possible to undo arrangements which have been entered in the past. One expects something will need to be done.

- The second is what to do for the future. Commentators continue to predict that a statutory definition of ‘casual employee’ will be developed to clarify the issue. The issue of course is the nature of the definition. It appears unlikely that the traditional definition of “engaged and paid as such” will be adopted. Something closer to the Federal Court’s test is more likely. That may involve a definition that provides expressly that employees who have a firm advanced commitment of work into the future cannot be casual employees.

  Given that approximately one in five employees across the country are casual employees, the precise nature of this definition will be critical.

Finally, it is also expected that a broad conversion mechanism will be inserted into the legislation, cementing a right of all casual employees to elect to become permanent, probably each nine months. The legislation will likely provide that where casuals do not take up this option, they will be deemed to be casual employees.

AWARD SIMPLIFICATION

Awards have very broad operation which has been expanded through the “four yearly review” process.

There have been loud calls for reform in this area from industries most severely impacted by Covid-19. They include restaurants, hospitality and retail, among others.

Media reports have indicated a desire for part-time employees to be able to work hours in excess of their part-time hours – up to 38 hours per week – without attracting overtime or other penalties. One expects that this would be by agreement with the individual concerned. It is not clear whether such an initiative would apply across the board or only to the awards that apply to those depressed sectors.

Beyond that, not much is particularly clear. However, one can identify specific issues which have been thrown up by the Covid crisis which the award system is just not equipped to handle. They include widespread work from home, a more streamlined stand down process and the reduction of employee hours to respond to reduced demand.

Australian businesses have been grappling with these through the course of 2020, and it would be a surprise not to see some reform to the award system to enable business to respond more effectively.

One area of the economy which has been particularly vocal in this area has been the small business sector. The media has reported calls for a new “small business award” to be created and other commentators are foreshadowing variations to existing awards which will apply only to small businesses.

The first question is how any such reforms would define a “small business”. Many will recall the exemptions from the unfair dismissal provisions introduced in 2006 which applied to all businesses with less than 100 employees. Currently, those exemptions apply to businesses that have less than 15 employees. Perhaps the Government might set a limit somewhere between these two numbers.

One of the main issues that the small business lobby has been vocal about is the ability to agree single “loaded” rates of pay. The initiative is said to remove complexity but of course would be open to the criticism that it may reduce employee entitlements. The limitations the FWC has placed around provisions of enterprise agreements that contain loaded rates is a good example of the difficulty in resolving this potential conflict. It will be interesting to see whether the Government endeavours to do so and the particular approach that it takes.

Finally, it will be very interesting to see how the legislation goes about varying awards, if that is what is decided, as traditionally this has been a matter for the FWC.

COMPLIANCE

This work group has focused on an issue which has generated recent attention, both at the state and federal level, being employer non-compliance with award obligations.

After the 2016 election, significant amendments were made to the FW Act creating “serious contraventions” being those where persons knowingly contravened their obligations as part of a systemic pattern of conduct. Significantly increased penalties were applicable for such contraventions.

Subsequently various state governments conducted inquiries, and have legislated with respect to criminalising certain serious cases of “wage theft”.

It will be interesting to see how any regulatory change in this area impacts those developments.

The media has reported one comment from the ACTU Secretary which is interesting. She is reported as having said “it shouldn’t be about punishment if you’re trying to do the right thing”. It is also reported that she indicated “that’s a shift for us”.

This may indicate that the amendments will include some mechanism for employers who innocently contravene obligations, perhaps “self-report” and make good any under-payments in a timely way, to enjoy an exemption from the civil penalties currently applying.

As the FWO has been extremely active in this area, it is possible that some additional role will be given to it under the legislation to assist in this area.

As the awards the subject of the contraventions are drafted by the FWC, there is even some logic in giving it a role in addressing such issues. In doing so, however, one would have to have regard to the limitations on the Commission’s powers, as it is not a court and hence unable to issue binding declarations of right or orders enforcing its awards.

ENTERPRISE BARGAINING

Much has been said about various proposals from both sides of the fence, but it is not at all clear what to expect here.

Employer representatives continue to express concerns about the BOOT, and how it is applied by the FWC. Various mechanisms have been floated by which it can be refined to remove complexity and promote the approval of more agreements.

Reports suggest that non-financial benefits may be given express recognition and other steps taken to address a perceived over emphasis on changes that are theoretically possible under the terms of an enterprise agreement, but have not been contemplated by the parties.

One can readily see how these matters would assist in applying the test.

It has been reported that some parties have sought a “fast-track approval process” with reports suggesting one employer association reached agreement with the ACTU to the effect that agreements negotiated with unions might be subject to such an approach.

More recent comments from the Minister, however, suggest that this is unlikely with a preference for union agreements and non-union agreements to be treated consistently.

GREENFIELD AGREEMENTS

It is difficult to foresee that some legislative change won't be enacted here. The objective will be to enable enterprise agreements to be approved by the FWC with a period of operation longer than four years.

The post-Covid economy will need major projects to create employment and generate economic activity.

The employer side has long argued for an enterprise agreements duration to match the duration of a major project. Prior to the last election, the ALP publicly announced its support for such proposal.

There is a question about whether any changes specify a maximum duration for enterprise agreements. On one view, if the reason for the change is to ensure that major projects can be covered by in-term agreements, then there would be no need, the duration of the agreement would simply be the duration of the project.

Reports have emerged, however, that some cap will be imposed. As the current limit is four years, it is difficult to see any cap exceeding eight years and it would not be a surprise to see a duration chosen which is between the two.

How a "major project" is defined will obviously be important. Project value is the most likely approach, but the devil will be in the detail in terms of how one calculates that value. The legislation will need to make this clear.

Finally, there will undoubtedly be some additional prescription applying to such agreements, perhaps to ensure that wages keep pace with inflation during the course of their extended period or even some additional matters concerning the resolution of disputes.

If this initiative is in the legislation it will be of great assistance to project proponents and their financiers. Close attention will need to be paid to any conditions applying to such agreements.

CONCLUSION

The working group process does not appear to have delivered any meaningful consensus. Whilst a series of small increments might deliver worthwhile reform as a whole, the context must be kept firmly in mind. The nation is experiencing record unemployment and record public debt.

So there just might be a real shifting of the dial in workplace regulation. Stay tuned.

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