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Authors: Tim Lange, Mark Caile
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Substantial IR reform on the agenda for 2021 – if the Senate agrees

With the aim of supporting economic recovery following the difficult conditions of 2020, the Morrison Government has proposed significant amendments to the Fair Work Act 2009 (FW Act).

The Morrison Government has today proposed the most significant set of changes to the regulation of employment relations since the enactment of the FW Act.

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**Bill**) represents the outcome of deliberations by five working groups convened by the Minister for Industrial Relations and featuring representatives from employer groups and trade unions.

That consultation process sought to continue engagement between the government and the union movement over the JobKeeper scheme and other aspects of the response to the COVID-19 pandemic. The momentum for reform is firmly rooted in that response, with the aim of supporting a level of workplace flexibility thought necessary to enable economic recovery. Some of the changes in this area proposed to be temporary, some permanent, but in either case many are likely to be contentious. Rounding out the changes are proposals driven by long-standing issues with casual employment, and with ongoing and prominent underpayment failures.

The Minister has already indicated that the government does not plan to treat the Bill as a package, and may be open to changes, so the fate of particular reforms will not be known until early in 2021, following the conduct of an inquiry into the Bill that is likely to be held over the summer.

We will release more detailed analyses of the proposed reforms in due course. For now, we set out what we see as the changes most likely to impact on our clients.

Casual employment

The Bill aims to remove the significant uncertainty with the current law that was uncovered by the recent Federal Court decisions in *Skene* and *Rossato*. Even though the *Rossato* decision is to be dealt with by the High Court on appeal in 2021, the timing and outcome of that decision is unknown and unpredictable.

The Bill proposes a legislative definition of casual employment focussed on the terms of the offer upon initial engagement, enabling employers to engage employees as casuals from the outset with a degree of certainty as to their status, even if they end up working regular hours. While significantly more wordy and with new administrative requirements, the change is in fact not far from a reversion to the traditional award definition of a casual, an employee who is 'engaged and paid as such'.

Where an employee has been misclassified and is found to have been permanently engaged, it will be possible to defend any claim for unpaid leave entitlements by seeking to offset some or all of any casual loading paid to the employee in question.

The changes both as to how casual employment is defined and the ability to prevent "double dipping" by misclassified workers are expressed to operate both prospectively ***and retrospectively***. It is possible, however, that the constitutionality of any retrospective operation may be challenged.

There is a cost to employers of this reform, in the form of two new administrative requirements. New casuals will have to be given a new Casual Employment Information Statement prepared by the Fair Work Ombudsman (**FWO**). And if a casual has worked for 12 months, with regular hours over at least the last 6 months, they must either be offered conversion to permanent employment, or given formal reasons why such an offer would not be appropriate (for example, anticipated reductions in working hours). Conceptually there is little that is new in this second requirement (which is currently located in modern awards), but despite its relatively long history incidents of conversion to permanent employment have been vanishingly rare – doing so typically involves a significant cut in pay by reason of the loss of casual loading.

It seems unlikely that many regular casuals will want to convert for that reason, but employers will still have to go through the paperwork or risk breaching the National Employment Standards (**NES**).

In the event of a dispute about any of these matters, the Fair Work Commission (**FWC**) may be asked to conciliate. But it can only arbitrate if all parties agree, and proceedings in the FWC may be avoided altogether if the employer creates its own dispute resolution process.

There will likely be significant union and ALP opposition to the removal (especially the retrospective removal) of the possibility of regular casual employees having access to paid leave as well as retaining their casual loading. However, early indications are this is based more on a concern that regular casual workers are obtained through labour-hire entities, thereby successfully avoiding the application of generous EAs negotiated with principals in particular industries, especially mining, under which permanent pay rates are often higher than casual rates, even when including a loading.

Part-time employment

The Bill proposes that permanent part-time employees who work at least 16 hours a week, and to whom certain awards apply, will be able to agree to work additional hours at ordinary rather than overtime rates of pay.

But this cannot be done for shifts of less than 3 hours, or that fall outside the span of ordinary hours specified under the award, or that take the employee over certain award limits (such as 38 hours per week). Nor can the employer require an employee to enter into an "simplified additional hours agreement" of this type, or put them undue pressure to do so, or take adverse action against them for failing to do so. Agreements will also be terminable by either party on 7 days' notice.

The list of awards for which this type of arrangement can be made will initially be limited to those in the retail and hospitality sectors, as well as a specified list including the Business Equipment, Meat Industry, Nurseries, Pharmacy, Registered and Licensed Clubs, Fast Food, Seafood Processing, and "Vehicle Repair, Services, and Retail" Awards.

This is a subtle but significant shift in the approach to workplace regulation – ordinarily a legislated condition will apply to all national-system employees. Here, the change is to be made by way of mandating modern award content in a broad but limited number of industries to include this ability to 'flex-up' ordinary hours for part-time employees. If this approach is accepted, it may lead in the longer term to a Pandora's box of other industry-specific changes that will (for good or ill) avoid the FWC's detailed evidence-based approach.

Award simplification

Although the first (and last) "four-yearly" review of modern awards is nearing completion after seven exhausting years, and the FWC has taken important steps to streamline awards and express them in plain(er) English, they are still beset by complexity for most employers.

While not formally part of the Bill, alongside the introduction of the Bill the Minister has also written to the President of the FWC to ask the tribunal to consider two key sets of changes to awards.

The first is to allow "loaded" pay rates that make payroll administration much simpler by combining base rates with a range of potentially applicable allowances and penalties. While these would be up to the FWC to set, the Minister expresses confidence that rates may be "optimally structured in a way that ensures workers are not financially worse off over time". It is also suggested they be available to employers and employees only on an "opt-in" basis.

The second is to streamline classification structures to make them clearer and easier to understand. Again, it is suggested that such a "broadbanding" exercise may be accomplished "with no reductions in pay and minimal increases".

Priority is requested in these respects for the awards covering "distressed" sectors hit hardest by the pandemic (general retail, hospitality, restaurants and licensed clubs). The Minister has also asked for changes to be introduced by the end of March 2021, if possible.

Flexible work directions

Earlier this year, Part 6-4C was added to the FW Act. It allows employers participating in the JobKeeper scheme the flexibility either to stand down workers receiving government payments, or to reduce their hours or change their job locations or duties. That scheme has, grudgingly or otherwise, been credited with a significant role in mitigating the impact of the Coronavirus pandemic on businesses and maintaining employment throughout the crisis. Temporary flexibility was also (initially by consent) introduced by the FWC in a number of awards, but renewal of those provisions as the crisis dragged on was resisted by unions on the basis that Part 6-4C was an adequate remedy.

Although those provisions will expire in March 2021, the Bill proposes a new Part 6-4D, to operate for a period of two years. This will continue a JobKeeper-like power under certain awards – the same ones specified above in relation to part-time hours agreements – to direct employees to perform any duties within their skill and competency, or to perform their duties at somewhere other than their normal place of work. There is little that is new in this, but the need for this level of flexibility to be continued in COVID-normal Australia will be hotly contested.

These new powers are not limited to JobKeeper recipients. But directions can only apply to the extent they are necessary to assist in the revival of the employer's enterprise, and to the extent they are not unreasonable in all the circumstances. They do not explicitly permit any reduction in working hours and they must not cause any fall in the employee's base rate of pay.

Transfer of employment

Somewhat unexpectedly, the Bill revives a change to the transfer of business rules originally proposed by the Gillard Government's 2012 review of the FW Act and later included in the Abbott Government's Fair Work Amendment Bill 2014.

The Bill seeks to ensure that when an employee transfers jobs of their own initiative between two related employers, this does not have the effect of taking the coverage of an EA with them to the new employer – or of forcing the new employer to apply to the FWC for an order avoiding that result. It is unclear quite how a court or the FWC would treat an attempt to avoid a transfer of business on the basis that a group of transferring employees had been invited to transfer to the new employer – while there is nothing preventing the provision applying to a number of employees seeking redeployment to an associated entity on their own initiative at the same time, it seems unlikely this would pass the perception test.

The provision is likely to have its best use in enabling employers to take on employees from associated entities on an individual basis to suit the individual employee and employer's purposes, without the disincentive of an inadvertent transfer of business.

Making and approving enterprise agreements

There has been for some years growing criticism of the level of technical scrutiny, drawn-out proceedings and sometimes bewildering results of application of the FW Act's current requirements for EA approval. Much of this has been driven by challenges to FWC approval by certain unions to what they see as the "misuse" of enterprise bargaining, and the effect has been to slow down the process of getting agreements approved – or to prevent that altogether.

In order to make the relevant processes "easier and faster for employers and employees, while balancing flexibility and fairness", the Bill proposes a series of major reforms. Some of the most important of these are to the BOOT, which are considered separately in the next section. But others include:

- ***Changes to the timeline for issuing the Notice of Employee Representation Rights (NERR)***. One of the simpler changes proposed in the Bill is to change the deadline for issuing the NERR from 14 days to 28 days after the "notification time" for the agreement, which is generally when the employer agrees to bargain or formally initiates bargaining.
- ***Changes to the steps that an employer must take prior to putting a proposed agreement to an employee vote***. The Bill proposes to refine an employer's obligations during the "access period" of 7 days before voting starts on a proposed EA. The employer's general obligation will be to "take reasonable steps to ensure that the relevant employees are given a fair and reasonable opportunity to decide whether or not to approve the agreement". An employer will be deemed to have complied with that requirement by (among other things) providing a copy of the EA and any incorporated material, as well as explaining the terms of the EA and their effect.
- ***Changes to voting cohort for proposed EAs.*** Casuals will only be eligible to vote on a new enterprise agreement if they performed work during the access period for the agreement. This would be an important clarification of the current framework, which does not specifically require employers to differentiate between casuals who worked during the access period and those who may have last worked in the week before the access period, although that is the general effect of a number of decisions. A similar change is proposed for votes on EA variations.
- ***A model NES interaction term***. The Bill introduces the concept of a "model NES interaction term", to be prescribed in regulations. The model term will explain how the NES interacts with terms of EAs. Given that inclusion, the FWC will no longer be required to scrutinise proposed agreements to identify inconsistencies with the

NES, or (as it has recently taken to doing) requiring a broadly-framed undertaking that covers the NES base.

- ***Limiting who can appear in a dispute about approval of an EA.*** In a bid to minimise the extent of delays involved in the EA approval process, a new provision will list the parties eligible to appear and make submissions or give evidence in relation to a proposed EA or variation. The FWC will only be free to seek views from a wider range of parties if there are "exceptional circumstances". The most obvious targets of this reform are unregistered unions such as the Retail and Fast Food Workers Union (RAFFWU), at least where they have not been a bargaining representative, and unions which have made it their business to challenge any EAs capable of operating in particular industries or sectors that do not meet the unions' self-determined "industry standards".
- ***Setting a KPI for the EA approval process.*** The FWC will be required, "so far as practicable", to determine an application for EA approval within 21 days. Where that deadline cannot be met, the FWC will need to give a written explanation of the reason for the delay. Although this may assist IR managers or employer representatives to manage expectations, it remains to be seen to what extent this will actually result in more efficient EA approvals.
- ***Allow franchisee employers to join an existing EA.*** The Bill seeks to assist franchise businesses to standardise the terms and conditions applicable across their franchisees. A franchisee employer will be able to request its employees to vote on whether an existing EA that applies to other franchisee employers within the business should be expanded to include that employer, rather than requiring votes at all those other enterprises as well.

Changes to the better off overall test

The purpose of the BOOT is to ensure that the employees covered by an EA are, on balance and weighing any advantages or disadvantages, better off than they would be under the award(s) that would otherwise apply to them.

Under its current approach, the FWC analyses a proposed EA to determine if it would permit a combination of rosters or work activities to be paid less than what an applicable award would pay for that combination of hours and work. However, the test is not focused on only those combinations that are reasonably likely to occur at the employer's enterprise. Instead, any theoretically possible permutation must be assessed. This can result in undertakings needing to be given for obscure scenarios that would never occur in practice, or the addition of irrelevant content to the EA itself, and in either case a drawn-out and delayed bargaining and approval process.

The Bill proposes to recalibrate the BOOT analysis so that it is focused on patterns and kinds of work that are actually engaged in, or are reasonably foreseeable by the employer. Furthermore, the Bill would allow the FWC to give "significant weight" to the views of employers, employees and any bargaining representatives about whether the agreement passes the BOOT. This is perhaps also reflected in a new requirement for the FWC to perform its functions and exercise its powers under Part 2-4 in a manner that "recognises the outcome of bargaining at the enterprise level".

A further change will specifically allow the FWC to take into account the "overall benefits **(including non-monetary benefits)**" that a proposed agreement would provide. That is in stark contrast to the current approach to the BOOT analysis, which typically does not allow non-monetary benefits to "push an agreement over the line" if monetary benefits fall below the award minima.

Permitting agreements to reduce award conditions

By far the most controversial element in the Bill is a change that the ACTU has complained was not raised in the working group discussions. This will create a new exception to the BOOT, to operate for two years, although with significant limitations (about which the ACTU and the ALP are entirely sceptical).

Under the existing FW Act, the FWC may approve an EA even if it fails the BOOT, if it is satisfied there are exceptional circumstances that would mean approval would not be contrary to the public interest, such as to deal with a short-term crisis and assist in the revival of an enterprise. In practice, few employers have sought to invoke that exception – and even fewer have succeeded.

What the Bill proposes is to create a temporary but broader version of that exception. The FWC will be able to approve EAs that reduce wages and conditions below award levels for some or all employees, provided it is "appropriate" to do so and not contrary to the public interest.

This is to be determined by reference to all the circumstances (which need not be exceptional), including the views of the employer and employees involved and their bargaining representatives, the impact of COVID-19 on the enterprise in question, and the extent of employee support for the EA.

If this change is made – and it is sure to be strongly contested – much will depend on how the FWC chooses to interpret and apply it. An employer would need to carefully weigh what advantage would be gained from an approach like this and whether that advantage would be shared with employees in terms of security, or how it would otherwise be argued to be

"appropriate".

Conversely, it can be expected that unions will be asking employers to give commitments that they will *not* seek to take this step, should it become available.

Termination and expiry of agreements

Many unions have expressed concern about employers seeking to gain a strategic advantage in bargaining for a new EA by applying to the FWC to have the previous EA terminated. If such an application is successful, it may force the affected employees to choose between whatever new EA is being offered by the employer and reverting to awards rates and conditions that may be well below negotiated standards in the relevant industry.

To deal with that situation, to the advantage of employees and their representative unions, the Bill proposes to prohibit an application to have an EA terminated until at least 3 months has elapsed since its nominal expiry date. This will not, however, affect terminations which are agreed by the employer and a majority of its affected employees.

A further reform which potentially impact a significant number of employers is the introduction of a sun-setting provision for all "old" (pre-FW Act) agreements that may still be in force, as well as EAs made during the "bridging period" in the second half of 2009, before both modern awards and the NES had taken effect.

The Fair Work (Transitional Provisions and Consequential Amendments) Act 2009 will be amended to put an end to any of these "agreement-based transitional instruments" (which may include old individual agreements such as AWAs, not just collective agreements) as from 1 July 2022.

Employers affected by this change will accordingly have at least 18 months to decide whether to operate on the basis of modern award conditions (to the extent they are not already applicable), or to enter into a new EA for the relevant employees.

Greenfields agreements

Although the capacity for employers to create a greenfields agreement was marginally expanded in 2015, the maximum of a four-year nominal life has meant that it is not possible to avoid the risk of lawful industrial action occurring during the life of many major infrastructure or mining projects.

The Bill proposes to give greater certainty to project management. It will allow certain "major projects" to create a greenfields agreement with a nominal life of up to 8 years. This new rule will apply to projects with a likely total "expenditure of a capital nature" equal to at least $500 million. Alternatively, a project may be eligible to make an 8-year greenfields agreement where the Minister declares it to be a "major project" for this purpose.

Many long-term projects will be able to avoid the risk of lawful industrial action, or escalating labour costs, by adopting a greenfields agreement under the new provisions. However, a significant limitation is that a long-life greenfields agreement can only be approved if the FWC is satisfied that "the work to be performed under the agreement relates only to the construction" of the major project.

It will also be necessary for an EA of this type to provide for at least annual increases to base rates of pay throughout the nominal term of the agreement.

Criminal penalties for underpayments

In 2019 the Coalition announced that it would implement a recommendation from the Migrant Workers' taskforce to create stronger penalties for the most serious forms of worker exploitation.

In addition to a new and more detailed framework for determining maximum pecuniary penalties, the Bill proposes to introduce a new criminal offence of "dishonestly engaging in a systematic pattern of underpaying one or more employees". The new offence is expressed to apply to employers, but individual mangers or advisers could also find themselves criminally liable under the Crimes Act 1914 or the Criminal Code. These developments will no doubt accelerate the need for ongoing and serious treatment of wage compliance issues at the most senior levels in all businesses.

For employers found guilty of the proposed underpayment of wages offence under the FW Act, the maximum penalty would be:

- In the case of an individual, 4 years imprisonment, a fine of 5,000 penalty unit (currently $1,110,000), or both;
- In the case of a body corporate, 25,000 penalty units (currently $5,550,000).

An employer will be found to have underpaid an employee if they do not pay the employee in full, in money, and at least monthly. Critically, an explicit emphasis is placed on employers only making deductions from an employee's pay in accordance with section 324 in the FW Act.

In determining whether a pattern of underpayments was systematic, the court will have regard to a range of relevant matters, including the number of underpayments, the period over which they occurred, and the number of employees affected.

Finally, it is important to note that the Bill should end speculation about whether State criminal offences for underpayment of wages, of the type introduced in Victoria or Queensland, are constitutionally valid, at least in relation to national system employers. A proposed amendment to the FW Act will have the effect of excluding State and Territory legislators from creating specific underpayment of wages offences that would apply in relation to national system employers and their employees.

Other new provisions on compliance and enforcement

While the new criminal liability provisions are clearly important, a series of other reforms to compliance and enforcement procedures will be of more immediate relevance to employers who may be exposed to allegation of breaches of the FW Act through inadvertence or misinterpretation.

Besides higher civil penalties, which in some cases will now be calculated by reference to the benefit an employer may have derived from a contravention, the changes include:

- making the existing small claims procedure in the Federal Circuit Court or magistrates courts available for claims of up to $50,000 (the current limit being $20,000)
- allowing courts to refer small claims to the FWC for conciliation and, if the parties agree, arbitration
- a prohibition on the advertisement of jobs with pay rates that are lower than the national minimum wage (except where such lower rates are lawful, as with certain junior pay rates)
- requiring the FWO and the Australian Building and Construction Commission (**ABCC**) to publish their policies as to the circumstances in which they will commence or defer legal proceedings, and
- codifying the circumstances which the FWO or ABCC should take into account in deciding whether to accept an enforceable undertaking in relation to a contravention.

Increasing the FWC's powers to manage vexatious applicants

The Bill proposes to expand the grounds on which the FWC may summarily dismiss certain types of application, including where the application is "misconceived or lacking in substance".

However, the FWC will also be granted a new power to restrict the right of a vexatious party to lodge further applications with the FWC. Where a party's application is dismissed in certain circumstances, such as if it was vexatious or had no reasonable prospects of success, the FWC will also be able to make an order restricting the party from bringing further applications to the FWC, other than with special permission from a presidential member. The order will only apply in relation to the kinds of application specified in the order.

Although employers can expect the use of this provision to be somewhat limited, it will be particularly useful in the case of current or former employees who persistently lodge applications with the FWC where those applications are very similar and consistently misconceived.

Union disamalgamation

On the same day that the Bill was introduced, a separate measure was tabled in Parliament, the Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Bill 2020.

The primary purpose of this measure, which has already passed through both houses of parliament with Labor support, is to allow disaffected branches of the powerful Construction, Forestry, Maritime, Mining and Energy Union to 'de-merge' from the union. In theory, it could apply to some other unions formed by previous amalgamations, and which retain distinctly separate divisions, but that seems unlikely.

Conclusion

Employers will no doubt follow the new Bill's progress through parliament with keen interest, and ensure that their workforce arrangements align with restrictions and opportunities presented as the Bill progresses. Although many businesses will not be affected by all the amendments currently being proposed, it is likely that the vast majority of

employers will experience important changes at least to the framework under which they engage casual labour and conduct enterprise bargaining, and are exposed to enhanced compliance action and scrutiny on underpayment issues.

Stay tuned for further updates on this important package of changes.