PROPOSED AMENDMENTS TO THE FAIR WORK ACT AND INDUSTRIAL RELATIONS SYSTEM

INTRODUCTION

In its final sitting week for this year, the federal government has introduced the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020. This is the anticipated Omnibus Bill of amendments to overhaul the *Fair Work Act* and related system.

WHY THE CHANGES?

Over a decade after the *Fair Work Act* and the related industrial relations system came into effect its shortcomings are clear, particularly in relation to enterprise agreements, casual employment and workplace flexibilities. Although the current IR system is functional there is certainly room for improvement, clarification and greater simplification.

The federal government states the aim of the Bill is to improve the operation and usability of the national industrial relations system by providing greater certainty and flexibility to employers and employees to support productivity, employment and economic growth and ensure employees also receive their share of benefits that flow from economic recovery.

WHAT IS AN OMNIBUS BILL?

Essentially, these can be seen as a useful legislative tool to make policy, technical and editorial amendments to various pieces of legislation that relate to an overall subject and at the one time. They can provide a utilitarian approach to reducing numerous stand-alone, but ultimately related, single-issue bills that would otherwise need to be reviewed and considered separately.

It is generally viewed that such a grouping of amendments does not limit parliamentary scrutiny or debate on such a bill, although parliament will vote on that single document rather than each particular issue covered within the omnibus bill. Such a 'packaging' of proposed legislation is used in various countries including Britain, Canada and the United States, although differing procedures may apply. Australia saw several omnibus style bills pass through parliament this year, at both a state and federal level, so as to respond to the effects of and respond to the effects of COVID-19.

WHAT ARE THE PROPOSED AMENDMENTS?

We provide the following outline on various of the particularly relevant proposed amendments that may have an effect on our industry should they become enshrined in legislation.

CASUAL EMPLOYMENT

Historically, in both the *Fair Work Act* and its predecessors, as well as modern and pre-modern Awards, the term 'casual employee' was often referred to as 'one who is employed and paid as such'. Generally, this was understood by employers and employees alike whereby an employee was paid a casual loading to compensate for loss of annual and personal leave and for the uncertainty of ongoing employment

However, this assumed historical definition and its intention has not kept up with modern employment practices and has become confused in practical operation. In recent decisions of the Federal Court a purported casual employee, who was paid a casual loading, but was employed on a

remote worksite and consistently across several years, was deemed not to be a casual employee and was therefore entitled to have been paid annual and personal leave. The court further held that a casual loading payment made "in lieu" of an entitlement, was not necessarily considered the same as satisfying that particular entitlement, and was ineffective as a set off against annual leave and other entitlements.

That decision illustrated several shortcomings in casual employment practices by not regularly revisiting casual arrangements and related contractual terms including “set off” clauses. Additionally, if casual workers are employed on a regular and systematic basis over long periods of time the benefit of employing such workers diminishes, while the risk of them being found to be a permanent employee increases in turn. Further, the abovementioned case and related others illustrated the need for clarification of casual employment due to confusion and errors in interpretation.

For clarification, the governments has proposed an amendment so as to include a statutory definition of ‘casual employee’ and ‘casual employment’. Under the proposed amendments a person is a casual employee of an employer if:

a) an offer of employment made by the employer to the person is made on the basis that the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person; and
b) the person accepts the offer on that basis; and
c) the person is an employee as a result of that acceptance.

In determining whether, at the time such an offer is made, the employer makes no firm advance commitment to continuing and indefinite work according to an agreed pattern of work for the person, regard must be had only to the following considerations:

a) whether the employer can elect to offer work and whether the person can elect to accept or reject work;
b) whether the person will work only as required;
c) whether the employment is described as casual employment;
d) whether the person will be entitled to a casual loading or a specific rate of pay for casual employees under the terms of the offer or a fair work instrument.

To avoid doubt, under the proposals a regular pattern of hours would not of itself indicate a firm advance commitment to continuing and indefinite work according to an agreed pattern of work. The question of whether a person is a casual employee of an employer is to be assessed on the basis of the offer of employment and the acceptance of that offer, not on the basis of any subsequent conduct of either party. Essentially, a person who commences casual employment as a result of the acceptance of such an offer remains a casual employee until either conversion to permanent status occurs or if the employee accepts an alternative offer of employment, other than as a casual employee, by the employer and commences work on that basis.

The proposed amendments will also obligate an employer to offer a casual employee a permanent part-time or full-time position if they have worked for a 12-month period, and during the last 6 months they have worked on a regular pattern of hours on an ongoing basis. However, employers may have reasonable grounds to not make the permanent offer based on facts that are known or reasonably foreseeable at the time of deciding not to make the offer. Reasonable grounds for deciding not to make an offer include:

a) the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer;
b) the hours of work which the employee is required to perform will be significantly reduced in that period;
c) there will be a significant change in either or both of the following in that period:

(i) the days on which the employee's hours of work are 19 required to be performed;
(ii) the times at which the employee's hours of work are required to be performed;
(iii) which cannot be accommodated within the days or times the employee is available to work during that period;

The Fair Work Commission would deal with any conversion related dispute referred to them by either the employer or employee.

Additionally, and to avoid double dipping scenarios, a statutory offset term is proposed so that any specifically identified casual loading payment will count towards any perceived entitlements a casual employee may otherwise try to later claim.

AWARD RELATED FLEXIBILITIES
The Bill seeks to further extend the workplace flexibilities rolled out as part of the JobKeeper wage subsidy scheme beyond the current sunset of late March.

Extension of JobKeeper flexibilities
The Bill seeks to extend existing JobKeeper flexibilities in the *Fair Work Act* concerning duties and location of work to employers and employees to whom identified modern awards (discussed below) apply. These flexibilities, with appropriate employee safeguards, would be available for a period of 2 years from the passage of the Bill.

Part-time Employment
The proposed amendments would provide employers with the ability to offer part-time employees more hours of work at their usual ordinary rates of pay. Employers and part-time employees would be able to enter into a 'simplified additional hours agreement' so part-time employees, and who are covered by specifically identified modern Awards, and work 16 hours per week or an average of 16 hours per week, may work additional hours for the same ordinary rate of pay rather than attract

overtime rates. Such agreements could be terminated subject to either party giving 7 days' notice in writing

The proposed list of identified modern Awards includes the Business Equipment Award and the Commercial Sales Award. Comparatively, the Graphic Arts, Printing and Publishing Award and the Clerks - Private Sector Award, and others, already contain terms whereby the employer and part-time employee can generally agree in writing to altering their ordinary hours of work.

Under the proposal there is the chance of some controversy if not appropriately handled as terminating a simplified additional hours agreement, or not doing so, would be seen as a workplace right for the purposes of the general protections under the *Fair Work Act*. The Act prohibits the exertion of undue influence or undue pressure on an employee in relation to a decision by the employee to terminate, or not terminate, a simplified additional hours agreement.

ENTERPRISE AGREEMENTS

Currently, entering into an enterprise agreement is not the most attractive undertaking for any business. Negotiations can be dragged out and require extensive time and resources have been expended by companies who have been pushed to a bargaining table for a less than productive outcome.

Further, the "Better Off Overall Tests" ("BOOT") that is applied to proposed enterprise agreements requires all workers to be covered by a proposed enterprise agreement to benefit from an enterprise agreement. This has often resulted in a nebulous voodoo of legalistic arguments over whether a proposed agreement does or would pass scrutiny. Under the proposed amendments the enterprise agreement making process and system could be streamlined, and the BOOT reformed.

The amended process for assessment of enterprise agreements against modern awards aims for clarification would require the Fair Work Commission, in applying the better off overall test (BOOT), to:

- only take into account patterns or kinds of work, or types of employment, that are currently engaged in or are reasonably foreseeable, not those that are hypothetical or not reasonably foreseeable;
- have regard to the overall benefits (including non-monetary benefits) employees would receive under the agreement compared to a relevant modern award; and
- have regard to any views relating to whether the agreement passes the BOOT expressed by employers and employees and their bargaining representatives.

The Bill will also permit the Fair Work Commission, in limited circumstances, to approve an agreement which may not pass the BOOT by taking into account the views and circumstances of employees, employer and employee organisation covered by the agreement, the impact of COVID-19 on the enterprise and the extent of employee support for the agreement, and whether approval is in the public interest. This is a time-limited measure (automatically be repealed two years after

commencement), intended to support businesses still recovering from the impact of COVID-19. Agreements approved under this provision would be limited to two years' duration.

The Bill would also enable franchisees to opt-in to a current single-enterprise agreement that covers a larger group of employers that operate under the franchise and ensure that industrial instruments do not transfer where an employee may transfer between associated employing entities at the employee's initiative.

The Fair Work Commission would also be required to determine the approval or variation of an enterprise agreement within 21 days after the application is made, or otherwise give written notice to the parties setting out the reasons why determination was not possible.

COMPLIANCE AND ENFORCEMENT

The Bill seeks to enhance compliance with the *Fair Work Act*, and particularly the payment of wages. Over the last number of years there has been some significant underpayment issues arise, and a number of those matters were as a result of deliberate avoidance rather than by error. Those deliberate underpayment and non-compliance cases affect fair competition in all industries.

To that end, the Bill introduces a new criminal offence for dishonest and systematic wage underpayments, and increases the value and scope of civil penalties and orders that can be imposed for non-compliance. The Bill seeks to introduce possible jail terms of up to 4 years for the worst underpayment offences. Determining such a level of dishonesty would be a question of fact and related evidence to be determined by the court. Penalties will be based on a multiple of two or three times the benefit obtained or up to a $666,600 fine.

NEXT STEPS

Overall, the proposed amendments can be viewed as an attempt to fix various existing problem areas rather than make wholesale fundamental change to Australia's IR system.

The Bill has some way to go before becoming entrenched in legislation. Further parliamentary debate will occur and a Senate Committee will likely be formed to examine the proposed legislation when parliament resumes sitting in February 2021. Remembering this is a review of a Bill, the final outcome may look different to what has been proposed at this point in time.

TRMC welcomes the opportunity to participate in reviewing the Bill in detail, taking member views on the proposed amendments, and informing government with our industry's responses.

Charles Watson
GM – IR, Policy and Governance
The Real Media Collective
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