NEW FEDERAL INDUSTRIAL RELATIONS BILL INTRODUCED

On 9 December 2020, the Morrison Government introduced the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (**Bill**).

The Bill proposes significant reform of existing industrial relations law to assist Australia's economic recovery from COVID-19, creating greater certainty and increased flexibility for both employers and employees.

The key changes in the Bill are summarised below:

1. New Statutory Definition of Casual Employee

Under the Bill, 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;

(b) the person accepts the offer on that basis; and

(c) the person is an employee as a result of that acceptance.

Importantly, in order to determine whether this definition is satisfied, the question of whether a person is a casual employee of an employer is assessed on the basis of the offer of employment and the acceptance of that offer, not any subsequent conduct of either party.

A casual employee will retain their status as a casual until either they convert to full-time or part-time employment, or accept an alternative offer of employment by the employer. This dispenses the need for employers and employees to continuously evaluate the nature of their employment relationship at any point in time to understand their obligations and entitlements.

This statutory definition aims to lay to rest the confusion and uncertainty surrounding the common law definition of a casual as seen in a number of recent Federal Court decisions such as *WorkPac Pty Ltd v Skene [2018] FCAFC 131* and *WorkPac Pty Ltd v Rossato [2020] FCAFC 84*.

2. Casual Conversion Entitlement in the National Employment Standards

The Bill imposes a positive obligation on an employer to make an offer to a 'regular casual employee' to convert to ongoing full-time or part-time employment, unless there are reasonable grounds not to make the offer.

A 'regular casual employee' is a casual employee who has been employed for a 12 month period and has worked a regular pattern of hours on an ongoing basis for at least the last 6 months.

The Bill sets out the requirements of the offer and acceptance procedure. The offer must be made within 21 days after the end of the 12 month period, with a response to be provided within a further 21 days. If the employer does not make an offer for conversion, it must give written notice to the casual employee explaining the reasons for this.

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Furthermore, casual employees retain a residual right to request conversion to full-time or part-time employment if they have not previously declined an offer or received a written notice from the employer explaining why an offer was not made within their last 6 month period of regular work.

The Fair Work Ombudsman will prepare and publish a Casual Employment Information Statement containing information about casual employment and casual conversion. This statement will need to be provided to all new casual employees before they commence employment.

For the avoidance of doubt, the Bill provides that any current employees employed as casuals prior to the implementation of this section will be casual employees under the new section.

3. Casual Loading

To prevent any potential "double-dipping" of entitlements by employees who are misclassified as casual, but received an identifiable casual loading during their employment, the Bill enables the Court to offset any identifiable loading amount against claims for "relevant entitlements" as defined in the Bill (including but not limited to annual leave, personal/carer's leave, compassionate leave, redundancy pay)

This approach differs from the existing regulations as it does not contain an express requirement for the loading amount to be payment "in lieu" of a relevant entitlement.

4. Part Time Flexibility

Currently, existing provisions surrounding part-time employees in some modern awards make it difficult for employers to offer additional hours to part-time employees outside of their agreed regular pattern of work, without the employee receiving overtime payments for the additional hours worked.

In order to assist employers in responding to ad hoc demands and operational needs of flexible businesses in certain industries, the Bill introduces a "simplified additional hours agreement" where one of the following 12 relevant identified modern awards applies to the employer and employee:

a. *Business Equipment Award 2020;*
b. *Commercial Sales Award 2020;*
c. *Fast Food Industry Award 2010;*
d. *General Retail Industry Award 2020;*
e. *Hospitality Industry (General) Award 2020;*
f. *Meat Industry Award 2020;*
g. *Nursery Award 2020;*
h. *Pharmacy Industry Award 2020;*
i. *Restaurant Industry Award 2020;*
j. *Registered and Licensed Clubs Award 2010;*
k. *Seafood Processing Award 2020; and*
l. *Vehicle Repair, Services and Retail Award 2020.*

A part-time employee who works at least 16 hours per week (or an average of at least 16 hours per week) can enter into a simplified additional hours agreement with the employer to work additional hours without receiving overtime pay (except where the additional hours are worked outside the ordinary spread of hours, maximum number of hours, in excess of 38 hours per week or otherwise specified as overtime under the relevant identified modern award.)

To be a valid 'simplified additional hours agreement':

(a) The agreement to work additional hours must be made prior to the employee commencing the first period of additional agreed hours:

(b) The employer must inform the employee that the agreement is a simplified additional hours agreement;

(c) If the agreement is not in writing, it must be recorded in writing before the end of the first period of additional agreed hours worked.

Each period of additional hours must be part of a continuous period of 3 hours and the agreement may be terminated at any time by mutual agreement or by either party giving at least 7 days written notice.

5. Flexible Work Directions

To provide further flexibility as adopted under JobKeeper directions, employers covered by the abovementioned awards are also permitted to issue flexible work directions to employees about their duties to be performed and location of work within reason.

An employer may only direct an employee to perform duties that are within their skill and competency, are safe and reasonably within the scope of the business operations. Similarly, a change in location of work must not result in travel of a distance that is unreasonable in all the circumstances, including COVID-19 considerations.

A flexible work direction must be a necessary part of a reasonable strategy to assist in the revival of the business after COVID-19 and the employer must have this information.

Before issuing a direction, an employer must give at least 3 days prior written notice of its intention to give the direction and consult with the employee. A flexible work direction continues until it is withdrawn, replaced or revoked.

A sunset clause applies to these directions which will cease to have effect 2 years after the relevant section commences.

6. Enterprise Agreement Making

There are a number of changes to the implementation and approval process of enterprise agreements, including:

(a) The time for an employer to provide the notice of employee representational rights has been extended from 14 days to at least 28 days from the date they agree to bargain for an enterprise agreement;

(b) Removal of prescriptive pre-approval steps with a requirement that employers take *"reasonable steps to ensure that employees are given a fair and reasonable opportunity to decide whether or not to approve a proposed agreement"*;

(c) Where a proposed agreement does not pass the better off overall test (BOOT), there is a temporary mechanism for the Fair Work Commission to approve the agreement if it is in the public interest to do so, taking into account factors including the impact of COVID-19. Agreements approved under this mechanism would be limited to 2 years duration.

(d) In applying the BOOT, the Fair Work Commission must:

  i. Only take into account patterns of work are the employees are currently engaged in, or which are reasonably foreseeable;

  ii. Consider the overall benefits, including non-monetary benefits, that employees receive under the proposed agreement; and

  iii. Place 'significant weight' on the view of employers, employees and their bargaining representatives.

(e) Franchise employers can apply to the Fair Work Commission to 'opt-in' to an agreement which 2 or more employers of the same franchise group are covered by, through an application to amend the agreement and subject to the agreement being within its nominal expiry date.

(f) Applications to terminate an agreement cannot be made earlier than 3 months after its nominal expiry date.

(g) The Fair Work Commission is required to approve agreements within 21 working days. If this cannot be done, the Fair Work Commission must write to the employer and any bargaining representative to explain why it has not been approved within this timeframe.

(h) All enterprise agreements must include the model NES term, which is taken to be a term of the enterprise agreement if it is not contained therein. The *Fair Work Regulations 2009* (Cth) will provide a model NES interaction term which explains the provisions of the Act that deal with the interaction between the NES and the enterprise agreements

Sunsetting of agreements and workplace directions

Employers should also note that there is a new sunset clause and the following documents will cease on 1 July 2022:

(a) All agreement-based transitional instruments

These are agreements which were made under the former Workplace Relations Act 1996 and were in force before the commencement of the *Fair Work Act 2009* and include:

- pre-reform certified agreements made by the Australian Industrial Relations Commission by 27 March 2006;
- employee collective agreements approved by the Office of the Employment Advocate or the Workplace Authority by 30 June 2009;
- Australian Workplace Agreements; and
- pre-reform certified agreements varied and/or extended by 31 December 2009.

(b) Division 2B State employment agreements

These are agreements that were:

- registered and approved under State industrial law in New South Wales, Queensland, South Australia and Tasmania covering employers who were not constitutional corporations (e.g. sole traders, partnerships, unincorporated entities etc.); and
- in operation immediately before 1 January 2010 (the referral commencement date of State industrial powers to the Commonwealth to create a new national workplace relations system).

(c) Enterprise agreements made during the "bridging period"

These are enterprise agreements approved from 1 July 2009 to 31 December 2009 prior to the commencement of the modern awards and the application of the BOOT. (These agreements were assessed against the no disadvantage test.)

(d) Workplace determinations made during the "bridging period

These are workplace determinations made from 1 July 2009 to 31 December 2009 prior to the commencement of the modern awards and the application of the BOOT. (These determinations were assessed against the no disadvantage test.)

If an enterprise agreement or workplace determination made during the bridging period ceases to operate in accordance with the sunset clause, that does not affect a person's right or liability before the agreement ceased to operate.

7. Transfer of Business

In general, where there is a transfer of business, the old employer's enterprise agreement continues to cover the transferring employee when they become employed by the new employer. A new subsection 311(1A) will be inserted to exclude these rules in the circumstance where:

(a) the new employer is an associated entity of the old employer when the employee becomes employed by the new employer; and

(b) before the termination of the employee's employment with the old employer, the employee sought to become employed by the new employer at the employee's own initiative.

8. Wage Theft Offences and Enforcement

The Bill increases civil penalties for dishonest conduct, as assessed according to the standards of ordinary people, up to 7.5 times higher than existing penalties for workplace contraventions.

In addition, a criminal offence of wage underpayment is introduced and attracts a penalty of up to 4 year imprisonment and/or a fine of $1.11 million for an individual and up to $5.55 million for a body corporate.

Criminal proceedings may be commenced by the Fair Work Ombudsman or the Australian Building and Construction Commissioner.

9. Small Claims Jurisdictional Limit

The small claims cap will be increased from $20,000 to $50,000 to facilitate employees in recovering their entitlements more easily and cost-effectively.

Courts will be able to refer small claim matters for conciliation (or consent arbitration) by the Fair Work Commission. The Court may also make an order as to costs for any filing fees paid.

As the Bill makes it way through Parliament, it is expected that there will be opposition from various groups in relation to some of the major changes to the industrial relations framework. The Attorney-General has indicated that the consultation process will continue and further submissions from all sides of the debate will be considered. This may impact the version of the Bill as it stands today. We fully anticipate that matters in the Bill will be further clarified and qualified by Parliament so watch this space closely.

If you have any questions about how this Bill may affect your business or employment, please contact MST Lawyers' Employment Law Team by email or on telephone +61 3 8540 0200.