

2020 Year in Review – Employment and Workplace Relations

This Year in Review publication provides a summary of key developments and cases from 2020. We also look at the key issues and developments anticipated in 2021.

It has been a pleasure working with our clients throughout the year and we look forward to supporting you in the coming year.

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Summary of key developments in 2020



COVID-19 pandemic

The COVID-19 pandemic resulted in the speedy enactment of a number of significant short-term government schemes as well as amendments to industrial legislation, including:

- the *JobKeeper* scheme, which provided financial relief to businesses impacted by the pandemic, with the government paying businesses \$1,500.00 per fortnight per eligible employee;
- the *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020*, temporarily amended the *Fair Work Act 2009 (FW Act)*. These temporary provisions provided employers with a wide variety of *JobKeeper* enabling powers to support continuity during the pandemic. The powers gave rise to a number of issues, especially around ‘stand down’ and ‘consultation’ rights; and
- *JobSeeker*, which was a reworked version of the “*Newstart Allowance*” with an increase to payments for eligible individuals.

Federal industrial relations reform

Federal industrial relations reform has been a hot topic, with key business groups and Unions conducting reviews and provide submissions about the workings of the Commonwealth industrial relations system.

Initially the reform was broken down into five working groups, each focussing on one of the following areas:

- *Award simplification*: targeting simplification of retail, tourism, restaurant and hospitality industry Awards.
- *Enterprise agreement making*: focused on the Better Off Overall Test (**BOOT**) and will consider lowering the threshold for agreement making, including consideration of reintroducing the No Disadvantage Test.
- *Casual and fixed term employees*: including consideration of an extension to the rights of casuals to request permanent employment if they have worked regular shifts for 12 months.
- *Compliance and enforcement*: criminalisation of serious forms of wage theft and penalties such as banning Directors and preventing offending companies from employing migrant workers.
- *Greenfields agreements for new enterprises*: considering whether Greenfields agreements should cover the life of mining, oil and gas construction projects.

On 9 December 2020, the *Fair Work Amendment (Supporting Australia’s Jobs and Economic Recovery) Bill 2020* was tabled to address the above reforms. It has been now been referred to the Senate Education and

Employment Legislation Committee, with their report due on 12 March 2021.

We will keep you updated on its progress.

Western Australian industrial relations reform

Western Australian Industrial Relations reform is also on the cards in the form of the *Industrial Relations Legislation Amendment Bill 2020*.

The standout proposed reforms include:

- *Modernisation of the Long Service Leave Act 1958* and introduction of penalties for non-compliance, including clarifying continuity of service provisions, clarifying LSL cash out provisions and providing increased flexibilities regarding taking LSL.
- *Inclusion of a Workplace bullying jurisdiction in the State Commission:* A workplace bullying jurisdiction heavily based on the FW Act bullying provisions is proposed and aimed at providing a mechanism that will prevent harm to a person's health and safety arising from workplace bullying.
- *Award coverage:* Ensuring all private sector employees are covered by an Award, other than those not traditionally covered by an Award. Currently some private sector Awards are expressed to apply to an industry as determined by the names of the employer respondents listed in the Award. The Bill will amend the Industrial Relations Act 1979 (IR Act) to prescribe how the scope of an Award is expressed when the Commission is varying its scope to ensure that all employers and employees operating in a specified industry or employees employed in a specified type of work are covered by a given Award.
- *Definition of employee:* Removal of exclusions from the definition of 'employee' in the IR Act and Minimum Conditions of Employment Act 1993 (MCE).
- *Increased penalties* for breaches so that there is equivalence with the FW Act.
- *Illegal contracts:* Changes to allow the Industrial Magistrates Court (IMC) to treat illegal contracts as valid: The reform will be based on the 'general protections' scheme in the FW Act which provides penalties for sham contracting.

Western Australian Work Health and Safety Bill

The Western Australian Work Health and Safety Bill is set to given Royal assent in early 2021.

The Act will replace the *Occupational Safety and Health Act 1984 (WHS Act)* in an attempt to modernise and harmonise the Western Australian law with other States and Territories.

The WHS Act creates offences for industrial manslaughter, clarifies the meaning of person in control of a business or undertaking (**PCBU**), and expands the scope of duty of care to persons in specified roles.



Summary of key cases in 2020

***Mondelez Australia Pty Ltd v AMWU & Ors* [2020] HCA 29**

This case dealt with how the entitlement to paid personal/carer's under section 96(1) of the FW Act should be calculated.

The majority of the High Court rejected the "working day" interpretation proposed by the AMWU and held that *"because patterns of work do not always follow two-week cycles, the entitlement to "10 days" of paid personal/carer's leave can be calculated as 1/26 of an employee's ordinary hours of work in a year"*.

***WorkPac Pty Ltd v Rossato* [2020] FCAFC 84 (Rossato Case)**

This case added further to the law on casual work and related entitlements. Mr Rossato was employed as a casual during his time at WorkPac. As such he was not provided annual leave, personal leave or redundancy pay but instead received 25% loading in lieu of those entitlements.

After Mr Rossato left WorkPac, he brought a claim declaring that he should have been classified as a permanent employee during his time at WorkPac and therefore was entitled to be paid out accrued annual leave.

The Court found that there were enough indicia to point to Mr Rossato's engagement as a permanent employee, not a casual, as his employment was not characterised by *"irregularity, uncertainty, unpredictability, intermittency and discontinuity in the pattern of work"*.

The Court further declared that the principle of *"offset"* could not be applied to the casual allowance, in response to WorkPac's argument that it could *"re-apply the money it had paid to Mr Rossato by way of casual loading against any sums owing in respect of annual leave, personal leave and compassionate leave"*.

The Rossato Case highlights the need to properly characterise the type of employment when engaging an employee as well as during the course of their employment.



A look ahead to 2021

Restructuring and redundancy

Restructuring and redundancy will undoubtedly pick up in the new year; many companies will start to turn their minds to downsizing and changing their workplace practices to adapt to a post COVID economy. The key employment issues to be aware of are complying with consultation and notice requirements and correctly calculating termination payments.

Workplace flexibility

The COVID-19 pandemic highlighted the utility of flexible working arrangements. Working from home has led to many workers having a greater appreciation of work-life balance; with much more time being spent around family. The PSA/CPSU NSW division's 'What Women Want Report 2020' listed flexibility in the workplace as the number one focus moving forward¹, and it is highly likely that other Unions, employee organisations will follow suit. Employers should seek advice about their flexible working arrangement obligations under the FW Act or applicable Federal or State Awards or applicable State Legislation.

Externalities of dynamic work environments

Mental health and wellbeing is going to be on the agenda in 2021. As we move to more physically isolated work patterns, the obligation on employers and businesses to maintain a safe and healthy environment for their workforce becomes paramount. Best practice includes regular meetings and check-ins with staff, providing ongoing support to staff if needed including employee assistance programs, and developing a mental health guide or manual to assist staff in understanding that help is available.

Underpayments

Underpayments in a variety of industries, especially Hospitality and Retail, has been described as endemic². The Fair Work Ombudsman has been allocated an increase in funding to investigate and prosecute employers who underpay their workers.



¹ Public Service Association of NSW and State Branch Secretary, Community and Public Sector Union (SPSF Group) NSW Branch, *Inaugural What Women Want Report 2020*, November 2020.

² Phillip Coorey, 'More wage theft revelations expected today', Australian Financial Review 19 February 2020, accessed on 16 November 2020 <https://www.afr.com/politics/federal/more-wage-theft-revelations-expected-today-20200219-p5424y>