FWD: THINKING

What are your top workplace priorities for 2019?

January 2019

2019 is a Federal election year, with industrial relations change forming a key plank of the Australian Labor Party's policy platform. Workplace issues are likely to be a key priority for business this year.

Our Top 8 workplace issues for 2019 are:

1. The Federal election
2. Casual workers
3. Worker status
4. Whistleblowing "personal work-related grievances"
5. Banking Royal Commission, BEAR and remuneration
6. #MeToo and NDAs
7. The five yearly National Review of Model WHS Laws
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ISSUE 1

The Federal election

With the Federal election looming, unions have been advocating for a raft of changes to the current workplace relations system. The enterprise bargaining landscape is a particular focus for the ALP because of continuing wage stagnation and the declining number of private sector agreements.

Some of the changes to look out for in 2019, particularly if there is a change of Federal Government, are:

- **Industry bargaining:** The ACTU and Transport Workers Union have been increasing pressure to introduce industry bargaining. The ALP supports multi-employer and multi-sector bargaining (although it may be limited to certain, low-income sectors) and in particular the ALP has said it will advocate for equal terms and conditions across the public sector.
- **Prohibiting employer lockouts during bargaining:** The ACTU is advocating for the prohibition of employer lockouts, arguing that it is in line with international law standards and best practice which prevent employers engaging replacement labour during periods of industrial action.
- **Limiting the ability to terminate expired agreements:** Since the 2015 decision of *Aurizon Operations Limited: Aurizon Network Pty Ltd; Australia Eastern Railroad Pty Ltd [2015] FWCFB 540*, an increasing number of employers have applied to terminate enterprise agreements when negotiations for a new enterprise agreement have reached an impasse. The ACTU has called for changes so that enterprise agreements can only be terminated in exceptional circumstances and not when bargaining is underway or being sought.
- **Arbitration to settle disputes under an enterprise agreement:** The ALP's National Platform includes the introduction of arbitration for unresolved enterprise agreement disputes. It is proposed that these disputes will be heard by an impartial tribunal.
- **Labour hire:** If the ALP is elected, expect restrictions on the use of labour hire and the introduction of legislation requiring labour hire workers to be paid the same as permanent employees performing the same job in the same workplace.
- **Labour hire licensing:** The ALP platform also calls for the introduction of a national scheme to license labour hire operators. In 2019 we can expect to see increased attention given to the case for regulating the industry at a national level.
- **Whistleblowing:** The ALP has stated its commitment to strengthening whistleblower protections if elected, with the potential to expand protections to exploited migrant or temporary workers who blow the whistle on their employer. So, if there is a change in government following the Federal election, it remains to be seen if the ALP would progress the current Whistleblower Bill or introduce a new or amended bill.
- **Restoring Penalty Rates Bills:** The Hon. Bill Shorten, MP introduced the *Fair Work Amendment (Restoring Penalty Rates) Bill 2018* in June 2018, which would have the effect of reversing the FWC's 2017 decision to cut penalty rates. An identical bill was introduced in the Senate by the Hon. Doug Cameron on 14 November 2018. We do not expect either bill to pass Parliament as currently constituted, but if the ALP is successful at the next Federal election then implementing the amendments will likely be a priority for 2019.
- **Industrial manslaughter:** At the end of 2018, the ALP's national conference passed a resolution to work with Safe Work Australia to introduce industrial manslaughter laws into the WHS model legislation during its first year of government, if it wins this year's Federal election. We anticipate that any such amendment would be informed by the Queensland laws. This follows a recommendation by a Senate committee inquiry into the framework surrounding the prevention, investigation and prosecution of industrial deaths in Australia. Conversely, the Coalition has indicated it is unlikely to support the introduction of such an offence.

ISSUE 2

Status and entitlements of casual workers

In 2018, a number of significant developments occurred relating to the entitlements of employees engaged on a casual basis, and further agitation of these issues will follow in 2019.

The Full Court of the Federal Court in WorkPac Pty Ltd v Skene [2018] FCAFC 131 found that casual employees with regular predictable hours may be entitled to the same statutory entitlements under the NES as permanent employees, regardless of whether they are engaged and paid on a casual basis (see our Employment Alert).

In response to concerns that the Federal Court's decision could lead to "double-dipping" of entitlements for employees *paid a casual loading, amen*dments to the Fair Work Regulations 2009 (Cth) were implemented with *effect from 18 December 2018 through the Fair Work Amendmen*t (Casual Loading Offset) Regulations 2018 (Cth).

Described as providing "declaratory clarifica*tion", the new subregulati*on 2.03A of the Fair Work Regulations 2009 (Cth) applies where a person employed as a casual employee has clearly received an identifiable loading in lieu of one or more NES entitlements during a particular period, despite not in fact being a casual employee for the purposes of the NES for all or part of that period. The provision explains that in these circumstances, the employer may make a claim to have the loading amount taken into account if the employee makes a subsequent claim to be paid an amount in lieu of one or more of the NES entitlements afforded only to non-casual employees (ie part-time or full-time employees).

Employers should still review existing arrangements with their casual employees (in particular, the terms of their contracts of employment) as the Regulation does little more than capture the current common law position.

The Federal Court in *Skene* left open the question of whether an employer who has paid to an employee a casual loading in lieu of certain entitlements, is entitled to set off that amount against entitlements later found to be owing, for example annual leave.

WorkPac has filed a separate test case to clarify the position with respect to "casual" employees and "double-dipping" to claim entitlements under the NES and/or relevant industrial instruments in addition to casual loadings. The matter will be heard by a Full Court of the Federal Court around April this year. Given the significance of the issues involved, the matter may be appealed to the High Court. The set-off issue is also likely to be raised in two class actions filed in December 2018 against labour hire firms. In our view this is a critical issue for employers in 2019.

Casual conversion

Early 2019 is the time for employers that engage casuals who are covered by a relevant modern award to make sure that systems are in place to ensure compliance with the notification requirements and other obligations imposed by new casual conversion provisions implemented late last year in the majority of modern awards.

The final model casual conversion clause was formulated by the Full Bench of the FWC in its August 2018 decision and has been inserted in 85 modern awards. The clause allows a "regular casual employee" to request that their employer convert their employment to part-time or full-time employment (depending upon hours worked over the preceding period) after 12 months of service. Although such a request may be refused by the employer, it may only be refused on "reasonable grounds" and following consultation with the employee. An employer must also provide the casual employee with reasons for the refusal in writing within 21 days of the request being made.

Following the insertion, with effect from 1 October 2018, employers are now required to provide any new casual employee with a copy of the conversion clause as it appears in the relevant modern award within 12 months of the employee's first engagement to perform work. (Employers were required to provide casual employees already employed as at 1 October 2018 with a copy of the clause by 1 January 2019).

The Government has indicated that it intends to amend the FW Act to provide regular casual employees with the right to request conversion to permanent employment.

Employers with enterprise agreements do not need to comply with the casual conversion clause obligations, but should expect pressure from employees and unions to include a casual conversion clause in replacement enterprise agreements.

ISSUE 3

Worker status

The rise of the "gig economy worker" has led to new working practices that challenge the existing traditional worker categories in Australia by introducing workers who are engaged as contractors but who enjoy varying degrees of independence.

There have been a number of reviews on the future of work and its impact on worker status. The Victorian Government commenced an Inquiry into the on-demand workforce on 20 December 2018. This inquiry will consider the extent and nature of the gig economy in Victoria as it impacts on the Victorian labour market, as well as examine how similar workers are regulated interstate and internationally. The inquiry is currently calling for submissions until 6 February 2019, and is expected to deliver a final report to the Victorian Government later this year.

This follows the Federal Senate Select Committee on the Future of Work and Workers which also concluded an inquiry on this issue in September 2018, and an interim report being issued in Western Australia arising from a Ministerial Review.

During 2018 the UK Government published its response to the 2017 Taylor Review of Modern Working Practices. It accepted a number of the Review's conclusions and recommendations, including the conclusion that there is currently a lack of clarity and certainty surrounding the tests for employment status. However, the UK Government has made clear that it has no plans to reform the current tripartite approach to employment status (the categories of employee, worker and self-employed). We expect that efforts towards law reform in this area will continue into 2019, however, changes are likely to be incremental rather than fundamental. To date there have been relatively few concrete proposals for reform, and a number of the Review's conclusions were put out to further consultation. We expect the UK Government responses to those consultations during 2019.

It is also likely that court and tribunal challenges to individuals' employment status will continue in both Australia and the UK, and that trade unions will continue to try to increase their representation and role in the gig economy.

ISSUE 4

Whistleblowing – "personal work-related grievances" carve out

In its last 2018 sitting, the Senate passed the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2018* (Cth) with amendments, and it is now before the House of Representatives.

A key change of relevance to employers is a carve-out for "personal work-related grievances" from the types of disclosures qualifying for protection. A disclosure of misconduct concerning a personal work-related grievance of the whistleblower will only be protected if it meets specific conditions, which include where the disclosure concerns alleged victimisation of the whistleblower, has significant implications extending beyond the whistleblower, or the disclosure is made to a legal practitioner for the purposes of obtaining legal advice or legal representation in relation to the operation of the whistleblower provisions.

We previously considered the Whistleblower Bill when it was first introduced into the Senate (see our Employment Alert). Since this Alert, the Whistleblower Bill has been amended in several respects. Some of the key aspects of the Whistleblower Bill are:

- **Who can make a qualifying disclosure?** The categories of people who may make a qualifying disclosure will include both current and former officers, employees, contractors or individual associates of a regulated entity, and their family members and dependants.
- **Who can receive a qualifying disclosure?** A person may blow the whistle to a number of regulators as well as an "eligible recipient". An "eligible recipient" is defined to include senior managers as well as officers of a body corporate or related body corporate. Due to amendments made in the Senate, the Whistleblower Bill no longer includes the whistleblower's supervisor or manager in the "eligible recipient" definition.

- **What type of disclosed information is protected?** The Whistleblower Bill introduces a broad definition of potential misconduct that a whistleblower may disclose information about, so as to qualify for protection. This includes where a whistleblower has reasonable grounds to suspect that the information concerns misconduct or an "improper state of affairs or circumstances" in relation to a regulated entity. However, as above, the Senate amendments now introduce a carve-out of "personal work-related grievances" from protected disclosures.
- **Are public interest disclosures protected?** A whistleblower may also be able to make a protected emergency disclosure or a protected public interest disclosure in certain circumstances to a journalist or parliamentarian.
- **Claims for compensation:** A whistleblower will be able to claim compensation for detriment suffered as a result of victimisation. Pursuant to the amendments, where the victimisation is committed by an individual, a body corporate will be liable for the compensation if it failed to fulfil a duty to prevent the offending conduct from occurring. Also, a reverse onus of proof will apply in respect of the reasons for the offending conduct. Once the other required elements are established by the claimant, the person against whom the claim is made will bear the onus of proving that the protected disclosure was not the reason, or part of the reason, for the detrimental conduct.
- **Maximum penalties:** The Whistleblower Bill and a related Bill concerning penalties will substantially increase both the criminal and civil penalties that apply for breach of relevant provisions. The most substantial increases relate to the civil penalties for breach of confidentiality of a whistleblower's identity, and victimisation. Subject to passage of both Bills, a person found to have contravened these provisions may face civil penalties of up to:
  - for an individual, 5,000 penalty units ($1,050,000 as at January 2019) or three times the benefit derived or detriment avoided;
  - for a body corporate, 50,000 penalty units ($10,500,000 as at January 2019) or three times the benefit derived or detriment avoided, or 10% of the body's corporate's annual turnover (up to one million penalty units, which is $210,000,000 as at January 2019).

Note: The above points relate to the whistleblower regime in the *Corporations Act 2001* (Cth), which will be reformed and expanded by the Whistleblower Bill. The same Bill will also introduce a similar whistleblower regime under the *Taxation Administration Act 1953* (Cth), and some (but not all) of these points are equally applicable to the new taxation whistleblower regime.

What's next?

The Whistleblower Bill is now before the House of Representatives, which is due to sit on 12 February 2019. While we anticipate that the issue of whistleblower protections reforms will be an agenda item for the Commonwealth Government this year, the upcoming Federal election in 2019 may have an impact on its progress.

ISSUE 5

Banking Royal Commission, BEAR and remuneration

As the fallout from the Royal Commission into the Banking and Insurance Industry continues, executive remuneration and reward structures will be subject to increasing scrutiny. Commissioner Hayne will deliver his final report by 1 February 2019, and his recommendations should be closely considered.

On 1 July 2018, the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Act 2018* (Cth) commenced, introducing the Banking Executive Accountability Regime (**BEAR**). Through amendments to the *Banking Act 1959* (Cth) (**Banking Act**), BEAR seeks to strengthen the banking accountability framework by introducing penalties for non-compliance by authorised deposit-taking institutions (**ADIs**) (effectively financial institutions) and their most senior and influential directors and executives (referred to under BEAR as "accountable persons").

For the purposes of this article, we focus on the BEAR reforms insofar as they relate to accountable persons.

An individual will be an "accountable person" if they have actual or effective senior executive responsibility for management or control of the ADI, or a significant or substantial part of the ADI or the ADI group operations. Without limiting this general definition, an accountable person of an ADI is also defined by reference to their responsibilities, which relate to responsibilities for oversight of the ADI as a member of the Board of the ADI as well as senior executive responsibility for various resources, functions and arrangements.

Amongst other things, the BEAR reforms impose a statutory obligation on an ADI (including in respect of its subsidiaries) to defer a proportion of an accountable person's variable remuneration granted on or after 1 January 2019 (or, for payments made under existing contracts, on or after 1 January 2020) for a minimum of four years or a shorter period if approved by Australian Prudential Regulatory Authority (**APRA**). The amount of an accountable person's variable income which is to be deferred depends on, amongst other things, the accountable person's role and the size of the ADI.

If an accountable person breaches their obligations under BEAR, the ADI is obliged to withhold all or part of their variable remuneration that has been deferred.

Accountable persons are obliged under BEAR to conduct the responsibilities of their position as an accountable person:

- by acting with honesty and integrity and with due skill, care and diligence;
- by dealing with the APRA in an open, constructive and cooperative way; and
- by taking reasonable steps in conducting those responsibilities to prevent matters from arising that would adversely affect the prudential standing or reputation of the ADI.

The BEAR reforms also confer powers on APRA to disqualify an accountable person for breaching their obligations under BEAR for a period that APRA considers appropriate. APRA's decisions to disqualify accountable persons, including to vary or revoke a disqualification, are subject to a merits review by the Administrative Appeals Tribunal under Part VI of the Banking Act.

What is clear is that the obligations on accountable persons are cast in very general terms, and these terms will commonly be applied by APRA with the benefit of hindsight. So, it will be important for accountable persons to be able to demonstrate the steps they took to discharge their personal obligations.

ISSUE 6

#MeToo and NDAs

The focus on workplace harassment generated by the #MeToo campaign will continue into 2019, in large part driven by the Australian Human Rights Commission's National Inquiry into Sexual Harassment in Australian Workplaces.

The Inquiry is the first of its kind globally. The Inquiry is currently in the public consultation stage, inviting public submissions until 28 February 2019. As part of the public consultation and call for submissions, the AHRC is calling for employers to give a limited waiver of confidentiality obligations in non-disclosure agreements (**NDAs**) for the purpose of allowing individuals affected by sexual harassment to make a confidential submission to the Inquiry. At the time of writing, various large employers have issued a limited waiver, including ANZ, BHP, the Commonwealth Bank of Australia, the NSW Government Sector, Rio Tinto and Telstra.

The use of non-disclosure agreements preventing employees from speaking out about past harassment is also a particular area of focus in the UK. NDAs, often in the form of a confidentiality clause in a settlement agreement (deed of release), are a common feature of resolving employment disputes in both Australia and the UK. In November 2018, the UK Parliament's Women and Equalities Committee initiated an inquiry into NDAs in harassment and discrimination cases. The inquiry will look into the use of NDAs in circumstances where any form of harassment or discrimination is alleged. The committee is seeking opinions on whether the use of NDAs should be banned or restricted and what safeguards should be put in place to prevent them being used unethically. The UK Government's response, which is expected in 2019, might impact how NDAs can be used in the future.

It remains to be seen whether the AHRC Inquiry will also make recommendations about the use of NDAs in Australia in this context.

ISSUE 7

The five yearly National Review of Model WHS Laws

During 2018, SafeWork Australia appointed Marie Boland, former Executive Director of SafeWork SA, to conduct a review of the operation of the model WHS laws. The review has now been completed and Ms Boland provided her report to WHS Ministers in December 2018. Ministers will confirm in 2019 whether Ms Boland's report will be publicly released. The Commonwealth and each State and Territory Government, will need to consider whether any recommendations in the report will be adopted as changes to the model laws as a consequence.

As part of the review, Ms Boland published a discussion paper calling for written submissions. Public consultations were also held over eight weeks. A consultation summary paper flagged several issues which emerged during the consultation process.

The summary paper noted:

- a prevalent view that the model WHS laws are operating effectively
- concern regarding the length and complexity of the model Codes of Practice
- perception that the model WHS laws do not sufficiently focus on psychological health
- the extent to which cost dictates what is "reasonable practicable" in the context of duties of care
- consistent feedback that neither the duty of PCBUs to consult with other PBCUs holding a concurrent duty nor the duty to consult with workers were clearly understood or enforced; and
- lack of consistency in the application and interpretation of the model laws within and across jurisdictions and the importance of authoritative regulatory decision-making.

The summary paper identified that there was a tension between smaller and larger businesses when considering the operation, benefits and disadvantages of the model laws. For example:

- smaller businesses desire more clear guidance on how to comply with duties whereas larger businesses prefer the flexibility of the principles based approach adopted by the current framework;
- smaller businesses and government found the question of who is an officer to be problematic for them, whereas larger businesses reported the duties framework as having the effect of driving safety from the top of an organisation; and
- small businesses viewed the Health and Safety Representative framework as impractical.

An offence of industrial manslaughter was also the subject of some discussion.

Publicly, when commenting on her report, Ms Boland described her review as having three key themes with possible recommendations in these areas;

- consistency (being linked to the application, interpretation and enforcement of the laws);
- clarity (to address the concerns raised by small business); and
- consequence (being linked to the deterrent aspects of the laws, such as penalties, sentencing, insurance products and the appropriateness of an industrial manslaughter offence).

ISSUE 8

Compliance with the Modern Slavery Acts

There are now two modern slavery regimes in Australia: a Commonwealth and NSW scheme, both of which require reporting by employers.

The *Modern Slavery Act 2018* (Cth) came into full effect on 1 January 2019 and the *Modern Slavery Act 2018* (NSW) is expected to fully commence on 1 July 2019 following the appointment of Professor Jennifer Burn as the Interim Anti-Slavery Commissioner NSW on 21 December 2018.

The primary operative provisions of the NSW Act will not apply to a commercial organisation if it is subject to obligations under a law of the Commonwealth that is prescribed as a corresponding law, so it is likely that only the Commonwealth Act will apply to most commercial organisations.

Entities falling within the scope of either Modern Slavery Act should review existing policies to monitor and combat modern slavery and conduct audits on suppliers and supply contractors to identify and mitigate any modern slavery risks prior to the first reporting deadline.

Under the Commonwealth Act, reporting entities must provide their first Modern Slavery Statement within six months after the end of the entity's first 12-month reporting period, which can be its usual financial year, starting after 1 January 2019. *Most reporting entities are expected to release their first statements in 2020.* The date for NSW reporting is yet to be released, pursuant to regulations.

The Commonwealth Act establishes requirements on certain entities carrying on business in Australia that have an annual consolidated revenue of more than $100 million, including to report on their actions taken to investigate and prevent modern slavery in their Australian operations and global supply chains.

"Modern slavery" includes all forms of trafficking in persons, slavery and slavery-like practices, including servitude, forced labour, child labour and instances of deceptive recruitment for labour and services (including where such conduct occurs overseas).

Reports must be published for each financial year and will be made publicly available on a register maintained by the Minister for Home Affairs. Reports must contain information about:

- the structure, operations and supply chains of the reporting entity;
- risks of modern slavery practices in the operations and supply chain of the reporting entity and any entities that the reporting entity owns or controls;
- actions taken by the reporting entity to assess and address those risks (including due diligence and remediation processes);
- the reporting entity's method of assessing the effectiveness of such actions;
- the process of consultation with any entities that the reporting entity owns or controls; and
- any other information the reporting entity considers relevant.

There are currently no penalties for failure to comply with the reporting obligations or for providing a false or misleading report, and the Commonwealth Act expressly does not permit any Rules made by the Minister to create an offence or civil penalty. However, as a deterrent measure, the Minister may publish details of any non-compliance on the public register, which may negatively impact the entity's reputation and goodwill.

The NSW Act generally applies to entities with an annual turnover of $50 million or more that have employees in NSW, however entities with over $100 million would likely be covered by the Commonwealth Act. Unlike under the Commonwealth Act, under the NSW Act, entities may be fined up to $1.1 million for non-compliance with reporting obligations.

Other Developments

In 2019, we also expect to see more State labour hire licensing schemes come into operation, increased enterprise agreement approvals as the FWC uses its new discretion, greater attention to domestic violence leave and family friendly work arrangements, and the new Victorian long service leave obligations will start to have a practical impact.

In relation to modern awards, a number of changes arising from the four yearly modern award review from late 2018 and early 2019 will take effect, about termination payments, family friendly work arrangements and casual conversion.

Other legislative change may be on the agenda to protect employee entitlements during insolvency, strengthen human rights in Queensland, protect against discrimination based on religious belief or activity and to amend regulations about discrimination on the basis of criminal records.

Globally, Singapore's Employment Act will change significantly from April 2019, with implications for all employers with staff in Singapore, and Brexit remains an issue for global employers.

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