IT'S ON THE ROAD – THE WORKPLACE OMNIBUS REFORM BILL 2020 HAS STARTED ITS JOURNEY

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By: Michaela Moloney, Nick Ruskin, Meg Aitken, John Monroe, Greta Marks

The Morrison Government's first major workplace reform Bill was introduced into Federal Parliament on 9 December 2020.

The Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (the Omnibus Bill) does not represent an overhaul of workplace laws, but applies touch paint to key aspects of the former Labor Government's Fair Work system that have created controversy, uncertainty and calls for change. It also aligns with the Government's focus on productivity, job creation and wage growth.

Click here for a PDF of the key reforms or read below:

CASUAL EMPLOYMENT

The Omnibus Bill proposes a framework designed to provide more certainty for employers and casual employees.

New definition of casual employee	
Context	After years of controversy regarding the meaning and parameters of casual employment, the Omnibus Bill proposes a definition of "casual employee" at section 15A, which will override the definition that has evolved over time at common law and responds to the decisions in *WorkPac v Skene* [2018] FCAFC 131 (***Skene***) and *WorkPac v Rossato* [2020] FCAFC 84 (***Rossato***). This new definition, while providing certainty and codifying common law indicia, provides employers considerable power to classify new employees as they see fit.
Proposed amendment	The new definition provides that a person is a casual employee if an offer of employment 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**, and the employee accepts the offer.
Requirements	Whether there is an absence of a firm advance commitment to continuing and indefinite work according to an agreed pattern of work must be **assessed at the time the offer was made**, against the following exhaustive list of factors:

New definition of casual employee	
	▪ whether the employer can **elect to offer work** and whether the person can elect to **accept or reject work**; ▪ whether the person will work **only as required**; ▪ whether the employment is **described** as casual employment; and ▪ 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. Employers will also be obliged to provide casual employees with a Casual Employee Information Statement, as prepared by the Fair Work Ombudsman.
Who's affected?	These provisions may apply to all employers and employees engaged as casuals. The new definition applies in relation to offers of employment that were given before, on or after commencement of the amendments.
Casual conversion	
Context	Where an employee has been engaged as a casual for a longer period, the employer and employee will now have more certain recourse to change the nature of the relationship by way of casual conversion. Although providing greater certainty, this proposed amendment also provides employers some discretion to refuse casual conversion.
Proposed amendment	An employer **must** make an offer to a casual employee for casual conversion **if the employee has been engaged for a period of 12 months, and during the last six months of that period, the employee has worked a regular pattern of hours on an ongoing basis** (ie regular and systematic), which the employee could continue to work as a full-time or part-time employee. An employee may request casual conversion on a similar basis. An employer may avoid this offer if there are reasonable grounds not to offer casual conversion, based on facts that are known or reasonably foreseeable at the time of the decision not to make the offer.
Requirements	Reasonable grounds for an employer not to make an offer for casual conversion

Casual conversion	
	after 12 months, or to refuse an employee's request for casual conversion include that: ▪ the employee's position will cease to exist in the period of 12 months after the time of deciding not to make the offer; ▪ the hours of work which the employee is required to perform will be significantly reduced in that period; ▪ in that period, there will be a significant change in the days or times that the employee's hours of work are required to be performed, which cannot be accommodated within the days or times the employee is available to work during that period; and ▪ making the offer would not comply with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory. An employee may not make a request for casual conversion if they have refused an offer of casual conversion in the last six months, the employer has advised that they will not be making an offer of casual conversion, or the employee has had a request refused in the last six months.
Who's affected?	These provisions will apply to all employers and employees engaged as casuals who are not covered by a modern award already containing a casual conversion clause.
Setting off casual loading amounts	
Context	The Omnibus Bill also seeks to address the issue of "double dipping" which was of particular concern in *Rossato*. In that case, the Full Court held that the employee was entitled to back pay for leave and public holiday entitlements. The employer was unable to offset these entitlements against the 25% casual loading that the employee had already been paid throughout his employment in lieu of receiving those entitlements. The proposed amendment expressly prevents this from occurring by requiring a court to apply the offset when assessing back pay.
Proposed amendment	The Omnibus Bill provides that in the event that a court finds that an employee has been employed as a casual and paid a casual loading (or an identifiable amount), but the employee is actually not a casual employee, **the court must reduce any**

Setting off casual loading amounts	
	amount payable by the employer to the employee by an amount equal to the loading amount.
Who's affected?	This amendment applies to entitlements that accrued before, on or after commencement of the amendments. Therefore the six year limitation period will apply to these claims, regardless of whether the employee is still employed by the employer so employers can use the amendment to defend existing claims such as class actions currently before the courts. There may be a challenge to the constitutionality of such a proposed retrospective law.

MODERN AWARDS

The proposed changes to the modern award system would create two new key areas of award flexibility, in respect of:

- offering additional hours to part-time employees without incurring overtime; and
- issuing "flexible work directions" to award-covered employees relating to their duties and locations of work.

The Omnibus Bill proposes that each of these new flexibilities will be taken to be terms of the modern awards they affect, and will prevail over other modern award terms.

Part-time additional hours	
Context	This change seeks to assist industries hardest hit by COVID-19 namely retail, food and accommodation industries. Part-time employees covered by modern awards must be engaged in an agreed regular pattern of hours, including the number of hours, days on which they are worked, and start and finishing times. These patterns usually cannot be varied except by written agreement, and any hours worked outside of the pattern agreed or varied must be paid as overtime. This is the case even if the employee works fewer than 38 hours per week or the maximum number of ordinary hours in a day. A number of awards impose even stricter limitations on varying part-time employees' hours.
Proposed	The Omnibus Bill proposes to allow employers and employees to enter into

Part-time additional hours	
amendment	"simplified additional hours agreements". These agreements will allow the employer and employee to agree that the part-time employee work additional specified hours on one or more days and not be paid overtime rates. These agreements will not override other provisions of an award relating to overtime. This means it will still count as overtime if the employee works over 38 hour in a week, or over the maximum amount of hours in day, or outside the span of ordinary hours.
Requirements	▪ The employer must explain to the employee that it is a "simplified additional hours agreement"; ▪ The agreement must be made before the start of the first period of additional hours; ▪ If the agreement is not made in writing, the employer must make a written record of the agreement before the end of the first period of additional hours; and ▪ Additional hours must be part of one or more periods of at least three hours.
Who's affected?	These will be permitted for employers covered by 12 awards listed in the Bill (including key awards such as the *General Retail Industry Award*; *Hospitality Industry (General) Award* and the *Restaurant Industry Award*). Regulations may add other awards to this list, or remove awards from the list.
Flexible work directions	
Context	As JobKeeper, and the associated JobKeeper enabling directions, wind to a close at the end of March 2021, the Omnibus Bill seeks to preserve some elements of those directions and extend them to all employers covered by modern awards. These directions will expire two years after the amendments commence.
Proposed amendment	The proposed "flexible work directions" would allow employers to direct an employee to perform any duties that are within their "skill and competency", even if those duties do not fall within the employee's role. This would be permitted if the duties are safe (including COVID-19-safe), the employee has any necessary

Flexible work directions	
	licence or qualification for the duties, and the duties are reasonably within the scope of the employer's business. These directions expand on the existing power of employers to direct an employee to perform duties within the scope of the employee's role. If passed, these directions will allow employers to direct employees to take on a more flexible range of duties than they otherwise could. The directions will also allow employers to direct an employee to work at a location other than their normal place of work, so long as it is suitable for the employee's duties, does not require unreasonable travel, and is safe (including COVID-19-safe).
Requirements	Both types of direction include requirements that will be familiar to JobKeeper eligible employers, including that: ▪ the employee must receive at least three days' written notice of the direction; and ▪ the employer must consult with the employee or their representative (which must be recorded in writing). Employers must also reasonably believe that the direction is a necessary part of a reasonable strategy to assist in the revival of their enterprise. Employees under these directions must be paid the greater of their existing rate of pay, or the base rate of pay for the new duties (if those duties are higher duties).
Who's affected?	These directions may apply to all employers and employees covered by modern awards. There is no requirement for the employer to have previously qualified for JobKeeper.

What else? While not part of the Omnibus Bill, the Attorney General has also requested that the Fair Work Commission explore the possibility of introducing opt-in "loaded rates" (a single rate which includes ordinary pay, overtime pay and penalty rates) into a number of key modern awards. On 10 December 2020, the Fair Work Commission indicated that it will consider this request and commence a process to consider the inclusion of loaded rates in a number of priority awards.

ENTERPRISE AGREEMENTS

The Omnibus Bill makes changes to enterprise bargaining a key feature of the reform by easing the requirements for approval, speeding up the approval process and tightening who can vote.

Changes to enterprise bargaining	
Changes to the BOOT	The Omnibus Bill seeks to ease the rigidity/earnestness with which the FWC has in recent times assessed whether an EBA meets the Better Off Overall Test (the BOOT). The FWC can only have regard to patterns of work or types of employment if these are engaged in by award covered employees or are reasonably foreseeable at the time the application for approval is made. The Fair Work Act currently enables the FWC to approve an agreement that does not meet the BOOT if it is not against the public interest. The Omnibus Bill provides that some circumstances like the impact of COVID-19 may be a reason in themselves for an approval not being contrary to the public interest; the proposal has met the ire of unions and the Labor Party. There is a sunset clause on this "COVID-19" provision varying the BOOT so it will expire two years after the amendments commence. The amendment is providing one of the most controversial aspects of the proposed legislation and IR Minister Porter has now indicated he is not wedded to the change.
Notice of Employee Representational Rights	The time period for **serving a notice of employee representational rights** on employee when bargaining begins is changed from 14 days to **28 days**.
Time limit on approvals	On the other hand the time period by which the **FWC approves or not approves an enterprise agreement has been limited to 21 working days**, and if it is not approved in that time, then it must produce a notice as to why it was unable to do so.
Information provided during access periods	The Omnibus Bill seeks to ease up on the requirements of what needs to be provided to employees in the seven day access period before voting begins to exempt information that is already publicly available.
Who can vote?	It tightens up those who are eligible to vote in an EBA ballot which has been a controversial issue, particularly with casuals. It proposes that those who are eligible to vote are:

Changes to enterprise bargaining	
	▪ full and part-time employees employed at the time when the employer requests staff to vote; and ▪ casual employees who perform work at any time during the seven day access period. This might mean that an employer must ensure that anyone in the seven day period immediately before the vote is given an opportunity to then vote and a casual who may have got access to the material during the access period may be ineligible to vote because they did not perform work during the seven day access period.
Who can Intervene?	It also seeks to limit the extent to which the FWC informs itself prior to approving or not approving an enterprise agreement limiting those who can intervene in proceedings namely unions who did not play a part in the process.
Franchisees	The Omnibus Bill now enables a franchisee employer to become a party to an existing enterprise agreement if: ▪ a majority of the employees of the franchisee employer approve the agreement in the usual way as for a new enterprise agreement; and ▪ the agreement to which the franchisee employer would become a party covers at least two or more other employers and the employer carries on a similar business activity under the same franchise as those other employers.
Transfer of business	It seeks to prevent an EBA transferring with an employee who joins a related employer if the employee voluntarily changed employers.
Expiry of pre-Fair Work Act EBAs	There is now a sunset clause on pre Fair Work Act EBAs. Any EBAs which were made prior to the 1 January 2010 will now cease to have effect, if not already terminated, on 1 July 2022. This proposed change addresses so-called "zombie agreements" which continue to have effect long after they have ceased to make employees "better off overall".
Greenfields agreements	
Context	After much speculation about "Project Life" greenfields agreements, the Omnibus

Greenfields agreements	
	Bill has taken the middle ground introducing longer terms for greenfields agreements applying to major projects. This amendment addresses a long held concern that current four year greenfields agreements are out of step with the reality of major projects that extend for significantly longer than four years. The change will remove the risk that employers will be faced with the uncertainty of industrial action mid-way through a project.
Proposed amendment	Greenfields agreements relating to "major projects" will now be able to apply for up to eight years. This replaces the current four year maximum term. Major projects will be any project of at least AU$500 million, as well as projects with expenditure between AU$250 and AU$500 million assessed by the Minister as being of national or regional significance or contributing to job creation. In an important safeguard for employees, to certify the agreement the FWC must be satisfied that such a greenfields agreement contains an annual increase of the base rate of pay for the life of the Agreement.

COMPLIANCE AND ENFORCEMENT

New criminal offence for dishonest underpayment of wages	
Context	After a series of high profile underpayments cases over the past few years, the Omnibus Bill introduces a new criminal offence for employers who dishonestly engage in a systematic pattern of underpaying one or more employees and significantly increases the penalties for inadvertent underpayments. These changes bring the issue of "wage theft" front and centre for employers and individuals. The proposed changes are intended to deter non-compliance with workplace laws and make it easier for employees to recover wages when underpayments occur.
Proposed amendment	The new criminal offence requires an **element of dishonesty and an intention on the party who has underpaid** to be captured by the criminal provision and does not apply to one-off underpayments. The offence will carry a maximum penalty of four years' jail and/or a fine of up to AU$1.1 million for an individual and up to AU$5.5 million for a body corporate. Where an individual is convicted of the criminal offence, they will be automatically disqualified from being a company director for a period of five years under the

New criminal offence for dishonest underpayment of wages	
	Corporations Act 2001. Other key changes include: ▪ Increased maximum civil penalties by 50% where remuneration-related contraventions are not the result of intentional dishonest conduct but are a result of inadvertent errors. Courts are also empowered to issue adverse publicity orders. ▪ Proposed tier system with separate maximum penalties depending on the size of the employer and whether the contravention is a serious civil contravention. ▪ Introduction of a new alternative penalty calculation method for remuneration-related contraventions by employers (other than small business employers) based on a multiple of the 'value of the benefit' obtained from the contravention. The value of the benefit is determined by the court and multiplied by either two or three times its value. The ultimate penalty imposed on a relevant employer will be the greater of the maximum penalty or the 'value of the benefit' times the applicable multiplier. ▪ Introduction of a non-exhaustive list of the factors the FWO may take into account in deciding whether to accept an enforceable undertaking in relation to a civil contravention (including: whether the matter was self-disclosed to the FWO, the circumstances, nature and gravity of the contravention, willingness to cooperate with the FWO and address the impact of the contravention). ▪ Increases to the small claims process cap from AU$20,000 to AU$50,000. ▪ Introduction of a civil provision which precludes employers from publishing job advertisements with pay rates less than the applicable national minimum wage. ▪ Proposed 50% increase in infringement notices fines and maximum penalties for sham contracting and failing to comply with compliance notices from the FWO.
Who's affected?	The new criminal provisions will apply to all employers who dishonestly engage in a systematic pattern of underpaying one or more employees and can capture individuals as well. Accordingly, now is an opportune time for employers to get their house in order and verify that they are compliant with the Fair Work Act to avoid being captured under the new proposed underpayment criminal provision or the

New criminal offence for dishonest underpayment of wages	
	increased civil penalty provisions.

CLOSING COMMENTS

Unsurprisingly, initial comments from unions are that the Omnibus Bill goes too far and from employer groups and that the changes are not enough.

The Omnibus Bill is far from a done deal. It will go before a parliamentary inquiry early next year and is not expected to be passed and become law until March 2021. Expectations are that there will be a number of changes along the way.

The journey has only just begun.

KEY CONTACTS

MICHAELA MOLONEY
PARTNER

MELBOURNE
+61.3.9640.4430
MICHAELA.MOLONEY@KLGATES.COM

NICK RUSKIN
PARTNER

MELBOURNE
+61.3.9640.4431
NICK.RUSKIN@KLGATES.COM

PAUL HARDMAN
PARTNER

BRISBANE
+61.7.3233.1248
PAUL.HARDMAN@KLGATES.COM

JOHN RODNEY
SPECIAL COUNSEL

SYDNEY
+61.2.9513.2313
JOHN.RODNEY@KLGATES.COM

