INDUSTRIAL RELATIONS UPDATE

September 2020

FWC Canvasses Flexibility Provisions

In the wake of the upheaval created by the reaction to the pandemic, the FWC has published a discussion document on a range of award-based working flexibilities. At pains to stress the proposals do not reflect FWC views on any matter it contains, the FWC has issued the material as a starting point for discussions.

The proposals include:

- working from home
- compressed working week
- half pay annual leave
- purchased leave
- changed span of working hours
- shared reduction in working hours
- wider performance of jobs according to skill
- working at different locations
- staggered start/finish times.

The way they are presented is detailed and bureaucratic and would likely be of limited appeal to most employers and employees given their restrictions as currently drafted.

And the problem with that is, if the past is any guide, they will go into awards pretty much like they are, and then create more difficulties for enterprise bargaining.

This is because the more complex the award is, with the better off overall test so stringently applied, the award complexity itself defeats the process of bargaining.

Bargaining works best with minimalist awards, not otherwise. Over the last ten years the awards have grown like Topsy. This latest venture by the FWC includes a frank admission that bargaining doesn't occur where arguably it ought to most – in small to medium sized workplaces.

This is where the bulk of the workforce is, and it isn't engaged in bargaining. For those that are, and want to have some of these flexibilities, when it comes to applying the better off overall test, they will have to deal with the award provisions.

If for example there were value in adopting a work from home regime in an enterprise agreement, instead of having to cover off the award provisions, an employer and its employees could craft their own, to suit themselves exclusively, as bargaining is supposed to allow for.

The proposals are anchored in the response to the pandemic, but most of these flexibilities don't need any special circumstances to be worthwhile in their own right. If any of those flexibilities appeal, the smart money would be on doing something about it before the awards are varied.

President's Statement Draft Award Flexibility Schedule (31 August 2020)

Underpayment Epidemic

Never mind the coronavirus, it looks like underpaying staff is reaching epic proportions according to the media. Of course they never report overpayments, but that aside, the calibre of the organisations (read: big enough to know better) that have been found wanting reads like a who who's list of previous "Employer of Choice" winners. And the list is getting longer, no doubt.

There are plenty of theories ranging from sheer incompetence from HR/IR graduates, heads filled with neo-Marxist claptrap instead of how to apply an award, through to the complexity of the system itself. Our money is (mainly) on the latter – experience tells us that there's likely not a workplace in breach of something.

We recommend audits be conducted. If errors have occurred, they can be made to look significant with negative media portrayal of the business. So it's a whole lot better reputationally if the problem is discovered and rectified discreetly by the employer and not by the Ombudsman acting on complaints. Get in first.

Changes to Parental Leave Coming

As the Paid Parental Leave Scheme (PPL) was changed in June this year, permitting an employee to split the 18 week entitlement into two separate periods, the Fair Work Act is to be amended to harmonise with that change. The PPL amendments allow parents to take the first 12 weeks in a continuous block within 12 months of the birth/adoption and the remaining 30 days of their payment (equivalent of six weeks), any time after the initial period and within 24 months of the birth/adoption.

The proposal would amend the Fair Work Act to allow parents to take up to 30 days of their entitlement to 12 months of unpaid parental leave flexibly, including on a single-day basis, at any time within two years of their child's birth or placement.

There will also be amendments to clarify entitlements to parental leave where there is a stillbirth or death of a child in their first two years, and access to compassionate leave in such circumstances.

Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Bill 2020

High Court Settles Sick Leave Entitlement Question

Ever since working patterns started to shift off the typical five day week in the mid-1980s, the issue of leave entitlements, expressed as "days", has been argued about. Sick leave (or personal leave as it is now known) was routinely described as either 10 days or two weeks in awards for many years. Some even used 80 hours and then later, 76 hours.

Since the Fair Work Act uses the expression "10 days" in the relevant NES, claims arose from time to time that this meant exactly that – an employee, regardless of the number of ordinary hours they worked on any one day, was entitled to be paid sick leave for the day. Eventually a case came before the full court of the Federal Court which decided that two employees on 12 hours shifts should get paid for the "day". This meant they were effectively entitled to 120 hours, whereas other employees were entitled to 76, simply because of their work patterns.

The company appealed to the High Court which overturned the Federal Court decision and made clear that sick/personal leave is 76 hours a year for full time employees. Fairness between employees played a significant part in the High Court's decision. But it made the important point that the Act itself makes a direct reference to accruing leave "according to the employee's ordinary hours of work". The court went on to say that the leave's purpose is to protect employees against loss of earnings and it does that by reference to the employees' ordinary hours.

This in turn meant that accruals, in the case of full time employees, were the same for all and not dependent on the actual working pattern of any particular employee.

To make it perfectly clear how to apply the relevant part of the Act, the High Court took the unusual step of making a declaration as follows:

> "*The expression '10 days' in s 96(1) of the Fair Work Act 2009 (Cth) means an amount of paid personal/carer's leave accruing for every year of service equivalent to an employee's ordinary hours of work in a week over a two-week (fortnightly) period, or 1/26 of the employee's ordinary hours of work in a year. A 'day' for the purposes of s 96(1) refers to a 'notional day', consisting of one-tenth of the equivalent of an employee's ordinary hours of work in a two-week (fortnightly) period.*"

Mondelez Australia Pty Ltd v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union, Minister for Jobs and Industrial Relations v Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union [2020] HCA 29 (13 August 2020)

Superannuation Choice Extended

Employees whose enterprise agreement nominates only one fund into which their superannuation will be paid will be able to choose another fund following changes to the law. Some enterprise agreements restrict the funds into which employees super can be paid, effectively removing true choice for the employees.

From 1st January 2021, where an agreement has such a restriction it will be of no effect and all employees will have freedom of choice regardless of what their enterprise agreement says. The changes do not affect default fund arrangements.

Treasury Laws Amendment (Your Superannuation, Your Choice) Bill 2019