



The forum for workplace relations leaders

Workplace Relations

Current issues and future directions

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Agenda

- Workplace Relations Legislative Agenda: what we have seen so far and what is on the horizon (including upcoming legislative reviews)
- Significant Fair Work Commission (**FWC**) proceedings
- Updates on other key workplace relations policy areas:
 - Potential Restriction on Restraint of Trade Clauses
 - Artificial Intelligence
 - Privacy
- Engagement with FWO & FWC

What we have seen so far ...

7 December 2022

Objects of Act and new modern award and minimum wage objectives

Equal remuneration orders

Pay secrecy

Job advertisements

Anti-discrimination

Initiating of bargaining

Dealing with EA errors

EA terminations limited

Sunsetting of zombie agreements

1 February 2023

NES paid family and domestic leave (1 Aug for small business)

6 March 2023

FWC Expert Panels

Sexual harassment disputes

ROC goes to FWC

4 June 2023

Family and domestic leave pay-slip requirements

7 June 2023

Pay secrecy penalties

6 June 2023

Flexible work requests

Multi-employer bargaining

EA approvals and BOOT

Industrial action

Intractable bargaining

Unpaid parental leave (requests to extend UPL and FWC disputes)

1 July 2023

Small claims jurisdiction

National Construction Industry Forum

Unpaid parental leave (flexible UPL, removing employee couple and concurrency, 12 months service at date UPL starts not birth/adoption)

6 December 2023

Fixed term contracts

7 December 2023

Zombie agreements end

12 December 2023

AHRC - positive duty powers

15 December 2023

Small business redundancy exemption

Labour hire arrangements (RLHA - 1 November 2024)

Employee workplace delegates rights

FDV – protected attribute

Compulsory conference – PABOs

Right of entry to assist HSRs

WHS: Silica, PTSD, penalties

30 December 2023

Recurring variable salary deductions

1 January 2024

NES superannuation entitlement

27 February 2024

Maximum civil penalties increase for underpayment related contraventions

Serious contravention test changes

Franchisees access single-enterprise bargaining stream

27 February 2024

Transitioning from multi-enterprise

Intractable bargaining changes

Sham contracting defence changes

Compliance notice changes

Independent contractor opt-out (no HICT)

Changes to Coal mining LSL Act

1 July 2024

Exemption certificates for union entry for suspected underpayments

Determinations varying modern awards employee delegates' rights term operate

Delegates' rights term - workplace determination on or after 1 July 2024

Delegates' rights term - in enterprise agreement approved by vote on or after 1 July 2024

What is still to come

26 August 2024

Right to disconnect and modern award right to disconnect terms commence (except for small business employers)

Casual employment changes

26 August 2024 or proclamation

New meaning of 'employee' and 'employer'

Regulated workers (employee-like and road transport) – minimum standards, unfair deactivation/termination, consent collective agreements and powers to impose obligations on participants in the road transport industry

Regulated workers' delegate rights

Unfair contracts jurisdiction - FWC

Delayed announcement of contractor high income threshold

1 November 2024

Regulated labour hire arrangement orders can commence operation

1 January 2025

Wage theft provisions apply (or, if later, the day after the Minister declares a Voluntary Small Business Wage Compliance Code) – including ability to determine maximum penalties for contraventions by 3 x value of underpayment

26 February 2025 or proclamation

Model terms in enterprise agreements

Commitment for 1 July 2025

Superannuation to be paid on PPL

26 August 2025

Right to disconnect (NES and modern award term) for small business employers

Next on the Agenda ... Legislative Reviews

- **16 May 2024** - Paid family and domestic violence leave entitlement (Flinders University engaged to conduct the independent statutory review and to report to government within 3 months).
- **14 September 2024** - Closing Loopholes (No.1) amendments - right of entry to assist HSRs
- **6 December 2024** - Secure Jobs Better Pay amendments - objects of FW Act, pay secrecy, sexual harassment at work contravention, fixed term contracts, flexible work, EA and bargaining changes, industrial action, multi-enterprise agreements, small claims, pay rate advertisements, unpaid parental leave
- **14 December 2025** - Closing Loopholes (No. 1) amendments – regulated labour hire arrangements, small business redundancy exemption, employee workplace delegate rights, wage theft, PABO conference changes etc.
- **26 February 2026** - Closing Loopholes (No. 2) amendments – casuals, employee/er definition, unfair contracts jurisdiction, regulated workers, intractable bargaining, right to disconnect, exemption certificates for right of entry - underpayments, penalty changes, unfair contracts etc.

Further Developments on the Horizon

- **Net Zero Economy Authority Bill 2024** – part of transition to net zero by 2050. It is directed at supporting workers at coal and gas fired power stations or related entities (coal mines) and ‘**dependent employers**’ to transition to new employment under an Energy Industry Jobs Plan.
- Mechanisms for facilitating transition of employees to other job opportunities
- Additional obligations on employers

Ai Group made submissions (and gave evidence) expressing concern about workplace relations implications that may flow from the Plan, and proposed a raft of amendments to the Bill. Currently in Senate – may be dealt with this week during sittings

- **CFMEU administration** – the Government is expected to introduce legislation imminently to support the FWC’s application to appoint an administrator to the construction & general division of CFMEU.
- Workplace Relations Minister Murray Watt has intervened in this matter in the Federal Court.

Further developments on the Horizon

- **Superannuation** to be paid on Government paid parental leave benefit – awaiting draft legislation as to how this may operate and who will be responsible for ensuring the payment is paid to the super fund.
- **Contractor high income threshold** – awaiting regulations to be registered
- **Digital Labour Platform Deactivation Code, and Road Transport Industry Termination Code**
- **Wage theft**
 - **Voluntary Small Business Wage Compliance Code**
 - **FWO approach to ‘co-operation agreements’ is yet to be published** – Required to be developed in consultation with the National Workplace Relations Consultative Council (Ai Group is a member of this)
 - If a co-operation agreement is in place it does not prevent FWO compliance or enforcement action in relation to civil remedies (e.g., compliance notice, enforceable undertakings etc.) as long as not inconsistent

The political agenda

- The Government has indicated that it does not intend to pursue further major legislative changes before the next election – did not proceed with consultation over portable leave entitlements
- The Coalition has committed to repealing elements of the recent Government amendments (including in relation to casual employment and the right to disconnect)

Fixed-term Contracts

- Recent amendment to the *Fair Work Regulations 2009* (Cth) extend the operation of some exemptions until 2025
- The limitations on the use of fixed-term contracts continue to be a source of confusion for employers.
- The scope of the exemptions in s.333F of the Fair Work Act is the most commonly raised issue, including:
 - what is '*a distinct and identifiable task involving specialized skills*';
 - what is a '*temporary absence*' of another employee;
 - the interaction with other instruments and regulatory requirements – for example visas and government funding arrangements.
- Ai Group continues to engage with Government on these issues – It has been proposed that parties should run award variation cases in appropriate circumstances.
- Members are encouraged to provide feedback on the operation of the new provisions.

New Award Terms – Delegate’s Rights / Right to Disconnect - Ai Group’s Perspective

- As a result of legislative amendments, the FWC initiated proceedings to develop new modern award terms in relation to:
 - Delegates’ rights; and
 - The right to disconnect
- Justice Hatcher, President of the FWC will discuss these developments in further detail later this morning.
- **Delegates rights** – Ai Group pressed for a clause that provided guidance as to how to achieve compliance with the legislation without imposing significant additional requirements on employers.
- Unions called for a raft of additional entitlements and obligations upon employers.
- The model delegates’ rights term was inserted into modern awards with effect from 1 July 2024.
- Will be the subject of review in 12 months.
- **Right to Disconnect** - The proceedings concerning the right to disconnect term remain on foot
- The award term is due to commence operation on 26 August 2024 (alongside statutory provisions).
- Unions called for the award term to impose significant addition requirements on employers.
- Ai Group is pressing for the provision to be retained as an employee’s ‘right to disconnect’ and not a prohibition on an employer making contact outside working hours.

Gender Undervaluation

- The FWC has commenced proceedings in relation to the following five 'priority' modern awards, directed towards assessing whether the minimum wages prescribed by those awards suffer from gender-based undervaluation:
 - *Children's Services Award 2010*
 - *Social, Community, Home Care and Disability Services Industry Award 2010 (SCHCDS Award)*
 - *Health Professionals & Support Services Award 2020*
 - *Aboriginal and Torres Strait Islander Health Workers and Practitioners and Aboriginal Community Controlled Health Services Award 2020*
 - *Pharmacy Industry Award 2020*
- The SCHCDS Award proceedings have been joined with two applications by various unions, seeking to:
 - vary the definition of the 'social and community services' stream in the award; and
 - fundamentally redraft the classification structure and increase minimum rates on the basis of increased work value.

Significant FWC Proceedings: Award Review 2023-24

- The FWC recently concluded Award Review 2023 – 24. Hatcher J will speak to this shortly.
- Ai Group devoted significant resources to the process, which focussed on certain key topics including:
 - Making awards easier to use;
 - Job security; and
 - Work and care.
- Ai Group advanced over 40 proposals re. ‘making awards easier to use’ – directed towards making awards simpler, clearer and more flexible.
- Advanced various submissions about the need to make part-time employment a more accessible model of employment.
- Unions advanced a raft of problematic union claims –. The proposals included abolishing casual employment, increasing the casual loading, introducing paid leave for casuals, introducing new rostering restrictions, increasing consultation obligations, increasing leave entitlements etc.

Significant FWC Proceedings: Award Review 2023-24

- None of the union proposals have been adopted by the FWC
- The FWC foreshadowed that it will commence various proceedings on its own initiative having regard to issues raised by the parties during the Review.
- These include:
 - A review of casual employment provisions in light of the upcoming changes to casual employment definition and conversion pathway.
 - Proceedings regarding working from home arrangements in the Clerks Award that will commence in August 2024 and focus on developing a 'working from home term' (which may be applied more broadly).
 - Part-time employment proceedings beginning in 2025.
 - Union likely to push for more restrictions, including minimum 4 hour engagements and 28 days' notice of roster changes
 - We will likely seek greater ability to offer additional work without the requirement to pay overtime rates

Significant FWC Proceedings: Exemption Rates Case

- On 31 July 2024 Ai Group filed an application to vary the *Clerks – Private Sector Award 2020* to insert an exemption rate.
- Exemption rates exist in multiple modern awards.
- Generally, they remove the obligation to comply with certain award terms (e.g. hours of work, penalty rates and overtime) in respect of an employee earning at or above a particular rate.
- Such a clause would avoid many of the onerous and problematic consequences that flow from the record-keeping provisions in the FW Act/Regulations and the annualised wage arrangement clause in the award.
- We are due to file draft determinations, submissions and any evidence in support by 20 December 2024.

Significant FWC Proceedings: Junior Rates Case

- On 6 June 2024 the Shop, Distributive and Allied Employees Association (**SDA**) filed an application to increase junior rates in three awards:
 - *General Retail Industry Award 2020*
 - *Fast Food Industry Award 2020*
 - *Pharmacy Industry Award 2020*
- The application would result in a significant change to the arrangements that currently exist, including to:
 - uplift the rates payable for employees aged 15 to 17 years; and
 - abolish junior rates for employees aged 18 years and over.
- The SDA application followed extensive media coverage about a renewed union push to curtail or abolish junior and apprentice rates.
- As yet, we are not aware of any application proposing changes to existing apprentice rates.
- The Junior Rates Case has been programmed by the FWC: the SDA and parties supporting the application are required to file submissions and evidence by 29 October.
- Ai Group is required to file submissions and evidence on 11 March 2025.

Significant FWC Proceedings: SCHCDS Award

- There are a number of other proceedings on foot concerning the SCHCDS Award.
- An application by Ai Group to vary the SCHCDS Award regarding sleepovers, asserting that the relevant clauses of the award are ambiguous and uncertain.
- A joint union application to vary the SCHCDS Award regarding sleepovers.
- Various applications by individual employees, including:
 - In relation to the client cancellations clause by extending it to casual employees; and
 - In relation to travel time

Multi-enterprise Bargaining

- Two key proceedings on foot regarding multi-enterprise bargaining.

Disability Sector Application

- On 9 November 2023 the Australian Education Union and the Health and Community Services Union filed a joint application for a **supported bargaining authorisation** concerning 19 **disability sector employers in Victoria**.
- First application in the context of the disability sector and has received widespread opposition from the respondent employers.
- Ai Group is intervening in the proceeding as a peak council - a hearing is likely to be listed after 1 November 2024.

Application against McDonalds

- On 5 August 2024 the SDA filed an application for a **supported bargaining authorisation** covering 14 **McDonald's franchisees in South Australia**.
- This is the first application of its kind concerning a sector that is not subject to government-funding arrangements.

Restraint of Trade Clauses

- The Federal Treasury is currently conducting a two-year Competition Review.
- Part of this Review focusing on non-compete clauses and other restraints in employment contracts (including non-solicitation and non-disclosure agreements)
- The Treasury conducted a consultation process on these clauses earlier this year.
- There is concern that the use of such clauses is potentially becoming more prevalent and both resulting in an adverse impact on job mobility and hampering employees from securing higher paying jobs.
- Ai Group has repeatedly engaged with Treasury as part of the Review and provided a submission. We emphasised that such clauses are highly valuable contracting devices for both employers and employees that protect employer incentives to invest in employees and innovation activities.
- The Competition Review more broadly is ongoing (due to be completed by August 2025), and it remains to be seen whether the Government will propose any changes to the use of restraint of trade clauses as a result.

Artificial Intelligence

- The House Standing Committee on Employment, Education and Training recently conducted an inquiry into digital transformation in the workplace
- The Committee is inquiring into the rapid development and uptake of automated decision making and machine learning techniques in the workplace.
- Ai Group made submissions pressing for the government to use AI to support employer compliance, including with payment obligations under industrial instruments. We also highlighted how AI systems support productivity and help identify and address health and safety risks in the workplace.
- Unions have expressed concerns over issues including:
 - **Ensuring that workers have a voice** – and have advocated for collective bargaining on AI, data ownership and privacy; workplace consultation provisions requiring genuine consultation on use of AI; the ability for workers to choose not to use AI and transparency around automated decision-making processes.
 - **Work health and safety issues** – address the risks and harm caused by work intensification, reduced autonomy and lower job control; and to clarify responsibilities between PCBU and the AI tool creator.
 - **Transition support** – redundancy, upskilling where industries transition to increased automation and digitisation.

Privacy

- The Australian Government is consulting with stakeholder groups and focus groups about its [response](#) to the [Attorney-General's Department review of the Privacy Act 1988](#).
- Key workplace relations issues that have been subject of this consultation include:
 - the removal of the small business exemption;
 - the introduction of a new privacy protections for employees, including the right of erasure, an individual right to explanation and the right to object;
 - the removal of the employee records exemption; and
 - expanding privacy protections for employees under the *Fair Work Act 2009*
- Ai Group has expressed strong objections to the above potential changes and we are waiting to see draft legislation.

Fair Work Ombudsman & Fair Work Commission Engagement

Engagement with the Fair Work Ombudsman

- Ai Group continues to engage closely with the Fair Work Ombudsman (**FWO**).
- The FWO has created a standing tripartite advisory group of peak employer organisations and worker representatives.
- Purpose includes to provide the FWO with advice, as well as collaborate on education and compliance.
- The FWO has also established sector reference groups focused on its priority areas, including groups dealing with issues relating to large corporates, small business employers, building & construction sector, retail & fast food sectors, agriculture & horticulture sectors, social & community services sector (Ai Group representatives have been appointed to each group convened by the FWO)

Engagement with the Fair Work Commission

- The Fair Work Commission has demonstrated a commitment to engaging with stakeholders.
- Registered Organisation Advisory Group
- Rules and Benchbook Committee
- Enterprise Agreement and Bargaining Advisory Group
- Regulated Workers User Group

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Thank You

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