



Working our Way through the Pandemic

Industrial Reform – What will it look like?

Australian Public Transport Industrial Association
MOVING PEOPLE

Bus Australia Network



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Industrial Relations Reform – What will it look like?

2018 - The Fair Work Commission and the Federal Court delivered some landmark decisions, including:

- Skene's case (supported later by the decision in Rossato) which confirmed a firm advance commitment of work might cause an employee not to be considered a casual. (Rossato on Appeal)
- Mondelez's case, which allowed personal leave to be taken in days, not hours, depending on the days taken off. (Successfully Appealed)
- One Key Workforce case, in which the need to explain the agreement to all employees to an agreement, was a reinforced.

Industrial Relations Reform – An Industry Position (IWG)

Our IWG developed a strategy to deal with the ramifications of Rossato's case, still awaiting appeal to the High Court, and which is likely to apply to any legislation which provides for a definition of casual employment.

Step One - Regularly review casual employment to identify patterns of work that might identify it as more permanent than casual. Make sure that it is very clear in any offer of employment to type of employment on offer.

Step Two - Communicate with employees about their employment wishes and whether they seek conversion to part time employment.

Step Three - Educate operational staff, including payroll, about the need to distinguish the type of employment, which is on offer, i.e. irregular roster patterns, without firm advance commitment of work, option to employee to take up work, clear understanding of the status of the work.

Step Four - Consider a change to a flexible part time employment type to cover school bus drivers who only work 40 weeks a year.

Industrial Relations Reform – What will it look like?

2019 - The election issues included, protecting penalty rates, stagnant wage growth, the need for secure employment and greater bargaining rights for Unions.

Other proposed IR changes included:

- industrial manslaughter (WA, Victoria, NT and Queensland)
- wages theft (Queensland)
- Portable long service leave
- paid domestic violence leave (currently 5 unpaid days)
- increased parental leave payments, and
- issues around the gig economy and labour hire



Industrial Relations Reform – What will it look like?

2020 - Covid 19

Lock downs, stand downs, the need to self distance became the norm.

The catch cry became 'job security' and 'job creation'.

This seemed to lead to a recognition by trade unions and employer groups that reform could only be achieved by consensus and changes needed to be made to the existing system.

I ask, however. Is reform likely to come from consensus?



Industrial Relations Reform – What will it look like?

2020 - Covid 19

The consensus has led to some changes.

- Changes to Awards and the Fair Work Act to allow flexibility for employees to work from home, to vary the span of hours, to make changes to leave arrangements and to give directions to change an employee's job description.
- An IR review initiated by the Federal Attorney General to consider reform in relation to the making of agreements, simplification of Awards, defining casual and fixed employment, how best to ensure wage compliance and making Greenfield Agreements more relevant.

Industrial Relations Reform – Casual and Fixed Term Employment

Casual employment was not defined in the Fair Work Act.

The IWG had concerns:

- That an employer should be able to employ a driver, as a casual, if both agreed, in writing, to the employment type.
- That school bus drivers, who were employed 40 weeks a year and usually 20 hours a week, could not be guaranteed work for 52 weeks as part time employees.
- That many school bus drivers, for a variety of reasons, simply did not wish to convert to part time employment and receive lower rates of pay, without the casual loading.
- That in the coach and charter industry, regular work was offset by external pressures such as pandemics, closed borders, reduced international and intranational tourism and even the weather.
- That there should not be double dipping and an offset of the casual loading should be allowed if a casual was deemed a part time employee.

Industrial Relations Reform – Casual and Fixed Term Employment

A definition might look like this:

- “A person is a casual employee if:
 - An offer of casual employment is made to that employee that makes no advance commitment to ongoing work, and
 - The employee accepts the offer on that basis
- (Non-exhaustive examples will be provided in the definition to assist with the determination of what is a firm advance commitment at the time of the offer, including whether the employer can elect to offer the work and whether the employee can elect to accept or reject the work.)
- A person who accepts such an offer remains a casual employee until:
 - The employee’s employment is converted to fulltime or part time employment; or
 - The employee accepts an alternative offer of part time or fulltime employment by the employer; or
 - The employee’s employment is terminated
- A casual loading is to be paid consistent with the existing section 323 obligations (i.e. 25%) for employers to pay wages which included loadings.
- The right to convert is available to all casual employees based upon the definition without the protection of ‘reasonable business grounds’ but if a casual employee chooses not to convert then they stay a casual, notwithstanding the definition.
- The right to convert will occur in the first 9 months of employment and thereafter 9 months later only.”



Industrial Relations Reform – Greenfield Agreements

A Greenfield Agreement is usually negotiated as part of a project where there are no existing employees to whom the agreement will apply.

The main issue is that the four year limitation for a new agreement may not exceed the duration of the project.

Most employer groups are seeking to extend such agreements, at least to the life of the project.

Greenfield Agreements can be valuable for a bus operator seeking to tender for new services to demonstrate a set of employment conditions for any new employees required to service the contract in the event of a successful bid.



Industrial Relations Reform – The Award System

Justice Iain Ross has issued a statement incorporating a draft flexibility clause and invited industry representatives to include those flexibilities into their Awards for a further two years and beyond. Whilst directed at retail, restaurants and hospitality it may apply to all Awards.

Such flexibilities incorporated, compressed working weeks, annual leave, span of hours, reduced working hours, employer directions to perform duties and dispute resolution.

Issues continue to arise about:

- The better off overall test v. no net disadvantage test
- Better use of individual flexibility agreements
- Empowering the Fair Work Commission to deal by compulsory conciliation and arbitration to settle genuine disputes.

Industrial Relations Reform – Enterprise Bargaining

The Attorney General announced that the ACTU and the Australian Business Council reached a consensus to fast track agreements which were Union negotiated. This attracted some employer backlash.

Our industry position was that an industry based agreement, limited to those parties, who wished to participate, with time limits for bargaining, was supportable.

To simplify the process, changes may include:

- The ability for the Fair Work Commission to use its discretion as to whether an agreement has been genuinely agreed to.
- Only casuals employed, at the time of the vote, should be able to participate in the vote.
- The obligation to explain second generation agreements should be limited to changes.



Industrial Relations Reform – Compliance

Employers took this approach to wage compliance

- Criminalisation in the workplace is highly undesirable and should be shelved.
- Arbitral powers should be given to the Fair Work Commission, with respect to underpayment claims, with a view to moderate behaviour and arrive at a reasonable settlement of a claim.
- The Fair Work Commission should be given powers of compulsory conciliation in regard to payment disputes and be able to issue certificates of indemnity for payment, which would act as a bar against further claims.

Industrial Relations Reform – Is it likely to happen?

The Attorney General has written to two Queensland based Federal LNP MPs, George Christiansen and Matt Canavan, stating:

“I intend to have legislation in the Parliament this year that Addresses the two major issues surrounding casual employment, being the uncertainty around the meaning of casual employment and an employee’s ability to access casual conversion.”

Both of these issues are interrelated and must be properly considered and reformed at the same time, through a clear and certain statutory definition and universal and strengthened access to casual conversion, so employees can choose the form of work that suits their needs.”

Industrial Relations Reform – Is it likely to happen?

The Australian Financial Review has reported that the changes will include a provision to fast-track both union and non-union agreements and that as a ‘carrot’ for the ACTU, it will be harder for non-registered employee bargaining representatives to derail deals as they will require nomination by a percentage of the workforce.

ACTU secretary, Sally McManus has said they had found a way of speeding up BOOT assessments for agreement approvals’ by saying that, if an employee, in the future found that they were worse off, they would be able to get that resolved by the Fair Work Commission.

IR Reform - Is it likely to happen? Well is it?



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Questions?

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