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Workplace Relations – Current Issues and Future Directions



POLICY
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REFORM

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Topics

- Proposed amendments to the Fair Work system
- The bargaining system
- The award system
- The future of work

Proposed amendments to the FW system

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The shape of Australia's WR system

- A flexible and productive IR system benefit employers, employees and the broader community
- As a medium-sized nation with a very open economy, Australia needs a WR system that allows businesses to be agile
- Australia's WR system is already swung in favour of unions and workers – The FW Act delivered numerous increases to union power and worker entitlements

Lack of action on positive WR reforms

- Employers are becoming increasingly frustrated with the public policy debate and the lack of action from Parliamentarians (of all parties) on positive WR changes
- Most of the recommendations of the PC Review into the Workplace Relations Framework have not been implemented (The Vulnerable Worker reforms are an exception. These reforms increased penalties on employers by up to 20 times)
- Many of the recommendations of the Heydon Royal Commission have not been implemented

Federal Government WR Bills and announcements

Workplace relations legislation that the Coalition Government is pursuing in Parliament or has announced:

- 4 Yearly Review and Other Measures Bill
- Proper Use of Worker Benefits Bill
- Registered Organisations - Ensuring Integrity Bill
- Unpaid Domestic Violence Leave

Key amendments to the Act that Ai Group is pursuing

Unlike the unions, Ai Group is not arguing that the FW Act is broken but rather that a few key changes need to be made, including:

1. Giving the FWC more discretion to overlook minor procedural defects in enterprise agreement approval applications
2. Addressing problems with the BOOT
3. Fixing the transfer of business laws
4. Tightening the “permitted matters” and expanding the “unlawful terms” for bargaining, including outlawing clauses that restrict the engagement of contractors

Key amendments to the Act that Ai Group is pursuing

5. Outlawing EA clauses that require contributions to entitlement funds, that do not have high standards of governance
6. Amending s.96 to clarify that “*10 days of paid personal/carer’s leave*” means 76 hours for employees who work 38 ordinary hours per week:
 - FWC decision in *RACV* case (“day” means the ordinary hours that fall within a 24 hour period)
 - Federal Court *Glendell Mining* and *Anglo Coal* cases
 - *Mondelez* case

WR proposals raised by Labor

- Restricting the ability for employers to apply to terminate expired enterprise agreements
- Restricting the ability for employers to reach an enterprise agreement with a small group of employees and later apply that agreement to a large number of employees
- Expanding the capacity for the FWC to arbitrate enterprise bargaining disputes and to impose an outcome
- Increasing penalties for employers who breach workplace relations laws and awards

WR proposals raised by Labor (contd)

- Expanding the multi-employer bargaining provisions of the FW Act, particularly to give low paid workers and those with little industrial power the ability to obtain an enterprise agreement:
 - **Currently:** a union can apply for a “low-paid authorisation” in relation to a proposed multi-employer agreement - A public interest test applies
 - If an authorisation is issued, the FWC can provide to facilitate bargaining for the multi-employer agreement, and can arbitrate in limited circumstances
 - Industrial action cannot be taken
 - FWC definition of “low paid” (2/3 of median wages: 2/3 of \$66,000 = \$44,000)

WR proposals raised by Labor (contd)

- Defining casual employment in a narrow manner in the NES
 - Other employees would be entitled to annual leave, personal/carer's leave and other entitlements of permanent employees
- Giving casual employees who have been employed for six months the right to convert to full-time or part-time employment
- 10 days of paid domestic violence leave per year through the NES

WR proposals raised by Labor (contd)

- Legislating to overturn the *Penalty Rates Decision* and preventing an award being varied if the variation would reduce the take home pay of any employee
- Setting a floor for the NMW of 60% of median earnings, or changing the criteria to give more weight to the needs of low paid workers:
 - NMW would increase by over \$100 per week – Australia would have the highest minimum wage in the world, by far

WR proposals raised by Labor (contd)

- Regulating labour hire arrangements
- Abolishing the ABCC
- Reviving the powers of the RSRT, as a separate tribunal or a division of the FWC
- Abolishing the ROC, with the powers to regulate unions and employer associations split between the FWC and ASIC

ACTU “change the rules” campaign

- ACTU is trying to convince the community that it is in everyone’s interests for the unions to be given a lot more power
- The campaign is based on distortions and misrepresentations
- Their main success so far has been in influencing Labor policies
- Ai Group is strongly opposing the ACTU’s campaign

ACTU industry bargaining proposal

- Unions and workers would be free to bargain at the industry level – and free to reach legally binding industry agreements
- Right to take industry-wide industrial action
- Hard to see how secret ballots could operate with this system
- The ACTU likes to talk about industry bargaining in Continental European countries but these countries do not have an award system

ACTU industry bargaining proposal (contd)

- The right to take industrial action at the industry level has never existed in Australia
- Would be very damaging for Australian industry, our international reputation, investment, competitiveness and productivity
- The only parties to gain would be unions
- Labor has not yet ruled out the proposal, but appears to be focussing on expanding the low paid bargaining stream

ACTU compulsory arbitration proposal

- Much wider arbitration powers for the FWC
- ACTU is talking about the FWC having a role in “enforcing awards”, through “payment orders”
- Aspects of the proposal appear to offend the delineation between judicial power and arbitral power – High Court’s *Boilermakers Decision* in the 1950s
- *Ai Group’s view*: Compulsory arbitration is appropriate for the award system, but over-award outcomes should only be subject to compulsory arbitration in very limited circumstances, e.g. where a dispute is threatening to harm the economy

The bargaining system

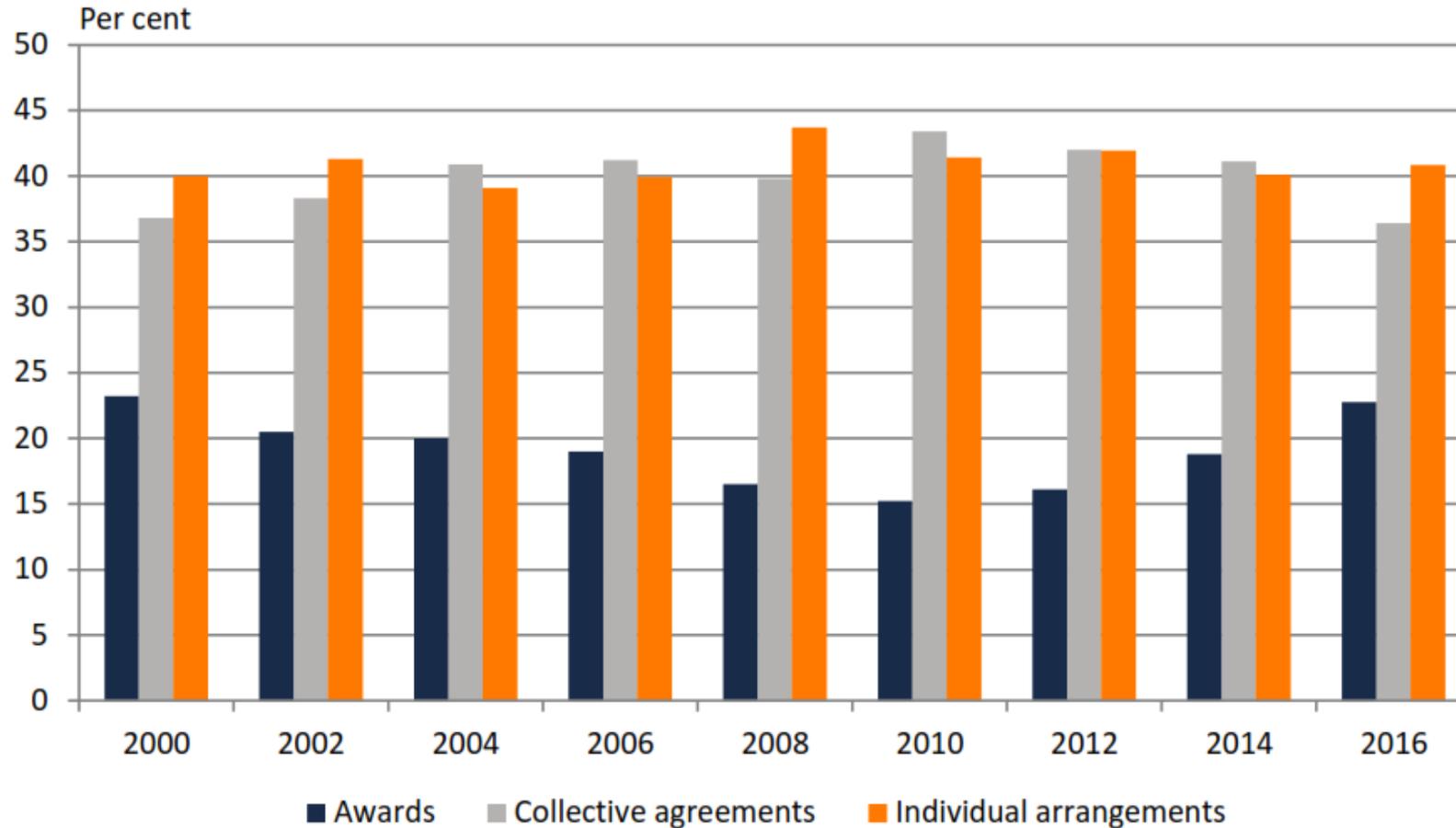
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The decline in collective agreements

Chart 7.1: Method of setting pay



The decline in collective agreements

Quarter	Number of private sector agreements current on last day of quarter	Number of employees covered by private sector current agreements
March 2017 quarter:	14,048 agreements	1.47 million employees
June 2017 quarter:	13,961 agreements	1.36 million employees
September 2017 quarter:	12,456 agreements	1.19 million employees

Source: Department of Jobs & Small Business, *Trends in Federal Enterprise Bargaining*, September Quarter 2017.

The bargaining system

- The FWC's approach to the assessment of EAs is operating as a major barrier to agreement-making
- More than 50% of EAs are now approved with undertakings – often after months of delays
- The establishment of the triage process through the Member Assist Team has caused far more problems than it has solved - It has led to a risk averse, theoretical approach, rather than a practical approach
- *FWC's Loaded Rates in Agreements Case*

The bargaining system (contd)

- Is the decline of enterprise bargaining a problem? Australia has a very comprehensive award system (unlike other countries) and an increasing number of employers appear happy to apply awards and grant annual merit-based wage increases
- The ACTU's recipe for reinvigorating bargaining is to give unions a lot more power (e.g. industry bargaining)
- PIR Concurrent Session

The award system

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4 Yearly Review

- 4 Yearly Review is into its 5th year with no end in sight
- None of the reviews of the 122 individual awards have been completed, and a number of “common issue cases” are still underway
- Ai Group is devoting a lot of resources to protect the interests of Members – doing the heavy lifting for employers
- Casual Employment Case
- Domestic Violence Case
- Family Friendly Provisions Case

4 Yearly Review (contd)

- Public Holidays and Blood Donor Leave Decisions
- Problematic current issues re. the 4 Yearly Review, include:
 - Annualised Salaries Decision
 - Plain language re-drafting
- Another 4 Yearly Review was due to commence on 1 Jan 2018, but FWC has decided that it is not practicable to start another review when the 2014 review is still underway

The future of the award system

- A proposal by another employer group to abolish the award system attracted some publicity a few weeks ago
- Australia is the only country in the world that has an award system
- 122 modern industry / occupational awards – more than 10,000 pages of detailed provisions, thousands of minimum wage rates
- If we were starting from scratch, it is unlikely that anyone would seriously suggest the current award system

The future of the award system (contd)

- If the award system was ever abolished, there would be a lot of issues to resolve. In theory, one model might be:
 - *Leave entitlements*: NES only
 - *National Minimum Wage*: Set by the FWC
 - *Classifications and other minimum wage rates*: Set by the FWC through a series of wage orders
 - *Casual loading*: Set at 25% in FW Act
 - *Overtime, shift and weekend penalties*: Set in a detailed regulation made under the Act identifying the classes of employees who the provisions apply to and the quantum (some similarity with US system re. overtime)

The future of the award system (contd)

- Ai Group is not currently pushing for the award system to be abolished
- If politicians were given the power to set all minimum wage rates and employment conditions, decisions would undoubtedly be made on political grounds
- Having minimum wages and conditions set by an independent tribunal has worked reasonably well in Australia over the years – No system is perfect

The future of work

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The future of work

- Part of the current debate about the shape of the WR system relates to the future of work - digitalisation, robotics, artificial intelligence, Industry 4.0, etc
- The future of work is also creating some issues concerning the boundaries of industries for the purposes of industrial regulation (e.g. buildings are increasingly being manufactured off-site)
- At the present time, only a fraction of 1% of the workforce carry out work for “gig economy” businesses like Uber, Airtasker, Foodora, etc

The future of work

- Ai Group is arguing that the future of work requires a more flexible WR system
- The unions and many academics are arguing for more WR restrictions to be imposed – not just on “gig economy” businesses, but all businesses
- It is important that the future of work does not become a vehicle for imposing more regulation on businesses

The future of work (contd)

- Problematic proposals being pushed by the unions and others under the banner of the “future of work”:
 - Limiting casual employment to exceptional circumstances
 - Giving unions more bargaining rights
 - A national portable long service leave scheme
 - The concept of a “dependent contractor”
- If well handled, the future of work will provide huge rewards and opportunities for the community