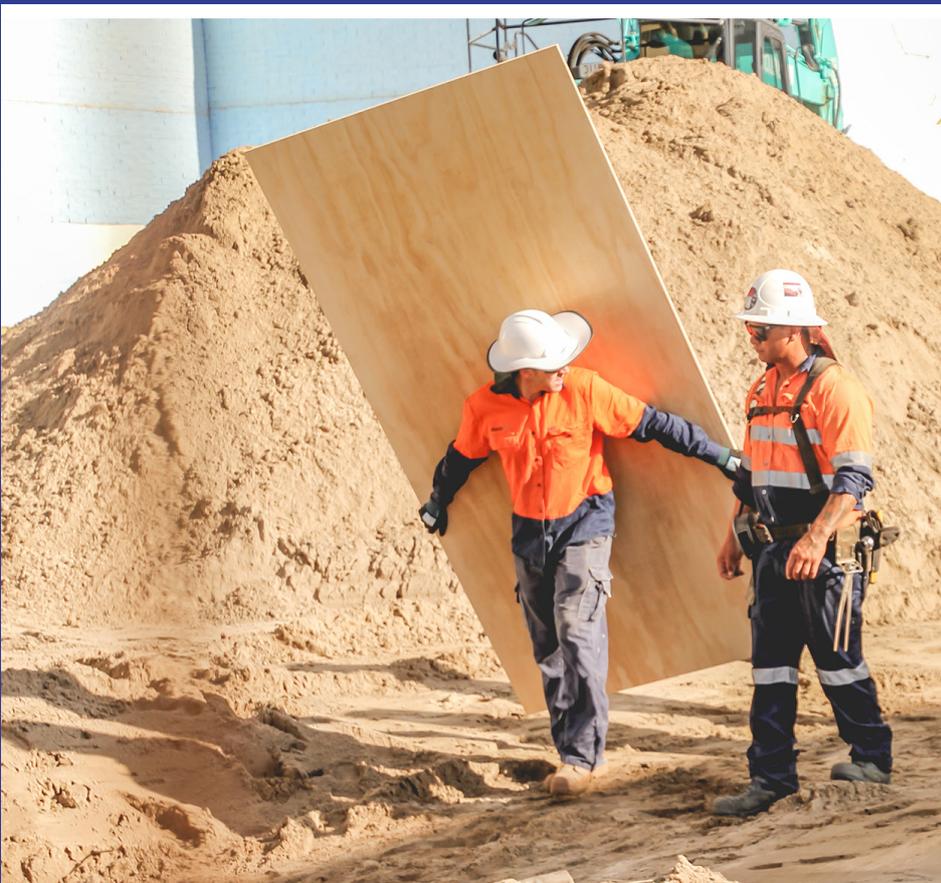


## COVID-19 and the future of Australian industrial relations



Professor Andrew Stewart

September 2020



## COVID-19 and the future of Australian industrial relations

The travel and business restrictions imposed in response to COVID-19 have created many challenges for the rules, processes and institutions governing industrial relations in Australia. In the short term, these challenges have generally been met with a pragmatism that may have surprised those who tend to complain about the system's inflexibility. But the crisis has also created the tantalising prospect of more fundamental change in the future.

In the 2015 Workplace Relations Framework Inquiry Report, the Productivity Commission was generally positive about how the current workplace relations framework seeks to balance the bargaining power of employers and workers, respect community norms about fair treatment, and encourage employment. The report declared that 'Australia's labour market performance and flexibility is relatively good by global standards, and many of the concerns that pervaded historical arrangements have now abated'.<sup>1</sup> That assessment has arguably been borne out by the reaction to COVID-19.

Employees who have been able to have generally shifted to working from home, with a minimum of fuss. Many employment relationships that might have been under threat have been preserved, sparing businesses severance costs and preserving some hope for an eventual 'snap back'. Although some of this can be attributed to the Morrison Government's JobKeeper scheme,<sup>2</sup> many employers have stood workers down or directed them to use up paid leave entitlements without the legal challenges that might well have been mounted.<sup>3</sup> Great flexibility too has been derived from the fact that one in four Australian employees are classified as casuals, even if there remains a question-mark about the legality of a large sub-set of those arrangements.<sup>4</sup>

There have also been notable examples of unions and business groups working together, with the support and encouragement of the Fair Work Commission (FWC), to agree on temporary variations to awards that create greater flexibility for employers in deploying labour.<sup>5</sup> The willingness to set aside ideological differences and seek common cause in tackling the coronavirus and its associated recession has also spread to Canberra. Rather than seeking to marginalise (not to say demoralise) the union movement, as the Liberal/National Coalition has so commonly done in the past, IR Minister Christian Porter has relied on former ACTU leader Greg Combet to help provide advice on industrial relations issues, while also speaking regularly to current ACTU secretary Sally McManus.<sup>6</sup>

This newfound appetite for tripartism, also aided by a decision to put the contentious Ensuring Integrity Bill on hold,<sup>7</sup> is now being tested further in a series of policy roundtables. The initiative followed a speech by Scott Morrison, in which he hailed the constructive way in which employers and unions had been working together to protect jobs during the pandemic, and signalled that business groups, employee representatives and government would be brought together to 'chart a practical reform agenda, a job making agenda, for Australia's industrial relations system'.<sup>8</sup>

Five working groups have been created, dealing with award simplification, enterprise agreement-making, casuals and fixed term employees, compliance and enforcement, and greenfields agreements.<sup>9</sup> Significantly, the members are drawn exclusively from employer organisations and unions, while the reform agenda is also a limited one. It reflects matters on which the government had already indicated a willingness to consider changes,<sup>10</sup> as well as the preoccupations of certain



# COVID-19 and the future of Australian industrial relations

employer groups.<sup>11</sup> The question is whether we can expect meaningful change from the current discussions – or indeed a continuation of the commitment to tripartite dialogue once the worst of the present crisis passes.

It seems highly likely that some reforms can be agreed. The government was already committed to criminalising the worst instances of ‘wage theft’,<sup>12</sup> while even employer groups have called for greater funding for the Fair Work Ombudsman’s compliance activities.<sup>13</sup> It should also be possible to find ways to streamline the process of approving uncontested enterprise agreements and allow major projects in the resources sector to be governed by agreements that operate for longer than the current maximum of four years, subject to appropriate safeguards (such as easier access to arbitration of disputes). Even the conundrum of how to properly define and regulate casual employment has potential solutions.<sup>14</sup>

Yet the fact remains that unions and business groups are poles apart in their diagnosis of what is wrong with both awards and enterprise bargaining, and more generally their views on what drives economic and social wellbeing. Employers in some sectors want the freedom to keep their businesses profitable (or indeed viable) by cutting labour costs, while others simply do not want to deal with militant unions. The labour movement, by contrast, sees wage stagnation in particular as an existential threat to the maintenance of prosperity and social cohesion – and not without reason.<sup>15</sup>

The big test will be what to do with awards, which set detailed minimum standards for up to 80 per cent of employees and in international terms remain the most distinctive feature of Australian labour regulation. Employers repeatedly complain about the ‘complexity’ of these instruments.<sup>16</sup> What tends to be overlooked is how much the FWC has recently done to streamline awards and make them more readable, informed by input from small businesses under a citizen co-design process.<sup>17</sup> A revamped set of awards are progressively taking effect throughout 2020, courtesy of a laborious review which started in 2014 and could have been completed much sooner had the FWC not been so sensitive (and sometimes even deferential) to the views of unions and employer groups.<sup>1</sup>

Awards could be further ‘simplified’ by stripping away some of the loadings and allowances for which they provide, and/or by reducing the number of job classifications. Workers could be compensated by significant rises in base rates of pay. But there is nothing to suggest that employers are prepared to see wage costs go up as the price of simplified pay administration – and unions will not approve of pay cuts.

A further area of sensitivity concerns a proposal from employers to replace the current ‘better off overall test’ for the approval of enterprise agreements with a simpler no-disadvantage test,<sup>18</sup> an idea previously supported by the Productivity Commission. It is easy to imagine how such a change might be used as a way of legitimating enterprise agreements that cut the entitlements of some

<sup>1</sup> For details of the review, see [www.fwc.gov.au/awards-agreements/awards/modern-award-reviews/4-yearly-review](http://www.fwc.gov.au/awards-agreements/awards/modern-award-reviews/4-yearly-review), accessed 5 September 2020. This was originally supposed to be the first of regular, four-yearly reviews. But a recommendation from the Productivity Commission (2015: 346–8) further reviews have been scrapped, in favour of more ‘targeted’ assessments of award conditions: see Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018 (Cth).



# COVID-19 and the future of Australian industrial relations

workers to fund wage raises for others,<sup>19</sup> or that trade off financial entitlements for non-monetary benefits (such as access to 'preferred' hours of work).<sup>20</sup> Again, these are reforms that most unions are unlikely to support.

Of course if difficult issues such as these are avoided, or taken off the table for lack of consensus, it may be possible for the working groups to produce some agreed changes to awards and enterprise bargaining. But these are highly unlikely to address the participants' core concerns. And the nearer the next election gets, the more business representatives will fret about their failure to secure more radical reforms, while unions will bemoan any wage suppression strategies or austerity measures that may be adopted by the Morrison Government to rein in a ballooning budget deficit.

If there is one other thing, however, that could be achieved before the present commitments to tripartism evaporate, it would be to acknowledge the value of promoting greater management-labour cooperation at a workplace level. Research has strongly demonstrated the value of expert third party assistance in helping businesses overcome the adversarialism that has long been the default mode for Australian industrial relations.<sup>21</sup> It would be useful, to say the least, if the government translated its newfound recognition of the value of cooperation into much-needed support for the FWC's work in this area.<sup>22</sup>

---

## References

---

- Attorney-General's Department (2019), *Cooperative Workplaces – How can Australia Capture Productivity Improvements from More Harmonious Workplace Relations*, Commonwealth, Canberra
- Bray, M, Macneil, J & Stewart, A (2019), 'The Cure for Workplace Strife', *Australian Financial Review*, 4 December
- Cameron, C (2012), 'Oxymoronic or Employer Logic? Preferred Hours under the Fair Work Act' 25 *Australian Journal of Labour Law* 43
- Forsyth, A (2020a), 'What Do we Know About the Extent of Stand Downs, Their Legal Basis, and Challenging Unlawful Stand Downs?', *Labour Law Down Under* (blog), 24 April
- Hannan, E (2019a), 'Christian Porter's Bid to Reshape Workplace Landscape', *The Australian*, 27 June
- Hannan, E (2019b), "'Complex" Awards on Industrial Relations Agenda', *The Australian*, 22 November
- Pennington, A (2018), *On the Brink: The Erosion of Enterprise Agreement Coverage in Australia's Private Sector*, Centre for Future Work, Sydney
- Productivity Commission (2015), *Workplace Relations Framework*, Inquiry Report No 76, Productivity Commission, Canberra
- Schneiders, B, Toscano, N & Millar, R (2016), 'Sold Out: Quarter of a Million Workers Underpaid in Union Deals', *Sydney Morning Herald*, 30 August
- Stewart, A & Bray, M (2020), 'Modern Awards under the Fair Work Act' 33 *Australian Journal of Labour Law* (forthcoming)



# COVID-19 and the future of Australian industrial relations

---

## Endnotes

---

- 1 See <https://www.pc.gov.au/inquiries/completed/workplace-relations/report/workplace-relations-overview.pdf>, accessed 28 June 2020
- 2 See <https://treasury.gov.au/coronavirus/jobkeeper>, accessed 28 June 2020.
- 3 As to the questionable scope of the power to stand down workers without terminating their employment, see Forsyth 2020a. For rare examples of standdowns or leave directions being challenged, see eg *Marson v Coral Princess Cruises (NQ) Pty Ltd* [2020] FWC 2721; *McCreeedy v Village Roadshow Theme Parks Pty Ltd* [2020] FWC 2480.
- 4 Stewart, A (2020), 'What Defines Casual Work? Federal Court Ruling Highlights a Fundamental Flaw in Australian Labour Law', *The Conversation*, 22 May
- 5 See eg *Australian Hotels Association and United Workers' Union* [2020] FWCFB 1574; *Application to Vary the Clerks — Private Sector Award 2010* [2020] FWCFB 3443.
- 6 Hartcher, P (2020), 'The Inside Story of our COVID Détente', *Sydney Morning Herald*, 29 May
- 7 Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019 (Cth). The Bill would, among other things, have made it easier for union officials acting unlawfully to be disqualified from holding office.
- 8 Prime Minister (2020), Address, National Press Club, 26 May
- 9 Attorney-General for Australia and Minister for Industrial Relations (2020a), 'Memberships of IR Working Groups Announced', media release, 11 June
- 10 See Hannan 2019a, 2019b. An earlier consultation process over many of these matters has been put on hold.
- 11 Forsyth, A (2020b), 'Morrison Government Invites Unions to Dance, but Employer Groups Call the Tune', *The Conversation*, 28 May
- 12 Attorney-General for Australia and Minister for Industrial Relations (2020b), 'More Options Needed to Prevent Wage Underpayments', media release, 18 February
- 13 ACCI (Australian Chamber of Commerce and Industry) (2019), Improving Protections of Employees' Wages and Entitlements: Response to Attorney-General's Department Discussion Paper, October
- 14 Workforce (2019), 'Stewart's Solution to "Unworkable Situation" Left by Workpac Decision', *Workforce*, Issue No 21385, 15 February
- 15 Stewart, A, Stanford, J & Hardy, T (eds) (2018), *The Wages Crisis in Australia: What It is and What to Do About It*, University of Adelaide Press, Adelaide
- 16 Valent, D (2020), 'Restaurateurs Claim There's No Reward for Them Following the Award', *Sydney Morning Herald*, 1 March
- 17 See 4 *Yearly Review of Modern Awards* [2020] FWCFB 810 at [7]–[14].
- 18 Workplace Express (2019), 'Employers Back Call to Replace BOOT', *Workplace Express*, 24 June; Bonyhady, N (2020), 'Not the Time for Tired Arguments': Employer Group Unveils Industrial Agenda', *Sydney Morning Herald*, 19 May
- 19 This is a practice that many union-negotiated agreements in the retail and fast food sectors previously adopted (Schneiders, Toscano & Millar 2016). After such a deal was successfully challenged in *Hart v Coles Supermarkets Australia Pty Ltd* [2016] FWCFB 2887, the FWC tightened its procedures to prevent further sub-standard agreements being mistakenly approved. This is arguably one reason why fewer enterprise agreements are now being made (Pennington 2018).



## COVID-19 and the future of Australian industrial relations

20 Preferred hours arrangements, which can be used in an attempt to deny overtime or other penalty rates for work that is 'voluntarily' undertaken outside ordinary hours, are not generally permissible under the current legislation: see *Re Bupa Care Services Pty Ltd* (2010) 196 IR 1; *Mondex Group Pty Ltd* [2015] FWC 1148; and see further Cameron 2012.

21 Bray, M, Macneil, J & Stewart, A (2017), *Cooperation at Work: How Tribunals Can Help Transform Workplaces*, Federation Press, Sydney

22 See <https://www.fwc.gov.au/disputes-at-work/new-approaches>, accessed 5 September 2020. Cf Attorney-General's Department 2019, a discussion paper that sees cooperation in almost exclusively unitarist terms, as opposed to the 'pluralist collaboration' that may hold greater prospects for success (Bray, Macneil & Stewart 2019).