

# A VISION IN THE WORKPLACE

## Our December edition of Vision includes:

- Welcoming our new Senior Solicitor Luke Maroney to Stevens & Associates Lawyers;
- An update on the major changes proposed in the Federal Government's Industrial Relations Reform; and
- A recent decision by the Full Bench with a broad interpretation of "regular and systematic" casuals protected from unfair dismissal.



**Stevens & Associates would like to wish you, our valued clients and your families, a safe and happy holiday season.**

**Please note that our office will be closed from Wednesday 23rd December until Monday 4th January.**

**Have a very merry Christmas. We thank you for all your support this year and look forward to working with you again in the new year.**



## Welcome Luke Maroney to Stevens & Associates Lawyers!

Stevens & Associates is pleased to welcome our new Senior Solicitor, Luke Maroney.

Luke comes to us after spending eight years as a trade union official and four years as a solicitor providing advice on employment law and industrial relations matters in the transport, aviation, health and aged care industries. He has worked in both private sector and public sector employment law, and is an experienced advocate in courts and tribunals.

Luke looks forward to assisting our clients in resolving their disputes in a manner which is both commercial and fair.

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## Industrial Relations Reform Update

After a long period of shy and cautious tinkering around the edges, the Federal Coalition Government has given us their first bold foray into major industrial relations reform. On 9 December 2020 Attorney-General and Minister for Industrial Relations, Christian Porter, introduced the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020 (FW Amendment Bill) into Federal Parliament.

In introducing the FW Amendment Bill, Minister Porter positioned it as 'crucial to securing Australia's economic recovery and safeguarding the workplace for future generations' and labelled the changes as 'practical' and 'balanced and pragmatic'. So, what are some of the key features to look out for?

### New NES Entitlements

The National Employment Standards (NES) are a series of minimum entitlements which apply to all employees in accordance with the Fair Work Act 2009 (Cth) (FW Act). Current NES entitlements include annual leave, personal/carer's leave, notice of termination and redundancy pay.

### *Employers must offer casual conversion*

The FW Amendment Bill proposes to add a new NES entitlement for casuals to convert to permanent employment. The entitlement would require employers to offer their casual employees equivalent part time or full time employment where the employee has been employed for at least 12 months and has worked a regular pattern of hours for the past six months which the employee could continue to do on a part time or full time basis without significant adjustment. The offer would need to be in writing and be given to the employee within 21 days of the first anniversary of their employment.

While there are some exceptions, such as the employer having reasonable grounds not to make the conversion offer (such as an expected significant reduction in the type of work the employee does), employers will be required to give written notice to a relevant employee advising that they will not offer casual conversion and giving details of the reasons for not making the offer.

### *Employees may request casual conversion*

Casual employees with more than 12 months service will also have a residual right to request conversion to permanent employment where they have worked a regular pattern of hours over the previous six months and have not been offered conversion to permanent employment. An employer must respond to the request within 21 days and must not refuse the request without first consulting the employee and having reasonable grounds to refuse the request.

These new NES entitlements will create significant compliance burdens for employers, who will need to

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ensure that their employee records are up to date and create new processes complying with the strict 21 day timeframes proposed in the FW Amendment Bill. Employers who are largely reliant on casual employees will need to seek advice about the best way to engage staff moving forward.

## **Increased Flexibility**

The FW Amendment Bill proposes to increase flexibility for employers and employees covered by 12 named awards in industries which have been severely affected by COVID-19. Part time employees who is engaged under one of these awards can agree to work additional hours, up to a maximum full time hours, without having to pay overtime. If passed, these agreements will allow 'part-time employers and employees to work together so an employee can take on additional hours when it suits them', giving the employee the opportunity to earn additional income without the employer being required to comply with strict hours and overtime provisions under the awards.

It is important to note that an employer cannot force an employee to enter into these arrangements for additional hours. Employers will also be required to make written records of the agreement, even if agreement was not originally made in writing.

## **Enterprise Bargaining**

The FW Amendment Bill proposes some major changes in enterprise bargaining. The process will be speeded up: the Fair Work Commission will be required to determine all agreement approvals within 21 days unless there are exceptional circumstances. This will ease the frustration felt by employers and employees

who have reached new agreements, but had to wait months for the Commission to greenlight the arrangements before implementation.

More substantively, there will be changes to the application of the better off overall test (BOOT). The Commission will now be able to approve more agreements which do not pass the BOOT, in circumstances where it is 'appropriate to do so' when considering the views of the employer, employees, bargaining representatives and the impact of COVID-19 on the relevant enterprise. These provisions are designed to allow employers in industries affected by COVID-19 to recover more quickly.

Enterprise agreement will be required to include a new 'model NES interaction term'. If such a term is not included in the agreement, it will still be deemed to form part of the agreement. Details of the content of this term will be available upon the making of the relevant regulations after the passage of the FW Amendment Bill, but are likely to reflect that enterprise agreements cannot provide for terms less beneficial than the NES.

For employers seeking to make enterprise agreements for major projects, there are some further reforms. For projects with capital expenditure expected to be over \$500 million, or who have less expenditure but are declared by the Minister to be major projects, employers will be able to make greenfields agreements which last up to eight years. This locks in terms and conditions for a significantly longer time than previously allowed and prevents industrial action which would disrupt the project.

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## New Penalties

The FW Amendment Bill proposes significant increases in penalties for non-compliance with the FW Act. Some of these changes will lead to criminal liability in certain cases involving dishonesty. Now is a good time to check that your workplace arrangements are compliant before the new laws are potentially enacted.

### *Criminal Wage Theft*

The FW Amendment Bill will introduce a "criminal offence of wage theft" which will carry a maximum penalty of four years' imprisonment if passed in its current form. This applies where an employer dishonestly engages in a deliberate and systematic pattern of underpaying one or more of their employees.

It will carry a maximum penalty of \$1.11 million and imprisonment for up to 4 years (or both) for individuals, and fines of up to \$5.55 million for a company.

### *Civil Penalties*

For wage underpayments, the maximum penalty for individuals will increase by 50% to \$19,980 fine (up from \$13,320), while penalties for a corporations including small businesses will rise to \$99,900 (up from \$66,600).

For underpayments by large businesses, maximum penalties will be based on the higher of either "two times the benefit obtained", or a \$99,900 a pecuniary penalty.

In case of serious underpayments by large businesses, penalties will be based on the higher of either "three times the benefit obtained", or a \$666,600 pecuniary penalty.

This "new concept" of linking the benefit obtained to the fine imposed aiming to encourage a greater focus on compliance by increasing civil penalties for individuals and corporations.

Small businesses and individuals will be exempt from linking the "benefit obtained" to the penalty, however, the current maximum serious contraventions penalty of \$666,600 for small business will remain, as will the current maximum penalty of \$133,200 for individuals.

Infringement notices and maximum penalties for sham contracting and for failing to comply with a Fair Work Ombudsman compliance notice will increase by 50% if the FW Amendment Bill passes.

## Future Changes

Parliament has now risen for the year and will resume in February 2021. The FW Amendment Bill is likely to be a high priority for the Government in the New Year, though we expect there to be significant negotiations on some aspects of the proposed reforms.

If you have any questions regarding the new industrial relations reforms, please contact [Nick Stevens](#), [Luke Maroney](#) or [Bernard Cheng](#).

*This publication is intended only as a general overview of legal issues currently of interest to clients and practitioners. It is not intended as legal advice and should only be used for information purposes only. Please seek legal advice from Stevens & Associates Lawyers before taking any action based on material published in this Newsletter.*