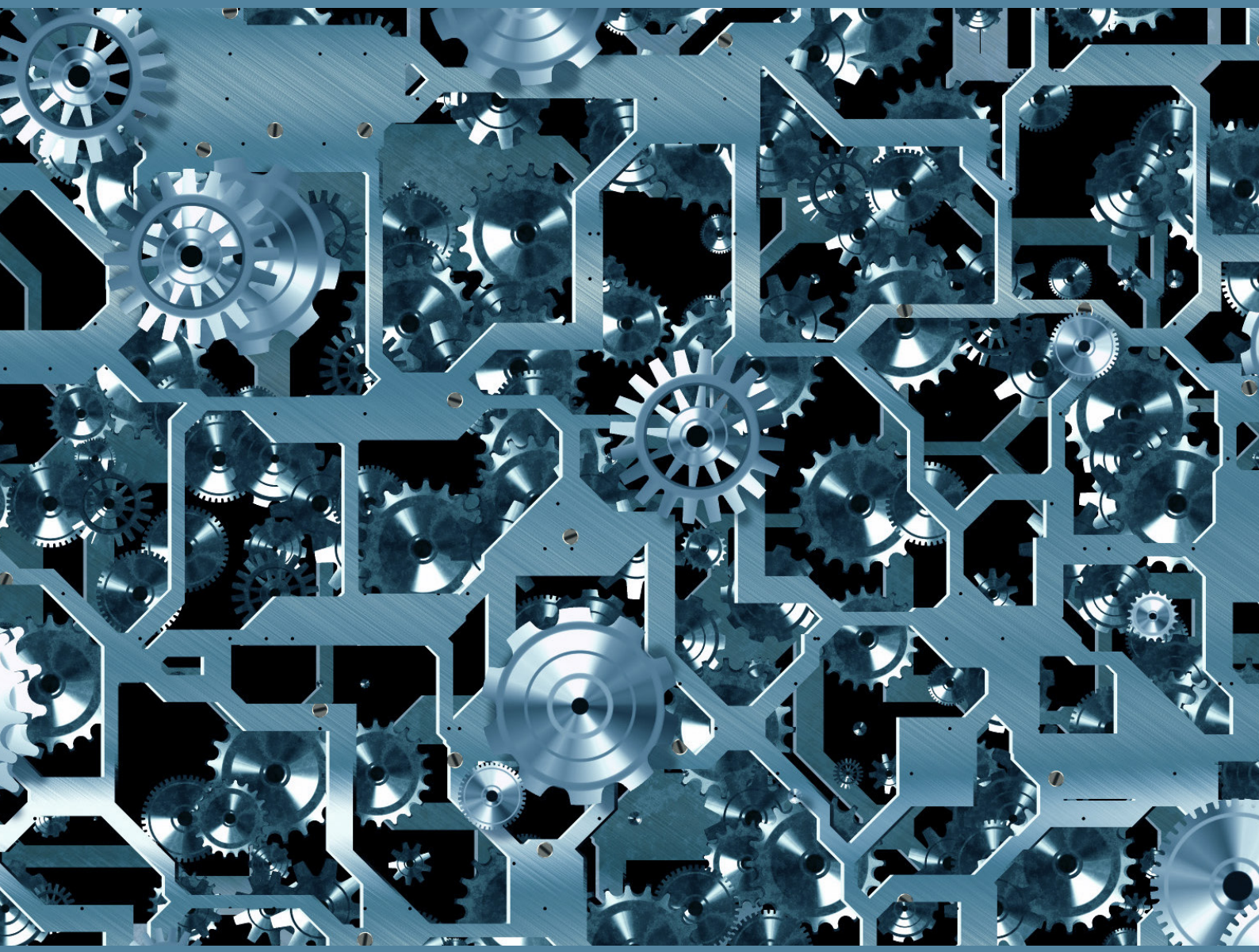
THE CENTRE FOR INDEPENDENT STUDIES

Analysis Paper 12
August 2020

CIS Pandemic to Prosperity



Industrial Relations in a Post-COVID World

Judith Sloan

A catalogue record for this
book is available from the
National Library of Australia

Industrial Relations in a Post-COVID World

Judith Sloan

Analysis Paper 12

Contents

Executive Summary

- Industrial relations regulation in Australia is an historical anomaly. It is highly prescriptive and complex, with substantial third party involvement. Both employers and individual workers are disempowered to the point where mutually acceptable exchange is often forbidden.
- The system of regulation is over-engineered. Many of the provisions serve merely to protect trade unions and employer associations while doing nothing to promote the interests of workers.
- There is a strong presumption of collective outcomes, with individual employment arrangements sidelined.
- While the system of regulation was initially a federated role in which the states played significant roles, the federal jurisdiction is now dominant. Apart from Western Australia, all other states have referred their industrial relations powers to the Commonwealth.
- The economic shocks of COVID-19 and the associated government responses have rendered aspects of our industrial relations regulations unworkable and/or perverse.
- There have been some temporary changes made to some awards as well as to the *Fair Work Act* to accommodate the government's wage replacement scheme, JobKeeper. They mainly relate to hours of work, location of work, assignment of duties and the taking of leave.
- It is unlikely that the award changes will be made permanent, given the opposition of the trade unions.
- There is some prospect that the tripartite negotiation process initiated by federal Minister for Industrial Relations Christian Porter may reach agreement in relation to the definition of casual work and matching the duration of greenfields agreements to the duration of projects. These changes will need to be legislated.
- There is the lingering issue of whether past regular casual workers will be able to claim back-payments for leave entitlements. The financial impact on businesses would be crippling and the government quickly needs to find a solution.
- In relation to award simplification, the making of enterprise agreements and compliance/enforcement, there is little prospect of agreement between the parties.
- The federal government should consider the option of introducing a streamlined and simple award covering small businesses. A possible cut-off point would be 20 workers, measured as 20 full-time equivalent employees.
- Another option would be enterprise contracts contemplated by the Productivity Commission, in which small businesses could seek variations to awards based on light-handed oversight.
- A state government intent on creating an environment conducive to business investment and strong employment growth might consider resuming its industrial relations powers from the Commonwealth (Western Australia would not need to).
- While state regulation of industrial relations would be confined to unincorporated businesses, there is scope for businesses to restructure to achieve this outcome. The federal government might also cooperate to allow that state's regulations to cover incorporated businesses operating within the state to broaden the impact of this option.
- The shift to independent contracting is also likely to gather momentum as the risks of direct employment under highly prescriptive arrangements become unacceptable in a post-COVID world of weak and uncertain demand.

Introduction

The Australian system of industrial relations regulation is an historical anomaly. It was developed at a time when costly industrial disputes were common and were occasionally long-lasting. Based on the then fashionable idea of alternative dispute resolution, the regulatory system introduced in Australia gave a key role to third party tribunals to act as mediators and arbitrators to resolve these disputes.

In line with Section 51(xxxv) of the Constitution, the federal government's power was limited to "conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State". This meant the system of regulation, at least for some time, was a federated one in which the states played major roles.

Over time, however, the power of the federal regulatory apparatus grew as a result of a series of High Court decisions. This trend culminated as a consequence of the resort to the Corporations power under the Constitution used for the WorkChoices legislation implemented by the Howard Coalition federal government in 2005. The net effect of these developments has been to emasculate the state systems. All states, apart from Western Australia, have referred their industrial relations powers to the Commonwealth.

Historically, the nature of industrial relations regulation in Australia was closely linked to the protection of the economy by high tariff barriers and other measures. This connection was made explicit with the introduction of a minimum wage in the famous Harvester judgement of 1907 that set a wage that would meet "the normal needs of the average employee regarded as a human being living in a civilised community."

In exchange for tariff protection, companies were compelled to pay workers at least the minimum wage. Over time, a raft of award rates of pay was established to cover most workers, using the same logic.

By the 1980s, this connection between industrial relations regulation and industry assistance was becoming untenable, with relative living standards falling as a result of the various protective measures. Government decisions to open up the economy —by reducing tariffs, floating the exchange rate, deregulating the financial sector and privatising or exposing government businesses to competition — meant the centralised system of wage determination was no longer viable.

In turn, there were a series of legislative decisions that promoted the shift to enterprise bargaining with a reduced role for arbitrated wage outcomes. The latest incarnation is the *Fair Work Act* 2009 enacted by a federal Labor government.

While enterprise bargaining is a key part of the Act, the award system and the setting of minimum wages remain intact. Moreover, the resolution of individual worker grievances — for unfair dismissal, for example — is now a component of the federal jurisdiction; this was previously the preserve of state regulation. Compliance is also policed and enforced by third parties.

Notwithstanding these evolutionary changes, industrial relations regulation remains one of the most contested policy areas in Australia. The system is still highly prescriptive, complex and subject to third party intervention. Its over-engineered status has more to do with protecting the trade unions and, to a lesser degree, employer associations. There are powerful forces working against any simplification of the system. There is also a strong collective bias in the system, with only limited rights of individual workers to make their own arrangements.

The key challenge now is to make the case for essential reform in a post-COVID world and to outline the adjustments to industrial relations regulations that are needed to ensure businesses can thrive while providing as many secure jobs as possible. While transitory changes are a welcome development as employers struggle to deal with the early economic consequences of the handling of the pandemic, the case for more fundamental and permanent reform is compelling.

Reform must mean moving away from a one-size-fits-all approach and allowing employers and workers to agree to arrangements that suit themselves. Rather than having third parties such as the Fair Work Commission impose often uncommercial dictates on employers, the new approach must confer primacy on the common sense of employers and workers to establish mutually-acceptable arrangements in respect of wages and conditions. Freedom of contract needs to replace paternalistic and costly third-party intervention.

The challenges of COVID-19

It is already clear that many businesses will struggle after the worst of the effects of the virus, including the mandated lockdowns and travel restrictions, are over. While some will re-emerge — and some have actually been able to thrive during the crisis — others will simply fold when the government supports are removed.

The early indications are that the deterioration in the labour market will be both dramatic and sustained. While the official figures have been confusing because individuals on the wage replacement scheme, JobKeeper, are not counted as unemployed, the overall rate of labour market underutilisation (the sum of unemployment and underemployment) rose sharply between February and May 2020 — by 8.5 percentage points to 20.2 per cent (ABS, *The Labour Force*). Change of this magnitude is unprecedented.

Note here that the participation rate fell by 3.2 percentage points over the year to May 2020 — another unprecedented change.

The June figures indicated some improvement, with an increase of 211,000 employed persons between May and June. There is still no doubt that the labour market will remain weak for some time, particularly when measured by the number of hours worked. Over the year ending in June 2020, hours worked in all jobs fell by nearly 6 per cent.

The federal Treasurer, Josh Frydenberg, has conceded that the official unemployment rate is not indicative of the true state of the labour market. He regarded a figure closer to 13 per cent to be more accurate for June.

The Reserve Bank Governor, Philip Lowe, has also indicated that the labour market may deteriorate further in the second half of 2020 and beyond. "[The fact is] the unemployment rate is likely to increase further, even with the recovery underway. This is because many of the people who lost their jobs over recent times have been classified as not in the labour force and so are not counted as unemployed. As the labour market continues to improve, we expect many of these people will start looking for jobs, and thus be classified as rejoining the labour force. This will push up the measured unemployment rate at the same time that the share of the working-age population with a job is also rising" (Lowe 2020).

In respect of industrial relations laws and regulations, various initiatives were implemented during the early months of the crisis to inject some elements of flexibility into the system. The *Fair Work Act* was quickly amended to allow employers using the government JobKeeper program to direct workers to work fewer hours, to work different shifts, to work in different locations and to alter workers' duties. However, these amendments were time-limited.

There were also a number of alterations made to particular awards; including the hospitality, restaurant, legal services and fast food awards. Amendments covered: changes to employee classifications and duties; full-time and part-time employees' hours of work; directions to take annual leave; and the inclusion of unpaid pandemic leave. Again, these changes were time-limited.

At the same time, the trade unions opposed some changes that were proposed and a number of applications for changes to awards were dropped by employers in the face of this opposition. Note here that the unions' support for the changes has been dependent on the continuation of the government's wage replacement scheme, JobKeeper.

This attitude has been reinforced in the context of the government's announced adjustments to the JobKeeper scheme, including more rigorous testing of firm eligibility as well as reduced payments to workers. The President of the Australian Council of Trade Unions, Michele O'Neil, has refused to support industrial relations changes for employers ineligible for JobKeeper.

According to O'Neil, "there is no justification whatsoever for changing workers' rights for businesses that are no longer struggling. The union movement will protect and defend workers and their rights, especially during this pandemic." This viewpoint has been supported by Labor's industrial relations spokesperson, Tony Burke.

To sum up, while the amendments to the *Fair Work Act* and the marginal changes made to some awards have assisted the adjustment process required to deal with the economic consequences of the COVID-19 related lockdowns and restrictions, they are a far cry from addressing the fundamental problems of the regulatory system. Moreover, because they are time-limited — although the precise cut-off dates are now unclear — the expectation on the part of the trade union officials is that the *ex ante* situation will be restored in due course.

The real opportunity here is that the fundamental problems of our regulatory approach should be addressed in order to facilitate the best possible economic and labour market recovering from the COVID-19 crisis. This point was in fact acknowledged by the Prime Minister, Scott Morrison, when he declared that the system is not fit-for-purpose. "It is a system that has, to date, retreated to tribalism, conflict and ideological posturing."

What is fundamentally wrong with our industrial relations system?

There are features of the workings of the labour market that were never contemplated in our industrial relations regulations prior to recent events. In particular, the scope for workers to work from home is not universally dealt with in all awards and agreements. It has been uncertain in many cases what the terms of engagement for workers instructed to work from home should be. Note that in May 2020, it was estimated that over 30 per cent of Australian workers were working from home (Roy Morgan 2020).

In a similar vein, award restrictions on the ability to reduce workers' hours of work or insist that workers take annual leave were revealed as inconsistent with the exigencies of the pandemic economic environment.

But beyond these specific contextual issues lies a raft of problems; related to the award system, in particular, but also to the workings of other aspects of the regulations. When thinking about what is fundamentally wrong with our industrial relations system, it is important to analyse the workings of these various parts of the system.

There are several separate components of the system, with some overlap between them. All involve third party interventions, mainly by the Fair Work Commission but also a number of other public agencies.

They are:

- National Employment Standards (NES) that set a floor for a range of conditions;
- National minimum wage setting;
- 122 Modern Awards which operate in addition to the NES;
- Regulation and certification of enterprise agreements that must meet a number of conditions, including the better-off-overall Test (BOOT);
- The handling of individual worker grievances including unfair dismissal claims; and
- Compliance and enforcement with demands for back payments and fines for non-compliance.

The 10 minimum entitlements of the NES are: maximum weekly hours; requests for flexible working arrangements; parental leave and related entitlements; annual leave; personal/carer's leave, compassionate leave and unpaid family and domestic violence leave; community service leave; long service leave; public holidays; notice of termination and redundancy pay; and Fair Work Information Statement (to be given to all new workers).

The *Fair Work Act* also establishes the process whereby the National Minimum Wage is adjusted. Each year, the specifically selected panel determines what NMW will apply and how all award wages will be adjusted accordingly. The panel is guided by a set of criteria provided in the Act, with some of the factors inconsistent with each other (worker needs versus employment promotion, for example).

In the midst of the COVID-19 crippled economy, the panel decided that minimum wages should be increased 1.75 per cent, with the timing of the increase divided into three award groups. These groups were determined on the basis of the presumed economic damage being caused to particular industries. The pay rise for the third group applies from 1 February 2021. Note here that panel member, Professor Mark Wooden, handed down a dissenting decision, arguing the case for a freeze of all minimum wages at time of unprecedented economic impairment. Note here as well that the minimum wage in Australia is the highest in the world, according to the Organisation for Economic Cooperation and Development.

When it comes to the 122 Modern Awards, the issues covered are highly prescriptive directives about hours of work, including breaks, worker classifications, the tasks that can be undertaken, penalty and overtime rates and casual work. The need for consultation with unions about changes to work patterns or work organisation is generally included as are clauses about employment termination and redundancy. There are also clauses dealing with superannuation that list a small number of default funds (for instances where workers don't make a choice) that are almost always the union-aligned industry super funds.

To give a further flavour for the detailed and prescriptive nature of awards, take the Hospitality Industry (General) Award 2020. A Food and Beverage Attendant Grade 1 can remove food plates from tables but cannot deliver them. Only a Food and Beverage Attendant Grade 2 is allowed to take reservations, greet and seat guests. The completion of "an apprenticeship in waiting" is required for a Food and Beverage Attendant Grade 4. There are 61 adult classifications in this award and 14 potential hourly rates.

Another example is the Building and Construction General On-Site Award which is nearly 150 pages and contains 80 separate allowances in addition to the prescribed wage schedule. The Restaurant Industry Award has 36 clauses and 10 schedules. There are 24 worker classifications in that award.

As an example of inflexibility and costly compliance, consider the issue of the payment of annualised

salaries which, in theory, can provide win-win opportunities for both workers and employers. Rather than cover the detailed prescriptions of awards, workers can be offered the option of being paid a predictable wage based on an annualised salary.

The relevant sub-clauses of the Hospitality Industry (General) Award 2020 are as follows:

> 24.4 An annualised salary must be at least 125% of the minimum weekly rate …
>
> 24.5 Unless the employer and the employee otherwise agree, an annualised salary satisfies the requirement of this award under clause 28 – Overtime and clause 29 – Penalty rates. However, by agreement between the employer and the employee, an annualised salary may satisfy this award in relation to other monetary entitlements provided for by this award.
>
> 24.6 An annualised salary must not result in an employee being paid less over a year … than would have been the case if an annualised salary had not been agreed and the employee had instead been paid their weekly rate and any other amounts satisfied by the annualised salary.

The key is the last sub-clause which effectively states that a worker on annualised salary must be paid at least as much as the award would have provided given the particular hours of work and the timing of those hours in terms of shifts, day of the week and overtime. But to ensure this test is met requires the undertaking of a costly and laborious procedure on the part of employers.

To deal with these instances, the Fair Work Commission insists that "company wage records and employee timesheets have to be kept for seven years. The Fair Work regulations also mandate that they have to be readily accessible to a Fair Work inspector, should they be needed. They should be legible, written in English, and above all, they must be accurate."

This is now referred to as the "bundy clock requirement" which forces employers to keep detailed work records (total hours and time of work as well as tasks undertaken) for all workers whether they are covered by an award or enterprise agreement.

Note here that despite there being many fewer awards than was once the case — there were thousands of awards when the state jurisdictions were fully operational — it is not at all clear that the system is any less complicated or easy for employers to obey.

This point has been made by Steven Amendola, senior workplace lawyer and reviewer of Western Australia's industrial relations system.

> Although the current incarnation of awards is called "modern", that's an oxymoron. It's true today's awards are fewer, more modern, and generally better expressed than the shambolic mess of the past, but they still refer to concepts about work and patterns of work behaviour that don't reflect modern work practices such as the harsh truths that COVID-19 exposed about the capacity and effectiveness of working from home.
>
> Awards regulate, in minute detail, processes such as how labour is utilised and moved around and in what circumstances and conditions, all of which are seen as untouchable sacred cows, such as the span of ordinary hours, allowances, penalty rates, overtime rates and minimum engagement of part-time and casual employees.

The loss of state awards, which were mainly common rule — meaning that all employers of the specified classes of workers were covered — actually entailed a loss of flexibility in terms of providing some variations in pay rates across the country. It is an economic incongruity that the General Retail Industry Award, for instance, would specify the same rate of pay for a shop assistant in Moree as one in CBD Melbourne.

Not only did state awards provide different rates of pay between the states, some state awards were broken up into awards that applied to workers in the capital cities and others that applied to workers in the rest of the state. This provided a degree of wage cost differentiation that was both required by the businesses but also reflected differences in living costs between the cities and regions.

Such differences are not uncommon overseas with the application of minimum wages. In most countries, there is one single minimum wage that applies to the lowest paid workers. But in the US, for instance, the minimum wage that applies varies across the states with the only restriction that the specified wage must be at least equal to the federal minimum wage. In the UK, there is also a London-loading for the minimum wage in that country.

In Australia, by contrast, the National Minimum Wage applies equally across the country and the awards are likewise applicable everywhere.

The largest chunk of the *Fair Work Act* is taken up by the rules and regulations related to enterprise agreements. In theory, these agreements are an avenue in which employers and workers can fine-tune their working arrangements to suit the workplace and the preferences of workers. The hope was that productivity gains would be made possible and the benefits could then be shared between employer and workers.

However, enterprise agreements have become trapped in a bureaucratic sludge of excessive oversight of process and an increasingly technical interpretation

of the BOOT that governs the certification process by the Fair Work Commission. The BOOT states that "the Commission must be satisfied that each award covered employee and each prospective award covered employee would be better off overall if the agreement applied to the employee than if the relevant modern award applied to the employee."

Over time, the Fair Work Commission has taken an increasingly interventionist role in overseeing the process whereby agreements are voted on by workers as well as the details of the agreements themselves.

Costly delays in having agreements certified, as well as the absence of real scope to secure any productivity gains, have led to enterprise agreements falling out of favour with employers. In 2018, the approval time for agreements by the FWC was 76 days on average, compared with its benchmark of 32 days. And in 2019, there were just over 10,500 enterprise agreements in operation, compared with close to 25,000 in 2011.

As the Australian Resources and Energy Group notes "in the same period, the number of Australians whose employment is covered by an enterprise agreement has dropped by 500,000, despite an additional 1.6 million people joining the national workforce. In total, only 12% of Australia's private sector workforce is covered by an enterprise agreement" (AMMA 2020).

Needless to say, there have been very few enterprise agreements certified in 2020, especially covering private sector employers. The combination of the restrictions of the BOOT and the heavy-handed and delayed certification process means that enterprise agreements hold very few attractions for employers; particularly given the unlikelihood of industrial action being undertaken at this time. (In theory, industrial action is not permitted when an enterprise agreement is in force because it is unprotected.)

There is even the possibility that, should it be found that the BOOT has not been met in practice during the course of an enterprise agreement, there is a possibility that employers may be required to pay back payments.

On the issue of individual grievance handling, a sub-industry has developed in which workers are assisted to seek compensation on the basis of unfair dismissal when they lose their jobs, even if the reasons for the dismissal are entirely valid.

Many employers prefer to have these matters settled by offering "go away" money to the ex-employee rather than have the matter adjudicated by a third party. The Small Business Code of Dismissal in theory protects small businesses as long as they have followed the code. However, there are trenchant criticisms of this code from employers.

Finally, the issue of compliance has been in the news over the past two years or so as the Fair Work Ombudsman has established cases of wage underpayment, as well as employers admitting to instances of underpayment after investigation. Some of these cases have been high profile, including the restaurant empire of George Calombaris, the Australian Broadcasting Corporation, Woolworths, Maurice Blackburn and some other well-known businesses.

These firms are liable not only for the workers' back pay; they may also be required to pay a "contrition payment" to the Commonwealth consolidated revenue fund. For example, based on underpayment of close to $12 million, the ABC paid $600,000 as a "contrition payment", the largest payment thus far.

However, the reality is that non-compliance is more often than not a result of the excess complexity of the system rather than any malevolence on the part of the employers. To be sure, there are some instances where employers might seek to short-change their workers. But given the difficulty of interpreting awards, as well as the effort required to determine whether workers on annualised salaries could have made more under strict award conditions, it is hardly surprising that instances of non-compliance pop up from time to time. Indeed, there are instances of overpayment as well as underpayment.

To sum up, what is fundamentally wrong with the industrial relations system is the presumption that the parties to the employment contract cannot be trusted to reach wages and conditions that are mutually acceptable. Rather, the legislation sets up a highly prescriptive set of arrangements in which third parties are given the power to arbitrate, certify and enforce compliance.

The implicit assumption is that all employers are potentially unreliable and dishonest, intent on misusing what is seen as a power imbalance between the employer and the worker. There is little acknowledgement of the invaluable role that workers play for businesses and that workers generally have the option to leave if their employer proves to be undependable and deceitful. Employers generally pay a high price for having a bad reputation in the labour market.

Will incremental reforms make much difference?

The federal Minister for Industrial Relations, Christian Porter, has played a leading role in 2020 both in relation to ushering in temporary changes to the *Fair Work Act* as well as praising the award adjustments that have been made to accommodate COVID-19 and the JobKeeper scheme.

However, not content with these initiatives, he has embarked on a campaign to institute broader and permanent changes to key aspects of industrial relations regulation. The expectation is that these changes would be mainly effected via legislative changes. For this reason, it is important that the Senate cross-benchers are convinced both of the need for lasting change and the precise nature of the proposed legislation.

To this end, Porter established five "reform committees" in June 2020. The areas nominated were: award simplification; enterprise agreement making; casuals and fixed term employees; compliance and enforcement; and greenfields agreements.

The members of these committees were nominated by the Australian Council of Trade Unions, a number of trade unions and various employer and business associations. Each committee is chaired by the minister. In what looks like, on the face of it, a version of old-fashioned tripartitism, the ostensible aim of the exercise is to achieve consensus for change in the selected areas.

Of the five areas, the most likely for constructive outcomes are casuals and fixed term employees, and greenfields agreements. The issue of casuals has assumed considerable importance in recent times as the Federal Court has handed down judgements to the effect that a casual worker who works regular and predictable hours of work should be entitled to paid leave entitlements notwithstanding the payment of a casual leave loading, generally 25 per cent. (The key cases here are WorkPac (v) Skene 2018 and WorkPac (v) Rossato 2020.) This decision was reached even though it is clear that the payment of a 25 per cent casual loading more than compensates workers for the absence of leave entitlements.

These decisions have led, in turn, to a number of class actions for back payments involving current and past casual workers who can demonstrate regular hours of work. While WorkPac is a labour hire company, there is no reason to believe that successful claims will be limited only to workers who have been or are employed by such companies, a point seemingly misunderstood by the Secretary of the Australian Council of Trade Unions, Sally McManus. The potential scope is much wider, with some estimates putting the potential compensation at close to $8 billion, with many small firms liable.

The central problem is that there is no agreed definition of a casual worker in the *Fair Work Act*, even though most awards contain provisions for the engagement of casual workers and the payment of a casual loading. The obvious solution is to insert such a definition into the act to ensure that casual workers are paid the casual loading but are not entitled to paid leave entitlements. One suggestion is along the lines: a casual worker is a worker engaged as such and paid as a casual worker.

A potential trade-off for the inclusion of this definition in the act would be to insert a template Casual Conversion right with the National Employment Standards whereby a casual worker can request the right to transfer to permanent full-time or part-time employment after a 12-month period

Without some rapid resolution of this issue, the fear is that employers will be reluctant to engage casual workers in a post-COVID recovery because of the fear of back payments. At the same time, they will not be in a position to offer permanent shifts to full-time and part-time workers.

In fact, some large businesses — the large supermarkets are an example — have already responded to these decisions by ensuring that their casual workers are not offered regular and predictable shifts, even though this might meet the preferences of the workers. A random factor has been inserted in the rostering software to ensure this outcome. This is a perverse outcome, by any measure.

In the interim, the government needs to devise a solution to the looming problem of back payments to casual workers who worked regular and predictable hours of work. Unless this issue can be sorted, there is a strong possibility that many firms will be bankrupt prior to any post-COVID recovery.

There is a range of options, including redrafting a regulation attached to the Act. (The previous regulation was dismissed by the Federal Court as being insufficient to provide a defence of workers receiving either a casual loading or paid leave entitlements.) The current fear is that some firms will be required to book the potential for back payments of regular casual worker in their annual accounts, which could tip them into insolvency.

The second area that is potentially capable of resolution through consensus — although this outcome is by no means certain — relates to greenfields agreement. The current situation limits

these agreements that cover workers engaged on large new construction developments to four years maximum.

Where completion of a large-scale project takes longer than this length of time, there is a requirement for a new or rolled-over agreement, and this is where problems occur. A small group of workers can potentially hold up the project and demand an exorbitant price to resume work. These enhanced pay rates and conditions then flow onto the other workers on the project. A case in point was the Woodside's Burrup Hub project in Western Australia.

The solution is relatively straightforward and that is to allow greenfields agreements to have the same duration as the project. This proposal has been around for some time and at one stage the Labor Party supported this amendment to the Act. Again, there is a possibility that consensus might produce a sensible outcome on this issue.

When it comes to the other issues, there is not much likelihood of any consensus emerging from the work of the reform committees. The union leadership remains highly committed to the highly prescriptive award system, bestowing a role for unions that its representation in the workforce would not justify. Note here that around 14 per cent of all workers belong to trade unions; less than 10 per cent of private sector workers are union members.

Award simplification is in fact a process that has been going on for several decades. And while awards are fewer in number and the language is less arcane than was once the case, they are in fact highly prescriptive and restrictive. In recent times, they have been added to and become even less flexible.

But given the opposition of the ACTU to continuing the award amendments introduced in response to COVID-19 for employers no longer qualifying for JobKeeper, it is highly unlikely that any consensus will emerge in relation to fundamentally altering awards.

When it comes to enterprise agreements, the falling number and coverage of awards has not pleased the union movement. After all, there are some specific clauses that can be inserted in these agreements that are highly favourable to unions. These include insistence on the payment of income protection insurance to union-aligned funds and the nomination of a single union-aligned superannuation fund.

Having said this, it's not clear that the unions can bring themselves to work away from the BOOT and support, say, a no-disadvantage test that would be averaged over the entire workforce rather than applied at the individual workers level, both present and future. ACTU secretary, Sally McManus, does concede there are failings in the system.

According to her, "I can understand if everyone has reached agreement, and you have got to wait a long time for that agreement to even be approved …So we do have some sympathy for that position." This is, however, a relative minor concession.

Former senior deputy president of the Fair Work Commission, Peter Richards, has suggested that the quagmire of enterprise agreement making can be resolved by giving primacy to the workers who will be covered. "An agreement should be capable of approval if it satisfied the Fair Work Commission it provides a basket of relevant benefits to the employees and the employees have genuinely approved it on the basis of an informed decision and there has been no deceptive or unconscionable conduct along the way. A simple, global approval test of this kind might accelerate the agreement approval process and remove scope for gaming by unions" (Richards 2020).

Finally, on the issue of compliance and enforcement, it's highly unlikely that there will be any lessening of the efforts made to discover instances of underpayment, even if that underpayment is unwitting. Indeed, the Andrews Labor government in Victoria has introduced the *Wage Theft Act* which provides for jail sentences of up to 10 years and hefty fines for employers found to have underpaid their workers.

Whether this process of top-down negotiation led by the Minister for Industrial Relations is ultimately constructive remains to be seen, although it is clear that the changes that will be agreed are likely to be marginal rather than fundamental. It's most unlikely that they will provide the basis for the much broader regulatory reform required in a post-COVID world. What is very clear is that legislated amendments will be needed because neither the actions of the third parties — particularly the Fair Work Commission — nor changes agreed by the industrial parties, will come anywhere close to the changes that are required.

The way forward

There is no doubt that COVID-19 is forcing a change in thinking about many aspects of the workings of the economy and the labour market as well as the role of governments. Unsurprisingly, both the federal and state/territory government have prioritised the suppression of the virus and dealing with the health aspects. Many of these actions have caused serious economic damage, particularly to businesses that have been forced to close or significantly curtail their operations.

Inevitably, the impact of COVID will involve lower national income for some time, leading in turn to a tussle about the distribution of the smaller pie. In this context, there is a strong case for rethinking how the wages and conditions of workers are established.

The principle of freedom of contract — in which employers and workers are best placed to judge what is in their mutual interests — should replace the idea that third parties should have a central role. This notion doesn't rule out the case for a set of national employment standards such as those set out in the Fair Work Act.

These standards are arguably superfluous in a situation where the state provides a strong safety net through the Newstart allowance (and now JobSeeker), because individuals will not be prepared to work unless there is a significant net gain from working over not working. Having said that, the political economy of industrial relations regulation points to having a set of national employment standards — payment of minimum wages, leave entitlements, etc. — to aid public confidence in the system.

But the award system on top of the NES makes for a seriously over-engineered system. Employers must comply with both the NES and at least the award that governs the particular workers. While there are 122 Modern Awards where once there were thousands (including the state awards), these Modern Awards are actually complicated and difficult to navigate; some more than others.

The irony is that some of the most convoluted and impenetrable awards cover the sectors hit hardest by the lockdown, including restaurants and the hospitality sector. But all awards are highly prescriptive.

The process of establishing reform committees by the federal Minister for Industrial Relations may produce some useful changes in relation to casual and fixed term employees and greenfields agreements.

But endorsement of broader change in respect of awards, enterprise agreements and compliance/enforcement is much less likely. Complexity suits a lot of the industrial parties; including the unions, employer associations and some big businesses. The government will need to think beyond what emerges from this tripartite process.

One option might be to consider the option of creating an award specifically for small business, irrespective of the industry of the business. The cut-off point might be 20 full-time equivalent employees; although there can be legitimate discussion of what the appropriate number is.

The idea would be to create a very simple, streamlined award which is much less prescriptive about hours of work and the assignment of tasks to workers than the typical award. A particularly valuable addition would be to allow employers to ask part-time workers to work extra hours up to 38 hours per week without paying an overtime penalty. In this way, the incentive for employers to employ workers on a casual basis would be reduced.

An alternative might be the enterprise contract proposed by the Productivity Commission in its 2015 Workplace Relations Framework report. This contract "would provide for variations to awards suited to the circumstances of individual enterprises. This would offer many of the advantages of enterprise agreements, without the complexities, making them particularly suited to smaller businesses. Any risks to employees would be assuaged through a comprehensive set of protections, including a clear written statement to employees of the implications of award variations, a no-disadvantage requirement, the right to revert to the award or to initiate enterprise bargain" (Productivity Commission 2015).

Given the constraints to achieving real changes within the federal jurisdiction, there may also be a case for at least one state stepping up to the plate by taking back its industrial relations powers (Western Australia would not need to do this). It would then be possible to institute laws that provide the basis for strong business investment and related employment growth in that state.

These state laws would only cover unincorporated businesses, but many employers would be able to structure their corporate arrangements to accommodate this requirement. There is also the possibility that the federal government could cooperate with such a shift and allow that state to also cover workers in incorporated businesses. This would work something along the lines of the shared appointments that exist within the Fair Work Commission for both state and Commonwealth appointments.

The other likely development is a shift to independent contractors whereby businesses contract with workers only for the timing of the tasks required. While this does not suit all business requirements, there is clearly considerable scope within many service industries to contain the risk of directly employing workers, a risk which is made greater by the workings of our anachronistic industrial relations system.

At this stage, the precise timing and magnitude of the recovery from the impact of COVID-19 and related lockdowns and travel restrictions are extremely unclear. At the macro level, it is clear that a reduction in national income has already occurred, with future growth in GDP likely to be significantly curtailed relative to the expectations formed at the beginning of 2020. Some economists do not expect GDP to regain its previous high level until 2022 or later.

The fallout for the labour market will also continue to be substantial. At its peak, there were 3.5 million workers on JobKeeper and an additional 800,000 were added to the unemployment queue within the first three months from the onset of COVID-19. Treasury estimates that the rate of unemployment will be close to 9 per cent by the end of 2020.

Given these challenges, it is critical that our industrial relations laws and regulations are fit-for-purpose, providing flexibility for businesses to rehire workers and hire new ones to the greatest extent possible. What was tolerable prior to the pandemic is no longer tolerable in this new context. Action — rather than talk — is vital.

References

AMMA (2020), "Enterprise bargaining is at crisis level", *memo.*

Amendola, S. (2020), Awards were made flexible in the crisis. Why should we go back? *Australian Financial Review*, 15 July.

International Monetary Fund (2020), *World Economic Outlook Update,* June (Washington)

Lowe, P. (2020), COVID-19, the Labour Market and Public Sector Balance Sheets, Speech to the Anika Foundation, Sydney.

Productivity Commission (2015), Workplace Relations Framework, *Final Inquiry Report*

Richards, P. (2020), "Broken enterprise bargaining system needs a reboot" *Australian Financial Review*, April 28.

Roy Morgan (2020), Nearly a third of Australian workers have been working from home, *Finding* No 8451, June

About the Author

Judith Sloan

Judith Sloan is Contributing Economics Editor at *The Australian* newspaper. For many years, she was an academic, holding the position of professor. She was Director of the National Institute of Labour Studies at the Flinders University of South Australia. She was also a Commissioner of the Productivity Commission and Member of the Australian Fair Pay Commission. She was Deputy Chairman of the Australian Broadcasting Corporation and has also sat on the boards of a number of listed companies. Judith holds degrees from the University of Melbourne and the London School of Economics.

Related Works

John Slater, *Industrial Relations in Australia: a Handbrake on Prosperity* (CIS Occasional Paper 157)

Patrick Carvalho, *Youth Unemployment in Australia* (CIS Research Report 7)

THE CENTRE FOR INDEPENDENT STUDIES

Analysis Paper 12 (AP12) • ISSN: 2209-3753 (Online) 2209-3745 (Print) • ISBN: 978-1-925744-61-3

Published August 2020 by the Centre for Independent Studies Limited. Views expressed are those of the authors and do not necessarily reflect the views of the Centre's staff, advisors, directors or officers.

This publication is available from the Centre for Independent Studies. Visit **cis.org.au**

Level 1, 131 Macquarie St, Sydney NSW 2000 • **phone:** 02 9438 4377 • **email:** cis@cis.org.au