

### Key Features of the Australian Government's IR Omnibus Bill

On 9 December 2020, the [Fair Work Amendment \(Supporting Australia's Jobs and Economic Recovery\) Bill 2020](#) (IR Omnibus Bill) was introduced to federal parliament following extensive consultation with peak employer groups and unions through five IR Working Groups. VACC was involved throughout the process, to ensure that the needs of members were heard and understood.

Whilst some within the union movement have been predictably quick to claim that the proposed changes are an 'ideological attack on workers', the reality is that the proposed changes seek to be balanced and pragmatic. Accordingly, there are a number of aspects of the proposed legislation that VACC views as problematic, notwithstanding our support for the Australian Government's objective to find incremental solutions to assist Australia's economic recovery from the impact of COVID-19.

Following its introduction, the IR Omnibus Bill has been referred to Committee – with a Report from the Senate Education and Employment Legislation Committee due on 12 March 2021. VACC will continue to be involved through the Committee inquiry process.

The IR Omnibus Bill consists of five schedules, reflecting each of the IR Working Groups:

- Casual Employees
- Modern Awards
- Enterprise Agreements
- Greenfield Agreements
- Compliance and Enforcement

Whilst the schedules dealing with enterprise agreements and greenfield agreements will have little relevance for industries such as automotive, the remaining areas will have broad application across industries. A summary of the key aspects of the schedules most relevant to the automotive industry is provided below:

#### Casual Employees:

- Addresses the issues created (including 'double dip' by the contentious *WorkPac Pty Ltd V Rossato* Federal Court decision now before the High Court (see previous [IR Bulletin](#)).
- **New definition** of casual employment under the *Fair Work Act 2009*, defined in terms of where an offer is made with "**no firm advance commitment to continuing and indefinite work according to an agreed pattern of hours**", rather on the subsequent conduct of either party.
- **New statutory casual conversion clause** – which is broadly in line with that already existing in the Vehicle Repair, Services and Retail Award 2020 (VRSR Award) and Clerks – Private Sector Award 2020 (Clerks Award).
- **New 'Casual Employment Information Statement'**, to be provided by employers to new casual employees.
- **'Double dip' issue addressed**, through inclusion of a statutory provision mandating that Courts offset any amount payable by the employer for non-casual entitlements (e.g. paid annual leave) against any casual loading that has been paid.

## Modern Awards:

- Creates two major types of flexibility arrangements under the *Fair Work Act 2009*, for employers and employees covered by **12 identified modern Awards** (includes the VRSR Award, but **not** the Clerks Award) – ‘Flexible Work Directions’ and ‘Simplified Additional Hours Arrangements’.
- **Flexible Work Directions:** are modelled on recent JobKeeper amendments and relate to an employee performing **different duties** or working at a **different location**. This flexibility will be available for **2 years** from the commencement of the legislation where an employer holds a **reasonable belief** that the arrangement is a necessary part of a reasonable strategy to revive the employer’s enterprise and consultation. **Consultation** is also required, following at least **3 days written notice** prior to the direction being given, unless the employee agrees to a lesser notice period.
- **Simplified Additional Hours Agreements:** or ‘flex up’ provisions, aim to make it administratively easier for **part-time employees** who work **at least 16 hours per week** to be able to take on additional hours at **ordinary rates** (rather than overtime rates). The agreement must **identify the additional agreed hours** to be worked and must be entered into **before** the start of the first such period – and the employer must **inform** the employee that the agreement is a simplified additional hours agreement **before** the employee agrees to it. If the agreement is not in writing, the employer must make a **record** of the agreement in writing before the end of the first period of additional agreed hours worked under the agreement – and **keep a copy** of the agreement or the record, providing a copy to the employee on request. The arrangements are **voluntary** and can be terminated by either employer or employee on 7 days’ notice. Where additional agreed hours are worked, they are treated as **ordinary hours of work** for the purposes of annual leave, paid personal/carer’s leave and superannuation.
- **Note:** the VRSR Award currently provides **significant flexibility** in relation to these matters. Accordingly, should the proposed Bill pass into legislation, members will need to consider whether the flexibilities sought are best achieved through the use of **existing VRSR Award and employment contract provisions** – or if applicable, through formal exercise of the new statutory provisions. Importantly in this regard, the proposed legislation makes clear that the new simplified additional hours agreement arrangements **do not** prevent employers and employees from using existing VRSR Award provisions where available to achieve the same outcome.

## Compliance and Enforcement:

- Creates a number of new compliance and enforcement provisions focusing on ‘**remuneration-related contraventions**’, including new **criminal** offence and penalties, new civil contravention, increases civil contravention penalties and changes to FWO and Court processes.
- **Criminal Offence:** where employer **dishonestly** engages in a **deliberate and systematic pattern** of underpayment of one or more of their employees. The maximum penalty will be \$1.11 million and four years imprisonment for individuals and fines of up to \$5.5 million for a body corporate. If passed, it would apply to the exclusion of State or Territory laws – e.g. Victorian *Wage Theft Act 2020*.
- **New Civil Contravention:** prohibits employers from publishing **job advertisements** with pay rates **less** than the relevant national minimum wage, with penalties of up to \$13,200 for individuals and \$66,600 for a body corporate.
- **Increased Civil Penalties:** for remuneration-related contraventions, base maximum penalties have increased by 50% - with such contraventions to be assessed to the greater of the value of the applicable civil penalty or the ‘**value benefit**’ calculated in relation to the contravention. Maximum penalties have also increased 50% in relation to pecuniary penalties for non-compliance with compliance notices, as well as for **sham contracting** contraventions.
- **Changes to Fair Work Ombudsman (FWO) and Court processes:** sets out a non-exhaustive list of factors the FWO may take into consideration in deciding whether to accept an **enforceable undertaking** as an alternative to being prosecuted – and provides greater certainty around FWO decision making processes, including a specific requirement for the FWO to publish information relating to circumstances in which an enforcement proceeding will be commenced or deferred. The **small claims** threshold will increase from \$20,000 to \$50,000, with the courts able to **refer such matters to the Fair Work Commission** for conciliation and arbitration (by consent). In addition, Federal Court and Federal Circuit Court will be able to impose adverse publicity orders.

Members will continue to be kept advised of developments.

In the interim, members seeking further information are encouraged to contact the Workplace Relations team at [ir@vacc.com.au](mailto:ir@vacc.com.au) or 03 9829 1123.

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