Industrial Legislation in Australia, 2020

Introduction

In Australia, some of the most significant effects of the 2020 international coronavirus or Covid-19 pandemic were felt in the realm of industrial relations, as a variety of nationwide, statewide and local area lockdowns and other precautionary measures (such as 'social distancing') were imposed across the country. These necessary measures led to the collapse of entire industries, mass stand downs, record high-unemployment and 'work-from-home' practices not hitherto seen within the Australian labour market. Accordingly, the pandemic precipitated a variety of industrial reform at the federal level of Australian government.

The Federal Morrison Government responded to the pandemic in two ways: first, through its 'JobKeeper scheme', an emergency response to looming financial collapse; and second, with an 'Omnibus Bill', a loose agglomeration of major industrial reform, following a corporatist consultation process between labour, capital and the state. While the Government dispelled Australian Council for Trade Unions' (ACTU) hopes for major structural reform at the outset of the pandemic (WE, 2020a), it nevertheless enacted massive stimulus (through the JobKeeper package) signifying a change in political direction, perhaps towards something approaching traditional labour or 'post-Keynesian' monetary and employment policy. However, trade unionists, precariously employed workers, as well as those in pandemic-affected industries quickly discovered that reform was limited and piecemeal. So too were the outcomes of the Government's touted 'accord 2.0' (WE, 2020b) or corporatist approach. These gestures of goodwill enticed the labour movement to participate in formulating a post-pandemic recovery plan, lending the Government legitimacy while allowing it to shelve its beleaguered 'Ensuring Integrity' legislation. Despite the Government's 'bi-partisan' rhetoric,

its recovery policy closely resembles traditional Coalition industrial legislation, unevenly distributing the costs of pandemic recovery to workers.

Meanwhile, state Labor Governments introduced a flurry of new industrial legislation reflecting a range of recent state legislative trends discussed by the authors of this annual legislative review article over the past three years (Rawling and Schofield-Georgeson, 2018; 2019; and Schofield-Georgeson and Rawling, 2020). 'Wage theft' or worker underpayment was criminalised in both Victoria and Queensland – a move eventually adopted in weaker, draft legislation both federally and in Western Australia (WA). Meanwhile, WA joined the list of states to enact industrial manslaughter laws and mental health was prioritised in the workers compensation schemes of Victoria, the Northern Territory (NT) and Queensland. The Tasmanian Government implemented gig economy regulation from a conservative angle (contrasted below with last year's Victorian scheme, pp….). The Australian Capital Territory (ACT) enacted new labour-hire licensing laws as well as a human 'right to work'. And WA further overhauled its entire industrial framework. With few exceptions, state government labour legislation in 2020 was geared toward enhancing the 'protective function' of labour law, in respect to employees (Kahn-Freund in Davies and Freedland, 1983: 18; Collins, 2010: 6; Stewart et al, 2016: 5).

Commonwealth

Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (Cth); Coronavirus Economic Response Package (Payments and Benefits) Rules 2020; Coronavirus Economic Response Package Omnibus (Measures No. 2) Act, Sch 1; Coronavirus Economic Response Package (JobKeeper Payments) Amendment Act; Coronavirus Economic Response Package Omnibus Act 2020, Sch 13; Economic Recovery Package (JobMaker Hiring Credit)

Amendment Act 2020; Public Service (Terms and Conditions of Employment)(General wage increase deferrals during the COVID-19 pandemic) Determination 2020

The 'JobKeeper Scheme', created under the first of the above Acts, was the centrepiece within the Federal Government's response to the pandemic. Its objective was to provide a generous social welfare package ($1500 per fortnight) to workers, including sole traders, in pandemic-affected businesses while stimulating the economy. But rather than pay workers directly, the Coalition Government designed the scheme around managerial prerogative. The scheme was administered by the Australian Tax Office (ATO) and more directly, by employers, necessitating a complex legal framework under a newly inserted Part 6-4C of the Fair Work Act 2009 (Cth) ('FW Act'). This framework was the mainstay of the Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020 (Cth) Sch 1. For a worker to receive fortnightly 'JobKeeper' payments under the scheme, their employer was required to elect to participate before undergoing an eligibility assessment by registering a 30% decline in business revenue over a monthly or quarterly period (Payment Rules, ss6, 8(2)(b) and (4)). Further, a worker's employment must have been continuous with the employer from 1 March 2020 and throughout the duration of the payments (Payment Rules, s9(1)). The employee must have been over 16 years of age, an Australian resident (or special visa holder) not in receipt of paid parental leave, having also submitted an eligibility declaration to their employer (Payment Rules, ss2 and 9(1)).

The most contentious aspect of 'JobKeeper', however, was that it excluded most casual employees from receiving payments (Payment Rules, ss2 and 9(1)). Given that casual workers comprised around 24% of the workforce in the pre-pandemic period (ABS, 2020), their carve-out from the scheme met with significant resistance and amendment proposals

from Labor and the Greens in Parliament and was the subject of sustained criticism by the ACTU and wider labour movement (WE, 2020c; 2020d). A minority of casual employees - 'long-term casual employees', of the kind referred to in the recent cases of '*Skene*' (*WorkPac Pty Ltd v Skene* [2018] FCAFC 131; 264 FCR 536; 362 ALR 311; 280 IR 191) and '*Rossato*' (*WorkPac Pty Ltd v Rossato* [2020] FCAFC 84, both cases discussed below) - were nevertheless entitled to receive the payments (Payment Rules, ss2 and 9(1)). 'JobKeeper' was distributed to over 700,000 workers (WE, 2020e) and was the largest single item of budgetry expenditure in Australian political history (Wright, 2020) at an amount of $101.3 billion (Morrison, 2020a).

Alongside the scheme, Part 6-4C of the FW Act vested employers with significant powers to bypass statutory protections and contractual rules of employment (Neil, Chin and Parkin, 2020: 9). These powers included employer discretion to stand down employees (s789GDC), direct employees to perform different duties (s789GE) or to work from home (s789GF), to agree to change ordinary working days and times (s789GG), including payment of annual leave at half pay (s789GJ(2)) and to request employees take annual leave, which employees could not unreasonably refuse (s789GJ(1)). To these powers were added further regulations affording managerial prerogative throughout the enterprise bargaining process (discussed below, pp. ….).

Uncertainty surrounded the end-date of the scheme, fomenting ongoing anxiety among workers in pandemic-affected industries. First slated to end on 28 September 2020 (six months from the date of commencement) (s2), it was changed to 1 February 2021 (WE, 2020f), before being settled as the 28 March 2021 under the second amending 'JobKeeper Payments' Act (in August 2020. Payments were reduced on a number of occasions between

September 2020 and March 2021 such that by 4 January 2021, most recipients were receiving an amount of $650 per fortnight (ATO, 2020). Meanwhile, wage increases to public servants were deferred (see the Public Service (Terms and Conditions of Employment) (General wage increase deferrals during the COVID-19 pandemic) Determination 2020) while employers were provided bonus payments from the State for a period of 12 months in return for hiring additional employees (aged between 16 and 35 years of age) (see the *Economic Recovery Package (JobMaker Hiring Credit) Amendment Act 2020*).

This second JobKeeper package terminated annual leave directions under the first scheme and divided employers into two categories: 'qualifying employers' and 'legacy employers'. Qualifying employers were those whose employees continued to be eligible for JobKeeper payments as a result of a 30% decline in their business income under the initial scheme (Payment Rules, ss6, 8(2)(b) and (4)). Legacy employers were recovering businesses – those who had previously been eligible for payments under the first iteration of the scheme and could prove a 10% decline in business income (Parliament of Australia 2020a: 1; s789GC). Although employees of such businesses were not entitled to JobKeeper payments, legacy employers were nevertheless entitled to continuing enhanced managerial powers pursuant to the initial scheme (ss789GDC, 789GE, s789GF, 789GG).

Fair Work Amendment (Variation of Enterprise Agreements) Regulations; Fair Work Amendment (Variation of Enterprise Agreements No. 2) Regulations

The initial regulatory amendment (above) was passed simultaneously with the JobKeeper package, with a six-month time limit. The regulations enhanced employer prerogative over enterprise agreement-making by reducing the number of days notice that an employer was

required to give to employees before announcing a proposed change to an agreement (under Part 7-4 of the FW Act), from seven days to one day. This seemingly minor amendment attracted significant controversy with ACTU leader, Sally McManus, labelling the change a 'disgusting power grab' (WE, 2020g), and the Construction Forestry Mining Maritime and Energy Union (CFMMEU) challenging it in the Federal Court (WE, 2020h). The legislation was also challenged by Labor, the Greens, Jacqui Lambie and One Nation in the Federal Senate, resulting in a Government concession ensuring that any changes to agreements made under the new rules would last for a maximum of 12 months (WE, 2020h).

Less than two months later, the Government introduced amending legislation (the second amending Act listed above) to abolish these provisions. The removal of the legislation was done in tandem with a Government promise to discontinue its ongoing and controversial trade union governance legislation (the Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019). The Government had attempted to pass various iterations of the Ensuring Integrity Bill since the conclusion of the of the Abbott Government's Royal Commission into Trade Union Corruption and Governance in 2015, overseen by former High Court judge, Dyson Heydon (for detailed coverage, see Rawling and Schofield-Georgeson, 2017; 2018 and Schofield-Georgeson and Rawling 2019). As mentioned at the outset of this paper, the Bill's withdrawal was publicised as an 'olive branch' to the labour movement, enticing the ACTU to participate in bi-partisan talks on major industrial reform leading out of the pandemic crisis (see, for instance, Morrison, 2020b). However, a key section from 'Ensuring Integrity' was watered-down and reintroduced through other legislation towards the end of 2020 (discussed below, p…).

Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill (the 'Omnibus Bill')

This Bill is the product of the Federal Government's claimed 'corporatist' approach to economic pandemic recovery. But as noted at the outset of this paper, this resulting 'Omnibus' Bill does little to enhance the collective pay and conditions of employees that might otherwise drive a social-democratic or consumption-led pandemic recovery. Predictably perhaps, the Government's post-pandemic strategy contained here is mostly one-sided, delivering employers greater workforce flexibility and discretion while capping opportunities to increase wages. The legislation proposes changes to five key areas of Federal employment law: casual employment; part-time employment; enterprise agreement-making, including the better-off-overall test (BOOT); Greenfields agreements; and wage underpayment.

The Bill would reverse the definition of casual employment, recently given by the Full Bench of the Federal Court in *Rossato* and *Skene*, defining casual employment in the interests of casual employees. At the time of writing, *Rossato* is on appeal to the High Court (see the 'Court and Tribunal Decisions' article in this JIR Annual Review edition). In *Rossato*, the Court confirmed that plans for continuing work, according to a specific and ongoing pattern of work, create a permanent employment relationship, despite any employer label or agreement to the contrary. Having organised both the *Rossato* and *Skene* cases, the CFMMEU hailed the resulting decisions a landmark victory for secure employment (Maher, 2020).

The first clause of the amending Bill would redefine casual employment in accordance with the label or 'offer of employment' (s15A(1)(a)) created by an employer, rather than the employment reality experienced by the parties. In fact, the Bill would expressly exclude a Court from considering the reality or context of the employment relationship (s15A(4)). This means that a worker would be classified as casual, so long as work is offered to them on the pretext that it will be without any 'firm advance commitment to continuing and indefinite work, according to an agreed pattern of work' (s15A(1)(a)), regardless of their actual hours or pattern of work. Accordingly, the Bill reinforces the primacy of the contractual label used by an employer when making an offer of employment (s15A(1) and (4)) together with their managerial prerogative. In a further blow against the *Rosatto* decision, the Bill would allow employers to offset casual loading paid to a misclassified employee against money owing for unpaid entitlements (s545A(1) and (2)), rather than requiring employers to pay both as per *Rosatto*.

And rather than simply requiring casual employment in certain circumstances, the Bill enacts an entitlement to conversion from casual to permanent employment subject to employer discretion. Employers must offer conversion to permanent employment after 12 months, provided that a casual employee has worked an ongoing and regular pattern of hours for the previous 6 months (ss66B). But employers need not make an offer if they have a reasonable excuse (s66C). Excuses include significant changes to the hours, days and times of work occurring within 12 months of the decision not to make an offer that are evidence-based or reasonably foreseeable (s66C). Simply reshuffling work rosters, for instance, might provide such an excuse. Ongoing casuals employed for longer than 12 months who have held regular hours for 6 months will also have the right to request casual conversion (s66F), which may also be reasonably declined on the same basis as that outlined above (s66H). Casual

conversion would have the effect of a workplace right, protected by the 'general protections' provisions of the FW Act, subject to adverse action claims and civil penalties (s66L).

The Bill further seeks to provide employers covered by 12 key awards with ongoing 'flexibility' to give JobKeeper-style directions (regarding an employee's place of work or duties) for two years from the date of the Bill passing (ss789GZG, 789GZH). It would also waive requirements to pay the overtime premium to part-time employees (those who work over 16 hours per week) by allowing employers covered by the same 12 awards to conclude special contracts that would prevail over other industrial instruments (ss168M, 168Q). Unlike the 'flexibility provisions', the part-time provisions do not have a 'sunset' clause.

In the realm of agreement making, the Bill seeks to reform the BOOT – the statutory test applied by the FWC to an enterprise agreement before certification, ensuring that the agreement renders employees 'better off overall' (FW Act, Part 5). The revamped test would require the FWC to consider non-monetary benefits to employees, as well as the views of the parties (ss193(8)(b) and (c)), while continuing to sideline the views of trade unions who are not bargaining representatives. It would have also permitted the FWC to certify agreements that fail the BOOT test for a period of 2 years after the Act's commencement (Part 5, Div 2). The reform would not have been limited to pandemic affected businesses, with COVID-19 being simply one factor for consideration. Although, at the time of writing in early 2021, this plan to permit certification of agreements that fail the BOOT test has been dropped from the Bill in response to significant pressure from the labour movement. Nevertheless, from these reforms, as well as the preceding changes to employment flexibility and part-time work, it is clear that the Federal Government intends to sacrifice the industrial interests of employees, rather than those of employers, in the name of pandemic recovery.

The Bill addresses worker underpayment or 'wage theft' in a more restrained way than comparative Victorian and Queensland legislation passed earlier in the year (discussed below), which the Bill proposes to override in relation to national system employers. a Wage underpayment is criminalised by a maximum of 4-years imprisonment or a civil penalty of $1,110,000 for individuals and $5,550,000 for corporations (s324B). Meanwhile, the cap on the availability of FW Act small claims process in the Magistrate's, Local and Federal Circuit Courts has been lifted to $50,000, making underpayment claims more accessible to workers, while emphasising wage recovery as the laws' objective, rather than the penalisation of employers.

The Bill's final substantive draft amendment seeks to extend the maximum nominal term of greenfields agreements in the construction industry from 4 to 8 years (s186(5)(b)). This proposed change builds upon a Government proposal in 2019 to extend the term of such agreements from 4 to 5 years. As discussed in last year's industrial legislation article, extending the term of greenfields agreements disadvantages workers in the construction industry (and their representatives, including the CFMMEU), stifling bargaining, industrial disputation and pay increases, while benefiting some of the largest corporate interests in the mining and construction industries (Schofield-Georgeson and Rawling, 2020: 431-432). Nevertheless, this particular proposal includes annual pay rises over the course of an agreement (s187(7)(c)) and would only cover certain ministerially-declared 'major projects'.

Paid Parental Leave Amendment (Flexibility Measures) Act; Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act

The *Paid Parental Leave Act 2010* (Cth) (unamended) provided that parents – mostly birth mothers and new adoptive parents – were entitled to take parental leave, paid at national minimum wage level, over an 18-week block, at any time two years post-birth or adoption. The first amending Act (above) adds flexibility to this scheme, permitting parents to split parental leave into two periods: a 'paid parental leave period' of 12 weeks (post-birth or adoption) (s11) and a further 6 weeks of 'flexible paid parental leave' that may be taken at any time within the first two years of birth or adoption (s11D). While the measures are a small step towards 'improving women's workforce participation, economic independence and earning potential' (Explanatory Memorandum (EM), Parliament of Australia, 2020b: 1), they also foster a key Coalition objective to enhance workplace flexibility for employers and parents 'who are self-employed and small business owners' (EM: 1). The second Act (above) amends the FW Act by expanding the class of recipients of unpaid parental leave (UPL) under the National Employment Standards. Parents of babies that are stillborn, premature or that die or are hospitalised within the first 24 months of life (ss77A, 78A) will now be entitled to up to 12 months job protected leave.

Fair Work (Registered Organisations) Amendment (Withdrawal from Amalgamations) Act

This Act amends the Fair Work (Registered Organisations) Act 2009 by delimiting the previous 5-year time period from the date of amalgamation that unions had to de-merge (s94A). It does so by permitting the Fair Work Commission (FWC) to accept a union ballot by a constituent part of an amalgamated union to disamalgamate, after the existing 5-year limit on such ballots has expired, provided that the FWC considers two factors. These are: first, 'whether the amalgamated organisation has a record of not complying with workplace or safety laws and any contribution of the constituent part to that record' (s94A(2)(a)); and

second, the capacity of the future disamalgamated union 'to promote and protect the economic and social interests of its members' (s94A(2)(b)). Failure to comply with an FWC order in respect to this section or the results of a disamalgamation ballot is a civil penalty offence punishable by 100 penalty units or $22,200 (s95A(9)).

The laws are a weakened version of a controversial section of the Fair Work (Registered Organisations) Amendment (Ensuring Integrity No. 2) Bill 2019, thwarted by a combination of Labor, Greens and Cross-Bench senators, late in 2019 (see Schofield-Georgeson and Rawling, 2019: 433-434). The previous Bill would have permitted the FWC to overturn the result of a democratic union ballot to amalgamate. While the 2020 laws are less interventionist, they are specifically designed to break-up the CFMMEU (Bonyhady, 2020). The laws were supported by the ALP and were accompanied by divergent views within the union movement ((Bonyhady, 2020; WE, 2020i). Since their introduction in late 2020, the mining division within the CFMMEU have expressed interest in pursuing de-merger (WE, 2020j).

Wage Theft in Victoria, Queensland and WA

Criminal Code and Other Legislation (Wage Theft) Amendment Act (QLD); *Wage Theft Act* (VIC); Industrial Relations Legislation Amendment Bill (WA)

After numerous public inquiries and much public discussion regarding the extent and severity of Australian wage theft – particularly among low-paid workers (e.g. Parliament of Queensland, 2018: 25) – Victoria and Queensland introduced new offence provisions criminalising acts associated with failing to pay wages. Before discussing the laws in detail, it

is noted that there is a possibility that laws will not apply to most employers ('national system employers') due to a constitutional legal conflict with the federal FW Act.

Queensland approached the issue of wage theft by amending the definition of 'stealing' under its existing criminal code (ss391(2AA), 391(6A), 391(6), 391(7)), while Victoria introduced a new act containing three new offence provisions: 'dishonest withholding of employee entitlements' (s6); and 'falsification of or failure to keep employee entitlement records' in order to obtain a financial advantage (ss7-8). The relevant 'fault' or mental element is 'dishonesty', assessed objectively in accordance with the standards of reasonable people (also taken to include recklessness, or what a reasonable person would have known but was reckless to in the circumstances) (s11 (Victoria); Queensland continues to rely on a common law definition of 'dishonesty': *Peters v The Queen* (1998) 192 CLR 493). Wage theft offences in both jurisdictions are punishable by a maximum penalty of 10 years imprisonment (s398 (Queensland)), while the Victorian legislation specifies additional fines of up to $991,320 for corporations (ss7-8).

There are significant differences in each states' approach to enforcement, employer liability and wage recovery. In Victoria, wage theft is enforced by a newly established 'wage theft inspectorate' (Part 3) with powers of investigation (Part 4), similar to those of other Australian regulatory bodies. In this respect, its efficacy will largely depend upon funding by successive Victorian Governments (Clibborn, 2019: 334; Hardy and Howe, 2009: 315). In Queensland, enforcement remains mostly a matter for trade unions or 'registered employee organisations', accomplished by amendment to the Industrial Relations Act 2016 (Qld) (Chapter 9, Pt 1, Div 6), permitting employees to request information sharing regarding their wages, between their employer and union. In both jurisdictions, nothing prevents other

Government agencies, such as the police, or employees themselves, from bringing a prosecution.

Meanwhile, Victoria has adopted a sophisticated approach to corporate criminal liability, derived from the Commonwealth Criminal Code Act 1995 and Corporations Act 2001, piercing the corporate veil by implicating boards of directors and attributing criminal responsibility on the basis of a 'corporate culture' (Wage Theft Act 2020, ss11,12). By contrast, the approach to corporate liability is unstated by the Queensland legislation and remains to be defined by the Courts of that State.

The Victorian approach to wage recovery, following prosecution, is relatively straightforward. It involves an amendment to the Sentencing Act 1991 (Vic) (ss84-85), permitting Courts to make a 'restitution order' for a convicted employer to repay their employee victim. The Queensland approach, on the other hand, requires an employee to undertake additional wage recovery proceedings within a small claims or Industrial Magistrates' Court (FW Act, Part 3, Chapter 11).

Draft WA wage theft legislation is the softer of current approaches to the issue. Rather than enacting criminal provisions, the WA Bill builds wage theft into the state's existing industrial code as a civil penalty or 'serious contravention of entitlement provision' (s83EA). Unlike most regulatory offences, however, this offence nevertheless requires proof of a knowledge element and maintains a fine amount that is 10 times higher than that for other contraventions of the Act (a fine of $600,000 for corporations). But this fine amount is still significantly less than penalties enacted in Queensland and Victoria. The provision reverses the onus of proof, requiring a defendant employer to disprove allegations under s.83EA (s83EB). It has been

partly replicated by draft Federal 'wage theft' or underpayment penalties, mentioned above (p.).

Workers' Compensation and Mental Health in the States and Territories

Return to Work Legislation Amendment Act (NT); Workplace Injury Rehabilitation and Compensation Amendment (Provisional Payments) Bill (VIC); Workers' Compensation and Rehabilitation and Other Legislation Bill (QLD)

This legislation is similar to Tasmanian workers' compensation amendments, passed last year, facilitating ease-of-access to compensation payments for mental health-related injuries sustained at work (see, Workers Rehabilitation and Compensation Amendment (Presumption as to Cause of Disease) Act 2019 (TAS) and Workers Rehabilitation and Compensation Amendment Act 2019 (TAS)). Nevertheless, the amending Act in the NT (Reg 9A) and the draft legislation in Queensland (Ch 1, Pt 4, Div 6, Subdiv 3BA) are less generous than the Tasmanian provisions, restricted to emergency services personnel or 'first responders'. The Victorian draft legislation, by contrast (see Part 4), is more generous in that it includes jurors and volunteers within the public service as well as public sector workers. And where the Tasmanian, NT and Queensland legislation is restricted to claims specifically arising from post-traumatic stress (e.g. s36EC (Qld), the Victorian Bill is again more advantageous to workers, covering 'mental injury' or 'impairment' more broadly (s73A). The Victorian Bill would also provide emergency payments to claimants who seek urgent mental health treatment, covering medical expenses during a pending claim (Part 2). Of particular note is that the NT Act redefines a 'worker' to capture labour hire providers (s3B). The cumulative effect of this legislation reflects the fact that across all Australian jurisdictions, members of the emergency services have the second highest rate of workers' compensation claims (after

those in the defence forces) and many involve mental health-related illness (Kyron et al, 2020).

Labour Hire Licensing in the ACT and SA

Labour Hire Licensing Act (ACT); *Labour Hire Licensing (Miscellaneous) Amendment Act* (SA)

The last three Annual Review editions of this journal have provided comprehensive coverage of a range of developments in the realm of labour hire licensing in Queensland, South Australia (SA) and Victoria (see Rawling and Schofield-Georgeson, 2017, 2018; Schofield-Georgeson and Rawling, 2019). In 2020, the ACT became the latest Australian jurisdiction to implement such laws. The laws are similar to the current SA scheme in that they do not establish an independent authority to oversee the scheme (although they do create an Office of a Labour Hire Licensing Commissioner, Pt 3). Unlike the Victorian and Queensland schemes, the Commissioner does not have extraterritorial jurisdiction over labour hire service providers. Like all other schemes, however, the Act imposes large annual licensing fees upon labour hire services firms operating within the ACT (ss7, 23), subjecting licensees to a 'suitable' or 'fit and proper person' test (s28). Failure to pay a licensing fee is subject to the largest fine ever implemented in an Australian labour hire licensing scheme – an amount of 800 penalty units for individuals ($128,000) and 3000 penalty units for corporations ($2,430,000) (s33).

After threatening to abolish the SA scheme in 2019, in 2020, the conservative Marshall Government of SA instead amended the Act, abolishing the three-year term of imprisonment as a penalty for unlicensed provision of labour hire services (under former s11). It further

tightened definitions of labour hire workers and services under the Act (ss6-9), limiting the scheme's operation to the 'worst-affected' industries, such as cleaning and horticultural processing.

Industrial Manslaughter in WA, SA and New South Wales (NSW)

Work Health and Safety Act (WA); *Work Health and Safety Amendment (Review) Act* (NSW); Work Health and Safety (Industrial Manslaughter) Amendment Bill (SA)

The WA industrial manslaughter provisions were implemented within the context of a new *Work Health and Safety Act* - part of a wider initiative to harmonise WA's industrial framework with that of the Federal system (discussed below, p14). The enactment of this offence follows a recent trend among the states, first in Queensland in 2017 (Rawling and Schofield-Georgeson, 2018: 391-392), followed by Victoria, the ACT and NT in 2019 (Schofield-Georgeson and Rawling, 2020: 430-431).

The WA industrial manslaughter provisions are unique in that they establish a two-tier system of industrial manslaughter. The first tier creates a criminal offence with a mental element of either criminal recklessness or negligence and is punishable by 20 years imprisonment or fines of up to $10,000,000 for corporations (s30A). The second tier establishes three graduated summary offences of 'failure to comply with a health and safety duty' that either: i) causes death or serious harm (s31); ii) causes a risk of death or serious harm (s32); or iii) is a mere failure to comply with a health and safety duty (s33). Each offence is accompanied by a graduated penalty regime (from 5 years imprisonment or corporate fines of $3,500,000 for a 'Category 1' offence, to individual fines of $120,000 and corporate fines of $570,000 for a 'Category 3' offence).

To date, all Australian industrial manslaughter provisions have exclusively been implemented by state and territory Labor governments. Nevertheless, the Liberal Berejiklian Government in NSW did take action in the industrial manslaughter space, albeit without articulating the phrase 'industrial manslaughter' while amending the principal Work Health and Safety Act 2011 (NSW). The amending Act increases all substantive and pecuniary work health and safety penalties by around 15-30% (Sch 2 and 3). As significantly, the legislation lowers the standard of criminal responsibility in respect to the most serious offence under the Act (formerly, 'Category 1 Recklessness'), conventionally reserved for workplace deaths. The offence has been renamed, 'Gross negligence or Recklessness – Category 1', importing the element of 'engaging in the conduct with gross negligence' (s31(1)(c)(i)). This is a similar standard of negligent criminal responsibility to that deployed under the Victorian and NT industrial manslaughter provisions, derived from common law (see, for instance, *Nydam v R* [1977] VR 430 at 437, 438-40, 444, 445 (VSC FC); *Lavender v R* [2005] HCA 37 at [13]-[15], [17], [56]-63]).

Mining Safety in Queensland and Tasmania

Resources Safety and Health Queensland Act (QLD); Mines Work Health and Safety (Supplementary Requirements) Amendment Act (TAS)

The Queensland Act establishes an independent health and safety commission for mining in that state: the 'Resources Health and Safety Queensland' (ss5 and 6), designed to enforce a raft of existing health and safety legislation in the mining and resources sector. The Commissioner will refer prosecutions to the State's workplace health inspectorate, Work Health Queensland (Part 7).

The Commission and its enabling legislation were established following a resurgence in 'black lung' disease or 'coal workers' pneumoconiosis in Queensland which triggered a Parliamentary inquiry. A key finding of the inquiry was that there existed an extraordinary conflict of interest in the office of the previous Commissioner for Mining Safety and Health, who had always simultaneously occupied the position of state 'Director of Natural Resources and Mining' (Parliament of Queensland, 2017: 6). Accordingly, the primary recommendation of the inquiry was to create an independent office of the Commissioner (Parliament of Queensland, 2017: 6). Following these findings, Tasmania introduced similar amendments to its Mines Work Health Safety (Supplementary Requirements) Act 2012, harmonising mining-related duties and offence provisions with its general Work Health and Safety Act 2012 (s4).

Responding to Covid-19 in the States and Territories

COVID-19 Legislation Amendment (Emergency Measures – Miscellaneous) Act (NSW)*; Treasury Legislation Amendment (COVID-19) Act* (NSW)*; Construction Industry Portable Paid Long Service Leave Amendment (Covid-19 Response) Bill (WA); COVID-19 Omnibus (Emergency Measures) and Other Acts Amendment Act 2020 (VIC); COVID-19 Emergency Response Legislation Amendment Act 2020 (ACT); State Service Amendment Regulations 2020 (TAS); Community Services Industry (Portable Long Service Leave) Act (QLD)*

These Acts are but some examples of numerous amendments to state and territory industrial legislation in response to the 2020 pandemic, particularly industry-specific portable entitlement schemes. Outlined first is a 'snapshot' of NSW industrial legislation, typical of other 'emergency measures' introduced across the states and territories in 2020. Changes affected annual holiday entitlements, LSL, state-based trade union elections and workers'

compensation. For instance, the NSW Act clarified that holiday entitlements would accrue during stand down periods (amending the Annual Holidays Act 1944 (NSW), s5A). It also amended the Industrial Relations Act 1996 (NSW), delaying state-system trade union elections by 12 months (s412). The amending Act inserted a new presumption into the Workers' Compensation Act 1987 (s19B) that a worker (including casuals) contracts Covid-19 in the course of their employment if they contract the virus while engaged in prescribed employment (outlined by an extensive list occupations s19B(9)).

Existing state and territory long-service leave (LSL) legislation entitles employees to take LSL after completing a *pro rata* term of uninterrupted service (between 7 to 10 years) with a single employer (Stewart et al, 2016: 475).'Portable' LSL schemes, by contrast, enable workers to accrue LSL, regardless of any change to their employer (Div 3). Over the past 40 years, such schemes have become common to industries affected by short-term, contractual employment such as in the community services sector, as well as construction and cleaning. Accordingly, the interruption to work occasioned by the pandemic saw State Governments respond by creating new portable LSL schemes and changes to existing schemes. QLD, for instance, established a new portable LSL scheme for community services workers. NSW and WA, amended existing portable LSL schemes in the cleaning (NSW) and construction (WA) industries. Amendments dispensed with particular waiting periods to access LSL and permitted employees to take broken or part-periods of LSL. Portable LSL schemes were also amended to ensure that LSL continued to accrue throughout the duration of a stand down.

Other State and Territory Legislation

Gender Equality Act (VIC)

This new Act is similar to the Federal Workplace Gender Equality Act 2012 and is applicable to mostly state-based public organisations operating within Victoria. Under the Act, organisations have a (non-actionable) public duty to promote gender equality (s7) by conducting a gender impact assessment within their organisation (s9), before developing a gender equality action plan (s10) and submitting both to a Gender Equality Commissioner (s12). Failure to make progress towards gender equality every two years may result in a compliance notice or enforceable undertaking issuing against the organisation (Part 6). Regulations made pursuant to the Act may prescribe gender quotas and targets (s17) (so far, none have been prescribed), while the Minister must create a new State Gender Equality Action Plan every four years that binds Government organisations (s50(1)).

Public Service and Other Legislation Amendment Act (QLD)

The most significant changes made by this amending legislation include enhanced procedures for 'casual conversion' and disciplinary action within the Queensland public service. Casual, and fixed-term temporary employees may now request conversion to full-time employment after having worked in a public service position for 12 months (s194(1)(e)). Thereafter, the status of their employment must be reviewed annually (s149A(2) and (3)) in accordance with departmental need and the applicant's merit (s149A(2) and Explanatory Notes (EN), Parliament of Queensland, 2020: 13). Other procedures, such as disciplinary action, have also been extended permitting employees a more comprehensive review and performance management process before termination of employment (ss186C, 187). These changes were implemented following two major independent reviews of the efficiency and effectiveness of the Queensland public service, recommending greater job security and 'positive performance management' (EN, 2020: 1).

Equal Opportunity (Parliament and Courts) Amendment Act (SA)

This amendment to SA equal opportunity legislation permits the SA Equal Opportunity Commissioner to receive and investigate sexual harassment complaints specifically in relation to those made against judicial officers and members of Parliament (ss87, 93 and 93AA). Its enactment follows a series of high-profile sexual harassment allegations in 2020, primarily against Dyson Heydon (Gleeson, 2020). Similar allegations were made in the media against Federal Attorney-General and Industrial Relations Minister, Christian Porter and Education Minister, Alan Tudge (4Corners, 2020).

Human Rights (Workers' Rights) Amendment Act (ACT)

This Act amends the Human Rights Act 2004 (ACT) by including 'the right to work' (s27B). The provision stops short of requiring the ACT Government to provide full employment, instead prohibiting forced labour and discriminatory hiring practices (Human Rights (Workers' Rights) Amendment Act 2020, ES, 2020: 3). The section contains a number of additional limbs or rights, including the 'right to just and favourable conditions' (s27B(2)); the 'right to enjoyment of rights without discrimination (s27B(3)); the 'right to form or join a work-related organisation and protection from anti-union action' (s27B(4)-(5)). Similar provisions were implemented in Queensland last year (Human Rights Act 2019 (QLD), ss15, 18 and 22) (Schofield-Georgeson and Rawling, 2020: 439-440).)

On-demand Passenger Transport Services Industry (Miscellaneous Amendments) Act (TAS)

Tasmania becomes the second Australian State, after Victoria in 2019, to regulate parts of the gig economy related to 'ridesharing' (Schofield-Georgeson and Rawling, 2020: 428-429). But rather than regulating the platform or 'booking service provider' (companies like Uber and Lyft), as the Victorian legislation does by enabling the Minister to set a fair price for services, this Tasmanian Liberal Government legislation focuses upon rideshare 'operators' or drivers (Passenger Transport Services Act 2011, as amended, s11). In this respect, the Act attempts 'to provide a level playing field for the various operators in the industry' - being taxi and rideshare drivers (Fact Sheet (FS), Parliament of Tasmania, 2020). It does so by imposing accreditation (s10) and licensing fees and processes on all operators (s24A), while reducing licensing fees for taxi drivers (FS). The effect of the legislation then is not to enhance pay and conditions for rideshare drivers. Rather, it imposes regulatory constraints upon them (instead of the platform company), while enhancing conditions for competition between taxi and rideshare drivers.

Personal Injury Commission Act (NSW)

This Act altered workers' compensation law in NSW by subsuming the Workers' Compensation Commission (WCC) into a division of a new 'Personal Injury Commission' (PIC) (s6 and Pt 2, Div 2.3). The PIC will deal with a range of motor vehicle accidents and workers' compensation claims and is designed to increase the efficiency of medical assessments that are common to both types of claims (Explanatory Notes (EN), Parliament of NSW: 1).

Industrial Relations Legislation Amendment Bill (WA)

This draft amending legislation is the primary vehicle to harmonise the state's industrial relations system (Schofield-Georgeson and Rawling, 2020: 440-441). Like the Federal FW Act, enforcement is a principal focus of the Bill, which introduces a range of new civil penalty provisions, increases penalties for existing offences and enhances powers of the state inspectorate (Part III). A further focus is wage theft, systematic worker underpayment (discussed above) and restrictions on sham contracting arrangements (Part VIB). The Act also clarifies and declares particular employers to be state-based, rather than national system employers (s80A). While this Bill lapsed in December 2020, it will presumably be reintroduced by a re-elected McGowan Labor Government.

Conclusion

The Morrison Government's initial response to the 2020 pandemic was a mostly bi-partisan one. It did not take long, however, for the Government to colour this response with an acutely political hue, proposing in its Omnibus Bill, that the greatest burden of pandemic recovery should be borne by workers, rather than employers. Nevertheless, the Federal Government's treatment of workers in this space was offset to some degree by a protective perimeter of industrial legislation enacted mostly by Labor State Governments around the edges of an increasingly employer-centric federal framework. Among the States' activities this year was underpayment and 'wage theft' regulation, industrial manslaughter offences, increased access to workers' compensation and portable LSL.

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