
Employment and Industrial Relations – What is in store for 2022?

December 2021



Reflecting on our combined decades of experience, the consensus view of the Corrs Employment and Labour team is that the years 2020 and 2021 were like no other. The once in a century pandemic impacted every workplace, most work practices and just about every business model. Business leaders needed to be directly involved in the very difficult decisions affecting the way their employees work, whilst making rapid and significant changes to deal with the health, safety and economic impacts of the pandemic. Stakeholders had no choice but to adapt, and most did so successfully.

We also believe that the post-COVID-19 workplace will not be a return to 'normality'. The world of work has changed. Many trends have accelerated, or have been overtaken by the next movement. 2022 will be a year of picking up the pieces, wiping off the debris and moving forward with the benefit of lessons learnt from the COVID-19 years so far. This will involve addressing difficult issues, as businesses evolve and develop future working models.

Corrs believes the most significant employment trends for 2022 will include:

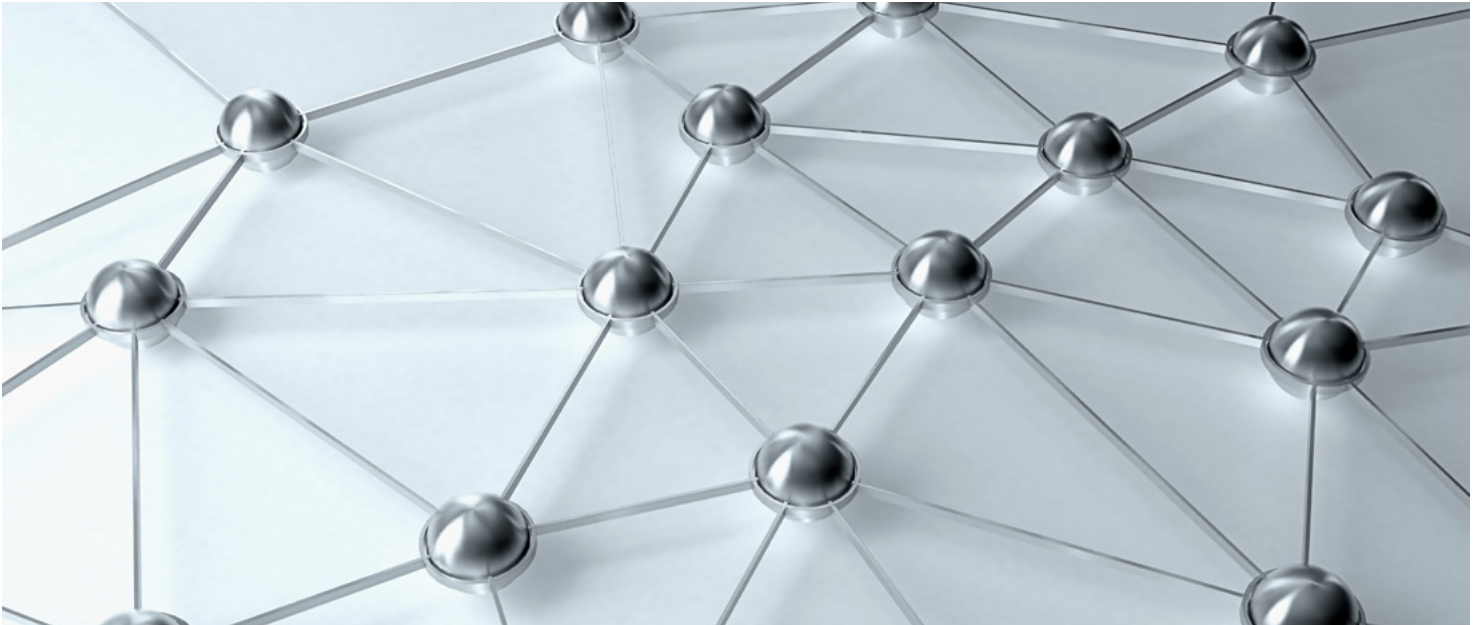
- work transformation and the future of work;
- compliance and enforcement;
- election driven policies and regulatory reform;
- enterprise bargaining;
- Respect@Work policies; and
- remaining COVID-19 considerations such as vaccination policies.

The future of work

COVID-19 has brought the future of flexible working much closer. For many areas of employment the practice of working from home is now an ongoing reality, and COVID-19 has provided a live experiment on its practical impacts. As the necessity of working from home looks likely to be reduced, and a broader suite of work options are evaluated, businesses and their employees will explore the pros and cons of flexibility from their respective positions.

Some of the questions that both employers and employees have front of mind include:

- What is the impact on productivity and culture?
- What will be the future impact of Environment, Social and Governance (ESG) issues on work practices?
- Is working from home a desirable form of work / life balance?
- Is the option to work from home now a standard employment benefit?
- How are record keeping obligations met, industrial instruments complied with and health and safety measures taken?
- Will the gig economy continue to grow under the microscope of increased regulation?
- What is the future for labour hire and contracting models?
- Will the anticipated High Court cases on the status of independent contractors confirm existing practices or shift the dial?
- Has the 'casual dilemma' been fixed? Will casual conversion be strengthened further?
- Will there be greater portability of entitlements and an ability to package leave entitlements?
- Will part time employment be the new normal?
- What will be the future for consecutive fixed term contracts?
- Will there be a quantum change in certain industries as they recover from the pandemic – will airline operations, tourism and tertiary education morph into new business models and what will be the employment implications?
- How will skill shortages, lifestyle choices, the 'great resignation' and changing generational priorities impact on productivity, attraction and retention?



Compliance and enforcement

The Fair Work Ombudsman (**FWO**) has revealed that over 70 large employers in Australia are being investigated for underpayments. Prosecution of Australia's largest employer has been announced and Australia's largest listed company is also facing a significant remediation bill.

Despite investigations, identification of breaches, enforceable undertakings and prosecutions, there are still many unanswered questions, including:

- How do you quantify an underpayment when there are no records of working time? How do you treat voluntary employee breaks and flexibility sought by employees? Has the relevant award changed when COVID-19 led to business changes?
- If big business is having such significant difficulties, how are small and medium businesses faring? Now that the retail and hospitality sectors are re-opening, what will be the result of FWO audits?
- Will state 'wage theft' laws be activated to take bigger scalps, or be held to be unconstitutional?
- Will executives and directors be casualties in the looming crackdown? Will corporate reputations be further tarnished?
- What will become of the recommendations of the Migrant Workers' Taskforce?
- Will the stalled reform of the federal penalty regime follow the coalition approach or the revamped Labor Party/ Australian Council of Trade Unions (**ACTU**) model?
- What will be the form of criminalisation of wage theft?
- Is there a role for the Fair Work Commission (**FWC**) in determining the level of underpayments?
- Will attention be given to the major underpinning source of compliance problems – the complexity of the award system? Is there hope for ground breaking reform such as universal exemption rates and loaded rates?

Federal and state election policies

Proposed changes in the law will always require consideration and preparation, therefore businesses must anticipate possible changes and be confident that they can handle the transition. The Fair Work Act has been in operation for over 10 years, however both unions and employers have expressed concerns that it is not operating effectively. The critical question is how to develop changes through the political dynamics of the time?

With a Federal Election due before May and state elections due in South Australia and Victoria, significant questions for 2022 include:

- There is unfinished business arising from the Morrison Government's working group process. But did that represent the right compromise? Is there an appetite and an available narrative for more significant reform?
- How will industrial relations (**IR**) policies figure in the state and federal elections – and the consequent mandates?
- Will the coalition go to the election with the IR Omnibus Bill compromises, or a more ambitious agenda? How much of the ACTU wish list will be picked up by the Labor Party?
- Are we destined for another enquiry into the problems and proposed solutions of the IR system?
- How does a government address the so-called 'cancer of insecure work' without removing necessary labour flexibility now widely used across the economy?
- Will the Labor Party strengthen bargaining by increasing the power of unions to force bargaining and agreements?
- How will 'same job, same pay' apply in practice?
- What will be the impact on the gig economy, labour hire, casual employment, consecutive fixed term contracts and specialist contracting work?

Enterprise bargaining

The number and employee coverage of enterprise agreements in Australia has continued to decline. The June 2021 data published by the Attorney General's department shows there were 10,182 current (not expired or terminated) agreements as at 30 June 2021, a fall from around 25,000 in 2010. The June quarter 2021 employee coverage of 1.78 million represents a reduction of 18%, from the 2.16 million employees at 30 June 2020.

These declining numbers pose the questions:

- In the absence of legislative reform, will the incidence of enterprise agreements continue to decline?
- Will unions in industries such as transportation, logistics and construction establish and consolidate industry bargaining rounds? Will unions be able to extend this model to other industries?
- Can we expect a growth in union militancy in key economic industries?
- What can we expect next from recently established disrupter unions?
- Will enterprises with established direct employee engagement models be able to continue to operate outside the system?
- Will viable alternatives to formal enterprise bargaining grow and prosper?
- Will business be able to sustain award-plus, single status and opting out arrangements?
- What will be the fate of union attempts to force bargaining in enterprises which do not have current enterprise agreements?
- Will union income streams such as worker entitlement and training funds be spread and expanded through bargaining?
- What will be the impact of legislative reform on the bargaining system? There is a widespread view that the system is broken – but the proposed solutions are widely divergent.



Respect@Work

Sexual harassment continues to be prevalent in Australian workplaces as Sex Discrimination Commissioner, Kate Jenkins' report Respect@Work has made clear. There is broad consensus across the community, government and business that this must change, with prominent questions for 2022 being:

- What has been the impact of the most recent legislative reforms? What further reforms can be expected?
- How will addressing sexual harassment from a workplace health and safety risk assessment based approach play out?
- How will boards equip themselves, their executives and their managers to engage in trauma informed processes for responding to sexual harassment?
- What is the impact on processes to address allegations of sexual harassment made against high profile executives or public figures – particularly in the context of recommended levels of transparency and current defamation laws?
- Will the spectre of unfair dismissal applications continue to impact disciplinary action for sexual harassment? And how might stop bullying and harassment orders have an impact?

Mandatory vaccination

As 2021 draws to a close, Australia has a confusing and fluctuating mix of border restrictions, health orders and operational restrictions. Several legal challenges have been unsuccessful, but political and workplace debate rages on.

Mandated vaccinations have been tested before an FWC Full bench – emphasising the need for very close attention to consultation obligations. In addition specific cases are emerging via unfair dismissal applications.

As vaccination levels continue to rise, booster jabs become available and the incidence of COVID-19 waxes and wanes in Australia, changes in the relevant circumstances will require further consideration of these issues – including processes involved in the introduction of vaccination policies. It will be some time before a clear pattern emerges from litigation, yet employers will not always have the luxury of awaiting the outcome.

Our approach

The Corrs Employment and Labour team is supporting our clients in dealing with these challenges. We will continue to assist with developing strategies and solutions to the specific challenges being faced – including holding seminars and networking sessions and preparing publications that explain more of the detail behind these and other employment issues in 2022. These will facilitate better understandings of the trends and options available for your business.

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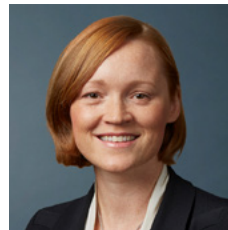
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