

Big problems in Fair Work Act

The new work laws add severe complications to shifting employees between subsidiaries, writes Peter Wilson.

Global economic competition is intensifying each year, and Australia's ability to compete is not guaranteed, given the flat performance in our total factor productivity over the past five years. A recent white paper published by the Australian Human Resources Institute shows that globalisation remains a powerful force on business, and the capacity of firms to restructure quickly, effectively and efficiently is vital to ensuring their survival and their contribution to economic performance and national prosperity.

The intensity of world competition is also driving many firms to outsource non-core activities in order to remain competitive where they have core strengths.

The ultimate choice for Australia is not between Work Choices or Fair Work, but whether our industrial regulations and fairness standards are themselves globally competitive and non-bureaucratic. Recent evidence on that front is not positive.

Not long after the Fair Work Act became law last year, the AHRI

received a number of persistent complaints from employees of a major Australian subsidiary to the effect that their employer would no longer allow them to move from one business entity to another within the group. Those employees were seeking promotional opportunities but were refused access. The only reason offered was a reference to the transfer of business provision in the new workplace relations legislation. The employer had decided as a matter of policy that movement within the group was too hard under the Fair Work Act, and was saying to its employees "we simply won't be allowing it".

A year later, in association with a university research partner, the AHRI has just completed a survey of about 1000 senior business and human resource practitioners about how the Fair Work Act is travelling in their workplaces, following a similar study on Work Choices during 2007.

This 2010 survey received detailed responses from the majority of respondents on the impact of the new act in areas such as workplace contracts, flexibility, record keeping, legal advice, union involvement, pay, leave, hours, conditions, absenteeism, bargaining, disputes and unfair dismissal.

A critical issue has emerged around the act's transfer of business provision, which attracted answers from slightly more than 10 per cent

of respondents, roughly in line with expectations given the proportion of businesses currently considering substantive outsourcing or insourcing solutions. However, the tenor of answers received gave every indication that the issue is a sleeper and likely to be the cause of greater concerns over time as a broader based need to restructure intensifies in line with a rebounding world economy.

While a small proportion of respondents reported positively, more than one-third reported

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negative or very negative impacts to the business.

The small minority reporting favorably on the provision mentioned its clarity, seamlessness, and the benefits of employee reassurance for continuing employment without resorting to redundancies. One mentioned a transfer complication that could have caused a site close-down but for the positive intervention of Fair Work Australia, thus sounding a positive note for the new umpire.

On the negative side, however, a much longer response list included refrains that staff transferring under this provision are forced to

bring with them industrial instruments often unsuited to a new entity's business strategy or culture.

Apprehension was expressed by a number of respondents about an inability to unblock employee benefits or reduce costs using outsourcing solutions. In the event of a business being sold, there were reports of buyers showing reluctance to take on existing staff and a preference for engaging labour-hire companies.

Many respondents opined negatively about the extra complexity in doing mergers and acquisitions, the added compliance matters requiring costly legal advice and the power that the transfer provision gives unions to intervene that are cumbersome and onerous.

The balance of evidence available to date from our Fair Work Act survey is that the transfer of business provision is unnecessarily impeding and complicating business restructurings and damaging future competitiveness, and that these consequences will intensify. At its best, the new legislative workplace relations framework is opening up a number of flexibility options for employers and employees, but the section of the act on transfer of business is heading in the opposite direction.

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