

# “ALL IS FAIR IN LOVE AND WAR” - BUT WHAT ABOUT IN INDUSTRIAL RELATIONS?

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Legal Briefings - By **Anthony Longland and Adam Lambert**

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It was once said (and many times repeated) that “[t]he adage “all is fair in love and war” is... as much applicable to industrial warfare as to any other type.” In other words, industrial relations is (or at least has traditionally been) a battle ground where parties have been largely free to pursue their own interests as they see fit, provided they are acting within the law.

Looking ahead to the upcoming federal election, it is clear that the scope of this general principle is likely to be further refined under an ALP government with the ‘industrial umpire’ (the Fair Work Commission) likely to be permitted to involve itself in a broader range of matters than it has previously.

The ALP’s bold agenda for workplace reform is not just focused on giving more power to employees and unions; the FWC will also gain greater powers under an ALP government. And it is likely there will be different powers as well.

The role of the ‘industrial umpire’ has been a unique feature in Australian industrial relations since Federation. Its powers and significance have changed over time. The current legislation, *Labor’s Fair Work Act 2009* brought about a slight increase in the tribunal’s role in Australian workplaces, reversing the general downward trend in this area over the previous decade.

Based on the ALP’s policy announcements, it appears highly likely that the FWC can expect to see its powers significantly further expanded should the ALP be successful in securing government in this month’s federal election.

Labor will not shy away from giving the umpire a “*stronger whistle*” (to use the language of Brendan O’Connor, the presumptive Minister for Workplace Relations in the event of an ALP government). It should hardly come as a surprise that a policy platform that seeks to ‘change the rules’ will also change the role of the FWC. In many respects, it will be the employer’s ‘managerial prerogative’ that will be the casualty of these changes.

## **WHAT CHANGES ARE WE LIKELY TO SEE?**

The expansion of the FWC’s powers can be seen in a number of the ALP’s policy announcements. Some key examples are set out below.

### **CASUAL CONVERSION**

Labor has announced that it will provide workers with a right to challenge an employer who unreasonably refuses a request to convert from casual employment to a permanent role. The FWC will hear this challenge, and it is likely that it will be afforded powers to order that the employer provide a permanent role. This is unprecedented.

It would effectively enable the FWC to determine who an employer must permanently employ. Given the size of Australia’s casual workforce (and that over a million casual employees are estimated to have been employed by the same employer for more than 12 months), this reform could significantly increase the number of disputes before the FWC.

In addition to an increased work volume, this reform would also mark a conceptual shift into new territory for the FWC – that is, being empowered to determine who an employer must employ and the basis of that employment. For more than a century, such matters have been confined to an employer’s managerial prerogative.

### **MANDATORY ARBITRATION POWERS**

Labor has announced that it will empower the FWC to arbitrate disputes arising from modern awards, enterprise agreements or the National Employment Standards. Presently, the FWC is only empowered to arbitrate such matters where the parties have expressly agreed to confer such power on the FWC.

The Constitution places limits on the scope of such powers (i.e. the FWC cannot exercise judicial power, which is reserved for Commonwealth Courts). However, this will nevertheless mark another change which will give the FWC the ability to intervene in matters that have previously been left to the discretion of employers.

The nature and scope of the FWC’s role in resolving disputes has been a matter for the parties to agree during bargaining. That is frequently a matter about which one side or the other will make concessions in order to achieve other outcomes elsewhere in their agreement. Accordingly, just how this policy will be introduced will be extremely interesting.

### **ARBITRATION OF BARGAINING DISPUTES**

On 15 March 2018, Brendan O'Connor observed that the *"renegotiation of expired agreements, instead of taking months, is taking years"* and that an *"arbitral power for the Commission could be used primarily as leverage to bring parties to negotiation, and to bring seemingly intractable disputes to resolution"*.

The FWC, of course, already has the power to arbitrate industrial disputes in very limited situations (such as, where industrial action causes significant economic harm to the parties or endangers the life, safety, health or welfare or causes significant damage to the Australian economy). Presumably, the ALP will look to lower the bar to accessing this function. Perhaps the FWC's arbitral powers could be triggered after an unsuccessful employee vote or after a minimum period of protected industrial action has expired.

Wherever the line is drawn, however, it is reasonably safe to assume that the effect of the reform will be that the FWC will have greater power to impose new legal obligations against the will of the parties. This may also present new opportunities but it will certainly influence future enterprise bargaining strategies on both sides.

## **GOOD FAITH BARGAINING**

The ALP's National Platform announced that *"Labor will promote and ensure good faith bargaining in workplaces... to allow access to and assistance from the independent umpire to resolve disputes"*.

The current legislation already enables the FWC to resolve disputes regarding whether a bargaining representative has met its good faith bargaining requirements. However, Labor has said that *"the good-faith bargaining provisions are not robust enough to bring bargaining to a conclusion"* - so reform in this area is highly likely. The Platform makes explicit reference to requirements such as 'truth in bargaining' and the release of information justifying why a claim cannot be agreed. There may be other additional requirements that are imposed. If the FWC's broad power is expanded to make orders in these areas, we might well see the tribunal playing a far more active role in bargaining.

The detail that sits behind such reform is not yet clear, but it is not far-fetched to expect that the policy might involve expanding the meaning of 'good faith bargaining' (potentially by explicitly requiring employers to disclose business information that may influence an employee vote, for instance) or by simply removing the existing assurance in the legislation that the good faith bargaining requirements do not require a bargaining representative to make any concessions during bargaining or to reach agreement on the terms that are to be included in the agreement.

This kind of reform would in turn enable the FWC to become more involved in the bargaining process. Since the reintroduction of 'good faith bargaining' a decade ago, the FWC has largely honoured the principle that the FWC should be slow to interfere in the legitimate tactics undertaken by parties during the bargaining process. This approach might be significantly watered down under a Labor government.

# WHAT CAN EMPLOYERS DO TO PREPARE?

Whilst the role and powers of the FWC (and its predecessors) have changed over time, there has been jurisprudence that has generally guided the umpire away from unnecessarily curtailing the employer from managing its business as it chooses.

Perhaps the clearest example of this is the often cited *XPT Case*, (decided way back in 1984), which provided that unless an employer's managerial prerogative was expressly prevented by law the role of the Commission was *"to examine all the facts and not to interfere with the right of an employer to manage [its] own business unless [it] is seeking from the employees something which is unjust or unreasonable."* Similarly, courts have confirmed that the Commission should not prevent an employer from engaging a particular contractor. Even the revered *Harvester* judgment, which set the first arbitrated terms and conditions of employment in 1907, proceeded on the basis that a fair and reasonable wage was to be determined by reference to societal standards – not the profitability of the employer. Justice Henry Bourne Higgins declared powerfully that this was a matter which was the sole concern of the relevant employer.

Of course, the FWC is a creature of statute. It can only do what Parliament has empowered it to do. But if the umpire is to be given a *"stronger whistle"* then it will need to be equipped with the tools to exercise these new powers in a fair and reasonable manner giving due consideration to the interests of all parties. It is uncontroversial to observe that most members of the FWC, whichever side has appointed them, have minimal experience in standing in the shoes of management. Even those from employer backgrounds are often skilled advocates and consultants, but they are very rarely experienced proprietors of businesses.

For employers, the need for effective advocacy will be as important as ever. If important parts of an employer's discretion is to be handed over to a third party, then the employer will need to ensure that the third party is made aware of the various pressures, concerns and factors that ought to influence the exercise of that discretion.

Should the ALP be elected later this month, all industrial parties should be looking at their own resources (both internally and externally) to ensure that they are well placed to for a new world where the FWC is reinvigorated and significantly empowered. Yes, there will be challenges for all industrial parties in adjusting to this new structure; but as always, where there are challenges, there is also frequently opportunity.

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## KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



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