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CAN LEGISLATIVE REFORM RESUSCITATE ENTERPRISE BARGAINING?

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Legal Briefings – By **Natalie Gaspar**

Enterprise bargaining in this country is on life support.

The latest statistics on bargaining trends released by the Attorney-General's department just last week[1] continue the tale of a bargaining system slowly atrophying. The data tells us that there are 27% fewer current enterprise agreements in the private sector than there was just 3 years ago. This is coupled with an increase in the proportion of employees who have their terms and conditions of employment regulated by an award – around 21% of all working Australians now, compared to 15.2% in 2010. In other words, enterprise agreements are either being terminated, or simply not replaced once they nominally expire.

Observers of the current system would hardly be surprised by these statistics. Anecdotes abound of bargaining campaigns taking far too long. Of a rigid approval process which often features demands by the Fair Work Commission ('FWC') for undertakings, and even knocks back deals that have been resoundingly endorsed by employees. Of the frustration in attempting to navigate a better off overall test ('BOOT') assessed against a complex system of modern awards, and hypothetical irrelevant scenarios which are not expressly ruled out by the agreement. Of an adversarial system which promotes combative rather than collaborative relationships, and bureaucratic processes.

And it's a bipartisan sentiment. Shadow Minister of Industrial Relations Tony Burke lamented earlier this year that bargaining is 'much harder at the moment and taking much longer than it should'.

It hardly seems worth it, right?

SO WHY BOTHER?

Enterprise bargaining was introduced in 1992 by the Keating government. It followed a number of extensive macroeconomic reforms of the Hawke government, in which Paul Keating served as Treasurer. The shift from centralised wage outcomes in the form of awards, to a system of enterprise bargaining, was profound. It moved away from industrial commissioners determining wages and conditions from the city centres, often perpetuating the notion that everyone should get paid the same for doing the same type of work, regardless of the employer, the sector, the specifics of the job, or the productivity of the enterprise. And so enterprise bargaining was introduced to enable employers and employees themselves, at their workplaces, fashion arrangements which would enhance the future success and prosperity of those workplaces. The underlying philosophy of deregulation recognises that it is the parties themselves that know what's best for their workplace. And human nature being what it is, workplaces would compete to establish innovative arrangements. This provides a win-win for employers and workers alike: above-award wages could be negotiated in exchange for productivity measures specific to the workplace.

That ideal seems lost these days. The latest bargaining trends report highlights this with a telling statistic: almost 20% of enterprise agreements approved in the June 2020 quarter, covering 53.6% of employees, do not contain quantifiable wage increases. In large part, this is because wage increases in these enterprise agreements are linked to future outcomes of the Fair Work Commission's annual wage review. This accords with a trend I have observed in some sectors, whereby enterprise agreements slavishly mirror the terms of the underlying award. So it seems that employers and employees are enduring a protracted bargaining and approval process only to be lumped with an agreement that largely replicates the underlying award. Somehow, it's all just become too hard.

This, surely, is a far cry from Prime Minister Keating's vision when he introduced the enterprise bargaining system nearly 30 years ago.

Industrial Relations Minister Christian Porter says that he wants us to get back to that underlying principle; that enterprise bargaining should deliver wage outcomes in exchange for productivity outcomes. And so one of the five working groups he convened was tasked with exploring possible areas of reform related to enterprise bargaining.

However, reports indicate that legislative reform can only be expected in relation to:

- certain aspects of the application of the better off overall test
- streamlining and fast-tracking the approval process to give primacy to bargaining outcomes; and
- imposing employee pre-requisites for non-union organisation bargaining representative.

THE BETTER OFF OVERALL TEST

Employer representatives continue to express concerns about the BOOT, and the rigidity by which it is applied by the FWC. Some employer groups say it should be done away with entirely. Unsurprisingly, unions maintain that it is a necessary safeguard to protect basic terms and conditions.

Of course, part of the challenge in administering the BOOT is the mind-bogglingly complex award system which forms the basis of the comparator of the test. The FWC itself reaches different and inconsistent decisions about award application from time to time. (Our awards system is another area of potential legislative reform which my colleagues have written separately about.[2]

Nevertheless, reports indicate that there is some good news expected for employers.

The first is a legislative recognition that the FWC can take into account both quantitative and qualitative elements in conducting the BOOT analysis. Which is a little curious, because that is what the current legislation requires. But a view has emerged that it is not being done that way, and hence change is needed to expressly mandate it. This will enable benefits provided under an enterprise agreement to be taken into account even though it is incapable of having a monetary value attributed. Things like blood donor leave, which may only be accessed by a small portion of the workforce a couple of times per year, could be factored into the holistic equation. Of course, an assessment of 'qualitative' factors will necessarily involve a degree of subjectivity to be exercised by the FWC member. As always, the impact of any amendments to the BOOT depends upon how any new laws are actually applied by the FWC.

The second area of anticipated legislative change to the BOOT will seek to reverse the current practice of the FWC to test all hypothetical permutations theoretically permitted under the proposed agreement. For example, assume an employer operates a factory. It operates a day shift and an afternoon shift. It does not operate a night shift, nor does it have any intention to. The agreement it strikes with its employees doesn't refer to night shifts. None of the employees even raised it, because they knew it simply wasn't an issue for their workplace. Nevertheless, if the employer's proposed agreement does not provide for a night shift penalty which at least matches that in the underlying award, or expressly rule out any night shift work in the future, then the agreement will not be approved (at least without undertakings, which the FWC will require). Reports indicate that amendments will ensure that the FWC should only have regard to arrangements contemplated by the parties, and not to hypothetical scenarios. Employers will be very relieved to hear that they no longer need to perform mental gymnastics contemplating scenarios which have no relevance to their business.

There is a sense here of a small concession to the principle that it is the parties themselves who know what is best for them.

A QUICKER, MORE STREAMLINED PROCESS

Employer and employee groups alike often lament the timeframe that it can take for agreements to be approved (despite the FWC's recent efforts in this regard).

Nevertheless, it is anticipated that the reform package will contain measures which seek to streamline the approval process by giving primacy to the bargained outcome. A welcome change for both employers and employees alike. Options which might be considered include an 'approval on lodgement' system, where agreements commence operating as soon as they are lodged, and the approval process occurs thereafter; or a deadline after which agreements will automatically be approved.

Despite some reports indicating there might be a 'fast track' approval process for agreements negotiated with unions, recent comments from the Minister indicate that union agreements will not be given preference over non-union agreements.

Reports also indicate that the new laws will provide for a fast track approval process within 14 days 'wherever possible'. Again, the success of any such legislative change will depend upon how the FWC applies the laws in practice.

UNREGISTERED ORGANISATIONS ACTING AS BARGAINING REPRESENTATIVES

The current scheme largely gives free reign to employees to appoint a bargaining representative of their choice. There are very few restrictions on who an employee can appoint as their bargaining representative. Once appointed, that bargaining representative has all the rights and responsibilities that apply to any union bargaining representative during bargaining.

This has seen the bargaining table crowded by organisations which describe themselves as 'unions' despite not being registered under the *Fair Work (Registered Organisations) Act* the way traditional unions are. The 'Retail and Fast Food Workers' Union' is a good example. The current system permits such organisations to participate in bargaining, whilst not being subject to the scrutiny and rules applied to registered unions.

It seems that new laws will require that unregistered organisations have support from at least 5% of employees before it can be recognised as a bargaining representative. That's a very curious proposition to take, and might indicate a concession to the larger registered unions – who probably don't like the competition!

IS IT ENOUGH?

Are these changes are enough to resuscitate our flailing enterprise bargaining system? Hardly. Many employers will say they don't go nearly far enough, particularly in a post-pandemic recessionary environment where jobs and productivity are critical. But the likely changes are certainly positive steps (rather than substantive leaps) in the right direction.

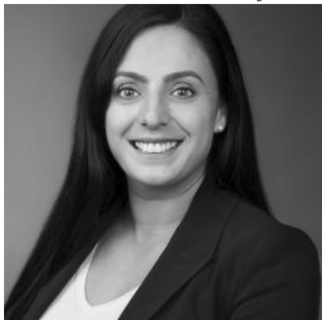
As always, much will turn on how the FWC applies these rules in practice. Let's hope that the spirit of the new laws are upheld in order to promote the approval of more agreements. Time will tell.

ENDNOTES

1. Trends in Federal Enterprise Bargaining Report – June quarter 2020.
2. 'Award Simplification – We'd Like To Do It, But We Just Can't Work Out How'.

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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