HERBERT SMITH FREEHILLS

EMPLOYERS SUGGEST CHANGES TO THE INDUSTRIAL ACTION PROVISIONS

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Legal Briefings

A number of employers have made submissions to the Productivity Commission's Inquiry into the Workplace Relations Framework calling for changes to the industrial action provisions in the Fair Work Act.

An increasingly common tactic of unions during bargaining is where unions notify the employer that employees intend to take protected industrial action on a particular day, but then cancel the action at the last minute. The consequences of this tactic was raised by the Qantas Group, Transfield and QUBE in their submissions to the Productivity Commission.[1] This tactic often results in employers incurring significant costs in developing contingency plans to mitigate against the effects of the protected industrial action, even though the action does not eventuate. There is also very little, if any, impact on employees, as employers are not permitted to deduct employees' pay for protected industrial action that is notified, but not taken.

A number of changes to the Fair Work Act have been suggested by employers to address this issue:

- Transfield suggested that the Fair Work Act should provide that if a notice of protected industrial action is withdrawn with less than 24 hours' notice to employers, employers should have the ability to refuse to accept employees making themselves available for work, and employees should be prohibited from engaging in any protected industrial action for 30 days,[2]
- QUBE submitted that a mechanism should be introduced where employees and unions can only give notice of protected industrial action that they 'genuinely intend to take', and that penalties be introduced if employees and union do not genuinely intend to take

the action that was notified,[3]

- Qantas submitted that employers should be entitled to deduct from employees' wages an amount equal to the duration of the defensive action taken by an employer if notified industrial action is cancelled and the employer incurs costs associated with defensive action. Qantas also recommended that there be a new ability to stand down employees because they cannot be usefully employed as a consequence of that defensive action,[4]

- BHP suggested that unions that engage in repeatedly giving notice of protected industrial action and withdrawing it should be prevented from giving further protected action notices for a specified period (e.g. 90 days), unless the Fair Work Commission has certified that the withdrawal was reasonable based on appropriate tests, or the employer has specifically agreed to the withdrawal.[5]

Another common theme in employers' submissions is that the right to take protected industrial action should only be a last resort – once all reasonable efforts have been made to reach agreement between the parties. At present, the *JJ Richards* decisions[6] mean that protected industrial action can be taken even before the employer has agreed to bargain with employees, as long as the Fair Work Commission is satisfied that the employees' bargaining representative is genuinely trying to reach agreement with the employer. While the *Fair Work Amendment Bill 2014* seeks to change this to only allow protected industrial action to be taken after the 'notification time', the legislation has been stalled in the Senate in 2014 and 2015.

Employers have suggested a number of different changes to the Fair Work Act to encourage employees and unions to negotiate and conciliate bargaining disputes, and only take protected industrial action as a last resort. These include:

- Transfield submitted that the Fair Work Act be amended to prohibit protected industrial action from being taken by employees before the following steps have been reached:

    - bargaining has formally commenced, negotiations have been significantly advanced and/or there is a genuine impasse in bargaining,

    - genuine productivity issues have been included in the negotiations,

    - a majority support determination has been made by the Fair Work Commission, and
    - employees and unions have made a demonstrated attempt to bargain in good faith with the employer.[7]
- Rio Tinto submitted that protected industrial action should only occur after formal negotiation meetings have commenced and if a bargaining party is not bargaining in good faith, only after good faith bargaining orders have been made by the Fair Work Commission,[8]
- Asciano has suggested that a mandatory cooling off period be introduced before the commencement of industrial action during which time parties would be required to engage in conciliation and/or mediation,[9]
- BHP submitted that protected industrial action should only be available where an employer has agreed to bargain or, if not, a majority support determination has been made, and where the Fair Work Commission is satisfied that an impasse in negotiations has been reached.[10]

In its submission, Qantas has also raised concerns about unions making statements to the media that industrial action will occur and will have a certain effect even though it has not notified the employer of that industrial action. Some of these statements are intended to impact negatively on customers and the employer's brand, without employees incurring any losses. Qantas submitted that claims surrounding industrial action should only be made by employees and their representatives regarding the effect of industrial action, if the protected industrial action has been notified to the employer, and there is a reasonable basis for the statements.[11]

Endnotes

1. Transfield's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 6; QUBE's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 7-8; Qantas Group's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 12-13.
2. Transfield's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 6.
3. QUBE's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 7-8.
4. Qantas Group's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 12-13.

5. BHP's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 12.

6. See for example, *TWU v JJ Richards & Sons Pty Ltd* [2010] FWA 8766, a proposition which was not overturned on appeal in *JJ Richards & Sons Pty Ltd v TWU* [2010] FWAFB 9963; *TWU v JJ Richards & Sons Pty Ltd* [2011] FWA 973, which was upheld on appeal in *JJ Richards & Sons Pty Ltd v TWU* [2011] FWAFB 3377; and by the Full Court of the Federal Court in *JJ Richards & Sons Pty Ltd v FWA* (2012) 201 FCR 297.

7. Transfield's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 6.

8. Rio Tinto's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 21.

9. Asciano's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 12.

10. BHP's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 12.

11. Qantas Group's submission to the Productivity Commission's Inquiry into the Workplace Relations Framework, page 13.

KEY CONTACTS

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