

ENTERPRISE BARGAINING - IF IT'S 'BROKEN', IS THERE A FIX AHEAD?

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Legal Briefings - By **Rohan Doyle**

What will become of our enterprise bargaining system if the ALP takes power in this year's federal election?

There has already been much talk of the possibility of industry bargaining. However, there is a more significant change to our enterprise bargaining system suggested within the pages of the ALP's national platform. A change that would be easier to implement, and have even greater consequences, than an industry bargaining system. A change that could bring some employers and supply chains who rely on indirect labour to breaking point...

“THE SYSTEM IS BROKEN”

The catchcries of “the system is broken” can be heard loudly from both camps, albeit for different reasons. On the union side, the calls for change seem based on the belief that the current system doesn't drive wages growth and has resulted in “wage stagnation”. In support of this view, the ACTU has pointed to:

- difficulties in encouraging employees to take industrial action;
- the relative ease in which employers can lock out employees and terminate enterprise agreements to force employees to accept a deal; and
- the ease in which employers may outsource work to ‘cheaper’ labour (labour which, incidentally, can be accessed when required to soften the impact of industrial action).

Many employers vehemently disagree with the proposition that they have it too easy, and are calling for change in the other direction.

THE ALP'S NATIONAL PLATFORM

The key question is how does the ALP intend to fix the system it describes as “collapsing”?

Labor's National Platform, finalised in late 2018, paints a very clear picture of the ALP's objectives for a new enterprise bargaining system. In particular, the ALP intends to:

- increase wages (the Hon Bill Shorten MP last week called the upcoming election “a referendum on wages”);
- increase the prevalence of collective bargaining (perhaps both the proportion of workers covered by agreements, and the frequency of bargaining for replacement agreements, including by providing employees with a greater capacity to force bargaining);
- increase union involvement in bargaining; and
- reduce the incidence of casual employment, franchising, outsourcing, subcontracting, labour hire and partnership agreements (or at least ensure that workers under those arrangements receive the same terms and conditions as direct employees in the same workforce).

The overarching theme is that the “wage stagnation” problem is being driven by the rise of insecure work, casualisation and labour hire.

A SUPER-CHARGED “MULTI-ENTERPRISE” BARGAINING SYSTEM

It doesn't take much reading between the lines to see how the ALP might try to achieve the above objectives through some relatively minor tweaks to the current system and without resorting to an industry-based system. One obvious avenue is through multi-enterprise bargaining; not at the industry level, but rather at site or supply chain level. Whilst such a multi-enterprise scheme might be restricted to lower paid enterprises, or where there is no current and operative enterprise agreement, there is a real possibility that the scheme won't be restricted in this way.

This avenue is 'obvious', and the tweaks required are 'minor', because we already have a multi-enterprise system - it's just rarely used. The reason it is rarely used is because there is generally no reason for separate employers (i.e. those that are not 'single interest') to join their bargaining rounds together in this way, and there is no way for employees and unions to compel them to do so (except in limited circumstances through the low paid stream and without access to protected industrial action). All of this would change with two very minor amendments to the existing legislation (by enabling employees to force multiple employers to bargain together, and by allowing protected industrial action in support of it).

THE IMPACT OF MULTI-ENTERPRISE BARGAINING

What impact would this have? These two minor tweaks would create a fundamentally different bargaining system and alter the balance of bargaining leverage significantly.

Currently, many employers have access to alternate labour sources, including through labour hire and contractors (indirect labour). This is helpful for a range of reasons, including:

- maintaining continuous production through peaks and troughs of labour demand, covering employee absences on leave or during periods of industrial action;
- attracting niche skills that are otherwise not freely available; and
- achieving cost savings through economies of scale.

Ultimately, these things drive productivity and cost efficiency and have, at least in part, contributed to employers' ability to maintain or improve terms and conditions of employment for their own direct workforces through traditional enterprise bargaining.

From a bargaining leverage perspective though, access to indirect labour gives some employers, in certain circumstances, the capacity to withstand protected industrial action campaigns. Unions see this as a threat to job security and the bargaining power of direct workforces.

Of course, unions are therefore incentivised to bring direct and indirect labour together to bargain collectively and take protected industrial action collectively. In fact, this type of multi-enterprise bargaining could potentially extend to all organisations within a particular supply chain, which would have significant implications from an industrial action perspective.

The impact of such a reform should not be underestimated, as it has the capacity to bring some employers and supply chains who rely on indirect labour to breaking point. The industrial pressure applied through multi-employer industrial action would be immense. It could significantly shift bargaining leverage in favour of employees and unions and could result in a significant uplift in strike action in pursuit of driving wage levels to the highest common denominator across the various different employers participating in the bargaining round.

Invariably, this could result in wages growth for the short to medium term. But at a cost. Employers with the capacity to pay will do so (at least in part) and there will ultimately be less discrepancy in terms and conditions between direct and indirect labour.

But many employers won't have the capacity to pay - at least without significant structural changes to business to drive down the cost base. Some will look to automation, partial divestment or offshoring. Perhaps not by accident, the platform refers to an automation tax. Some business models might simply become unsustainable, or might need to find a new wages equilibrium lower than current direct employee rates.

A critical question then arises: What rights will employers have to apply to suspend or terminate industrial action? This becomes even more critical in a new world of multi-enterprise bargaining. One can foresee an increasing reliance on applications to terminate industrial action based on threatened harm to employers and the economy.

ADDITIONAL TWEAKS TO THE BARGAINING PLAYBOOK

The above changes might also be coupled with other changes to the bargaining system that will also shift leverage away from employers. For example, the ALP national platform suggests:

- prohibiting employers from terminating existing enterprise agreements post their nominal expiry dates;
- prohibiting “unrepresentative” agreements (presumably those that seek to cover employees in particular classifications of work that are not yet employed by the employer);
- prohibiting organisations from applying different terms and conditions to workers for the same work (across both direct and indirect labour at the same workplace);
- additional obligations on employers to disclose information in bargaining (for example, to provide even greater justification of a refusal to agree to a union wage claim);

- greater access to arbitration; and
- reinforced rights for union members and union delegates to conduct their affairs “without interference”, and to take industrial action.

CONCLUSION

There is no doubt that the winds of change are blowing across our enterprise bargaining system. Whatever happens, employers should start by taking a fresh look at what industrial action vulnerabilities they may have across their supply chains – it may be that in the new world of enterprise bargaining, use of indirect labour to cover periods of strike action may no longer be a viable option.

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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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