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INDUSTRY BARGAINING – THE IMPOSSIBLE DREAM?

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Legal Briefings – By **Heidi Fairhall**

Multi-employer bargaining is high on the ALP's "to do" list if it wins the election, leading to speculation about the prospect of 'industry bargaining' under an ALP Government.

Bill Shorten recently stated that Australia's workplace system needs to be "renovated" for the future and industry-wide bargaining – the ability to bring multiple employers across an industry or an industry sector under the same agreement – has caught the particular attention of commentators as one area for potential radical legislative reform.

What has been largely missing from the ALP's reform proposal to date is considered analysis as to why the facility for industry bargaining already available in the current system has remained largely unutilised for nearly a decade. In this article, we look more closely at the current system and some of the challenges facing regulators installing industry bargaining into our workplace relations framework.

DÉJÀ VU? LOW PAID BARGAINING BY ANOTHER NAME…

The ALP has pledged to improve access to collective bargaining, "including where appropriate through multi-employer collective bargaining". While this theoretically could extend to industry-wide bargaining, there is scant reference to this in the ALP's campaign material, although last year, it announced its focus would be on certain industry sectors that have low-paid workers (e.g. cleaners and early childhood educators).

The ACTU has been more expansive on the issue, arguing that industry bargaining should be available where enterprise bargaining "isn't appropriate" or "isn't working". In addition to areas where enterprise bargaining has failed to deliver wage increases, the ACTU has also flagged industry bargaining where a third party higher up the supply chain is driving decisions on wages, or where the small size of individual workplaces means that it's not efficient for parties to go through the bargaining process.

If this sounds familiar, that's because the current system, designed by the Rudd government and in place for nearly a decade, already provides for much of this via the "low-paid" bargaining stream.

Unions and bargaining representatives already have the facility to compel unrelated employers to bargain together by applying to the Fair Work Commission for a "low paid authorisation". This option was designed specifically for use by employees where enterprise bargaining has historically been inaccessible or failed to deliver wage outcomes appreciably above award minimums.

While "low paid" is not defined in the legislation, the Fair Work Commission has supported using a threshold of two-thirds of median full-time wages as a benchmark for identifying who is "low paid". Arguably this accounts for a sizable chunk of the employees in industries or sectors that are of most concern to the ALP and ACTU.

WHAT WOULD INDUSTRY BARGAINING REFORM LOOK LIKE?

Notwithstanding the above, the ALP and ACTU have made it clear that they are not content with industry bargaining being limited to those who are "low paid".

Compelling employers across an industry to bargain with their competitors against their will, while depriving them of the opportunity to make an agreement tailored to the circumstances of their own enterprise, must not be imposed lightly. While the ACTU believes it is in the national interest to take wages out of competition so as to enable employers to focus on innovation, productivity, service and product improvements to boost their bottom line, negotiating an agreement that facilitates these improvements is likely to be harder for employers when bargaining with their competitors at an industry-sized table.

If reform is to occur, it would make sense to use the current low paid bargaining system as a base, removing the eligibility requirement for employees to be "low paid" but maintaining some of the existing checks and balances.

In particular, it is reasonable to expect that there will still be a role for the Fair Work Commission in assessing whether it is in the "public interest" to allow a departure from the enterprise bargaining based system in favour of multi-enterprise or industry bargaining. The criteria that the Fair Work Commission must currently consider would arguably continue to remain relevant in an industry bargaining context, including for example:

- whether it would assist employees to access collective bargaining or where they have faced substantial difficulty bargaining at the enterprise level;
- the relative bargaining strength of the employers and employees;

- the degree of commonality in the nature of the enterprises to which the agreement relates;
- whether it would assist in identifying improvements to productivity and service delivery;
- the extent to which the likely number of bargaining representatives for the agreement would enable a manageable process; and
- the views of the employers and employees.

The ACTU is pressing for the current restriction on protected industrial action in multi-enterprise bargaining to be lifted, opening up the potential for industry-wide strikes. While this may strike fear into the heart of some employers, take some comfort from the existing safeguards which provide for the suspension or termination of protected industrial action, including where it jeopardises the safety, health or welfare of the population, or the economy (or an important part of it). These circuit-breakers are likely to become more accessible where industrial action occurs across an industry or sector, although it may also lead to an increase in arbitrated workplace determinations by the Fair Work Commission where parties remain unable to agree.

Some commentators have also pointed to the existence of prevailing forces such as global competition and "structural changes" as additional mechanisms for keeping unions and rampant industrial action in check (though the effectiveness of these remain to be seen).

OTHER BARRIERS TO INDUSTRY BARGAINING

But before the ALP bursts into print on the amending legislation, it's worth pausing to consider that despite a purpose-built vehicle being installed in the legislation nearly ten years ago to support vulnerable workers to compel collective bargaining with multiple employers, there have been less than a handful of applications to do so, only one of which has been successful.

It's not clear why there have been so few applications. If low wage outcomes are a driving force, one would have expected the Fair Work Commission to have been inundated with applications.

Some commentators have criticised the low paid authorisation process as being too "complex". We know that in at least one case, the Fair Work Commission declined to make an authorisation in part because the majority of in-scope employees fell outside the concept of "low paid" – presumably this would no longer be a barrier if the ALP is elected.

However, the lack of activity points to more a fundamental reason – the unavailability of protected industrial action. Without this prime leverage tool, compelling multiple employers to bargain together is a distinctly unappetising prospect for unions.

There are other considerations that legislators should have regard to when providing for bargaining beyond the single enterprise and across a wider group of employers in an industry. For example:

- there needs to continue to be an incentive to encourage, where possible, bargaining at the enterprise level. This is still the most efficient and effective way to achieve agreements which are adapted to the needs of both employers and employees, taking into account their particular circumstances. As such, sufficient effort must be made to genuinely bargain at the single enterprise level first. What constitutes "sufficient" may vary, depending on a range of factors including the number of employers, the profile of the workforce and nature of the industry;

- compelling employers to engage in multi-enterprise bargaining should be subject to the same prerequisites as single enterprise bargaining, including in particular that a majority of employees who will be covered by the proposed industry agreement actually want to bargain in this way. This can be confirmed relatively easily (e.g. via a petition or an online vote) – this would be a minor adjustment to the current system but a vital one to ensure consistency with enterprise bargaining and that there is sufficient appetite by employees to embark on the process; and

- determining how to facilitate accessibility while assessing, in a procedurally fair way, whether multi-employer bargaining is appropriate in the circumstances. Currently, obtaining a low paid authorisation is a time-consuming and resource-intensive exercise – the Aged Care case, which covered 682 employers in Victoria and Tasmania, took nearly a year from application to granting of the authorisation. It is questionable whether employers or employees have the stamina, resources or patience to participate in extended proceedings on an industry-wide basis.

Even where the green light is given for industry bargaining to take place, it will inevitably be a complex process. Employers will be drawn to the bargaining table against their will. The process of arranging participation, even with extensive rationalisation of employer representatives and the aid of tele or videoconferencing to bridge the tyranny of distance, will inevitably be cumbersome. There is likely to quickly become a point where industry-wide bargaining will become too unwieldy or inefficient for both employers and unions alike.

CONCLUSION

Australia's workplace relations system is built on bargaining at the enterprise level. In the decade since the Fair Work Act commenced, only a few applications have been made to compel employers to engage in multi-enterprise bargaining across industry or sectors, and only one has been granted.

However, the lifting of the restriction on protected industrial action, and only minor changes in eligibility to authorise this bargaining, would likely change this, providing unions with the potential to maximise their bargaining outcomes with minimum input (e.g. by undertaking strategically targeted protected industrial action in areas which will exert the most leverage across an industry). When viewed this way, industry bargaining has the potential to rapidly overshadow enterprise bargaining as the preferred method of compelling employers to the bargaining table in a range of different sectors. Given this, serious thought is required to ensure that general industry bargaining is integrated into the existing system in a fair and practical way.

What is clear is that industry-based bargaining will almost certainly compel employers to think differently about their bargaining strategy. Inevitably this will involve opportunities, it just may take some time to identify them.

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