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TO THE AUSTRALIAN LABOUR LAW ASSOCIATION BIENNIAL NATIONAL CONFERENCE 2021

THE DEATH OF COLLECTIVE BARGAINING? THE REGULATION OF WORK IN POST-PANDEMIC DIGITAL AUSTRALIA

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INTRODUCTION

By way of background, it looks and feels very much as if the economy has returned to recovery mode after this winter's Delta disruption. The various forecasters differ a bit about the timing of the rebound, but they have in common the view that we are likely to have once again regained the lost ground by the middle of 2022.

While we may well see a return to aggregate levels of activity, no one is thinking that we just pick up where we left off. In particular the pandemic has accelerated major changes that, before the pandemic, had already begun to reshape work and workplaces. Despite the acceleration of these processes, we should be wary of thinking that we are near the end of these changes. It is more likely that we've let a genie out of the bottle.

Another point about the recovery is that we should be very wary of thinking that it's a destination that we should be particularly pleased about. Getting back to where we were in, say December 2019, is hardly a stretch ambition. For several years prior, our economy had been beset by low productivity growth, low business investment and low real income growth outside of the mining and finance sectors.

These outcomes were not unrelated to the fact that enterprise bargaining too was struggling before the pandemic. Fast forward the next part of two years and it faces even more challenges in being relevant to the changing workplaces of today and the future.

There is still hope for Australia's enterprise bargaining system but action is needed without delay. Otherwise, the system will continue to 'wither on the vine'.

Australia needs an enterprise bargaining system that recognises the flexibility that both employers and employees need, and that drives productivity improvement at the enterprise level. Productivity improvement is the pathway to delivering real wage increases to employees.

AGREEMENT-MAKING TRENDS

Collective bargaining is not dead, but it has certainly declined in importance as a wage setting mechanism since the Fair Work Act was introduced in 2009.

This is unfortunate, unnecessary and undesirable.

According to the latest *Trends in Federal Enterprise Bargaining Report,* released by the Attorney-General's Department in September this year, there were around 10,000 in-term enterprise agreements covering 1.79 million employees in June 2021.

This compares to around 25,000 agreements covering 2.6 million employees in 2010.

These changes are stark but when you consider that the size of the workforce increased from around 11 million to around 13 million between 2010 and 2021, the failure of enterprise bargaining under the Fair Work Act is even more obvious.

Another glaring picture can be seen in the ABS statistics that identify the level of award reliance in Australia.

The ABS statistics show that between 2000 and 2010, there was a constant reduction in the level of award reliance in Australia. Every two years when the statistics were released, they showed that more and more employees had their pay set by an agreement and fewer and fewer employees had their pay set by an award.

From 2010, that trend was reversed and there has been a constant increase in the level of award reliance. This trend in award reliance is largely mirrored by the trend in employees whose pay is set by collective agreements. Every year a smaller and smaller proportion of employees are covered by collective agreements.

These statistics show that something is seriously wrong with Australia's enterprise bargaining system.

THE REASONS FOR THE DECLINE IN ENTERPRISE BARGAINING

Some academics have suggested that the decline in enterprise bargaining is largely due to the decline in union membership over recent years.

However, this view fails to recognise that if the enterprise bargaining system was attractive to employers and employees, agreements would be reached regardless of whether or not a union is involved in the workplace.

There was a significant fall in union membership between 2000 and 2010 but over this period the number of enterprise agreements increased substantially, as did the proportion of employees whose pay was set by an enterprise agreement. This highlights that the level of union membership is not the main reason why the enterprise agreement making system is declining.

The unions argue that the reason why enterprise bargaining is in trouble is due to a lack of union power. This is nonsense. When the Fair Work Act was introduced, Ai Group published a list of around 100 areas where the Fair Work Act increased union powers compared to the earlier Workplace Relations Act.

Giving unions more power is not the solution. We don't need industry bargaining or any of the other radical approaches on the union movement's wish list.

The problems with the enterprise bargaining system are obvious and widely recognised. Politics is all that is standing in the way of the problems being fixed.

KEY PROBLEMS WITH THE ENTERPRISE BARGAINING SYSTEM

The BOOT

Perhaps the most important change that is needed to the enterprise bargaining laws is to fix the Better Off Overall Test.

The practical and sensible approach that applied in the earlier days of enterprise bargaining under the Industrial Relations Act and the Workplace Relations Act needs to be restored. In those days an experienced Commission member considered the terms of each proposed enterprise agreement and the terms of the relevant award and made a judgement about whether the employees would be disadvantaged by the agreement. This judgement was based on the types of work and patterns of work being carried out by the relevant employees and drew on the experience of the Commission member in the industrial relations field.

These days the Better Off Overall Test has become largely a spreadsheet exercise which often takes into account theoretical rosters and patterns of work that the employees covered by the agreement are highly unlikely to work.

There are numerous examples that have been discussed in the media, including the Commission insisting on undertakings from Officeworks in relation to the serving of alcohol and the operation of cool rooms before its agreement would be approved, even though the business was never going to engage in these activities.

The agreements reached between employers and employees are very often disturbed through the Commission requiring undertakings that change the terms of the agreement reached between the parties at the enterprise. Worse still, on many occasions the employer is invited to withdraw its application for the approval of an agreement on the basis that unless it does so the agreement will be rejected.

Employer after employer has reported that the Commission's approach to applying the Better Off Overall Test has led to enterprise agreement making becoming far too risky and complicated to bother with.

No employer wants to have to explain to its employees why the independent Fair Work Commission has insisted on changes to the agreement it has reached in good faith with its employees. Employers are concerned that their employees might think that they cannot be trusted or that they don't understand the law when in reality the issues of concern identified by the Commission often relate to theoretical issues that are never likely to arise. Even in circumstances where an employer has good cause for contesting the Commission's views, they will often not have the appetite for disputing the matter, especially if it means they will be perceived by their workforce as delaying the implementation of a pay rise.

Requirement to explain the terms of a proposed enterprise agreement

Another key problem related to the requirement to explain the terms of an enterprise agreement before the approval vote. This has become a 'minefield' for employers. Changes need to be made to the Act to clarify the requirements and to ensure that a sensible approach is taken.

Yes, of course it is appropriate for the employer to ensure that the employees are advised of the key provisions in a proposed enterprise agreement and how those key provisions differ from the relevant award.

But no, it is not reasonable to expect an employer to understand the implications of the large number of inconsistent Commission decisions on this topic, and work out what they need to do to avoid their agreement being deemed invalid.

Casual voting cohort

Another 'minefield' for employers is working out which casuals are entitled to vote on an enterprise agreement.

In large workforces with many casuals, there will typically be:

- Casuals who are rostered to work on the day when the vote is taken;
- Casuals who are rostered to work on at least one day in the week leading up to the vote but not on the day of the vote;
- Casuals who are 'on the books' but haven't worked for a while; and
- Casuals who are away on a vacation or who are ill or injured.

Working out which casuals are entitled to vote and which are not should not require the employer to be a labour law expert or require them to engage one.

Again, it is not reasonable to expect an employer to understand the implications of the various inconsistent Commission decisions on this topic, and work out what they need to do to avoid their agreement being deemed invalid.

Sensible amendments need to be made to the Act to clarify the requirements and to ensure that a practical approach is taken.

Imposing a timeframe for approving enterprise agreements

Consistent with a number of other provisions in the Fair Work Act that impose timeframes for the Commission to make decisions on particular matters (i.e. the provisions about stop orders and protected action ballots), the Commission should be required to approve enterprise agreements, where practicable, within a specified reasonable period. 21 days is reasonable in this regard.

The Commission publishes statistics on its timeliness in approving enterprise agreements that don't require undertakings. However, the Commission insists on undertakings for a large proportion of enterprise agreements and many of these agreements are not approved for lengthy periods.

When the approval of an enterprise agreement is delayed, typically wage increases for employees are delayed. Therefore, it is reasonable for a 21 day timeframe to be imposed, with flexibility for circumstances where it is not practicable to approve the agreement within this period.

The Commission's explanation for its highly technical approach when assessing agreements at the approval stage is that it is simply applying the provisions of the Fair Work Act. Therefore, the Act needs to be amended to address the problems that are occurring and to ensure that a practical approach is taken when agreements are lodged for approval.

Agreement making is typically disruptive and resource intensive. If unnecessary barriers are placed on the approval of agreements, it is quite logical for employers and employees to give up on the process wherever possible.

IR Omnibus Bill

Last year, it was pleasing to see the Government set up 5 IR Working Groups of employer and union representatives to deal with 5 key IR topics. Ai Group was involved in all five of the working groups and the discussions were very useful in analysing the issues and developing solutions.

It was particularly disappointing that the legislative reform proposals which flowed from the work of the Enterprise Agreements Working Group fell one vote short of being supported in Parliament.

The changes proposed in the Bill were modest and sensible and included the changes that I have referred to.

In fact, many of the changes were supported by the unions but only if the changes were limited to agreements reached with unions. This lopsided and unfair approach was never going to fly with most employers and their representatives – and certainly not with Ai Group.

The enterprise agreement reforms in the Government's IR Omnibus Bill remain very worthwhile and should be pursued by whoever wins the next election.

With a few sensible reforms, enterprise agreements can once again play a key role in delivering higher wages to employees and higher productivity for businesses.

Dramatic changes are not needed to the Fair Work Act in this area. Just some sensible and practical changes to remove some obvious major barriers to agreement-making.

Australia's enterprise bargaining system served Australia well in the past and it can do so again with some sensible modifications to the relevant provisions in the Fair Work Act.

INDIVIDUAL FLEXIBILITY ARRANGEMENTS

Individual Flexibility Arrangements (**IFAs**) also have a lot of potential to deliver flexibility to employers and employees, both under enterprise agreements and under awards.

One barrier that currently exists is the uncertainty about whether a particular IFA leaves the employee better off overall compared to the relevant enterprise agreement or award.

This could be readily addressed through implementing an optional lodgement and approval process for IFAs. If an IFA is approved by the FWC, both the employer and employee would have a lot more certainty that their IFA is valid.

UNION PROPOSALS

As I have mentioned, so far the unions have not supported these sensible changes. Instead, they are pursuing a wish list of proposals that would inflict even more damage on the enterprise bargaining system.

The two items on top of the unions' wish list for changes to enterprise bargaining laws appear to be:

- Firstly, to allow industry bargaining; and
- Secondly, to stop employers applying to terminate expired enterprise agreements.

Both of these proposals need to be rejected.

The unions' industry bargaining proposals

Industry bargaining is completely inconsistent with enterprise bargaining and inconsistent with Australia's award system which provides an industry level safety net.

The unions like to point to industry bargaining systems in Continental European countries but an award safety net does not operate in these countries. Australia is the only country in the world that has an award system.

The idea that giving unions the right to organise strikes across whole industries is somehow in the public interest is absurd.

We experienced this years ago and those of us who are old enough to remember, saw how that worked out. The last thing Australia needs is an international reputation as an unreliable supplier of goods and services.

The unions proposal to stop employers applying to terminate expired enterprise agreements

The unions also want to stop employers applying to terminate expired enterprise agreements. This proposal needs to be rejected

The number of enterprise agreements that have been terminated on application by an employer in contested proceedings is still only a handful and in each case the application was made after very lengthy negotiations and extensive attempts to reach agreement with the employees and their unions.

Not surprisingly the unions are not proposing that they lose their right to apply to terminate an expired enterprise agreement; it is only an employer's right that they want removed.

Where the terms of an expired enterprise agreement negotiated in a very different operating environment are no longer appropriate, it is important for an employer to be able to make an application to the independent Fair Work Commission to have the agreement terminated.

An appropriately high bar applies when the Commission is considering these applications, and in each case when an agreement has been terminated by the Commission, there have been exceptional circumstances.

Exceptional circumstances also exist with the current application made by Patrick Stevedores to terminate its enterprise agreement after two years of negotiations.

ENTERPRISE AGREEMENTS AND PRODUCTIVITY IMPROVEMENT

The arguments of unions in support of the retention of enterprise agreement provisions that were negotiated in a bygone era and are no longer appropriate are often cloaked in claims about the need to protect job security. However, the only real job security for employees comes from enabling businesses to remain competitive and productive.

The latest *Productivity Insights* report by the Productivity Commission highlights that the past decade of economic growth in Australia marks the slowest in at least 60 years on a per person basis, both in terms of output per person and income per person. This is the case regardless of whether or not the latest year of data (which includes the impact of COVID-19) is included.

The Productivity Commission attributes this mainly to a global productivity slowdown and the end of the mining investment boom.

In the 1990s Australia experienced a significant increase in productivity and it is no coincidence that during this decade the centralised wage fixing system was abandoned and enterprise bargaining was introduced. During the 1990s, there was widespread recognition and support for the idea that enterprise agreements were designed to be a 'bargain' between employers and employees which delivered productivity improvements to employers and wage increases to employees.

By the end of the 1990s, the unions had grown tired of a productivity-based bargaining system and looked for easier ways of gaining wage increases for their members, including pattern bargaining which soon became entrenched in the construction industry. "No trade-offs" became their catch-cry.

Those who argue that there is no scope for enterprise agreements to deliver productivity improvements are kidding themselves.

As US Economist Paul Krugman said: *"Productivity isn't everything, but in the long run, it's almost everything."*

Many enterprise agreements include provisions which are highly restrictive and unproductive. A quick glance at many agreements that apply on the waterfront and in the construction and utilities industries highlights this. Some examples are clauses which require extremely onerous consultation processes before any work is automated or outsourced, and clauses which, in effect, require the agreement of

unions to engage particular subcontractors.

Also, awards remain extremely complicated and there is a lot of scope for enterprise agreements to be used to align terms and conditions with the needs of employers and employees at the enterprise level.

This was the vision articulated by Paul Keating in the early 1990s when enterprise bargaining was introduced in Australia. The vision was one of enterprise agreements being the main wage setting mechanism, with wages and conditions tailored to the needs of each enterprise, and awards progressively becoming less important.

This vision was a good idea then and it remains a good idea now.

CONSIDERATION OF CHANGES TO THE CC ACT AND THE PROBLEMS WITH ENTERPRISE AGREEMENTS THAT APPLY ON THE WATERFRONT

The release last week of the ACCC's annual Container Stevedores Monitoring Report has focussed attention on whether changes should be made to the Competition and Consumer Act.

One important area of change that is needed is to narrow the exemptions in section 45E and section 45EA that exempt the provisions of industrial agreements from the operation of certain competition laws.

The ACCC's report identifies the extremely restrictive provisions in the enterprise agreements that apply to the Stevedoring companies in areas including:

- The recruitment of new employees;
- The order in which employees must be engaged to work on particular shifts;
- The allocation of work to employees;
- The outsourcing of labour; and
- The efficient utilisation of equipment.

The ACCC's report states that:

> *"..many current stevedores' Enterprise Agreements contain restrictive provisions which reduce flexibility of labour supply and allocation, retard automation and other technological advances, reduce timeliness and reliability, constrain workplace performance, and increase labour costs for a given level of activity".*

The report also states that the enterprise agreement restrictions have *"contributed to the sub-optimal performance of the nation's major ports and added to the pandemic-induced supply constraints".*

It is appropriate of course for enterprise agreements to contain provisions about wages and conditions of employment, but enterprise agreements should not be able to affect the supply or acquisition of goods or services by a business, including in

relation to recruiting employees, using labour hire and outsourcing work.

The Harper Competition Review in 2015 recommended changes to sections 45E and 45EA of the Competition and Consumer Act to tighten up the exemptions under competition law for the content of industrial agreements, and it is timely for this issue to be revisited.

Another way of addressing the extreme restrictions in waterfront enterprise agreements that drive up costs for the whole community, is through a Code that addresses enterprise agreement content. This approach works very well in the building industry. A Code for the Maritime and Ports Industry could be created through amendments to the Fair Work Act. The Act already provides for a Code for Outworkers in the Clothing Industry and a Small Business Fair Dismissal Code.

In addition, the Fair Work Act already contains some industry-specific prohibitions on enterprise agreement content that apply to emergency management bodies, namely that agreements which apply to these bodies cannot include provisions that restrict or limit the ability of a body to engage or deploy its volunteers. Therefore, there is no reason why the Act cannot contain industry-specific prohibitions on enterprise agreement content in the Maritime and Ports Industry to enable stevedores to reasonably manage their businesses and to enable businesses to move their products through ports efficiently and at a reasonable cost.

ACCELERATION OF DIGITAL TECHNOLOGIES AND THE FUTURE OF WORK

The pandemic has led to a dramatic acceleration in digital technologies and brought forward the future of work.

The effective transition to remote and hybrid working arrangements and the widespread adoption of Zoom, Teams and other on-line conference platforms are a couple of obvious examples.

In most businesses, Zoom or Teams meetings have become a mainstream way of collaborating amongst staff and with customers and suppliers. Even courts, the Fair Work Commission and Parliamentary inquiries have embraced this technology.

Gone are the days when employees will simply hop on a plane to attend one meeting in another State and lose a whole day in the process. People will of course still travel for work purposes but travel will be given more thought, and hence will be more productive.

The pandemic has accelerated processes that have changed and are continuing to change workplaces forever, particularly for workers who are able to work productively from home or another remote location.

The future of work is already arriving for a large proportion of the white-collar workforce. It is hard to see many businesses in industries where work can be performed remotely returning to the practices of the pre-pandemic period.

Employees in many jobs have become accustomed to working from home and generally employers have reported that their employees in these types of jobs have worked productively.

Skill and labour shortages mean that businesses that do not offer flexible work arrangements to employees in jobs that can be performed remotely, will find it increasingly hard to attract and retain quality staff.

The workplace relations system and awards have not kept up with the fast pace of changes in work practices. For example, the Commission has increasingly imposed more onerous record-keeping requirements upon employers in recent years through award provisions, but this is hard to reconcile with the increased flexibility that employees are demanding.

When working from home, often there is no reason why an employee needs to work their hours continuously, with a one hour meal break in the middle of the day, as awards often require. Also, the three hour or four hour minimum engagement periods under awards were set based on assumptions about the cost and inconvenience of travelling to and from work.

The rapid development in digital technologies is transforming all segments of the economy. These changes are having major impacts on business operations, the organisation of work, and it is leading to completely new jobs, new types of businesses and new business models.

The pace of change in digital technologies continues to increase and become more embedded in the economy. Innovation with digital technologies needs to be encouraged, not stifled through inappropriate regulation.

As with all previous waves of new technology through history, digital transformation should not be seen as inherently negative to the workforce, the workplace or society more broadly. If adopted successfully and combined with successful organisational change and change management practices, digital technologies will enable businesses to innovate, grow, expand their workforces, improve their productivity and remain competitive in an increasingly global marketplace.

There is a long and positive history of Australian businesses and industries successfully adopting and adapting new technologies.

Enterprise bargaining could play an important role in delivering the flexibility needed in modern workplaces. However, it could also operate as a major barrier if some of the current problems are not addressed or if the union movement’s proposals are adopted.

CONCLUSION

In conclusion, Australia’s enterprise bargaining system is in need of renovation.

It is rapidly falling into a state of disrepair and without some attention it will continue to deteriorate.

The pandemic has rapidly accelerated changes in the workplace, and enterprise agreements could play a constructive role in delivering important flexibility to employers and employees in this new environment and reviving the trend of real wage rises for employees and real incomes growth for business owners and the self-employed.

However, without the necessary changes to the Fair Work Act, enterprise agreements will continue to be a barrier that will be avoided by employers where possible.

An inefficient and unproductive enterprise agreement making system is not in the interests of employers, employees or the broader community.