



Australian Education Union

Submission

Productivity Commission Inquiry into the Workplace Relations Framework

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List of Recommendations

1. The Productivity Commission should recommend that a new intergovernmental agreement on workplace relations, perhaps restricted to the public sector environment, be developed and overseen by the Council of Australian Governments. Such an agreement to set out the fundamental principles or objectives by which Commonwealth and the states would frame their public sector workplace relations frameworks. This would include seeking additional constitutional foundations for the federal statute, eg, the conciliation and arbitration power (s51(35)) and the external affairs power (s52(29)).
2. That the new intergovernmental agreement incorporate a ‘fairness’ principle and also require amendment to state & commonwealth industrial relations ‘referral’ legislation to alleviate the continuing limitations and uncertainty surrounding the extent of Commonwealth power referred to by the Commission.
3. The FW Act be amended to include a mechanism which would enable state public sector employees, should they so choose, to access the federal jurisdiction where they no longer have access to a state-based tribunal able to exercise independent decision making powers of conciliation and arbitration.
4. The FW Act be amended to enable FWC to arbitrate industrial action or bargaining disputes, particularly in public sector contexts, which are protracted and intractable or in ‘surface bargaining’ contexts where despite nominal compliance with good faith bargaining requirements, little scope for reaching agreement is evident.
5. The Productivity Commission should recommend that the Commonwealth government ratify the Labour Relations (Public Service) Convention 1978 (C No 151) and the Collective Bargaining Convention 1981 (C No 154).
6. The Productivity Commission should recommend that the Australian Commonwealth and state governments incorporate an express object in their respective labour law statutes that such statutes are intended to ensure implementation of the relevant international labour standards.
7. The Productivity Commission take account of the ILO Committee of Experts on the Application of Conventions and Recommendations Reports. The Productivity Commission should recommend to government that the protections and exemptions for Union rights to organise freely be removed from the CCA, placed in the FW Act and broadened consistent with the ILO’s observations and with Australia’s obligations under ILO Convention 87.
8. The Act be amended to provide for a single stage process for oversight of single-interest employer agreements with the FWC utilising the criteria as currently provided by the Ministerial declaration at s247(4) and that employee bargaining representatives be enabled to apply for such a single interest declaration/authorisation.
9. The deletion of s58(3) which provides for a single-enterprise agreement to prevail over an existing multi-enterprise agreement prior to its nominal expiry date and that

good faith bargaining orders and protected industrial action ballot orders be obtainable in relation to bargaining for a multi-employer agreement.

- 10. Section 172 be amended to enable ‘permitted matters’ to encompass any matter on which the parties can agree subject to a further amendment to s194 that a term of an agreement would be unlawful if it were to provide a condition worse than the standards established by the Act.**
- 11. The FW Act be amended to delete the 30 day rule in s459(1)(d).**
- 12. The same threshold voting requirements for approval of enterprise agreements should apply for the taking of protected industrial action.**
- 13. Section 426 be deleted. Alternatively, should public policy interests be such that the needs of third parties ought be taken into consideration, the AEU recommends that termination rather than suspension of industrial action is more appropriate as this opens the existing pathway to arbitral workplace determination under s266.**
- 14. The FWC be empowered to deal with disputes arising from a rejection on business grounds of applications for flexible work arrangements or extensions of unpaid parental leave and that the test threshold be raised from ‘reasonableness’ to ‘significant’.**
- 15. That the Productivity Commission consider the invitation of the High Court in *CBA v Barker* and recommend to the Australian Government it introduce a statutory term of mutual trust and confidence in all employment contracts**
- 16. The FW Act be amended to the effect that in discrimination or ‘adverse action’ situations, the subjective intention of the ‘discriminator’ is not determinative in establishing a defence to the claim.**
- 17. The AEU recommends that in unfair dismissal situations, there be a no distinction as to the qualifying period of service based upon the size of the employer.**
- 18. Amendment to s386 to the effect that non-renewal of fixed-term contracts of employment despite the work continuing to be required to be performed will be deemed to constitute a termination of employment at the initiative of the employer where the employee desires to continue in employment.**

Introduction

The Australian Education Union (AEU) provides the following submissions on the operation of Australia's workplace relations framework for consideration by the Productivity Commission. The AEU would welcome any further opportunity to elaborate on these views should the Commission determine a need for further consultation.

The AEU has had an opportunity to review and provide input into the submissions of the ACTU to this Inquiry. The AEU endorses those submissions.

The Australian Education Union is an organisation of employees registered under the provisions of the *Fair Work (Registered Organisations) Act 2009*. It has approximately 187,500 members employed in government schools and public early childhood work locations, in public institutions of vocational education and in disability services work locations as teachers, instructors, supervisors, school leaders and education assistance or support work classifications.

The core business of the AEU is the maintenance of comprehensive industrial protection and effective representation on employment and professional issues as they affect AEU members as employees. The AEU is also concerned about developments in the wider community which impact on our members' work through the intersection between educators and related staff and the students, families and communities they work with as well as the industries in which they work.

This submission does not address all questions or issues which the various Issues Papers released by the Commission have raised. The AEU will address several key issues in the practical operation of the workplace relations framework so far as it has affected the working lives of its members.

Public Sector Workplace Relations

- *How should WR arrangements in state and public services (and any relevant state-owned enterprises) be regulated? In particular, to what extent and why, should WR provisions vary with the public or private status of an enterprise?*

The AEU operates exclusively in the public sector. Its members may be direct employees of state governments, eg, TAFE and school teachers and education support staff employed in various state or territory 'teaching services', employees of public bodies established for public purposes under state legislation, eg, in some states, employees of school councils or of governing boards of TAFE Institutes or more broadly in some community sector and government-funded agencies, eg, early childhood education and care and disability services centres.

This creates a complex web for the operation of the workplace relations framework with some areas covered by the federal industrial relations system and others by state –based industrial relations systems. In some instances, different sectors of the AEU membership within the one state can operate either within the federal or the state system depending on the legal identity of their employer. In another instance, even those who operate wholly within the federal system may be denied access to particular provisions or remedies provided in the

federal statute due to the legal definitions being used, eg, the FWA anti-bullying jurisdiction (Part 6-4B) and its foundational reliance on ‘constitutionally covered businesses’.

Below is a table summarising this ‘patchwork quilt’ nature of industrial relations regulation for AEU members:

	State system	Federal System
Queensland	State school teachers. Most TAFE teachers despite their employment by a trading corporation (TAFE Qld) due to the operation of FWA, s14(2)(b) & (c), s14(4)(a).	TAFE teachers employed by Central Queensland University following its amalgamation with Central Qld Institute of TAFE in 2014 & utilising the provisions of FWA, Part 6-3A re transfer of business from a state public sector employer.
NSW	State school teachers	TAFE teachers
ACT		All employees (schools, TAFE)
Victoria		All employees (state schools, TAFE Institutes, Early Childhood, Disability Services) either because of their employment by trading corporations or because the state has referred its ‘IR powers’ to the Commonwealth.
Tasmania	All state school & TAFE employees	
South Australia	All state school & TAFE employees	
Western Australia	All state school & TAFE employees	
Northern Territory		All state school & TAFE employees

Traditionally, a balance existed between the operation of state and federal labour law statutes. This was due to a combination of the federal statute’s foundational reliance upon the conciliation & arbitration power of the Commonwealth Constitution (s51(35)) in order for the federal tribunal to act in preventing or settling industrial disputes extending beyond any one state and because the federal statute itself contained a mechanism enabling the federal tribunal to refrain from dealing with a matter either because it was better dealt with by a state arbitrator or further dealing wasn’t in the public interest.

This balance has been increasingly eroded as the federal statute’s foundational reliance switched from the conciliation and arbitration power (s52(35)) to the corporations power (s51(20)) and the state referral power (s51(37)).¹ Initially that switch was required in order to facilitate the introduction of enterprise bargaining – the capacity to bargain with a single ‘corporate’ employer or many ‘corporate’ employers in a single industry – without the need for an underlying interstate industrial dispute. However the federal statute now relies virtually solely on the corporations’ power for its efficacy, supplemented by the referral power where the Commonwealth and a state’s parliament agree.

¹ This occurred in phases principally with the *Industrial Relations Reform Act 1993*, the *Workplace Relations & Other Legislation Amendment Act 1996*, the *Workplace Relations Amendment (Work Choices) Act 2005* and the *Fair Work Act 2009*.

While most states (WA being the exception) agreed to – and did - refer their private sector ‘IR’ powers to the Commonwealth as a mechanism needed to ensure industrial regulation of ‘non-corporate’ employers, only Victoria referred its ‘industrial powers’ in respect of its public sector to the Commonwealth. Absent corporatisation of functions, this means state-based employees remain within their respective state’s industrial jurisdiction. Even where corporatisation does occur, this does not necessarily mean the ‘transfer’ of employees and the new ‘corporate’ employer into the federal jurisdiction. Section 14 of the *Fair Work Act 2009* [Cth] contains a mechanism enabling a state or territory parliament to declare, and for the Commonwealth Minister to endorse, that a particular employer is NOT an employer for the purposes of the federal Act. This occurred in 2014 with respect to TAFE employees in Queensland who were transferred from employment by the relevant state department to that of a new corporate entity, TAFE Queensland.²

Commonwealth and state governments and ‘industrial parties’ in each jurisdiction – including state branches of the AEU – undoubtedly have differing views as to the relative merits of their particular workplace relations framework/s. However, to some extent, this misses the point. Any framework should balance the interests of both employees and employers, including governments in their capacity as employers.

The State – whether Commonwealth or state - is in a unique and unbridled position of power. It is legislator, executive, employer, policy controller or formulator and funder/purchaser. Indeed the Productivity Commission hints at this unique position in referring to the Victoria Government’s centralised control of enterprise bargaining process for public employees.³ This illustrates the uniquely ‘vulnerable’ position of public sector employers.

Should a state operate to unfairly constrain the powers and functions of its industrial tribunal or to remove the capacity for industrial awards or enterprise agreements to contain certain subject matter, state based employees are left no capacity to resolve issues associated with significant terms and conditions of their employment. There is no choice for such employees.

² *Industrial Relations Amendment Regulation (No 2) 2014 [Qld]*, s4; *Fair Work (State Declarations — employer not to be national system employer) Endorsement 2014 (No.1) [Cth]* [F2014L00684]

³ Issues Paper 5, p8

Two examples are illustrative:

New South Wales

In 2011, through passage of the *Industrial Relations Amendment (Public Sector Conditions of Employment) Act* and its similarly titled Regulation, the NSW government effectively restricted the capacity of the NSW Industrial Relations Commission to independently assess and determine industrial matters based upon equity, good conscience and the substantial merits of any case brought before it and instead required the tribunal **to give effect to**, rather than take account of, the government's specifically declared policy on industrial or employment matters.

Effectively, NSW state school teachers, and a host of other NSW public sector workers, are unable to bring wages and working conditions claims before the state industrial 'umpire' and have their issues argued based on the evidence and the merits of the case. Irrespective of any merit or evidence, the NSW state industrial tribunal is limited to awarding increases in wages and other conditions of employment to an employee-related cost increase restricted to 2.5% unless fully off-set by demonstrable savings.

Queensland

In 2012, effectively commencing in 2013, the *Public Service & Other Legislation Amendment Act* rendered null and void any provision in an industrial instrument covering public sector employees that dealt with contracting in or out of services, employment security or organisational change and severely curtailed employee and union consultation rights concerning the termination of employment on redundancy grounds.

In this way, by supervening legislative fiat, a state government has used its plenary, sovereign power to overturn – rather than argue the merits before an independent tribunal or to bargain with its own employees – existing industrial provision.

It is the view of the AEU that a modern workplace relations framework needs to recognise the position of public sector employees and provide suitable 'differential' machinery for resolving industrial issues.

Access to Arbitration More Generally

Currently the FW Act enables the Fair Work Commission (FWC) to arbitrate only in a very limited number of circumstances:

- by the consent of parties to a dispute;
- where an enterprise agreement provides power to do so; and
- where, in industrial action or enterprise bargaining contexts, certain 'threshold tests' are met.

In industrial action circumstances, the scheme of the Act requires the industrial action to escalate to the point where it endangers life, personal health and safety or welfare or causes significant economic harm. For bargaining situations, orders and 'serious breach' declarations must first be obtained.

In the area of public education concerning pre-school age & school age children, the industrial action circumstances present a low threshold. However, education workers are not going to put children and students' lives at risk and it is unlikely any industrial action will cause the 'required' significant economic harm established by the jurisprudence. Even so, it is only termination and not suspension of industrial action that enables the FWC to use arbitral power (s266).

By way of example, in late 2013 the Northern Territory Branch of the AEU undertook protected industrial action in pursuit of an enterprise agreement. Part of that action involved a ban by teachers on the electronic recording of student classroom attendance. Manual attendance rolls were still maintained by those teachers although not provided to school administrators. That ban was held to meet the threat of endangerment to personal health and safety or welfare under s424(1)(c) with FWC subsequently by order suspending the industrial action. All other otherwise ostensibly protected action was also rendered nugatory by virtue of s413(7).

As to bargaining, as the AEU notes below, there is currently no ability to obtain bargaining orders in multi-employer bargaining contexts. Further, any bargaining orders which might be obtained are restricted to certain procedural matters in order to facilitate bargaining – good faith bargaining orders under s230, majority support determinations under s237 and scope orders under s238. And yet, both the industrial action and bargaining disputes in which AEU members have been engaged can be both protracted and intractable.

Recommendations

A number of pathways to solutions appear worthy of consideration:

A new intergovernmental agreement on workplace relations, perhaps restricted to the public sector environment, could be developed and overseen by the Council of Australian Governments. Such an agreement would set out the fundamental principles or objectives by which Commonwealth and the states would frame their public sector workplace relations frameworks. This would include seeking additional constitutional foundations for the federal statute, eg, the conciliation and arbitration power (s51(35)) and the external affairs power (s52(29)).

That new intergovernmental agreement would incorporate a 'fairness' principle and would also require amendment to state & commonwealth industrial relations 'referral' legislation to alleviate the continuing limitations and uncertainty surrounding the extent of Commonwealth power referred to by the Commission.⁴

⁴ Issues Paper No 5, p8. The limitations and uncertainties concern an implied constitutional limitation identified by the High Court in *Melbourne Corporation v. Commonwealth* (1947) 74 CLR 31, elaborated further in *Re AEU* (1995) 184 CLR 31 and most recently in *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548 in areas other than public sector bargaining. The High Court has in recent years emphasised that constitutional limits to the power of the Commonwealth to regulate industrial relations matters of the States needs to be understood in practical terms (see, in particular, *Austin v Commonwealth* (2003) 215 CLR 185 [186]). The recent Full Federal Court decision in *United Firefighters' Union of Australia v Country Fire Authority* [2015] FCAFC 1 has usefully clarified these principles in the context of enterprise bargaining in particular (Issue Paper 5's glib summation that "it demonstrates that there is continuing uncertainty about the constitutional limitations" misses the point that an intermediate appellate court has provided considerable certainty in the area of public sector bargaining. The State of Victoria has not appealed the judgment). An intergovernmental

The FW Act could be amended to include a mechanism which would enable state public sector employees, should they so choose, to access the federal jurisdiction where they no longer have access to a state-based tribunal able to exercise independent decision making powers of conciliation and arbitration.

The FW Act be amended to enable FWC to arbitrate industrial action or bargaining disputes, particularly in public sector contexts, which are protracted and intractable or in 'surface bargaining' contexts where despite nominal compliance with good faith bargaining requirements, little scope for reaching agreement is evident.

International Labour Standards

- *What are the implications of international labour standards (including those in trade agreements) for Australia's WR system?*

International Labour Standards do not form part of Australian domestic law at federal or state levels until they are expressly enacted by or incorporated within that domestic law.⁵ However the impact or implication of international labour standards remains controversial. The High Court has held that the act of ratifying an international instrument could give rise to a legitimate expectation at law that could form the basis for challenging an administrative decision that was contrary to the international convention.⁶ At least one state has enacted legislation intended to limit the effect of ratifying international conventions, while at the Commonwealth level it appears this legislative pathway has not been pursued.⁷ However, the High Court, while not over-ruling *Teoh*, has doubted its decision and the underlying doctrine of legitimate expectation has limited application in Australian jurisprudence.⁸

Australia has ratified some 58 conventions of the International Labour Organisation. Of these some 41 remain in force, the others having expired in effect. However, it has not to date ratified some 54 up-to-date Conventions.⁹

Among the ILO Conventions ratified by Australia are the *Freedom of Association and Protection of the Right to Organise Convention 1948* (C No 87) and the *Right to Organise and Collective Bargaining Convention 1949* (C No 98).

Somewhat surprisingly, the Australian Government has not to date ratified the *Labour Relations (Public Service) Convention 1978* (C No 151) or the *Collective Bargaining Convention 1981* (C No 154).

agreement would assist courts to determine practical questions as to whether, and the extent to which, the powers referred to the Commonwealth by States nevertheless result in a significant curtailment or interference with State constitutional power.

⁵ *Kioa v West* (1985) 159 CLR 550 at 570 per Gibbs CJ.

⁶ *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273

⁷ South Australia: see *Administrative Decisions (Effect of International Instruments) Act 1995*. A bill by the same name was not proceeded with by the Commonwealth Parliament in 1997 & again in 1999.

⁸ *Minister for Immigration & Ethnic Affairs; Ex Parte Lam* (2003) 214 CLR 1

⁹ http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102544 [accessed 4 March 2015];

http://www.ilo.org/dyn/normlex/en/f?p=1000:11210:0::NO:11210:P11210_COUNTRY_ID:102544 [accessed 4 March 2015]

The ratification of such conventions would facilitate the making of a modern workplace relations framework, especially in the area of public sector workplace relations and help reduce the need for complex additional layers of state and Commonwealth legislative & administrative regulation.

The ratification of such international conventions could be given effect in Commonwealth and state domestic law through the adoption of a general purpose or objects principle phrased either to ensure the Commonwealth/state labour standards meet international obligations or perhaps in a more confined way to give effect or further effect to the specified international convention/s.

The AEU notes the Commission itself must have regard, in the performance of its functions, to the need for Australia to meet its international obligations and commitments.¹⁰

Recommendations

The Productivity Commission should recommend that the Commonwealth government ratify the Labour Relations (Public Service) Convention 1978 (C No 151) and the Collective Bargaining Convention 1981 (C No 154).

The Productivity Commission should recommend that the Australian Commonwealth and state governments incorporate an express object in their respective labour law statutes that such statutes are intended to ensure implementation of the relevant international labour standards.

Is Competition Law a neglected limb of the WR System?

Secondary Boycotts

- *To what extent do the existing secondary boycott arrangements in the CCA contribute to a well-functioning WR system? Should the Australian Government modify ss45D and 45E, and if so, how?*
- *Are there barriers of a regulatory or policy nature to enforcement of ss45D and 45E, and if so, what should be the remedies?*

Anti-competitive Conduct

- *Are there grounds for widening the capacity of the CCA to address concerns about misuse of market power exerted through collective bargaining by employees and employer groups? If so:*
 - *what would be the scope of any desirable changes and their linkages with the FWA?*
 - *what would be the effect of any changes on the outcomes of the WR system (for example, workplace harmony, the power balance between employers and single employees, efficiency, productivity; wages and conditions, transaction costs), the existing industrial law system, and the resourcing of the ACCC?*

¹⁰ Productivity Commission Act 1998, s8(1)(j)

- *how would it be practically applied? For example, how would the ACCC identify restrictive trade practices, who could be the infringing parties, and what would be the role of authorisations and notifications for unions and employer groups?*
- *Are there grounds for changes to the CCA to address enterprise agreements that have the effect of limiting competition from contractors or labour hire businesses (and why would the CCA be preferred to the FWA in this respect)?*
- *what would be the benefits, costs and risks of any changes?*
- *On the other hand, are there grounds for shifting some aspects currently covered by the CCA to the FWA?*

The provisions of the *Competition and Consumer Act, 2010* [CCA] continue to maintain general prohibitions on the capacity to undertake secondary boycott and ‘sympathy strike’ or ‘protest action’ activities.

There is a narrow, general permitted area of activity as well as provision for certain exemptions and exceptions contained in ss45DD(1),(2) & (3) and s51(2). These relate to where the dominant purpose of the activity concerns, generally, terms and conditions of employment of employees and environmental or consumer protection.

However, the CCA contains no general protection for Unions engaged in activity for the furtherance of the Objects for which they are established.

The CCA, as indeed its predecessor, therefore continues to breach Australia’s international obligations as a signatory to International Labour Organisation (ILO) Convention (No 87) on Freedom of Association and Protection of the Right to Organise.

Article 3 of that Convention states, ‘(1) Workers’ and employers’ organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. (2) The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.’ Articles 8 states ‘(2) The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.’ And in Article 11, ‘Each member of the International Labour Organisation for which this Convention is in force undertakes to take all necessary and appropriate measures to ensure that workers and employers may exercise freely the right to organise.’

The ILO itself has repeatedly noted the former *Workplace Relations Act* and now the *FW Act* breach this Convention and has urged the Australian Government to bring its legislation into line with the Convention’s requirements.¹¹

The secondary boycott provisions of the CCA continue to militate against a well-functioning workplace relations system. They create a level of complexity and add a further layer of – and institutional apparatus for – regulatory over-sight that reduces efficiency. The regulation of labour markets should be the province of the workplace relations system or framework in which competition policy has no role to play.

¹¹ See, eg, the Report of the ILO Committee of Experts on the Application of Conventions and Recommendations (2012), Report 3, Part 1A, pp58-60
[http://www.ilo.org/public/libdoc/ilo/P/09661/09661\(2012-101-1A\).pdf](http://www.ilo.org/public/libdoc/ilo/P/09661/09661(2012-101-1A).pdf) [accessed 9 March 2015].

The AEU consequently recommends that the Commission take account of the ILO Committee of Experts on the Application of Conventions and Recommendations Reports. The Productivity Commission should recommend to government that the protections and exemptions for Union rights to organise freely be removed from the CCA, placed in the FW Act and broadened consistent with the ILO's observations and with Australia's obligations under the Convention 87.

The AEU favours the continued exemption of employment relations generally from the CCA as maintained by current s51(2).

As noted earlier in relation to public sector workplace relations, government generally is in a very powerful position. In competition policy terms, they have monopoly market power. All governments have wages policies which seek to dictate a similar outcome from bargaining either in relation to their direct employees or the employees of various government 'agencies.' Some state governments go so far as using their legislative power to over-ride bargaining outcomes.

To limit s51(2) without also limiting this market power of government would dramatically distort the power relations within the workplace relations system. This is unlikely to enhance the operation of the system.

The Bargaining Framework

Types of Bargaining and their key processes

(i) Single Interest Employer Declaration & Authorisation

The provisions of the Act, principally in ss247-252, in relation to single interest employer bargaining are of particular interest and concern to the AEU as it bears upon bargaining in the Early Childhood, Disability Services and TAFE college areas of its membership coverage, predominantly in Victoria but increasingly elsewhere. These are sectors of the economy and workforce where the state provides the majority of each service's funding and where state legislation and administrative processes to a large extent provide a common regulatory framework.

The provisions are cumbersome, duplicative and militate against the promotion of effective bargaining. They require one or more employers to obtain a Ministerial Declaration that the specified employers do share a 'common interest' and may bargain (s247) and then to obtain an authorisation from FWC that they can bargain (s248). The Act then treats the bargaining process as if it were for a single enterprise agreement.

In practice these processes of declaration and authorisation have operated to delay or hinder bargaining and have resulted in unproductive and unnecessarily incurred transaction costs.

The bargaining process should not be solely at the initiative of the employer in the situations covered by these processes. Employees and their unions should be able to initiate the process/es.

The AEU recommends the Act be amended to provide for a single stage process for oversight with the FWC utilising the criteria as currently provided by the Ministerial declaration at s247 (4) and that employee bargaining representatives be enabled to apply for such a single interest declaration/authorisation.

(ii) Multi Enterprise Agreements (MEA)

The AEU has had experience of multi-enterprise agreements in early childhood education and in TAFE. It is the experience of the AEU that the FW Act displays a decided preference for a particular species of enterprise agreement, the single enterprise agreement.

A number of provisions of the Act militate against the making of an MEA:

- Bargaining orders in relation to an MEA cannot be obtained except where FWC issues a low-pay authorisation (s229(2));
- Industrial action in support of an MEA cannot be subject to protected industrial action ballot orders, even where employers want an MEA albeit not one in the terms sought by the applicants for such orders (s413(2) and s437(2));and
- Despite all the employers covered by the MEA having to have genuinely agreed to its making, a single enterprise agreement made during the term of operation of the MEA and expressed to apply (even in relation to a single subject matter) to an employee otherwise covered by the MEA, will ‘oust’ the operation of the MEA in relation to the employee and it will never operate again (s58(3)).

The AEU recommends the deletion of s58(3) which provides for a single-enterprise agreement to prevail over an existing multi-enterprise agreement prior to its nominal expiry date and that good faith bargaining orders and protected industrial action ballot orders be obtainable in relation to bargaining for a MEA

(iii) Agreement Content

Currently, the Act, largely through ss172 & 194 restricts the matters that can be contained in enterprise agreements. This occurs predominantly through use of the ‘matters pertaining’ formulation in s172 and the specification in s194 of a prohibition on agreements containing terms concerning right-of-entry, unfair dismissal and industrial action at least so far as they would involve regimes that are inconsistent with, or would override the Act’s provisions in those regards.

The formulation in s172 is archaic in that it reflects an era when the ‘industrial relations regime’ was primarily concerned with the settlement of industrial disputes about industrial matters. This is no longer the case with the Act now primarily concerned with a balanced framework for cooperative and productive workplace relations promoting national economic prosperity and social inclusion¹², in essence, facilitating the relations between a corporation and its employees (and on those matters referred by the states).

In a statutory environment predicated upon the constitutional underpinning of the corporations’ power, employers, their employees and their representatives should be able to

¹² Fair Work Act 2009, s3

bargain on any matter that affects their enterprise subject to the current prohibitions on the inclusion of discriminatory or objectionable terms.

The AEU recommends that s172 be amended to enable ‘permitted matters’ to encompass any matter on which the parties can agree subject to a further amendment to s194 that a term of an agreement would be unlawful if it were to provide a condition worse than the standards established by the Act.

Industrial Action

As noted above, there should be no prohibition on the taking of industrial action in support of a proposed Multi-enterprise agreement subject to the requirements of authorisation being met.

(i) The 30 day Rule

The requirement in s459(1)(d) & (3) of the Act that each of the various ‘types’ of industrial action authorised by a protected action ballot be commenced within 30 days of the declaration of the results of the ballot unless FWC extends the period for up to a further 30 day period protects neither employer nor employee interests in the bargaining process or outcome.

Rather it forces a frustrated party to commence action earlier, and on a broader scale or range, than might otherwise have occurred or even to take action that could have been avoided. The parties become focussed on the mechanics of taking industrial action, such as seeking further protected industrial action ballots, rather than on the negotiating process to achieve a mutually acceptable bargaining outcome.

The AEU recommends deletion of the 30 day rule in s459(1)(d).

(ii) Voting Requirements: Approval of Industrial Action & Enterprise Agreements

The difference in the ‘quorum requirements’ for approval of industrial action in s459(1)(b) as against approval of a single enterprise agreement in s182(1) is anomalous and confusing. For industrial action, at least 50% of employees must vote and of these a majority of the valid votes must approve the action whereas for enterprise agreement purposes, simply a majority of the valid votes cast is required.

The AEU recommends the same threshold voting requirements for approval of enterprise agreements should apply for the taking of protected industrial action.

(iii) Suspension of protected industrial action for threatening significant harm to third parties (s426).

Industrial action always adversely affects the employer/s and employees involved and it always adversely affects in significant ways a host of ‘third parties’. This is its purpose: to create pressure to influence one side in a bargaining situation to make decisions they otherwise would not. It is a purpose recognised by the legislature in permitting industrial action that would otherwise be unlawful to occur.

To permit industrial action to occur in the limited circumstances of bargaining and then to deny protection to such action because of threatened significant harm to third parties is to introduce into the bargaining situation a variable which is beyond the capacity of either party to control. This is simply unfair. It also introduces into the bargaining context matters which are extraneous to the process itself. This does not help facilitate bargaining outcomes.

Moreover, as currently formulated, s426 provides only that protected industrial action is suspended. In effect this provides an unparalleled advantage to one side in the bargaining equation.

The AEU recommends that s426 be deleted. Alternatively, should public policy interests be such that the needs of third parties ought be taken into consideration, the AEU recommends that termination rather than suspension of industrial action is more appropriate as this opens the existing pathway to arbitral workplace determination under s266.

The AEU notes in this regard the registration in 2014 of the *Fair Work Amendment (Protected Industrial Action) Regulation 2014*. This regulation extended the class of persons who might apply to FWC for orders suspending or terminating protected industrial action on the ground of endangering life or personal safety, health or welfare. That extended class comprises a Minister of a non-referring state and an organisation or other person, other than an employee, directly affected by the action.

While it is still too early to assess the impact of the new regulation, it seems reasonably clear on the face of the regulation that ‘third parties’ would no longer have to demonstrate adverse impact or significant harm.

Employee Protections

The Reasonable Business Grounds Exception

Under s739(2), FWC is unable to deal with a dispute arising under the National Employment Standards concerned Flexible Working Arrangements (s65) or Extensions to Unpaid Parental Leave (s76) where the employer has reasonable business grounds to reject employee requests. Although, as the Note to the section makes clear, this does not prevent FWC from dealing with an enterprise agreement provision in substantially the same terms as the NES provisions.

This is a nonsensical provision as it simply replicates in a bargaining context what is provided in a statutory context but without the dispute resolution provision.

There are no public policy considerations which necessitate continuing statutory prohibitions in the industrial arena on flexible working arrangements on family caring matters when statutory provisions in other contexts are aimed at facilitating those same arrangements, eg, the Paid Parental Leave scheme.

Victorian school teachers, for example, are routinely denied applications for a temporary, as opposed to permanent, adjustment to their time fractions from full-time to part-time in order to care for family members but FWC is unable to deal with an application to resolve any subsequent dispute.

The AEU recommends the FWC be empowered to deal with disputes arising from a rejection on business grounds of applications for flexible work arrangements or extensions to unpaid parental leave and that the test threshold be raised from ‘reasonableness’ to ‘significant’.

The Implied Term of Mutual Trust and Confidence

The High Court has determined that the common law in Australia does not recognise that there is an implied term of mutual trust and confidence in the contract of employment¹³. The complex history of common law and statute law development in the Australian context meant the Court thought it was a matter more appropriate to the legislature than for the Courts to determine.¹⁴ The effect is that employees are left without a remedy in situations where the employer acts in such a way as to destroy or seriously damage the relationship of trust and confidence between them.

The New Zealand *Employment Relations Act 2000*, s3 provides one way in which statute law can address the implication of a term of mutual trust and confidence into the employment relationship

The AEU recommends the Productivity Commission consider the invitation of the High Court in CBA v Barker and recommend the Australian Government introduce a statutory term of mutual trust and confidence in all employment contracts

General Protections

The extensive litigation in the *Bendigo TAFE v Barclay* case¹⁵ and in subsequent cases makes it desirable for the statute to specify that an objective test in addition to any consideration of the subjective reasons of a decision-maker applies in applications alleging adverse action. Considerable uncertainty still prevails over the extent of protection afforded to union officers who, as employees, offend their employer’s interest while undertaking lawful industrial action or pursue legitimate union activity.

The AEU recommend that the FW Act be amended to the effect that in discrimination or ‘adverse action’ situations, the subjective intention of the ‘discriminator’ is not determinative in establishing a defence to the claim.

Unfair Dismissals

Undoubtedly the Act affords better protections for employees from unfair dismissal than its predecessor. Two areas however warrant further consideration.

(i) The Minimum Period of Employment for a Small Business Employer

Currently, FWC has no jurisdiction to entertain any application alleging unfair dismissal where the applicant has not served a minimum period of employment of 6 months except for small business employers, in which case the threshold is 1 year (s383). A small business

¹³ *Commonwealth Bank of Australia v Barker* [2014] HCA 32

¹⁴ *Ibid* per French CJ, Bell and Keane JJ at [40].

¹⁵ *Board of the Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32

employer (ie, one with less than 15 employees) works more closely with its employees on routine or even daily basis and far more likely to know the conduct and capabilities of its employees than a larger one and easily able to unfairly dismiss an employee within a 6 month time frame without attracting the jurisdiction of FWC.

There can be no justification for continuing this small business exclusion in such situations. The AEU has significant membership in early childhood and in disability work locations. A substantial number of employers in such locations are small business employers and it is incongruous to say the least that employers can, and in the AEU experience do, unfairly dismiss, employees who are subsequently denied a remedy, not because of lack of merit but because of want of jurisdiction due to the differential minimum qualifying period of employment rules that apply.

The AEU recommends that in unfair dismissals, there be no distinction as to the minimum period of qualifying service based upon the size of the employer.

(ii) Non renewal of fixed-term employment can constitute an Unfair Dismissal

Under s386(1) a termination of employment must be at the initiative of the employer and under s386(2) there won't be any such termination if a fixed-term contract is not renewed unless, under s386(3), a substantial reason for the employee's engagement on a fixed term basis is avoidance of an employer's obligations in relation to dismissal of employees.

However, the ostensible protection of s386(3) is simply non-existent as the definitional requirements of s386(1) will simply not be met – contracts of employment which reach their expiry date and are not renewed simply do not terminate the employment at the initiative of the employer but rather are terminated by consent and the effluxion of time.

The AEU recommends amendment to s386 to the effect that non-renewal of fixed-term contracts of employment despite the work continuing to be required to be performed will be deemed to constitute a termination of employment at the initiative of the employer where the employee desires to continue in employment.