

Parliament votes to abolish the Australian Building and Construction Commission

The Building and Construction Industry Improvement Amendment (Transition to Fair Work) Bill 2011 has passed through both Houses of Parliament. The Bill: abolishes the Australian Building and Construction Commission (ABCC), and establishes a new Fair Work Building Inspectorate

The ABCC was created by the Building and Construction Industry Improvement Act (the Act) in 2005 in response to the Cole Royal Commission. Its mandate was to enforce the law in the building and construction industry following a series of industrial disputes and alleged corruption.

The key changes that will occur under the amended law include:

- the removal of higher penalties for breaches of the industrial law in the building industry, and
- narrowing of circumstances in which industrial action in the building industry will attract penalties

The new *Building Inspectorate* will retain the coercive information gathering powers currently afforded to Inspectors of the ABCC. However, the use of the powers will be dependent upon an Inspector first gaining approval from the Administrative Appeals Tribunal (AAT).

Although the new Inspectors will be able to institute proceedings for contraventions of various civil remedy provisions of the Fair Work Act, they will not have the ability to bring proceedings in circumstances where a claim has already been settled by relevant building industry participants. This re-opens the industry to potential corruption as one of the major problems has been coercion and standover tactics applied to contractors.

The new arrangements will commence within six months after the Bill receives the Royal Assent.

[\[More\]](#)

Fair Work Australia – the third party at the bargaining table

The Full Bench of Fair Work Australia has brazenly imposed itself as the third party at the negotiating table in its most recent decision on the *'Good Faith Bargaining Principles'*.

In the case of [Endeavour Coal Pty Ltd v Association of Professional Engineers](#), Fair Work Australia has issued orders against the employer, notwithstanding the fact that

it does not wish to enter into an enterprise agreement with the union.

It has required the employer to:

- Provide the union with a list of subject matter that it would be prepared to include in an enterprise agreement
- Tell the union what aspects of the latest version of the union's proposed enterprise agreement if any, can be agreed and what changes should be made to make it an agreement that it would make
- Propose terms of an enterprise agreement that the employer would be prepared to enter into.

It has also prohibited the employer from making any changes to the individual terms and conditions of the applicable employees whilst the bargaining is undertaken.

The implications of this decision are discussed in TIP OF THE MONTH: Is enterprise bargaining worthwhile?

Superannuation increases to be paid by employers

Readers will recall that in December last year we reported that the Australian Government had introduced a Bill into Parliament to increase the level of Superannuation Guarantee contributions from 9 to 12 percent. The amendments to the Superannuation Guarantee (Administration) Act 1992 have passed into law. The amendments:

- increase the superannuation guarantee age of an employee at which the superannuation guarantee no longer needs to be provided from 70 to 75 years of age; and
- Incrementally increase the superannuation guarantee charge percentage from 9 per cent to reach 12 per cent in the 2019-20 financial year

Each of these measures commence on 1 July 2013.

Notwithstanding the rhetoric of the Australian Government, no revenue from the new mining tax has been allocated toward assisting employers to meet the increases. The payment of the increases will be the employer's responsibility and therefore an additional cost on the business.

The table overleaf shows the schedule of increases each year, starting with a 0.25% increase on 1 July 2013 and reaching the 12% level by 1 July 2019.

Year	Super Guarantee
1 July 2013	9.25%
1 July 2014	9.5%
1 July 2015	10%
1 July 2016	10.5%
1 July 2017	11%
1 July 2018	11.5%
1 July 2019	12%

Employers should be mindful that any increases to ordinary salaries that they choose to make will be subject to the higher rates listed above. Therefore it may be appropriate to consider discounting future wage increases to offset the increase in superannuation.

[\[More\]](#)

Adverse action in the High Court

On Thursday 29 March 2012, the High Court heard its first test case of the adverse action provisions in the Fair Work Act 2009.

The Bendigo Institute of TAFE wants to overturn a Federal Court full bench ruling that the TAFE had taken 'adverse action' against an employee who was also a union delegate. It suspended the employee from duties after an incident involving an email sent by him to staff. The Federal court held that the TAFE had taken the action against the employee for acting in his capacity as a union representative, notwithstanding the fact that the CEO had provided uncontested evidence that the employee had been suspended for reasons unrelated to his union activity.

The majority of the Federal Court decided that the determination of whether or not there had been a breach of the adverse action laws "... involves characterisation of the reason or reasons of the person who took the adverse action. The state of mind or subjective intention of that person will be centrally relevant, but it is not decisive. What is required is a determination of ... the "real reason" for the conduct. **The real reason for a person's conduct is not necessarily the reason that the person asserts, even where the person genuinely believes he or she was motivated by that reason. The search is for what actuated the conduct of the person, not for what the person thinks he or she was actuated by. In that regard, the real reason may be conscious or unconscious, and where unconscious or not appreciated or understood, adverse action will not be excused simply because its perpetrator held a benevolent intent. It is not open to the decision-maker to choose to ignore the objective connection between the decision he or she is making and the attribute or activity in question.**"¹

This is an astonishing decision but not surprising. The two Federal Court judges seem to think it possible to attribute unconscious motivation to a person's action even where

there is no evidence to support such a conclusion. This makes it difficult but not impossible for employers to respond appropriately to action taken by their staff at work in their capacity as union members or delegates.

The High Court reserved its decision on this matter. It is expected to be handed down by the middle of the year. However, employers should not be totally discouraged. There are legitimate strategies to control the behaviour of union delegates in the workplace but employers should be cautious in how they approach the activities especially during enterprise bargaining. Disciplinary action such as warnings, suspension or dismissal should not be the first response.

[Contact us](#) for advice.

TIP OF THE MONTH: Is enterprise bargaining worthwhile?

Since the commencement of the Fair Work Act Maguire Consulting has assisted some clients to develop enterprise agreements for their businesses and we have also discouraged several clients from re-negotiating their enterprise agreements after they expired. Not a good business move by us, but generally a sensible response to the risks of enterprise bargaining under the Fair Work Act. Why would we do this? Is bargaining to make an enterprise agreement worth the trouble? Do employers have a choice? The answer to these questions may be found in an analysis of whether the statutory ideal of the Fair Work Act matches the reality of everyday business.

The statutory objects

The objectives of Part 2—4 of the Fair Work Act are to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that deliver productivity benefits. Secondly, it is to enable Fair Work Australia to facilitate good faith bargaining and the making of enterprise agreements through:

- (i) Making bargaining orders,
- (ii) Dealing with disputes where bargaining representatives request assistance, and
- (iii) Ensuring the applications for approval of enterprise agreements are dealt with without delay.

The objectives sound good. But how does it work in practice? Let's examine the risks and opportunities for employers at each stage of enterprise bargaining.

¹ Barclay v The Board of Bendigo Regional Institute of Technical and Further Education [2011] FCAFC 14 (9 February 2011) at paragraph 28

Initiating bargaining

Bargaining in a formal sense commences when one of several events occur including where Fair Work Australia issue:

- Majority support determinations
- Scope orders
- Low paid authorisations

Alternatively, employers may simply agree or initiate bargaining by notifying employees that it wishes to make an enterprise agreement with them.

However, these events up the bargaining process to a world of regulation that most employers will be unfamiliar, including mandatory third party representation whether employees and employers wish this or not. There is not an option of an employer and employee only collective agreement.

Default union representation of employees during bargaining means employers are forced to engage with people and organisations that it may never have had a prior commercial or industrial relationship. The dynamics of the employer and employee relationship is immediately altered. This can be a daunting experience for employers. The employer in this instance will often engage its own third party representative if it wishes to bargain on an equal footing. This creates an adversarial rather than cooperative environment in which to develop an agreement.

In these circumstances the opportunities to directly learn more about employees and their views and ambitions is somewhat inhibited and often filtered through the agenda pursued by the bargaining representatives. The direct relationship that the employer may wish to foster with employees becomes problematic. Employees may feel more secure in this structure, but it definitely places employers outside of their comfort zone.

Good faith bargaining

Once bargaining has commenced with employees and their representatives the employer must conduct themselves in accordance with rules that it has little or no experience. Not negotiating is not an option. It is also difficult to maintain direct communication and consultation with employees.

Good faith bargaining means the employer must:

- Attend, and participate in meetings at reasonable times
- Disclose relevant information (other than confidential or commercially sensitive information) in a timely manner
- Respond to proposals made by other bargaining representatives for the agreement in a timely manner

- Give genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals
- Refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining
- Recognise and bargain with the other bargaining representatives.

Although the rules do not require an employer to agree to specific terms or make concessions to the other party, the most recent decision² of Fair Work Australia suggests that passive resistance is futile. Good faith bargaining orders may be obtained to force an employer to disclose information on staff wages to bargaining representatives, respond with alternative proposals and terms to which it would find acceptable within an enterprise agreement. In other words, just saying no is not acceptable.

Pattern bargaining

Notwithstanding the fact that industrial action in support of pattern bargaining is prohibited, the issues that are listed for negotiation in enterprise bargaining will often be standard claims made of all employers in an industry. This will occur whether or not the employees of an enterprise have nominated them as priorities. They may be provisions that have not been allowed in modern awards but were evident in pre-modern and State based awards. They may be claims for improvements to paid leave, additional allowances, or complex consultative mechanisms. Employers are told that every other employer in the industry has agreed and therefore it should simply fall into line notwithstanding the fact that the claim if adopted would inhibit flexibility or reduce productivity.

Of course, employers are not compelled to agree to these 'standard industry provisions' but the negotiations are likely to continue beyond the reasonable period that an employer wishes to participate and therefore may often agree to conclude the negotiations with these additional burdens.

Matters outside the employment relationship

One of the most significant departures from the Work Choices system of enterprise bargaining has been the right to bargain over matters that are not directly pertaining to the employment relationship. For example, the Victorian nurses' dispute was not about wages increases per se. The Victorian nurses wanted to control hospital admissions based on rigid patient to bed ratios. The ANF expected wage increases and the imposition of restrictive work

2 Endeavour Coal Pty Ltd v Association of Professional Engineers,[2012] FWAFB 1891

practices on Victorian public hospitals. Productivity improvements were not on the agenda.

The Australian airline, building and construction and manufacturing industries have been subjected to claims that would restrict the employment of temporary staff and contractors, often requiring employers to seek approval from the unions to engage 'outside' staff.

The inclusion of these claims affecting '*management prerogative*' may substantially and unnecessarily prolong negotiations to the detriment of employer and employees alike. Acceptance of such claims will inhibit flexibility and innovation which are the drivers of productivity,

Protected industrial action

The right to strike, work bans and employer lockouts within a bargaining period have been a feature of Work Choices and the Fair Work Act. These weapons of persuasion have been used very successfully by unions and employers alike. However, the cost to each party is actually disproportionate. An employer stands to lose substantial revenue through lockouts unless they can guarantee supply to customers. Unions rarely use full work stoppages (strikes) in the modern era. The more sophisticated use of selective work bans by unions during 2011 has inflicted significant economic damage on employers with minimal loss of wages to employees. The classic example of this was the Qantas dispute of 2011. The '*slow bake*' famously coined by the National Secretary of the Transport Workers Union, illustrates perfectly the disproportionate cost of industrial action during bargaining for an enterprise agreement.

Better off overall

An enterprise agreement will not be approved by Fair Work Australia unless the employees covered by the agreement are better off overall in comparison to the applicable modern award. The limitations of the modern award are effectively incorporated into agreements as exclusion of any particular condition no matter how irrelevant or inefficient, must be compensated in other areas. Approval is an exercise in accounting not a measure of innovative and flexible approaches to employment.

In fact, even prospective employees must be better off overall and future wage increases are of no consequence, as the test is applied at the time of the making of the agreement only.

Fair Work Australia terminated the bargaining period in the Qantas dispute, but the final determination was simply a reflection of the status quo in conditions combined with wage increases. Fair Work Australia failed to challenge either the airline or the unions on measures to improve productivity. Two weeks after the determination Qantas announced major changes to its maintenance operations resulting in significant redundancies. Thus Qantas

demonstrated how business will introduce changes to drive competitiveness in spite of enterprise bargaining, not because of it.

Individual flexibility

A provision to allow individual employees and employers to agree to arrangements that vary or deviate from the norm to suit their individual interests is mandatory for an enterprise agreement. However, the experience so far suggests that the provisions included in approved agreements are designed to inhibit flexibility rather than facilitate such arrangements. The Act itself discourages such agreements by requiring no more than 28 days notice to terminate an agreement. The limitations for business of an arrangement that may be terminated at such short notice are obvious. Consequently, there has been limited take up of the '*flexible*' option by employers.

Conclusions

I may have painted a fairly bleak picture of enterprise bargaining in Australia. However, I would not wish employers to despair. Although there is sufficient evidence across a range of industries to conclude that there are substantial barriers to making an enterprise agreement that improves productivity, a well organised employer may be able to achieve improved flexibility and productivity savings for their business. The keys are:

1. Decide what you want now. The form and content of your ideal agreement should be ready before you commence bargaining.
2. Use various means to drive productivity and performance. Enterprise agreements are not the only tool.
3. Know what motivates your employees. Regular communication and feedback are vital. Use surveys as means to gauge the mood of employees.
4. Set a timetable to introduce, consult and conclude the bargaining.
5. Don't be afraid to take your proposal to the vote. If you are confident that a majority of employees will support your offer then go ahead. Don't wait for the bargaining representatives to agree to everything.
6. Think long term. Although your wages policy should reflect the business cycle, successful change can often occur incrementally.

Finally, get good advice as early as possible. Please [contact](mailto:contact@maguire.com.au) Paul Maguire to discuss the options for your business if you are unsure or require assistance.