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LAWYERS

The ACTU's industry bargaining proposal is not in Australia's interests

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Introduction

Given the relatively harmonious industrial relations environment in Australia over the past 15 years, many people have forgotten the lessons of the past. This is on stark display in the current public debate about the ACTU's industry bargaining proposal.

Surprisingly, the Federal Government and even some smaller employer groups appear to be actively considering this crazy idea. The unions' proposal is self-serving, not in the community's interests, and needs to be quickly and decisively ruled out by the Federal Government.

The ACTU's proposal is a 'wolf in sheep's clothing'. It is dressed up with deceptive assertions about being focussed on the low paid and being of benefit to small businesses, but industry bargaining would be available across all sectors, including those with militant unions and where workers are highly paid. The unions have made no secret of their plan for lawful industrial action to be available across entire industries as a so called 'last resort'. Protected action ballots to authorise industrial action at the enterprise level and the current laws which ban industrial action in pursuit of pattern bargaining would be cast aside.

Australia's international reputation as a reliable trading partner was severely damaged in the past due to industry-wide stoppages, and the costs to the community were very high. For example, in a 2002 inquiry the Productivity Commission noted that the estimated cost of lost production from two industrial disputes in the automotive industry that stopped production across the industry in 2001 were up to $630 million.[1] This cost would be more than $1 billion in today's money.

In the 1970s when industry-wide strikes were common, Australian industry operated behind high tariff walls. These days, Australia has a very open economy and industry-wide strikes would inflict major damage upon our international reputation. This in turn would lead to reduced exports, reduced economic growth and lower living standards.

Industry-wide industrial action has never been lawful in Australia. Since 1993, there has been a right to take industrial action in pursuit of an enterprise agreement, but there has never been a right to take industry-wide industrial action. The industry-wide strikes of the past were all unlawful.

[1] Productivity Commission, *Review of Automotive Assistance*, final report, p.53.

Genuine enterprise bargaining and the requirement introduced in 2006 for a secret ballot at each enterprise to authorise industrial action have led to a dramatic decrease in industrial action. It is foolish to think that a huge increase in the level of industrial action would not be a direct result of the ACTU's proposals being adopted.

The unions' proposed bargaining system would lead to the Australian economy being crippled by strikes across the construction, maritime, mining, manufacturing, transport and other industries. These strikes would inflict widespread hardship on businesses, workers and the broader community.

Does anyone other than the unions and a few academics seriously think that an outbreak of industrial action is what the community needs in these challenging times?

In the early 2000s, the Royal Commission into the Building and Construction Industry considered in detail the arguments often raised in support of industry and pattern bargaining. The Royal Commission's conclusions are as relevant today as they were at the time:

- Industry and pattern bargaining denies employers the capacity for flexibility, innovation and competitiveness.
- It denies employees the capacity to reach agreement with their employer regarding their own employment conditions – including leave arrangements, participation in bonus schemes, flexible working hours and other mutually acceptable arrangements.
- It assumes that all businesses and their employees operate in the same fashion, have the same objectives, adopt common approaches to working arrangements and are content with uniformity.
- It assumes that third parties such as unions and employer associations understand better than either the employer or the employees what the business model of the enterprise is and what the wishes and desires of the employees are.
- It assumes that employees are not capable of negotiating satisfactorily on their own behalf.[2]

[2] Royal Commission into the Building and Construction Industry, Final Report, Volume 5, p.53.

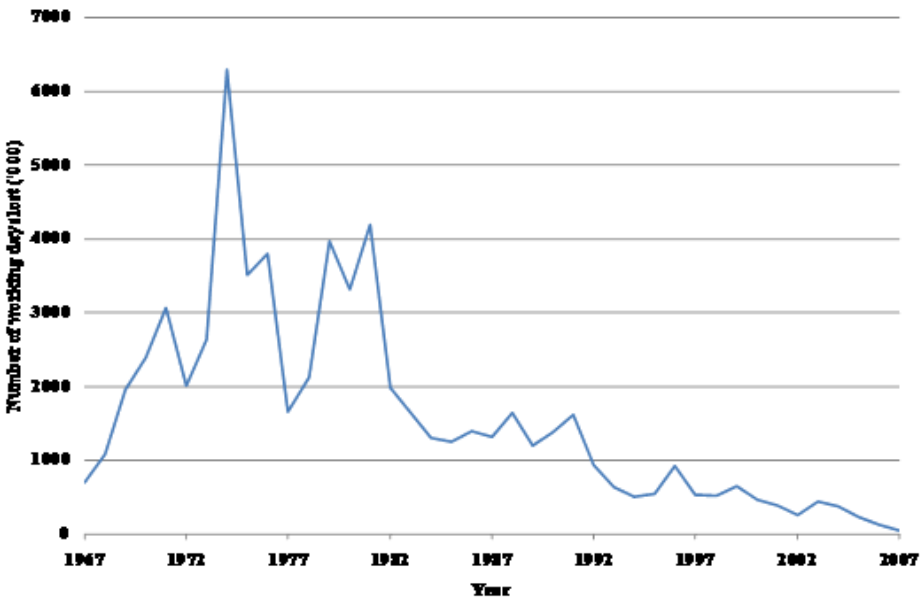
Just like larger businesses, there is absolutely no benefit for small businesses in being part of a multi-employer agreement reached between the unions and an industry group. Any industry group that negotiated such an agreement could find that a large proportion of its membership quickly evaporates.

In these challenging times businesses and the community need a focus on productivity, innovation and flexibility, not on gifting unions a major weapon to use against employers.

The loss of protected action ballots would lead to a huge increase in the level of industrial action

The significant decline in industrial action in Australia aligned with the introduction in 2006 of secret ballots to authorise industrial action at each enterprise, as can be seen from the following chart which shows the number of working days lost to industrial disputes between 1967 and 2007. The level of industrial action has remained low since 2007.

Number of working days lost to industrial disputes (000), Australia, 1967 to 2007



Source: Parliamentary library

The loss of protected action ballots as part of an industry bargaining system will undoubtedly lead to large increase in the level of industrial action, with consequent large losses and disruption for businesses, workers and the community.

Protected action ballots are inherently democratic. It is unfair for employees to be pressured into taking industrial action and losing wages, without having the right to express their views about any proposed industrial action in a secret ballot.

When the Fair Work Act was being developed, the Rudd Labor Government rightly rejected union claims for secret ballots to be abolished given the democratic principles that underpin such ballots, and their role in protecting workers against intimidation and coercion.

The pattern bargaining laws in the Fair Work Act

The Fair Work Act outlaws the taking of industrial action in pursuit of pattern agreements (i.e. template agreements that are adopted by many employers as terms for their enterprise agreement).

The pattern bargaining laws are inconsistent with the ACTU's proposed industry bargaining system. The removal of the laws would give unions the ability to organise very damaging industrial action across entire industries.

The Fair Work Act already includes a low paid bargaining stream and scope for multi-employer bargaining

There is already a low paid bargaining stream in the Fair Work Act which permits multi-employer bargaining in defined circumstances. There is also the ability for multi-employer agreements to be reached in other sectors. However, the unions do not like the fact that the existing laws do not enable them to organise sector wide industrial action in pursuit of multi-employer agreements.

There have only been three applications made by unions under the low paid bargaining stream:

- In 2011, the Fair Work Commission (FWC) granted a union application for a low paid authorisation applicable to aged care workers.[3] The authorisation was granted but the union decided not to pursue the matter, apparently because the Commission decided that employees covered by existing enterprise agreements should be excluded.

- In 2013, the FWC rejected an application for a low paid authorisation for nurses in medical practices. The Commission decided that the nurses were not low paid.[4]

[3] *United Voice and the AWU* [2011] FWAFB 2633.

[4] *Australian Nursing Federation v IPN Medical Centres Pty Limited and Others* [2013] FWC 511.

- In 2014, the FWC rejected an application for a low paid authorisation for security workers.[5] The Commission noted the fact that there are numerous enterprise agreements in the security industry and therefore security industry employees do not face any special difficulties in reaching enterprise agreements.

The reason why the low paid bargaining steam has been underutilised is because unions have chosen not to make applications under it for the past eight years. As can be seen from the above cases, if the unions made an application for a group of employees who were genuinely low paid and genuinely unable to secure an enterprise agreement, the application would have good prospects of success.

Industry bargaining is inconsistent with Australia's award system

Australia has a system of industry awards that set a safety net of wages and minimum conditions across numerous industries. Awards play a similar role to the industry-wide agreements that operate in many European countries.

Australia is the only country in the world that has an award system. There were two countries until the early 1990s, but New Zealand abolished their award system at that time.

Australia's modern award system provides a comprehensive set of legally enforceable wage rates and conditions of employment at the industry level. What would be the point of having an award in an industry if an industry agreement overrode that award for employers and employees throughout the industry?

Addressing the problems with Australia's enterprise bargaining system

The number of enterprise agreements and the number of employees covered by enterprise agreements have fallen dramatically over the past 12 years since Labor's Fair Work Act was implemented.

The enterprise bargaining system is worth resuscitating. It served Australia very well in the 1990s when big gains in productivity were achieved and it could serve Australia well again.

There are some obvious problems with the current enterprise bargaining laws that need to be addressed. Undoubtedly, the way that the Better Off Overall Test (BOOT) has been interpreted and applied by the Federal Court and the FWC has driven businesses away from bargaining in droves. Regardless of whether the blame lies in the wording of the Fair Work Act or in the inflexible way that the BOOT is now being

[5] *United Voice* [2014] FWC 6441.

applied, the fact remains that unless the problem is addressed those employers who have abandoned enterprise bargaining are highly unlikely to return.

The same can be said for some of the unworkable and inconsistent Federal Court and FWC decisions relating to the requirement to explain the terms of a proposed enterprise agreement to employees, and decisions about which cohorts of casuals on a company's books are entitled to vote on a proposed agreement.

It is beyond any reasonable argument that these problems need to be fixed through amendments to the Fair Work Act. An employer and its employees should be able to make an enterprise agreement that is designed to provide benefits to all parties and have confidence that their agreement will be approved by the FWC in the terms agreed upon. Currently, the parties can have no such confidence.

During the term of the Coalition Government, for political reasons the unions refused to support the changes that were needed to the enterprise bargaining laws to fix the obvious problems. They supported some amendments but only for agreements reached with unions. This self-serving and unfair approach cannot be allowed to prevail.

To reverse the decline in enterprise bargaining, the system needs to be more attractive to employers and employees. The answer is all about flexibility. Businesses need and want flexibility and so do employees. Enterprise agreements need to be able to include terms that substantially depart from those in the relevant award provided that employees are better off overall under the agreement.

This is the way things were in the 1990s – the heyday of enterprise bargaining. It was not uncommon for agreements to include annualised salary arrangements, innovative leave arrangements and flexible hours of work arrangements. In the early 1990s, the Department of Employment and Workplace Relations set up a database so that the innovative clauses in agreements could be identified and shared, and the Government provided grants to businesses to enable them to obtain expert assistance to develop and negotiate innovative enterprise agreements.

Some commentators have argued that the major productivity gains in the 1990s were the result of enterprise agreements in that era focussing on 'low hanging fruit'. Even if that is true, a smart country like Australia can surely find ways to incentivise employers and employees to focus on win-win solutions in enterprise agreements.

The solution to the decline in enterprise agreements is certainly not the ACTU's industry bargaining proposal.

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