Seminar on termination of enterprise agreements to the NSW Society of Labor Lawyers: 12 March 2019

Introduction

The title for this seminar is as follows: *Termination of Enterprise Bargaining Agreements – The New Fair Work Battle?*

For the reasons explained, I am going to suggest that title is apt to mislead.

I am going to focus on unilateral termination under federal legislation. With some exceptions, unilateral termination of an enterprise agreement is in the employer's interests. Unilateral termination is usually contrary to the interests of workers and their unions.

My comments are mainly directed at unilateral termination during bargaining. This is because unilateral termination is mostly relevant during bargaining for a replacement enterprise agreement.

Unilateral termination is a powerful tool for the employer during bargaining – cop it sweet or go back to the Award.

The termination of an enterprise agreement is actually a relatively old battle. Furthermore, the FW Act was drafted to improve the position of workers and their unions in that battle. The FW Act did that by making it harder to unilaterally terminate an enterprise agreement.

To properly make those points, I will need to explain the history of this provision.

History of the provision

Enterprise bargaining has been central to workplace relations system since the early 1990s. There has always been capacity to terminate an enterprise agreement. A non-exhaustive and brief summary of the various legislative tests is set out below:

- *Industrial Relations Act 1988 Amendments*: Two mechanisms for unilateral termination:
    - Section117(1): At any time while certified agreement in force, Minister may apply for review of an agreement. Heard by Full Bench and can set aside (or varied) if satisfied that continued operation is contrary to public interest; or
    - Section 117(5): Where party to certified agreement engaged in industrial action in relation to a matter dealt with in the agreement, the affected party bound by the agreement could apply to no longer be bound. Commission could make order if satisfied that is in the public interest.
- *Industrial Relations Reform Act 1993*. Continued with two mechanisms for unilateral termination:
    - Section170NN(1): Continued approach that agreement could be reviewed (and then terminated) by Full Bench at any time. However, changed law to allow such application to be made by any person bound by the agreement or Full Bench on its own initiative. Importantly, changed the test from a positive public interest test to only being able to terminate if "*continued operation of the agreement would be unfair to the employees covered by the agreement*" (s.170NN(4)); and
    - Section170NN(6): Continued approach re termination where industrial action occurs.
- *Workplace Relations Act 1996 (pre WorkChoices Amendments: 1996 – March 2006*). Two mechanisms for unilateral termination:
    - Section 170MH: After nominal expiry date and on application by employer or majority of employees or relevant organisation could apply to Commission to terminate the agreement. The Commission was required to take appropriate steps to obtain views of persons bound, and must terminate if satisfied that it not contrary to the public interest.

    - Section 170MHA: Provided certified agreement made provision for termination if certain conditions were met, employer or an employee or relevant organisation could apply to Commission to terminate after nominal expiry date. Commission had to be satisfied those conditions were met.

- *Workplace Relations Act 1996 (WorkChoices Amendments: March 2006 – March 2008).* As enacted, allowed for unilateral termination by either employer or majority of employees or relevant organisation lodging a declaration with Workplace Authority. This could only be done after nominal expiry date of the agreement and on giving 90 days written notice. The Agreement would terminate (with no oversight from Industrial Commission) on filing of that declaration.

- Further amendments were made during WorkChoices era. The capacity to unilaterally terminate in the manner described above was confined to those agreements that provided for a process for unilateral termination, and a provision (in the form of s.397A) was introduced that was quite similar to s.170MH of the WR Act (pre WorkChoices).

The point is that prior to the FW Act, enterprise agreements were unilaterally terminated on application by the employer during bargaining. Indeed, a good example is Full Bench of AIRC in *Re Kellogg Brown and Root Bass Strait (Esso) Onshore/Offshore Facilities Certified Agreement* (2005) 139 IR 34 (**Kellogg**). This case remains the leading authority on the concept of the public interest in these applications.

FW Act

Section 226 is set out below:

> *If an application for the termination of an enterprise agreement is made under section 225, the FWC must terminate the agreement if:*
>
> *a) The FWC is satisfied that it is not contrary to the public interest to do so; and*

b) *The FWC considers that it appropriate to terminate the agreement taking into account the circumstances including:*

   i. *The views of the employees, each employer and each employee organisation (if any) covered by the agreement; and*

   ii. *The circumstances of those employees, employers and organisations including the likely effect that the termination will have on each of them.*

The FW Act retained the negative public interest that was introduced in the WR Act. However, quite significantly, the FW Act introduced the appropriateness test and separated consideration of all relevant circumstances from the public interest.

Tahmoor

For a number of years, the FW Act did its job. That is, the FWC interpreted the FW Act in such a way that employers were effectively unable to unilaterally terminate an enterprise agreement during bargaining. This was the consequence of the decision of Vice President Lawler in *Tahmoor Coal Pty Ltd* [2010] FWA 6468 (23 August 2010) where it was held:

> [**55**] *It seems to me that under the scheme of the FW Act, generally speaking, it will not be appropriate to terminate an agreement that has passed its nominal expiry date if bargaining for a replacement agreement is ongoing such that there remains a reasonable prospect that bargaining (in conjunction with protected industrial action and or employer response action) will result in a new agreement. This will be so even where the bargaining has become protracted because a party is advancing claims for changes that are particularly unpalatable to the other party. While every case will turn on its own circumstances, the precedence assigned to achieving productivity benefits through bargaining, evident in the objects of the FW Act, suggests that it will generally be inappropriate for FWA to interfere in the bargaining process so as to substantially alter the status quo in relation to the balance of bargaining between the parties so as to deliver to one of bargaining parties effectively all it seeks from bargaining*.

Aurizon

The Full Bench of the FWC decision in *Aurizon* [2015] FWCFB 540 dramatically lowered the bar. Indeed, the Full Bench in *Aurizon* (at [138] & [142]) expressly rejected the proposition extracted above from *Tahmoor*. A Full Court of the Federal Court in *CEPU* v *Aurizon Operations Ltd* [2015] FCAFC 126 at [25] confirmed the Full Bench was right to reject *Tahmoor*.

More mundanely, the Full Bench in *Aurizon* explained at [129] – [131] how the public interest (s.226(a)) and at [167] how the question of appropriateness (s.226(b)) was to be assessed.

Change the Rules

There is strong consensus right across the labour movement that it is far too easy for an employer to terminate an enterprise agreement during bargaining.

Should Labor win Government at the next Federal election, it appears highly likely that the laws will be changed to make unilateral termination more difficult.

However, a point that is sometimes overlooked in the debate about the termination of enterprise agreements is that the FW Act did not change between *Tahmoor* and *Aurizon*. Rather, the exact same section of the FW Act was interpreted very differently by different members of the FWC.

That is the trouble with discretionary decisions. Careful consideration must be given to those exercising that discretion.

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