

Productivity Commission Review:
Australia's Workplace Relations Framework

**Submission of Minter Ellison in
relation to Issues Paper 3, 'The
Bargaining Framework'**

13 March 2015

MinterEllison

SUBMISSION OF MINTER ELLISON

Issues Paper 3: The Bargaining Framework

Minter Ellison is a national law firm with offices in Brisbane, Sydney, Canberra, Perth and Melbourne and an associated office in Adelaide. It has a leading practice in employment and industrial relations law, with 15 partners and over 80 lawyers specialising in the area. Its clients include many of Australia's leading companies in all sectors of the economy.

Introduction

The Productivity Commission (**Commission**) has been tasked with undertaking a review into Australia's Workplace Relations (**WR**) Framework. Amongst other things, the Commission is tasked with inquiring whether the emphasis on productivity and flexibility at the enterprise level as *goals* of the WR system have been achieved.¹

The Issue Papers prepared by the Productivity Commission to guide the parties in making submissions make it clear that the purpose of the inquiry is not to favour any one group but to find an appropriate balance. The "*balance of negotiating strength*" is key to that endeavour.² In assessing any proposed change to the WR system, the Commission will be assessing, amongst other things, how to curtail the abuse of power that could add significantly to social and economic costs.³

This submission addresses a specific aspect of the scheme of enterprise bargaining contained in the *Fair Work Act 2009* (**FW Act**), namely the inadequate provisions to balance the negotiating strength of the parties in industries where industrial action by employees can cause massive financial losses for employers. This 'imbalance' has inhibited the achievement of improved productivity and flexibility and led to unrealistic pay and conditions outcomes.

BETTER BALANCE IN ENTERPRISE BARGAINING

Enterprise Bargaining Objective

1. The object of the FW Act is to provide a balanced framework for cooperative and productive workplace relations that promotes national economic prosperity and social inclusion for all Australians.⁴ The Act endeavours to do this, in part, by achieving productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.⁵
2. Enterprise bargaining is dealt with in Part 2-4 of Chapter 2 to the FW Act. The objects of Part 2-4 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.⁶
3. The scheme of enterprise bargaining contemplated by the FW Act is one where employees, employers and unions can negotiate and make claims in relation to matters to

¹ Productivity Commission, *The Workplace Relations Framework: The Inquiry in Context*, Issues Paper No 1, 2015, 9.

² Ibid, 15.

³ Ibid, 16.

⁴ s.3 of the FW Act.

⁵ s.3(f) of the FW Act.

⁶ s.171(a) of the FW Act.

be contained in agreements and, in support of those claims (subject to certain legislative conditions being met), take protected industrial action.

4. Enterprise bargaining works as a mechanism for achieving productivity benefits because both employers and employees are able to bring reasonable pressure to bear so that the other party will make realistic concessions in bargaining.
5. The system works when there is a reasonable parity, or something at least approaching parity, in the bargaining power of the parties. In circumstances where one party in bargaining has disproportionate bargaining power that balance is undermined. Employees may be 'forced' to agree to unreasonably low wage outcomes, while employers may be 'forced' into agreements which unreasonably restrict productivity and flexibility and/or contain excessive wage and condition outcomes.
6. The FW Act contains a variety of mechanisms designed to curtail abuses of power (or the disproportionate use of power) and create appropriate "circuit breakers" where bargaining is proceeding inefficiently. These mechanisms might conveniently be described as the "checks and balances" of the FW Act bargaining scheme.

Checks and balances in the Fair Work Act are an important part of the bargaining framework

7. One of the clear ways in which the FW Act seeks to balance negotiations is through the low-paid bargaining provisions contained in Division 9, Part 2-4 of Chapter 2 to the FW Act. The object of the low-paid bargaining provisions is to, amongst other things, address constraints on the ability of low-paid employees and their employers to bargain at the enterprise level, including constraints relating to a lack of skills, resources, bargaining strength or previous bargaining experience.
8. The effect of a low-paid authorisation in relation to a proposed multi-enterprise agreement is that the employers who are specified in the authorisation are subject to certain rules in bargaining that would otherwise not apply.⁷ Employees who are subject to the authorisation cannot engage in protected industrial action,⁸ however the Fair Work Commission (FWC) is empowered to take certain steps to ameliorate the impact of disproportionate power exercised by employers. For example, the FWC is empowered to make a low-paid workplace determination if the issues in dispute cannot be resolved by negotiation.⁹
9. The purpose of the low-paid provisions was described by Vice President Gostencnik in the decision in *Re United Voice* where his Honour said:

"[13] It is apparent from this review that the legislative scheme establishing special provisions for low-paid bargaining seeks to strike a balance between the emphasis of the enterprise bargaining provisions generally on collective bargaining particularly or primarily at an enterprise level for agreements that deliver productivity benefits on the one hand, and a recognition of the need and perhaps desirability of providing some additional assistance to certain classes of employees who are low-paid who have historically not had access to collective

⁷ See the note to s.242(1)(b) and also ss.174(4), 176(1)(b), 176(2), 229(2), 230(2)(d), 240(2)(b) and 246 of the FW Act.

⁸ See s.437(2)(b) of the FW Act which provides that a bargaining representative cannot apply to the FWC for a protected action ballot order in relation to a proposed agreement if that proposed agreement is a multi-enterprise agreement.

⁹ Applications for a low-paid workplace determination can be made on a consent basis or by one party only (see ss.260 to 263 of the FW Act).

bargaining or who face substantial difficulty in collectively bargaining at the enterprise level on the other."¹⁰

10. The low-paid bargaining provisions provide an appropriate and necessary measure to balance inequality in bargaining for relevant employees.
11. As noted earlier, at the opposite end of the spectrum, the FW Act also contains mechanisms for responding to the circumstance where a party has the ability to exercise disproportionate power in negotiations. Commonly, this arises in the context of industrial action.
12. The FW Act contains a framework for regulating industrial action. With limited exceptions (and provided certain criteria in the Act are met), the FW Act provides parties who engage in protected industrial action with complete legal immunity.¹¹ Provided they fulfil the relevant obligations in the FW Act, employees and employers are immune from any civil liability for economic harm caused as a result of their industrial action. As a consequence an employer (or employees for that matter) cannot recover any losses, no matter how significant they are.

Suspending or terminating protected industrial action

13. Division 2 of Chapter 3 of the FW Act, particularly ss.423, 424, 425, 426 and 431, provides various mechanisms for dealing with the excessive consequences of protected industrial action. The purpose of these provisions was described in the Explanatory Memorandum to the *Fair Work Bill 2008*:

*"1708. The Bill recognises that employees have a right to take protected industrial action during bargaining. **These measures recognise that, while protected industrial action is legitimate during bargaining for an enterprise agreement, there may be cases where the impact of that action on the parties or on third parties is so severe that it is in the public interest, or even potentially the interests of those engaging in the action, that the industrial action cease – at least temporarily.***

1709. It is not intended that these mechanisms be capable of being triggered where the industrial action is merely causing an inconvenience. Nor is it intended that these mechanisms be used generally to prevent legitimate protected industrial action in the course of bargaining".

(emphasis added)

14. Section 425 empowers the FWC to make an order suspending industrial action for a 'cooling off period' if it is satisfied that the suspension is appropriate taking into account a range of factors.
15. Section 426 similarly allows the FWC to make an order suspending industrial action that is threatening to cause significant harm to a third person other than the bargaining representatives.

¹⁰ *Re United Voice* [2014] FWC 6441, [10].

¹¹ See s.415(1) of the FW Act which provides that no action lies under any law (whether written or unwritten) in force in a State or Territory in relation to industrial action that is protected industrial action unless the industrial action has involved or is likely to involve personal injury or wilful or reckless destruction of, or damage to, property, or the unlawful taking, keeping or use of property. Section 415(2) provides that the prohibition in s.415(1) does not prevent an action for defamation brought in relation to anything that occurred in the course of industrial action.

16. Section 424 is designed to protect the general public. Under that section the FWC must make an order suspending or terminating protected industrial action that is being engaged in or that is threatened, impending or probable if it is satisfied that the action has threatened, is threatening, or would threaten to endanger the life, personal safety or health, or the welfare, of the population or part of it or to cause significant damage to the Australian economy or an important part of it.
17. Section 431 allows the Minister to suspend or terminate industrial action on the same grounds as are found in s.424.
18. Section 423 is intended to be a circuit breaker where protected industrial action is causing significant economic harm to the negotiating parties themselves. It empowers the FWC to suspend or terminate protected industrial action where certain criteria are met.

Consequences of Termination of Protected Industrial Action

19. If protected industrial action is terminated by the FWC under ss.423, 424 or 431 it can lead to compulsory arbitration. There is first a 21 day compulsory negotiation period after which the FWC is empowered to resolve matters that remain in dispute by the making of a workplace determination.¹² The FWC must make a workplace determination as quickly as possible after the end of that period.¹³ The workplace determination must include any terms agreed by the parties in the 21 negotiating period and any terms the FWC considers deal with the matters that were still at issue at the end of that post-industrial action negotiating period.¹⁴
20. The availability of compulsory arbitration through this process can have the effect of curbing the excesses of the parties and assisting in the negotiation process. If one party 'overplays its hand' by taking excessive protected industrial action, it may end up having to justify its negotiating position in an arbitration before the FWC. This prospect can have a moderating effect on both the claims made by the parties and the extent of the industrial action engaged in.

The problems with section 423

21. This submission is concerned with the inadequacy of s.423, which is the mechanism provided for in the FW Act to deal with the impact of protected industrial action on the parties themselves. Minter Ellison makes no submissions regarding the other sections referred to above.
22. The limitations which exist in s.423, and the manner in which the section has been applied, mean that it is, in practical terms, of no real utility. For the reasons set out below, and contrary to the conclusions reached by the 2012 FW Act Review Panel Report s.423 does not "*strike the appropriate balance between facilitating a lawful right to strike for employees, and protecting the economic interests of employers....*".¹⁵
23. Under s.423 the FWC **may** suspend or terminate protected industrial action that **is being engaged in** by employees in circumstances where that protected industrial action is causing, or is threatening to cause, '**significant** economic harm' to the employer **and** the employees, but only if the FWC is satisfied that:

¹² See s.266 of the FW Act.

¹³ See s.266(1) of the FW Act.

¹⁴ See s.267(2) and (3) of the FW Act.

¹⁵ Australian Government 2012, *Towards more productive and equitable workplaces: An evaluation of the Fair Work Legislation*, 186.

- (a) the harm threatened is **imminent** (see s.423(5));
- (b) the protected industrial action **has been engaged in** for a **protracted** period of time (see s.423(6)(a)); and
- (c) the dispute will not be resolved in the **foreseeable** future (see s.423(6)(b)).¹⁶

Issue 1

- 24. The first issue that limits the effectiveness of s.423 is that it requires the damaging industrial action to have been engaged in for a protracted period before relief can be granted. This is to be contrasted with s.424, which is designed to protect the public. It **requires** the FWC to make orders early before the damage is done, when 'damaging' industrial action is being engaged in or where it is threatened, impending or probable'. In practice, this means that an employer faced with protected industrial action which threatens to cause immense financial injury to its business must first endure the action for a protracted period before seeking relief. This aspect of s.423 alone means that employers are under immense pressure to concede when faced with serious threats of protected industrial action.
- 25. This limitation is well illustrated by *Nyrstar Port Pirie Pty Ltd v Construction, Forestry, Mining and Energy Union and Others* where O'Callaghan SDP declined to issue an order for suspension or termination under s.423 on the basis that industrial action had not commenced at the time of the hearing and could not, therefore, be described as protracted. This was despite a finding that there was likely to be significant economic harm to the employer if the industrial action was taken and that such harm was imminent.¹⁷
- 26. That relief is not available under s.423 unless protected industrial action is engaged in for a protracted period can also seriously damage productivity in the workplace in indirect ways. Protracted industrial disputation can cause significant damage to the relationship between the workforce, frontline management and the employer. This results in a lack of trust and creates real barriers to cooperation between the parties in the workplace, impeding any attempts to introduce productivity initiatives. As one employer has said to us, it can create an "*enduring legacy of mistrust*".

Issue 2

- 27. Further, where the relevant action is employee claim action, the FWC must be satisfied that there is significant economic harm not only to the employer but also to the employees who will be covered by the agreement before it can suspend or terminate industrial action under s.423.
- 28. The situation for employers is worse where the protected industrial action causing the harm is employer response action (lock out) or employee response action (any action taken in response to a lockout). In those circumstances economic harm to the employer becomes irrelevant. Relief can only be granted under s.423 if there is significant economic harm to the employees, or any of them, who will be covered by the agreement – s.423(3).
- 29. This aspect of s.423 makes employers particularly vulnerable to protected industrial action in the form of partial work bans. By imposing partial work bans employees in some industries can inflict enormous economic harm on their employer without suffering

¹⁶ Where the relevant industrial action is employer or employee response action, it is only harm to the employees which is relevant (see s.423(3) of the FW Act).

¹⁷ [2009] FWA 1148, [27] and [28].

any substantial loss of wages themselves. Where employers respond to partial work bans by implementing a lockout or 100% payroll deductions such action can make the situation worse and even then the loss to employees may fall well short of the 'significant economic harm' required under s.423.¹⁸ This issue is well demonstrated by *Schweppes Australia Pty Ltd v United Voice - Victorian Branch (Schweppes)*¹⁹.

30. In *Schweppes* Kaufman SDP dismissed an application by Schweppes, who was seeking termination of industrial action under s.423 on the basis that the employer response action (lockout) was not causing significant economic harm to employees.²⁰ Of particular importance to Kaufman SDP was the apparent ability and willingness of the employees (whom the employer said were being harmed) to bear any negative consequences of the lockout. Frequently the financial impact of industrial action on employees is at least partially ameliorated by union strike funds. In any event, where a short strike or work ban can cause substantial losses for the employer there is unlikely ever to be a coincidence between the losses of both parties to meet the test in s.423 that both must have suffered significant economic harm.

Issue 3

31. Further limitations as to the utility of s.423 arise as a consequence of the strict approach taken by the FWC in relation to the meaning of '**significant** economic harm'. For example, in *Prysmian Power Cables and Systems Australia Pty Ltd v NUW, CEPU, AMWU*²¹ (**Prysmian**) Cargill C refused an application by Prysmian to terminate an indefinite strike by employees finding that the economic harm to the employer and to the employees was not "*significant in terms of it being exceptional in either its character or magnitude*" but rather it was "*the very sort of harm which would be expected to result from an indefinite strike*".²² In relation to the meaning of 'significant economic harm' in s.423, Cargill C relied on the Full Bench decision in *Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd, Kentz E & C Pty Ltd (Woodside)* which referred to 'significant harm' in the context of s.426 as:

*"...having a meaning that refers to harm that has an importance or is of such consequence that it is harm above and beyond the sort of loss, inconvenience or delay that is commonly a consequence of industrial action. In this context, the word "significant" indicates harm that is exceptional in its character or magnitude when viewed against the sort of harm that might ordinarily be expected to flow from industrial action in a similar context".*²³

32. The difficulty with this approach is that in some industries an employer can lose tens of millions of dollars through industrial action. The mere fact that this would be an "expected" consequence of industrial action in that industry does not mean that it is not significant.

¹⁸ It is also possible for employers to respond by imposing partial pay deductions (see s.471(1) to (3)). It is, however, difficult for employers to determine the proportion by which an employee's pay is to be reduced and the FWC may make an order varying the proportion (see s.472 of the FW Act).

¹⁹ [2011] FWA 9329.

²⁰ Note that whilst Kaufman SDP later agreed to terminate the protected industrial action (lockout), he did so without any opposition from United Voice (see PR520061, 10 February 2012).

²¹ [2010] FWA 9402.

²² *Prysmian*, [88] and [89].

²³ [2010] FWAFB 6021, [44].

Issue 4

33. Finally, we note that s.423 is discretionary, even where that threshold is met. The FWC may decide whether to suspend or terminate industrial action. Alternatively it may decide to do neither.

Practical Effect

34. The 'bottom line' as far as s.423 is concerned is that the FWC has not made any effective orders under the section since it was introduced in 2009. Otherwise the few applications that have been made by employers have been unsuccessful, and it is only when the effect of the industrial action spreads to the wider community that the FWC has been able to step in to make orders under s.424.
35. As the following case studies indicate, the limited utility of s.423 is particularly problematic for certain employers who are vulnerable to industrial action in a way that is uncommon elsewhere.

(a) Case Study 1 – Electricity Generators

A common form of industrial action by power station operators in the electricity generation sector is the imposition of bans or limitations having the effect of 'winding-down' generation to restrict the output of the generators. This can constitute a 'partial work ban' under the FW Act.²⁴

The effect of this action is to impose very large financial losses on the employer with little or no economic consequences for the employees. Employers can make a partial deduction of the employees' pay for the duration of the bans²⁵, but this would have a minor economic effect on the employees. More drastic action by the employers, such as a lockout or total pay deduction, would almost certainly result in a total shutdown of the power station and, given the nature of the regulated electricity market, cause the employer even more significant (if not catastrophic) economic harm.

As an illustration of the magnitude of the losses that can be suffered in the electricity generation sector, during negotiations for a new enterprise agreement with the CFMEU in 2013, EnergyAustralia gave evidence in Federal Court proceedings that in the event of a stoppage of work by employees, it could lose between \$1 million to \$5 million per day, and depending on the circumstances (market conditions) its losses could be as high as \$18 million per hour.

The kinds of losses which can be suffered by electricity generators in the event of industrial action is further demonstrated by the circumstances surrounding the making of an arbitrated award to cover the Yallourn Power Station in October 2001.²⁶ The making of the award in 2001 was the culmination of a protracted industrial dispute between Yallourn Energy Pty Ltd and three unions which took place between 1999 and late 2000. On 2 November 2000 Commissioner Lewin terminated bargaining periods initiated by the three unions under s.170MW(7) of the *Workplace Relations Act 1996* (which was then in force).²⁷ In reaching this

²⁴ See s.470(3) of the FW Act.

²⁵ See ss.19, 411, 470 and 471 of the FW Act.

²⁶ *The Association of Professional Engineers, Scientists and Managers, Australia, Australian Municipal, Administrative, Clerical and Services Union, Construction, Forestry, Mining and Energy Union, Yallourn Energy Pty Ltd* AW811222 PR910214, 12 October 2001.

²⁷ *Yallourn Energy Pty Ltd v Construction, Forestry, Mining and Energy Union and ors*, [2000] AIRC 513, Dec 1304/00 M Print T2538

decision, Commissioner Lewin observed the cost of the industrial action in February that year had been between \$40 to 50 million and that the overall cost of the industrial action to the company was approaching \$100 million.²⁸

(b) Case Study 2 – Woodside

In the *Woodside* matter (referred to at paragraph 31 above) the Full Bench overturned a decision by McCarthy DP to suspend industrial action (in the nature of a stoppage of work) by employees of Mammoet Australia Pty Ltd (**Mammoet**) on the Woodside Pluto Liquid Natural Gas Project on the Burrup Peninsula pursuant to s.426 of the FW Act.

The construction of the on-shore components of the Project was said to have a value of \$9 billion. Employees of Mammoet had a key role in the construction of on-shore components.²⁹ Work by other contractors could not take place until Mammoet had completed its component of work.

The Full Bench found that the kind of loss complained of by Woodside was the sort of harm that will be caused by industrial action on any large construction project.³⁰ Losses for Woodside alone were estimated by them to be at least \$3.5 million per day.³¹

(c) Case Study 3 - Qantas

In *Minister for Tertiary Education, Skills, Jobs and Workplace Relations* or, as it is more commonly known, the '**Qantas Case**'³² a Full Bench of Fair Work Australia (as it then was) terminated protected industrial action in relation to three separate enterprise agreements being negotiated between Qantas and the ALEA, AIPA and TWU under s.424 of the FW Act. The relevant action said to threaten to cause significant damage to the Australian economy or an important part of it was a threatened lockout by Qantas of all its employees, in advance of which Qantas grounded its entire fleet. The grounding was announced on 29 October 2011.

Qantas gave evidence in that case that the industrial action by the unions prior to 29 October 2011 "*had affected 70,000 passengers, led to the cancellation of 600 flights, the grounding of 7 aircraft, \$70 million in damage*" and had also led to significant reductions in forward bookings and a decline in market share.³³ The industrial action in that case was a series of rolling stoppages and bans which had limited economic effect on the employees. It is apparent from the circumstances that the absence of substantial economic harm to employees was a barrier to Qantas utilising s.423 and, having regard to *Prysmain* and *Woodside*, the damage to Qantas may well not, of itself, have been enough to meet the threshold under s.423 of the FW Act.

Instead, it was not until the entire Qantas fleet was grounded and an important part of the Australian economy was threatened that Fair Work Australia was able to utilise its powers under s.424 of the FW Act. In relation to the grounding, Qantas gave evidence in the proceedings that the cost to them alone would be \$20 million

²⁸ Ibid, [45] and [70].

²⁹ *Woodside*, [6].

³⁰ *Woodside*, [55].

³¹ *Woodside*, [57]-[59].

³² [2011] FWAFB 7444.

³³ *Qantas Case*, [7].

per day.³⁴ Relevantly, Qantas later estimated that the industrial dispute cost the company \$194 million in total (including direct losses from the industrial action, the impact of the grounding, the impact on forward bookings and customer recovery initiatives). Qantas further estimated that if the industrial campaigns by the unions had been allowed to continue, the cost to Qantas would have been \$85 million per month.³⁵

36. It is open, of course, to parties to negotiations to take protected industrial action in a manner which brings reasonable pressure to bear on the other party in bargaining. However, where employees have the ability to inflict very significant economic harm on employers by taking protected industrial action (for which the employer has no legal recourse) the balance necessary to enable the negotiations to achieve a fair outcome for employees and improvements in productivity and flexibility for employers is destroyed. What results is the entrenchment of inflexibilities in enterprise agreements negotiated at the 'point of a gun' and wage and conditions outcomes which do not reasonably reflect the relative contribution of the workforce. As currently drafted the FW Act has no effective mechanism to address this form of imbalance.

A further problem with unprotected industrial action

37. Section 423 is concerned only with protected industrial action, but employers can also be faced with the risk of significant economic harm from unprotected industrial action.
38. The FW Act does provide a number of options for responding to unprotected industrial action, including:
- (a) employers can apply to the FWC under s.418 of the FW Act for orders that unprotected industrial action that is happening or is threatened, impending or probable, stop, not occur or not be organised;
 - (b) if the action occurs during the nominal life of an enterprise agreement it is unlawful and applications can be made to the Federal Court for injunctive relief and/or compensation under s.417 of the FW Act; and
 - (c) employers can seek relief in the common law courts to recover damages under the industrial torts.
39. While these courses of action provide some relief to employers the FW Act does not provide any direct mechanism to protect the integrity of the bargaining process from unprotected industrial action which causes excessive economic loss as it has sought to do for protected industrial action under ss.423 to 426 and 431.
40. Unlike the regime found in ss.423 to 426 and 431 of the FW Act, there are no consequences for the bargaining where parties engage in unprotected industrial action. In particular, there is no means by which the Commission can intervene in its capacity as a circuit breaker to arbitrate the dispute. Therefore, while an employer can seek orders which would stop unprotected industrial action by employees, this would not alter the course of bargaining.³⁶ This is clearly contrary to the scheme of the FW Act which

³⁴ *Qantas Case*, [10].

³⁵ See the 2012 ASX Preliminary Final Report – Qantas, 2 and Press Release *Qantas Profit Update Sydney*, 28 November 2011.

³⁶ A party could conceivably apply for good faith bargaining orders where unprotected industrial action was been used as a means to place illegitimate pressure on the parties in negotiations however as the case of *Toll Transport Pty Ltd v NUW* (B2012/1126 and B2012/1128 decision in transcript 13 July 2012) demonstrates, it can be difficult to obtain good faith orders from the FWC for this type of conduct. In the *Toll* case Commissioner Cribb declined to

contemplates a scheme of bargaining where employees, employers and unions can negotiate and make claims in relation to matters to be contained in agreements lodged under the FW Act and, in support of those claims (and subject to certain legislative conditions being met), take **protected** industrial action.

The checks and balances in the Fair Work Act are not adequate to achieve the Act's objects because enterprise agreements can continue in perpetuity

41. Under the FW Act enterprise agreements have a 'nominal expiry date'. Broadly speaking, once an agreement passes its nominal expiry date, the Act contemplates that the parties to that agreement will commence bargaining for a replacement agreement. While theoretically the agreement has expired, the scheme of the FW Act is such that the agreement will continue to apply to the parties until it is terminated or replaced.³⁷
42. The FWC may terminate an agreement which has passed its nominal expiry date pursuant to s.226 of the FW Act provided that certain requirements are met. The test which an applicant must satisfy in order to successfully apply to terminate an agreement under s.226 is onerous. As a consequence enterprise agreements are very rarely terminated and they invariably continue indefinitely, unless they are replaced by a new agreement.
43. For the reasons identified by Vice President Watson in *Energy Resources of Australia Ltd v Liquor, Hospitality and Miscellaneous Union*, this is not desirable:

"[29] In my view it is unreasonable to lock such an agreement in place indefinitely. The legislative scheme supports the ending of agreement obligations at or after the nominal period of the agreement. Termination of the Agreement does not preclude further enterprise bargaining. Regular revisions and renewal of enterprise arrangements is desirable.

*[30] I acknowledge the understandable concerns of employees at the loss of entitlements. The loss of some employee entitlements is almost inevitable when an agreement is terminated. In this case the undertakings given by ERA are not insignificant. In my view the loss in this case is not such as to outweigh the other factors which support the notion that a party to an expired agreement should be entitled to withdraw from it."*³⁸

44. The practical effect of this is that inflexibilities and inefficiencies can become entrenched in agreements because the party taking the benefit of those provisions can simply refuse to make concessions in respect of them safe in the knowledge that without a new agreement those provisions will continue indefinitely. When this feature of the FW Act is combined with a situation where employees have the capacity to resist any change by imposing significant economic harm on the employer through protected industrial action, the inevitable result is that bargaining is rendered incapable of effecting changes to improve productivity and efficiency.
45. This point is also well illustrated by the restrictive working arrangements, in particular the arrangements with regard to 'fixed manning', which persist in the electricity generation sector. For example, various clauses in the *Loy Yang B Enterprise Agreement 2013* prescribe how many and what kind of employees must be engaged in a particular role at a particular time. Similarly, the *Loy Yang Power Enterprise Agreement 2012* contains a number of onerous requirements with respect to 'manning'.

make an order sought by Toll in relation to alleged picketing partly on the basis that the action could be dealt with by other legal means.

³⁷ See s.54 of the FW Act.

³⁸ [2010] FWA 2434, [29] and [30].

46. There are very limited exceptions in either of the agreements which would allow for any deviation from these manning requirements. This inhibits productivity because the relevant employers cannot make necessary changes to take account of actual operational needs or advancements in technology. Such limitations on the ability of an employer to properly staff its operations necessarily have implications for overtime and other costs and inhibit productivity.

Fair Work Amendment (Bargaining Processes) Bill 2014 and Fair Work Amendment Bill 2014

47. While we acknowledge that the Commission's focus is the existing WR framework rather than any amendments which are currently before Parliament, we understand that the Commission will be considering how any amendments to the framework will need to be revised in line with the Commission's recommendations.³⁹ For that reason we set out some observations about the amendments below.
48. The *Fair Work Amendment (Bargaining Processes) Bill 2014 (Bargaining Processes Bill)*, which is currently before the Senate proposes changes to the FW Act which relate to the bargaining process and the ability of parties to take industrial action. Specifically:
- (a) if the agreement is not a greenfields agreement the FWC must be satisfied that, during bargaining for the agreement, improvements to productivity at the workplace were discussed;
 - (b) before issuing a protected action ballot order the FWC must have regard to a range of additional matters including the steps taken by each applicant to reach an agreement, the extent to which each applicant has communicated its claims in relation to the agreement, whether each applicant has provided a considered response to proposals made by the employer and the extent to which bargaining has progressed; and
 - (c) the FWC must not make a protected action ballot order in relation to a proposed enterprise agreement if it is satisfied that a claim of an applicant (or the claims if taken as a whole) are manifestly excessive or would have a significant adverse impact on productivity.
49. Similarly, the *Fair Work Amendment Bill 2014 (FW Act Amendment Bill)* (which is also before the Senate) proposes changes to the approval of Greenfields agreements which would allow an employer to apply to the FWC for approval of the agreement without union approval after a 3 month negotiation period. The purpose of those changes is, in part, to ensure that employee organisations are not able to utilise their role in making greenfields agreements so as to jeopardise major projects by making excessive wage claims or causing delay.
50. The measures proposed by the Bargaining Processes Bill and the FW Act Amendment Bill are a positive step. In particular, the changes with regard to greenfields agreements recognise that employers on major projects are vulnerable to delays and excessive wage claims. The amendments seek to place some limit on the ability of unions to exercise disproportionate power to exploit that vulnerability.
51. The changes do not, however, deal with the particular difficulties encountered by certain employers who are exposed to substantial economic harm as a result of damaging industrial action.

³⁹ Issues Paper No 1, 7.

Proposed Amendments to the Fair Work Act

52. The scheme of enterprise bargaining in the FW Act does not require wholesale change. As discussed at paragraph 4 above, enterprise bargaining works as a mechanism for achieving productivity benefits because both employers and employees are able to bring reasonable pressure to bear so that the other party will make realistic concessions in bargaining.
53. The changes proposed in this submission are designed to do no more than restore balance and prevent employers being "held ransom" to damaging protected or unprotected industrial action. In this sense they are comparable to the changes contained in the FW Act Amendment Bill and the Bargaining Processes Bill.
54. There is also an additional change proposed in relation to the termination of enterprise agreements. The purpose of this is to encourage parties to ensure that unproductive practices at the enterprise do not continue in perpetuity.

First proposal – Amend s.423 of the FW Act

55. The first proposal relates to s.423 of the FW Act. This submission proposes that the limitations inherent in the formulation s.423 (identified at paragraphs 21 to 33 above) be addressed by:
 - (a) removing the discretion of the FWC to suspend or terminate industrial action where the FWC is satisfied that the requisite threshold is met. As is the case with s.424, once the requisite threat is established the Commission should be required to make an order. Parties should not be permitted to utilise protected industrial action to effect a disproportionate degree of pressure. To deter that behaviour, the Commission should be required to suspend or terminate protected industrial action where the threshold in s.423 is met;
 - (b) by allowing an application to be made under s.423 where the action is threatened, impending or probable, instead of where it is being engaged in and is protracted. This is also consistent with s.424 and will prevent the relevant damage from actually occurring;
 - (c) by amending the provision so that whether the relevant industrial action is employee claim action or employer or employee response action, significant economic harm to the employer **or** the employees is relevant;
 - (d) by amending s.423 (and also s.426) to make it clear that 'significant economic harm' does not mean harm different from the sort of harm which might ordinarily be expected to flow from industrial action in a similar context. Instead, 'significant' should be given its ordinary meaning.

Second proposal – Bargaining consequences for unprotected industrial action

56. The second amendment proposed to the FW Act is designed to ensure that parties are not permitted to utilise disproportionate power outside of the FW Act framework to gain an advantage in negotiations (see paragraphs 37 to 40 above).
57. In particular, it is proposed that where a party engages in unprotected industrial action the other party be able to apply to the FWC to make a workplace determination provided that:
 - (a) there is a sufficient connection between that unprotected industrial action and the bargaining; and

- (b) the harm which is threatened or caused by the unprotected industrial action would, if it were protected industrial action, meet the threshold in ss.423 or 424 of the FW Act.

Third proposal – preventing inflexible practices in enterprise agreements continuing indefinitely

- 58. The third amendment proposed to the FW Act is to amend the Act so that enterprise agreements cannot, without order by the FWC, continue in perpetuity (see paragraphs 41 to 46).
- 59. This could be done by introducing a "sun-set" provision into the Act whereby an enterprise agreement automatically terminates in circumstances where:
 - (a) the nominal expiry date of the enterprise agreement has passed; and
 - (b) negotiations for a replacement agreement have been occurring for a reasonable period after the nominal expiry date (for example 12 months) ('**sun-set period**').
- 60. In circumstances where one or the other party wanted the enterprise agreement to continue after the sun-set period, provision could be made to allow the party to apply to the FWC to continue the agreement on an interim basis provided that they are genuinely trying to seek an agreement.
- 61. It may also be appropriate in these circumstances that the FWC be given power to make interim orders for the continuation of certain 'core' terms and conditions such as wages and shift penalties.

Minter Ellison
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