

Productivity Commission Review:
Australia's Workplace Relations Framework

Submission in relation to Draft Report

18 September 2015

SUBMISSION OF MINTER ELLISON REGARDING DRAFT REPORT

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**) released its draft report into Australia's Workplace Relations (**WR**) Framework on 4 August 2015 (**Draft Report**). The purpose of this submission is to respond to specific aspects of the Commission's Draft Report and to draw the Commission's attention to a further issue not addressed in the report. In particular, this submission addresses the following issues:

- (a) how should 'significant harm' be defined when the Fair Work Commission (**FWC**) is deciding whether to exercise its powers under ss.423 and 426 of the *Fair Work Act 2009* (**FW Act**); and
- (b) the need to adequately address disputes over the appointment or conduct of bargaining representatives (and the individuals nominated to act on their behalf) to enhance productivity and/or remove impediments to efficient bargaining.

In making this submission, Minter Ellison refers to, and relies on, its submissions regarding 'Issues Paper 3: The Bargaining Framework' dated 13 and 30 March 2015.

How 'significant harm' should be defined under ss.423 and 426 of the FW Act

1. In our submission dated 13 March 2015, we identified a number of deficiencies in s.423 of the FW Act. A key deficiency identified was the limitation on the utility of s.423 arising as a consequence of the strict approach taken by the FWC in relation to the meaning of 'significant economic harm'.¹ In its Draft Report, the Commission observed:

"Through its interpretations of the meaning of significant harm, the FWC has set a high bar for intervention. The Woodside decision in 2010 by the Full Bench of the FWC interpreted the meaning of 'significant' under s. 426 as being '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.' On this basis, the Fair Work Commission rejected an application by Woodside. This interpretation has also been subsequently adopted in other decisions relating to applications under s. 423.

....

On balance, at this stage the Productivity Commission agrees with inquiry participants that the prevailing definition of significant harm sets the bar for FWC intervention too high. While the powers under ss. 423 and 426 should be used sparingly, this should not extend so far as to consign these powers to irrelevance

...

¹ See submission of Minter Ellison in relation to Issues Paper 3, 'The Bargaining Framework' at 7.

The Productivity Commission seeks further input from stakeholders on how 'significant harm' should be defined when the Fair Work Commission is deciding whether to exercise its powers under s.423 and s.426 of the Fair Work Act 2009 (Cth)".²

2. Minter Ellison welcomes the Commission's findings on this matter and suggests the following changes to the meaning of 'significant' in Chapter 3, Part 3-3 of the FW Act:

- (a) At s.407:

SECTION 407 DEFINITIONS ~~MEANINGS OF EMPLOYEE AND EMPLOYER~~

407(1) *In this Part, **employee** means a national system employee, and **employer** means a national system employer.*

407(2) *In this Part **significant** has its ordinary meaning.*

Note 1: See also Division 2 of Part 6-4A (TCF contract outworkers taken to be employees in certain circumstances).

Note 2: Section 407(2) has been inserted to make it clear that, contrary to the decision in Construction, Forestry, Mining and Energy Union v Woodside Burrup Pty Ltd, Kentz E & EC Pty Ltd, [2010] FWAFB 6021, significant harm is not 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. Significant has its ordinary meaning.

- (b) At s.423:

423(4) *For the purposes of subsections (2) and (3) the factors relevant to working out whether protected industrial action is causing, or is threatening to cause, significant economic harm to a person referred to in those subsections, include the following:*

- (a) *the source, nature and degree of harm suffered or likely to be suffered;*
- (b) *the likelihood that the harm will continue to be caused or will be caused;*
- (c) *whether the level of harm is disproportionate, including in comparison to:*
 - (i) *the cost to the employer/s of agreeing to claims, made in good faith, by the bargaining representative/s; or*
 - (ii) *the threatened/actual economic loss suffered by the party engaging in protected industrial action;*
- ~~(c) — the capacity of the person to bear the harm;~~
- ~~(d) — the views of the person and the bargaining representatives for the agreement;~~
- (d) *whether the bargaining representatives for the agreement have met the good faith bargaining requirements and have not contravened any bargaining orders in relation to the agreement;*
- (e) *if the FWC is considering terminating the protected industrial action:*

² Productivity Commission, Workplace Relations Framework, Draft Report at 686, 688 and 689.

- (i) *whether the bargaining representatives for the agreement are genuinely unable to reach agreement on the terms that should be included in the agreement; and*
- (ii) *whether there is no reasonable prospect of agreement being reached;*

(f) *the objective of promoting and facilitating bargaining for the agreement.*

3. The change suggested to s.407 of the FW Act is designed 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, s.407 makes it clear that 'significant' in the context of Chapter 3 – Part 3-3 of the FW Act has its ordinary meaning – i.e. is important or of consequence.³ The introduction of a definition for 'significant' is supported by two other mechanisms:
 - (a) the introduction of a legislative note in s.407; and
 - (b) amendments to s.423(4).
4. In relation to the proposed legislative note to s.407, we note that it is common in the FW Act to include legislative notes to provide context to, or explanation of, a particular provision: see for example the note at s.19 of the FW Act which refers to the decision in *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union v The Age Company Limited*, PR946290. This change could further be supported by a more detailed explanation in the explanatory memorandum.
5. In relation to s.423(4), consequential amendments are suggested to provide guidance to the FWC about how to assess whether something constitutes 'significant economic harm'.
6. The amendment suggested to s.423(4)(c) addresses the situation where one party has the ability to exercise disproportionate power in negotiations. The ability of parties to use industrial action as a legitimate tool in bargaining is well recognised. 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. It is appropriate, for this reason, that there remains a high bar to suspension or termination of protected industrial action.
7. However, as noted in our 13 March 2015 submission, where employees have the ability to inflict 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.
8. The amendment at s.423(4)(c) is designed to address this imbalance, while preserving the ability of parties to place reasonable pressure on one another by means of protected industrial action.
9. The amendments suggested to s.423(4) also make it clear that capacity to bear the harm and the views of the parties are not relevant to determining whether harm is significant. This is important because the mere fact that a party can "bear" the harm does not assist to determine it is significant. As noted at paragraph 32 of our 13 March 2015 submission, in some industries an employer can lose tens of millions of dollars through industrial action.

³ *Macquarie Dictionary Sixth Edition.*

Such harm is objectively significant – notwithstanding that a particular employer may be able to endure such harm without "shutting its doors". Similarly, the parties' subjective views do not assist the FWC to determine, on an objective basis, whether something is causing significant harm – we suggest removing this as a consideration for that reason.

10. In relation to s.426, we suggest making changes which correspond with our suggested amendments to s.423(4). Specifically, we recommend inserting a requirement that the FWC consider whether the harm is disproportionate in line with the amended s.423(4)(c). We also suggest removing s.426(4)(a), which requires the FWC to take into account any matters it considers relevant, including the extent to which the protected industrial action threatens to *"damage the ongoing viability of an enterprise carried on by the person"*. It should not be necessary for the ongoing viability of a business to be threatened before the FWC will intervene.
11. Finally, we note the Commission's comments, at page 689 of the Draft Report in relation to the requirement in s.423 that damaging industrial action be engaged in for a protracted period before relief can be granted. In particular, the Commission observes:

"It may seem appealing to attempt to pre-emptively shield parties from harms where they are likely to be significant. However, this misconstrues the purpose of the powers under ss.423 and 426, which do not exist to pre-emptively protect or balance the bargaining power of parties. Rather, their purpose is to bring to an end disputes that are significantly damaging but are unlikely to reach a negotiated outcome. Arguably, this can only be clearly established once the parties have demonstrated a continued failure to agree even when the harms of industrial action are felt.

Indeed, the threat of significant harm from industrial action (whether it be a strike or lockout) may be the decisive factor that breaks an impasse in bargaining, if the costs of industrial action exceed the costs of making a concession in bargaining. While some parties may resent bowing to such pressures, these outcomes are not necessarily inefficient, particular where one party is simply capturing a greater share of surplus from the employment relationship...."⁴

12. In our respectful submission, contrary to view expressed by the Commission, s.423 clearly is intended to be available before significant harm is in fact caused. Section 423(2) states that the FWC must be satisfied, that the action *"is causing, or is threatening to cause, significant economic harm"*. The problem is, that from a practical point of view, the ability of the FWC to make orders in advance of the harm occurring is limited by the requirement in s.423(1) that the action is 'being engaged in' and s.423(6) that the action is 'protracted'. For example, if employees were to threaten strike action which would have crippling effects on an employer's business, then, unless the strike action had been engaged in, s.423 would not be available.
13. In our submission, subject to an applicant demonstrating by clear and cogent evidence that significant economic harm will be suffered, s.423 should be available. Otherwise, to put it simply, the damage is done.
14. Further, we note that the fact that a threat of significant harm may be the decisive factor that breaks an impasse in bargaining is at the very centre of the problem with s.423. As noted in our 13 March 2015 submission, a consequence of the situation where one party in a negotiation can cause significant harm (perhaps with little or no harm to themselves)

⁴ Productivity Commission, *Workplace Relations Framework, Draft Report* at 689.

is the entrenchment of inflexibilities in enterprise agreements negotiated at the 'point of a precipice' and wage and condition outcomes which do not reasonably reflect the relative contribution of the workforce.

15. In light of these matters, we request that the Commission reconsider recommending that s.423 be amended to allow an application to be made where the action itself, is threatened impending or probable, instead of where it is being engaged in and is protracted.

The FW Act bargaining framework does not adequately address disputes over the appointment or conduct of bargaining representatives (and the individuals nominated to act on their behalf)

16. We refer to, and rely on, our submission dated 30 March 2015. This submission addressed the need for a provision in either of the FW Act or the *Fair Work Regulations 2009* that recognises that the (potential and realised) issue of conflicts of interest arising in relation to the identity of bargaining representatives.
17. This matter was raised on behalf of a client, who was concerned that they were forced to negotiate an enterprise agreement with a bargaining representative who was an employee of a direct competitor. The resulting actual or perceived conflict of interest in that case, which was an inhibitor to productive bargaining and the improvement of productivity in the workplace, could not be resolved within the framework of the FW Act.
18. We note that this issue was not addressed by the Commission in its Draft Report. We understand, given the volume of materials filed with the Commission, that it may have been difficult to do so. With that in mind, we again raise this issue for the Commission's consideration.

18 September 2015