How does the Fair Work Act affect your business?

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There will no doubt be a myriad of players with a vested interest in the retention of the status quo who shall rush to critique the following observations of the Fair Work Act.

They will use quantitative measures, such as the Australian Bureau of Statistic's latest measures on the level of industrial disputation, in order to justify their positions and argue the following observations are 'alarmist rhetoric'.

However, in taking such an approach what they will in fact do is gloss over some of the substantive issues being faced by resource industry employers; dismissing the fact employers are often facing considerable challenges in their negotiations in an environment where in some cases a workforce is yet to be put in place, and in other cases agreement is reached in order to simply avoid the prospect of a series of crippling industrial stoppages.

In the lead up to the introduction of the Fair Work Act in 2009 (the Act), the Federal Government made the following clear to unions, employers and employer organisations – unless employers agreed to commence enterprise bargaining, protected strike action would not be available unless, and until, a majority of the employees to be covered by the proposed agreement were in favour of commencing negotiations.

Simply put, employers were led to believe a minority of the workforce could not compel an employer to bargain with unions and/or commence strike action against the wishes of the majority.

Recently the national resource industry was astounded to see a Full Bench of Fair Work Australia determine that protected strike action can in fact be taken by a minority of employees seeking a new enterprise agreement, despite the vast majority of the workforce and the employer having expressed no interest in negotiating such an agreement.

It would appear the previous assurances given to employers by the political and legislative arm of Government were assigned to the waste-paper basket of history.

And whilst many may leap to the simple conclusion this is a fault of Fair Work Australia, the reality is it is not the fault of the administrative body, but rather a more deep-rooted flaw in the design of the FW Act, which lies at the heart of the problem.

The JJ Richards case has been going on since late 2010, so the obvious question arises – given the significance of the matter, who was aware this problem would potentially arise and what was done to address it?

Leading the way on behalf of employers was AMMA, supported by two other industry organisations.

Similarly, the ACTU also sought to appear before Fair Work Australia.

Despite AMMA's request the Federal Government also intervene in order to put its view, it declined to do so.

It is AMMA's view the Government's failure to appear in such a significant case was a consequence of either it being embarrassed to publicly voice its legislative intent or it had a lack of interest in making the Act workable for employers.

This being the case employers can only come to either one of two conclusions:

The Government is prepared to allow Fair Work Australia to interpret legislation in a manner which appears to be at complete odds with the intentions given to employers on its introduction; or alternatively the Full Bench interpretations are correct and supported by the Government.

If this is the case, employers were in fact misled in this critical area of Australia's new workplace relations laws when the laws were drafted.

As we approach the second anniversary of the introduction of the FW Act, more strikes are being threatened and more and more tribunal decisions are eroding the right of management to run their businesses.

As a consequence productivity improvements remain low and the chances of history repeating itself when the commodity price cycle turns, which it inevitably will, is enhanced.

Given this background, it is extremely disappointing for employers to see neither the Government nor Opposition recognise the need for immediate IR reforms.

At the same time there also appears to be a lack of serious political discourse over the way in which many members of the new independent tribunal are interpreting the Act.

Take, for example, the following recent example made in a Fair Work Australia decision of 28 April 2011.

Ex-ACTU official and Fair Work Australia senior deputy president Jennifer Acton held the following clauses the electrical trades union, the CEPU, sought to include in an enterprise agreement were legitimate:

- A clause requiring employers to actively promote union membership to their employees and prospective employees
- A clause requiring employers, if engaging contractors to do work covered by the enterprise agreement, to provide contractors with rates and conditions no less than those offered to employees under the agreement and
- A clause allowing unions a right to enter workplaces without holding a right of entry permit, without providing 24 hours' notice.

Importantly, it was said these clauses were legitimate and allowable for inclusion in an enterprise agreement as they did not offend the Act or any other piece of legislation.

This decision was made all the worse because the agreement reflected a pattern bargaining claim which the union was seeking to apply to all electrical contractors in the state, notwithstanding the fact that prior to the new Fair Work laws being enacted, employers were told such pattern bargaining would not be allowed.

What makes the approval of this pattern agreement insidious is not only that its terms and conditions are not focused on what is best at the enterprise level, but that the union can take its members out on protected stoppages where an employer refuses to agree to such claims.

Even before these latest examples came to pass, under the Fair Work Act resource industry employers have already had to deal with situations such as:

- Unions using protected industrial action as the first weapon in advancing their claims as opposed to first exhausting a genuine negotiation process; extravagant and inflationary claims being successfully pursued due to employers having no practical alternative to negotiating with unions, particularly for Greenfield agreements; and
- Fair Work Australia telling third parties that losses of $3.5m per day being incurred are not significant enough to suspend protected industrial action being taken by employees of other parties which is impacting on their business.

Despite the Federal Government's rhetoric about enterprise bargaining and productivity and the benefits the Act would bring in this regard, employers have seen no evidence of that occurring.

To date, the Government has made no representations to any respective courts to argue they have misunderstood the provisions.

It is increasingly apparent to resource industry employers as they become exposed to the practical application of the Fair Work legislation, the current legislative framework is failing to deliver the day-to-day tools needed by those interested in creating a competitive, viable and resilient workplace.

It is AMMA's strong belief if changes are not forthcoming soon, restrictive work practices and poor productivity performance will once again set into Australian workplaces and as a consequence, Australian businesses will once again be poorly placed to rapidly respond to dramatically changed economic circumstances when the commodity cycle turns.

AMMA provides industry advocacy, workplace advice and training solutions for companies in the resources sector.

Controversial: A handful of employees represented by the Transport Workers' Union of Australia was allowed to take strike action against employer JJ Richards & Sons, even though the latter refused to enter negotiations.

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