cullings

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cullings is the newsletter of
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New Year resolutions

The prospect of a fresh start in the New Year is a powerful tonic for any business, and indeed for any government. The New Year may provide the impetus for implementing the Government's long heralded changes to collective bargaining. In this edition of Cullings we review some of the key changes and what they might look like in practice for employers.

Breaking up is hard to do

At present unions and employers must conclude collective bargaining, unless they have a genuine reason based on reasonable grounds not to do so. The Government has proposed to change the law so that good faith does not require parties to enter into a collective agreement. This was the law before 2004.

With this change the Government hopes to prevent protracted negotiations where it is clear the parties cannot agree. However, it is unlikely that this provision by itself will provide an escape hatch for employers wanting to liberate themselves from drawn out negotiations. In the event of prolonged bargaining, employers will still be expected to explore avenues provided by the Employment Relations Act 2000 including mediation and facilitation. Refusing to engage with these mechanisms could result in accusations of pursuing a predetermined outcome and negotiating in bad faith.

Walking away from collective bargaining will not avoid the need to negotiate with unions. Where collective bargaining ends there is likely to be either an expired collective agreement that still applies to union members, or no collective agreement at all. In either case a union can initiate, or in the instance of an employer walking away, re-initiate bargaining with the employer.

Looked at in this light, the proposed change may not achieve much at all. At most it might lower the threshold where an employer can walk away from bargaining, but it will not keep unions at bay.

No obligation to turn to MECAs

Something that the proposals will do away with is the requirement to bargain for a multi employer collective agreement (MECA). At present employers cannot lawfully refuse to participate in MECA bargaining prior to negotiations commencing. The employer may withdraw in good faith from collective bargaining, but not before giving it an honest shot.

Under the proposed changes employers will have the ability to opt out of collective bargaining involving multiple employers. This will not rule out unions bargaining with an employer which opts out, but the negotiations will have to be one-on-one.

Ready, set, go

A further proposal will give employers the same rights to initiate collective bargaining as the unions. This proposal would remove the 20 day head start unions have on employers to initiate bargaining.

Former Minister of Labour, Kate Wilkinson, has stated said that she "tidied up" the law because there is no rationale for the different timeframes. In fact the rationale is embedded in the Employment Relations Act and understood by the Courts.

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THE EMPLOYMENT LAW FIRM

The Act sets out to build productive employment relationships through acknowledging the inherent inequality of bargaining power in employment relationships and promoting collective bargaining. For these reasons unions and employees are given certain advantages in the bargaining process.

In the case of initiating bargaining there is a tactical advantage for unions in setting the initial agenda for bargaining and the obligations that arise as a result. If this advantage is made available to employers then they should have the opportunity to exercise greater control over the bargaining process.

Penny pinching

Another of the Government's changes will give employers a proportionate response to employees who take partial strike action. Partial strikes can involve employees who continue to work, but refuse to perform certain activities such as answering the telephones or unloading a particular ship. As partial strikers are still at work, there is no basis not to pay them.

Locking out a workforce in response to a partial strike is often impractical, especially when employers still rely on partially striking employees to perform the bulk of their duties. It can seem like cutting off your nose to spite your face.

Partial deduction of wages will achieve two things. It will keep partially striking employees at work and also give employers another tool in bringing pressure to bear on unions.

Australian employers can deduct wages in proportion to the time usually spent on the tasks concerned, but unions can challenge amounts deducted on the basis of reasonableness. It remains to be seen if our Government will follow this approach.

In the greater scheme of the bargaining process, deductions for non-performance of minor duties may simply be petty. Deductions would be more significant where they relate to the bulk of a worker's activity. Either way, unions would likely challenge the reasonableness of any deductions, undoubtedly creating even more work for the Authority.

Seasons Greetings

From all of the team at ***Cullen—The Employment Law Firm***, we wish you a festive holiday season and a very happy new year.

Should auld acquaintance be forgot

Given the reluctance of governments to institute major change in an election year, we anticipate these changes being implemented in 2013. Even so, it is clear that the proposed changes give weight to the notion that the pendulum continues to swing in favour of employers.

As much as employers should consider the implications of these changes, they should not forget the law which remains the same. Employers will be well acquainted with the provisions of good faith, which in substance remain the same. After all, the New Year is as a good time to consider what lies ahead, as it is to remember old friends.

OTHER CHANGES TO EMPLOYMENT LAW INCLUDE:

- **Changes to Part 6A:** Businesses with less than 20 employees would be exempt from the contracting out provisions relating to vulnerable workers.
- **Changes to the rest and meal breaks provisions:** Prescribed minimum break requirements would be replaced with entitlements to reasonable opportunity for rest, refreshment, and attending to personal matters. Absent agreement employers can then impose break times.
- **Changes to first 30 days:** New employees would no longer be required to start on the collective agreement. This will enable employers to negotiate individual terms immediately with new employees, but also likely diminish the ability of unions to persuade new employees to become members.
- **Changes to flexible working:** All employees would have the right to request flexible working arrangements.

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