

HR Nicholls Society - Annual Conference - Melbourne 2013

Opening remarks – Is Kevin Rudd a miracle worker?

Let us open with some unfair dismissal statistics for the 2011-2012 year, from the **FAIR WORK AUSTRALIA ANNUAL REPORT 2011–2012**.

14,063 unfair dismissal applications were made -most settled at mediation.
Only 325 of the 14,063 claims went to trial.
At trial, 215 of the 325 employees had their application dismissed.
Out of 14,063 claims, 110 employees won their unfair dismissal case. Less than one per cent - .78%
Out of the 110 winners, only 17 won reinstatement.
About one tenth of one per cent - .12% - of employees unfairly dismissed wins reinstatement!

So congratulations Prime Minister Kevin Rudd! Just on the unfair dismissal statistics alone, by winning reinstatement after your unfair dismissal, you proved you truly are a miracle worker!

Has enterprise bargaining been a rolled gold con?

Enterprise Bargaining Agreements were first introduced in Australia under the Prices and Incomes Accord in 1991 (Mark VII). They later became the centrepiece of the Australian industrial relations system when the Accord was next revised in 1993 (Mark VIII). This ended nearly a century of centralised wage-fixing based industrial relations.

The theory of bargaining was this; bargaining was the only legal means an employer could use to vary the terms and conditions of an Award. Employees could bargain away Award conditions they didn't want or need in exchange for pay increases that were over and above CPI. Twenty years on and we need to ask, what has bargaining done for us, do we have fantastically flexible and productive workplaces, has bargaining helped businesses and employees or have we just ended up with many large workplaces have enterprise bargains that are basically 'gold plated Awards'?

The answers to our questions can be found in the latest data, drawn from TRENDS IN FEDERAL ENTERPRISE BARGAINING MARCH QUARTER 2013.

Recently, Fair Work Commission President Iain Ross pointed to a widening gap between Australian workers. Ross said "*modern award minimum wages have fallen over the past decade and earnings inequality is increasing*". He is right - minimum wages have fallen...in comparison to enterprise bargaining wage rates.

All non-managerial employees (%)	2006	2008	2010	2012
Award	21.0	18.1	16.4	17.8
Collective Agreement (Federally Registered)	28.5	29.0	33.1	34.3
Collective Agreement (State Registered)	12.8	13.2	12.4	10.6*
Collective Agreement (Unregistered)	3.2	0.7	0.0	
Individual Agreement (Registered and unregistered)	34.5	39.1	38.0	37.3

- The gap between those on EBA's and those on the minimum wage is now significant.
- At the top sit our 'blue chip workers', the 44.9% of us on enterprise agreements.
- At the bottom sit our 'working poor', the 17.8% of us paid the award (minimum) wage.
- *In the middle 37.3% of us hover at 'market rates' expressed in individual agreements.
- *The wages of the market rate group are determined by employers and employees having a sense of the top and bottom of the wages heap and picking an agreeable middle ground.

Bargaining agreements always express their increases in percentage terms. The minimum wage is usually adjusted on a dollar amount. Let us consider the difference over twenty years, of the same amount of money given as a dollar amount versus given as a percentage increase. In addition, let us consider that even after an agreement expires, it continues with the force of law forever, unless replaced with another agreement. Unlike all other commercial contracts, which can be ended, an enterprise bargaining agreement is forever. A poor agreement actually reduces the capital value of a business.

For the vast majority of businesses the most sensible thing they could do is never do an enterprise bargaining agreement. The simplest and easiest thing to do is to simply allow the business to be bound by the modern award and pay individuals above it at your discretion.

This is because, the vast majority of time, employers cannot bargain competently.

This is a big claim. Is it true? Let's look at the TRENDS IN FEDERAL ENTERPRISE BARGAINING REPORT, I refer to both the December 2012 and March Quarter 2013.

On the front page of the document it says:

While a union may be a bargaining representative, there is no capacity under the Fair Work Act 2009 for agreements (other than greenfields agreements) to be made with a union.

Yet peruse the Fair Work Commission website, most agreements are made with unions and signed by unions. Many employers can't even get this basic matter right.

Let us look at a few statistics.

As at March 31 2013, there were 22 983 agreements, covering 2.54 million employees.
In the March 2013 quarter 1,338 Federal Agreements approved.
Average increase of 3.7%
ABX Wage Price Index 3.2%

Let us look at some statistics from the December Quarter.

Construction industry average increase 4.8%
Mining industry average increase 5.1%
Out of 1892 agreements made in the December quarter; <ul style="list-style-type: none">➤ 93 were linked to the minimum wage➤ 35 were linked to CPI➤ 5 (0.26%) were linked to performance.

Conclusion; the vast majority of time employers cannot bargain competently.

A general rule of thumb is that the longer a company has been bargaining the less viable it is.

To illustrate, consider three real examples of Australian manufacturers, all based in the same location, making goods for the Australian market and employing unskilled manufacturing workers largely from non-English speaking backgrounds.

'**Company A**', a family business, pays staff the award wage, always has and probably always will. The business is viable and has grown consistently over the last 15 years. On every occasion that external factors – and there have been many - have challenged the business; the owner has restructured the business to ensure its survival, without making anyone redundant. As such, the long term work force comes to work confident that although they may not be paid well, there is plenty of work to go round and job security is not a concern. Company A has a growth trajectory.

'Company B', also a family business, has been enterprise bargaining with its workforce via a union for over a decade. The company has suffered declining profits for that period and has had to make some staff redundant in the last few years. This year the company began to lose key contracts as long term clients revealed they intend to buy the same products off other Australian manufacturers for far less. The shocked owner investigated its new competitors and found their staff to be paid award rates. A wage comparison was done and a devastating realization occurred; Company B has enterprise bargained itself into a position where it is paying its workers 35% more than the people taking their clients do. The owner is currently considering union requests for another pay rise in a new EBA.

'Company C', the Australian branch of a global entity, has been enterprise bargaining since the concept was introduced, in 1993. Its story over the last decade has been of slow decline in profitability and workforce numbers. Its overseas parent is fed up with subsidizing its expensive, unprofitable and unviable Aussie workforce. Recent wage comparisons reveal Company C is paying its workforce 64% more than the award. This discovery was made on the cusp of enterprise bargaining negotiations but in the face of employee and union objection to a wage freeze or reduction, the company made another EBA containing healthy wage increases for all, at the same time as finalizing plans to send hundreds of jobs off shore. Company C is now organizing emergency funds for mass redundancies.

The challenge for the new government is to examine the productivity impact of bargaining and devise solutions. One solution is to simply ban any future bargaining. However, with IR, you must always be wary of the unintended consequences of legislation. Another solution is to legislate to protect employers from themselves, by restricting allowable matters and putting other constraints on bargaining parameters. However, unions are of the most part, better and more willing than employer groups to find creative solutions to problems and so would find a way around restrictions.

My personal view is that governments don't solve problems, the market does. I say, let the market sort out the problem. Those companies that bargain badly will go out of business; those that bargain well will prosper and succeed.

An enterprise bargaining agreement is probably the most expensive and important contract a business will ever enter into. Eventually companies will understand this and place greater investment into skilled bargaining practices. The market, the need to thrive and not fail, rather than legislation, is likely to solve our bargaining related challenges.