

*Fair Work Act 2009*

**s.229 - Application for a bargaining order**

**Construction, Forestry, Mining and Energy Union-  
Construction and General Division**

**v**

**Australian Precast Solutions Pty Ltd**

**and**

**Abigroup Contractors Pty Ltd**

(B2009/10404)

**Submission**



**August 2009**

## Leave sought to make submissions

1. The Australian Industry Group (Ai Group) seeks leave to make submissions in these proceedings on grounds which include the following:
  - Ai Group is a major registered organisation which represents employers in a wide range of industries including construction, manufacturing, transport, ICT and numerous others;
  - Ai Group is a “peak council” within the meaning of the term defined in the *Fair Work Act* (“FW Act”) and is formally recognised as a State Peak Council in the NSW Industrial Relations System;
  - The powers of FWA to issue a Bargaining Order preventing or delaying a vote of employees on a proposed agreement are central to the rights of employers and employees under the new bargaining system;
  - This issue is of relevance to thousands of employers which have enterprise agreements in place, or who may wish to bargain in the future;
  - FWA’s interpretation of the FW Act, as it relates to its power to issue Bargaining Orders, will have a direct and substantial impact on a very large number of Ai Group member companies; and
  - Many Ai Group members are currently bargaining, given the large number of agreements which expired in the manufacturing industry between March and June this year.
  
2. Section 590 of the FW Act gives FWA the power to inform itself in relation to any matter before it, in such manner as it considers appropriate. This includes granting a party with a substantial interest in the outcome, such as Ai Group, the right to make submissions.

3. Paragraph 2235 and 2366 of the Explanatory Memorandum for the *Fair Work Bill* state that:

“2235 FWA’s functions will be broadly similar to those previously performed by the entities it replaces. FWA will be a modern institution with a user-friendly culture. It is not intended that it will adopt processes that are overly formal, legalistic or unnecessarily adversarial.

2236 The Bill encourages this culture by:

- providing FWA with broad powers and discretions as to how it informs itself and how it deals with matters;
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- emphasising that FWA may inform itself as it sees fit, rather than providing parties with a right to be heard through formal hearings.”

## **Summary of Ai Group’s position**

4. Ai Group submits that s.255 of the FW Act prevents FWA making an order which prevents or delays the approval of a proposed enterprise agreement by employees.
5. If Ai Group is incorrect in its interpretation, then we submit that the power should only be used in very exceptional circumstances, and only where FWA has determined that the employer has committed a serious breach of the good faith bargaining requirements.

## **Section 255**

6. Section 255 of the Act is a critical aspect of the new good faith bargaining system. This section operates to prevent orders of FWA intruding upon various key rights of employers and employees.

7. These rights include:
  - The right of a bargaining representative to not make concessions during bargaining;
  - The right of an employer to choose when to request that its employees approve a proposed agreement; and
  - The right of employees to approve or not approve a proposed agreement.
8. The limitations upon FWA's powers under s.255 are very substantial, but for very good reasons.
9. If FWA had the power, and adopted the practice, of issuing a Bargaining Order whenever a union raised allegations that the good faith bargaining requirements have not been met, the bargaining system could soon become unworkable and the Object of the FW Act, and the Objects of Part 2-4 (Enterprise Agreements) of the Act, would not be achieved.

***Paragraph 255(1)(a)***

10. Despite the requirement in 228(1)(f) for bargaining representatives to recognise and bargain with other bargaining representatives, paragraph 255(1)(a) prevents FWA making an order that requires or has the effect of requiring that particular content be included or not included in a proposed enterprise agreement.
11. Paragraph 255(1)(a), and subclause 228(2) implement an important public commitment given by the Federal Government. That is, that the good faith bargaining requirements do not require parties to make concessions in relation to a proposed agreement.

**Paragraph 255(1)(b) and subsection 181(1)**

12. Paragraph 255(1)(b), we submit, is intended to prevent FWA extinguishing an employer's right under subsection 181(1) to decide whether to request that its employees approve a proposed agreement and to determine the timing of that request.
13. S.181(1) make it clear that an employer has the right to request its employees to approve a proposed agreement. Nowhere in the Act is it stated that this right is subject to any order issued by FWA.
14. An order which seeks to extinguish the employer's right under s.181 is, we submit, beyond power.
15. The Explanatory Memorandum (para 1070) gives the following **example** of an order that would be beyond power under s.255

"..an order that has the effect of requiring....an employer to request employees to vote on a proposed agreement on or by a particular day".

**Paragraph 255(1)(c)**

16. We submit that paragraph 255(1)(c) is intended to prohibit FWA preventing employees from exercising their democratic right to approve, or not approve, a proposed agreement.
17. The term "*approve*" should be read as a reference to both the process of approval and the outcome of the vote.
18. The Explanatory Memorandum contains numerous references to the "*approval process*", with reference to the process which FWA goes through in deciding whether to approve an enterprise agreement.

19. An “*approval process*” also applies when employees are deciding whether to support a proposed enterprise agreement.
20. The approval process involves the employer giving employees at least seven days notice of the time and date when a vote will be held to approve the agreement.
21. A FWA order preventing an employer proceeding with a proposed vote to approve an agreement would be an order which “*has the effect of requiring..... an employee to....not approve, a proposed agreement*”.
22. We submit that such an order is beyond power under s.255.

**The Act gives primacy to the rights of employers and employees, over the alleged interests of unions**

23. It is evident that the Act gives primacy in the bargaining process to the rights of employers and employees, over the alleged interests of unions and other bargaining representatives.
24. Enterprise agreements are made between employer/s and employees (other than greenfields agreements) and it is not until after an agreement is made that a union has the right to apply to be covered by it.
25. The Act gives very substantial rights and protections to employees to ensure that they are able to make an informed decision about whether they genuinely agree to a proposed agreement.

26. These protections include:

- As soon as practicable after an employer initiates or agrees to bargain (and not later than 14 days), an employer must take all reasonable steps to give the employees notice of their right to be represented by a bargaining representative (s.173);
- Before an employer requests under s.180(1) that employees approve a proposed agreement, the employer must take all reasonable steps to ensure that the employees are given access to a copy of the agreement and other material incorporated by reference (s.180(2));
- The employer must take all reasonable steps to notify employees of the start of the “access period” for the agreement, being the 7 day period ending immediately before the start of the voting process in s.181(1) (s.180(3) and (4));
- The employer must take all reasonable steps to ensure that the terms of the agreement and the effect of those terms are explained to employees in an appropriate manner, taking into account the particular needs and circumstances of the employees (s.180(5) and (6));
- An employer request under s.181(1) must not be made until at least 21 days after the notice of employee representational rights is given (s.181(2));
- The Act defines the circumstances when an enterprise agreement has been “genuinely agreed” to by the employees, with reference to the above procedural requirements (s.188);
- An employer must not coerce an employee to enter into an enterprise agreement (ss.341 and 343).

27. The above process ensures that the employees have ample opportunity to:
- invite a union to participate in the negotiation process, should the employees wish this to occur; and
  - decide not to approve the agreement if they are not happy with the manner in which the employer has bargained with any relevant union.
28. As set out earlier, we strongly submit that FWA is not empowered to make a Bargaining Order which has the effect of:
- Extinguishing an employer's right under s.181(1) to request that employee's approve an agreement at the time which the employer chooses (subject to the abovementioned onerous requirements of the Act); or
  - which *"has the effect of requiring..... an employee to....not approve, a proposed agreement"*.

### **Unions have substantial rights under the Act but not the right to stop employees approving an agreement**

29. Unions have very substantial rights under the FW Act including, for example:
- The right to represent their members in the bargaining process (unless a member chooses an alternative bargaining representative);
  - The right to represent employees who are not union members, if those employees choose to appoint the union as a bargaining representative;
  - The right to enter workplaces and hold discussions with employees;

- The right to enter workplaces to investigate alleged breaches of the Act and industrial instruments;
  - The right to pursue a Bargaining Order if the union believes that the good faith bargaining requirements are not being adhered to (subject to the limitations imposed upon FWA's powers in this regard);
  - The right to pursue a Serious Breach Declaration if there have been serious and sustained contravention/s of bargaining orders;
  - The right to pursue a penalty or other remedy if the good faith bargaining requirements have been breached.
30. However, whilst such rights are substantial, we submit that they do not extend to the right to obtain a Bargaining Order to frustrate the rights of employers and employees to enter into agreements of their choosing.

### **When an agreement is made**

31. Under the FW Act, an agreement is made when a majority of those employees who cast a valid vote approve the agreement (s.182(1)).
32. We submit that FWA is not empowered to prevent an agreement being made, if the employer and employees wish to make an agreement.

### **Compliance with the good faith bargaining requirements is not a pre-requisite for agreement approval**

33. Sections 186 and 187 of the Act specify that FWA must approve an enterprise agreement if certain specified requirements are met.

34. The only reference to good faith bargaining is in s.187(2) which applies in limited circumstances when a Scope Order is in operation.

35. The Explanatory Memorandum explains the purpose of s.187(2) as follows:

788. Subclause 187(2) provides for an additional approval requirement where a scope order is in operation in relation to a proposed enterprise agreement, or enterprise agreement. This subclause is intended to deal with the situation where a bargaining representative has made an application for FWA approval of an enterprise agreement that is not expressed to cover all the employees and employers specified in a scope order issued by FWA in relation to that agreement. FWA may approve an enterprise agreement in that situation provided that it is satisfied that the approval of the agreement would not be inconsistent with or undermine good faith bargaining by one or more of the bargaining representatives.

789. If (despite a scope order) the bargaining representatives have subsequently all agreed to make an agreement of a different scope, this may not undermine good faith bargaining. However, if the employer has obtained employee approval for an agreement despite a scope order against the wishes of a group of employees who should have been covered (or excluded) as a result of the scope order, then this clause is likely to be triggered.

36. Accordingly, compliance with the good faith bargaining requirements is not a pre-requisite for agreement approval in all but very limited circumstances.

## **Regulatory Analysis in the Explanatory Memorandum**

37. The Regulatory Analysis in the Explanatory Memorandum contains the following section on good faith bargaining which supports the view that Bargaining Orders are not intended to be issued lightly or frequently.

### *“Good faith bargaining*

r.199. Good faith bargaining provisions currently operate in the Queensland and Western Australian workplace relations systems. Consultations with state government representatives indicate that these state systems do not impose onerous additional obligations on employers. The Department is not aware of any concerns with these good faith bargaining systems among state-based employer representatives.

r.200. For example, in the entire Queensland bargaining system in 2006-07 there was only one application to arbitrate a bargaining dispute to determine whether negotiations were conducted in good faith. In Western Australian bargaining system, there were only 4 requests for good faith bargaining orders between 2002 and 2006. This period was prior to the commencement of the Work Choices amendments to the WR Act when the jurisdiction of the state industrial relations systems was considerably larger.

r.201. It is advanced that good faith bargaining requirements will serve to facilitate more effective agreement making without unnecessarily imposing regulation and outcomes on bargaining representatives.”

### **It is essential that FWA not allow unions to frustrate the agreement making process**

38. If FWA is empowered to issue a Bargaining Order preventing or delaying a vote of employees to approve an agreement, any union with even one member would be able to assert that various good faith bargaining requirements have not been met and then apply for an order preventing an employer seeking that employees approve a proposed agreement.
39. In the event that Ai Group is incorrect in its interpretation of the Act and FWA has the power to make a Bargaining Order preventing or delaying the approval of an agreement by the employees, it is essential that FWA not allow union tactics to undermine the agreement making system which is intended to be *“simple, flexible and fair”* and result in *“agreements that deliver productivity benefits”* (s.171).
40. Such Bargaining Orders should only be issued in very exceptional circumstances and only where FWA has determined that the employer has committed a serious breach of the good faith bargaining requirements.
41. Further, FWA should not waive the requirements of s.229(4)(b) and (c), other than in the most extreme circumstances.