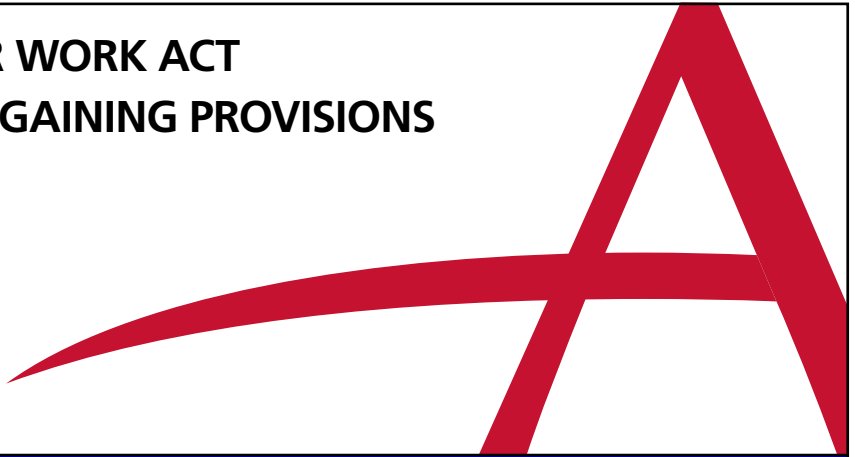


**FAIR WORK ACT
BARGAINING PROVISIONS**



THE FIRST 100 DAYS





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15 October 2009

FAIR WORK ACT BARGAINING PROVISIONS – THE FIRST 100 DAYS

OVERVIEW

The *Fair Work Act* and related legislation commenced on 1 July 2009, implementing the Federal Labor Government's new workplace relations system. The new laws include a new enterprise bargaining system, incorporating good faith bargaining obligations.

In this report, bargaining developments during the first 100 days* of the Act's operation are reviewed.

The introduction of the new laws coincided with the expiry of a large number of enterprise agreements. More than 5000 enterprise agreements expire in 2009, including around 1300 in the manufacturing industry.

Ai Group is watching developments closely. It is essential that the new legislation results in a workplace relations system which is productive and fair for employees and employers.

While Ai Group was active in achieving hard won amendments which wound back some of the sharper ends of the legislation, there is no doubt employers face a different industrial landscape with increased union power.

The Fair Work legislation was a massive drafting exercise and it will be some time before the law is tested and settled. Ai Group will continue to closely monitor how the laws operate in practice and will seek changes if problems arise.

INDUSTRIAL CLIMATE

During the first 100 days of operation of the *Fair Work Act* undoubtedly the industrial climate changed, with unions pursuing new bargaining claims with some vigour. Despite this, the level of industrial action remained relatively low by historical standards.

No doubt the economic environment had an impact. Given the global economic downturn, the priority in most workplaces was the preservation of jobs.

GOOD FAITH BARGAINING REQUIREMENTS

The decisions of Fair Work Australia (FWA) are very important in determining the reach of the new bargaining system under the *Fair Work Act*. A number of important decisions have already been made as summarised in this report.

* This report includes decisions up to 12 October 2009.

Several cases have dealt with the good faith bargaining requirements in the Act which include obligations to:

- Attend and participate in, meetings at reasonable times;
- Disclose relevant information (other than confidential or commercially sensitive information) in a timely manner;
- Respond to proposals made by other bargaining representatives in a timely manner;
- Give genuine consideration to the proposals of other bargaining representatives and reasons for responses to proposals;
- Refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- Recognise and bargain with other bargaining representatives.

The good faith bargaining requirements do not require making concessions or reaching agreement on the terms to be included in an agreement.

THE RIGHT TO “HARD BARGAIN”

It is a requirement of the *Fair Work Act* that a union must be “*genuinely trying to reach agreement*” in order for industrial action to be protected¹. Further, in order for FWA to make a protected action ballot order, it must be satisfied that each applicant “*has been, and is, genuinely trying to reach an agreement with the employer*”². Relatively similar requirements existed under the *Workplace Relations Act*.

In a case involving office supplies company ACCO, Commissioner Thatcher of FWA was called upon to determine whether the National Union of Workers (NUW) had “*genuinely tried to reach agreement*” before taking industrial action.³

During the enterprise agreement negotiations, the company sought to remove the existing RDO system and the NUW was not prepared to agree. Following discussions between the parties, the NUW applied to FWA for a protected action ballot.

ACCO opposed the ballot order on the basis that the union’s inflexible stance on the RDO issue constituted a failure to genuinely try to reach agreement.

Thatcher C cited the decision of Justice Munro in *Australian Industry Group v AFMEPKIU*⁴ in which His Honour stated:

“[45] The more the negotiation conduct can be categorised as evidencing a refusal to allow agreement other than on an all or

¹ S.413(3)

² S.443(1)

³ *NUW v ACCO* [2009] FWA 226, 7 September 2009

⁴ *Australian Industry Group v AFMEPKIU* (the Campaign 2000 Case), Munro J, Print T1982, 16 October 2000.

none basis, the greater the likelihood that it should be found to fail the genuinely try to reach agreement with the other negotiator test. However, there are variations and permutation of demands, conduct, and character of negotiating parties that must be assessed.”

Thatcher C also referred to the fact that Munro J's views had been adopted by a Full Bench of the Australian Industrial Relations Commission (AIRC) in *Re: Media, Entertainment and Arts Alliance*⁵. With reference to the Munro J's views, the Full Bench said:

“[46] We adopt those observations as a useful guide for the application of the genuine try test. In particular, we endorse the emphasis given to the application of the test through an even handed assessment of the industrial context, of demands, conduct, and character of the negotiators and negotiations, in which it becomes an issue. We note that a similar emphasis upon assessment of circumstances, context, and reasonableness, may be discerned in decisions dealing with the analogous concepts of ‘bargaining in good faith’ in United States industrial jurisprudence, and in the construction and application of ‘best endeavours’ clauses in Australian and U.K. commercial contract law.”

Thatcher C held that the NUW was genuinely trying to reach agreement. He said

“[23].....Whilst negotiations may have reached an impasse on the RDO issue, by not bending to ACCO's position and maintaining its opposition to the removal of RDOs, the NUW is merely engaging in hard bargaining. Hard bargaining is not the same as not genuinely trying to reach an agreement.”

A number of decisions of the AIRC over the years have referred to the right of a party to engage in “hard bargaining”⁶.

Whilst the employer was not successful in this case, the principle confirmed by Thatcher C was that employers have the right to engage in “hard bargaining” and cannot be forced by FWA to make concessions. This is a vital element of the *Fair Work Act* that Ai Group worked hard to achieve during the development of the legislation.

“Hard bargaining” is not the same thing as pattern bargaining. Employees do not have the right to refuse to negotiate over the terms of a pattern agreement and take industrial action in pursuit of their position. Employees and unions must demonstrate a preparedness to bargain for an agreement which takes into account the individual circumstances of the relevant employer.

⁵ *Re. Media, Entertainment and Arts Alliance*, Full Bench, P⁹⁹²⁸⁰³³. 11 March 2003, per Munro J, Leary DP and O'Connor C

⁶ For example, see the *ABC Case*, Print L4605, 31 August 1994; and *Re Australian, Rail, Tram and Bus Industry Union*, Print L5622, 30 September 1994

DOES INDUSTRIAL ACTION NEED TO BE A LAST RESORT?

As set out above, it is a requirement of the *Fair Work Act* that a union must be “genuinely trying to reach agreement” in order for industrial action to be protected.

This requirement raises the question of whether industrial action needs to be a last resort?

In a lengthy decision of 1 September, Commissioner Thatcher of FWA considered this argument in a case involving Total Marine Services Pty Ltd⁷ and held that the union was genuinely trying to reach agreement.

The company appealed against C Thatcher’s decision and argued that the parties needed to be a long way down the bargaining track before industrial action could be taken.

In the appeal decision⁸, the Full Bench concluded that Commissioner Thatcher had erred in finding that the union had genuinely tried to reach agreement.

It was held that the concept of genuinely trying to reach an agreement “involves a finding of fact applied by reference to the circumstances of the particular negotiation”.

The Full Bench stated:

“[32] We agree that it is not appropriate or possible to establish rigid rules for the required point of negotiations that must be reached. All the relevant circumstances must be assessed to establish whether the applicant has met the test or not. This will frequently involve considering the extent of progress in negotiations and the steps taken in order to try and reach an agreement. At the very least one would normally expect the applicant to be able to demonstrate that it has clearly articulated the major items it is seeking for inclusion in the agreement, and to have provided a considered response to any demands made by the other side. Premature applications, where sufficient steps have not been taken to satisfy the test that the applicant has genuinely tried to reach an agreement, cannot be granted.”

There had been limited face to face meetings and limited articulation of many of the claims, including the wage claim which had not been specified.

The Full Bench said:

“[36] Many items were only set out in a list of headings and were not explained or discussed. The wage claim had not been specified. There is nothing to suggest that in taking the steps that it did, the MUA

⁷ *MUA v Total Marine Services*, [2009] FWA 187, 1 Sept 09, Thatcher C.

⁸ *Total Marine Services Pty Ltd v MUA* [2009] FWA 368, 9 October 2009, VP Watson, SDP Hamberger and C Roberts.

was other than genuine. Nevertheless, in our view it cannot be said in these circumstances that the MUA had genuinely tried to reach an agreement. The steps it had taken were preparatory to developing an agreement but in our view insufficient to satisfy the test its application needed to meet. The error made by the Commissioner involves both a mistake of fact and an error of principle.”

WHAT IS THE RELATIONSHIP BETWEEN THE GOOD FAITH BARGAINING REQUIREMENTS AND THE CONCEPT OF “GENUINELY TRYING TO REACH AGREEMENT”?

Over the years a number of AIRC and Federal Court decisions have held that the concept of “genuinely trying to reach agreement” includes the concept of “bargaining in good faith”⁹.

Accordingly, it is open for an employer to argue in proceedings relating to a union application for a protected action ballot that industrial action cannot be taken until the relevant employees and unions have met the good faith bargaining requirements of the *Fair Work Act*.

In the 1 September decision of Commissioner Thatcher¹⁰ relating to Total Marine Services Pty Ltd, as referred to above, this issue was considered. The Commissioner held that:

- “Without doubt there is a close relationship between genuinely trying to reach agreement and bargaining in good faith”;
- In considering whether a party is genuinely trying to reach agreement it is relevant to take into account whether the relevant union is meeting the good faith bargaining requirements of the Act;
- The assessment of whether a bargaining representative is genuinely trying to reach agreement is not limited to an assessment of whether the representative is complying with the good faith bargaining requirements of the Act.

The decision was subsequently overturned on appeal for different reasons, as set out in the previous section. The above views about the relationship between the good faith bargaining requirements and the concept of “genuinely trying to reach agreement” were not overturned by the Full Bench in the appeal proceedings.

This issue was considered again in a case involving the TWU. After analysing the union’s bargaining conduct, Senior Deputy President Hamberger decided¹¹ that the union was genuinely trying to reach agreement. His Honour said:

“[26] While there is a relationship between ‘genuinely trying to reach an agreement’ and ‘bargaining in good faith’ it would be wrong simply

⁹ For example, see *AMIEU v G & K O’Connor Pty Ltd* (1999) FCA 310.

¹⁰ *MUA v Total Marine Services*, [2009] FWA 187, 1 Sept 09, Thatcher C.

¹¹ *TWU v CRT Group* [2009] FWA 425, Hamberger SDP, 8 October 2009.

to conflate the two terms. Even if I had found that the TWU was not bargaining in good faith – something I have not done – that would not necessarily mean that the TWU was not genuinely trying to make an agreement. Indeed the Explanatory Memorandum to the Fair Work Bill 2008 states, when dealing with the ‘genuinely trying to reach an agreement’ expression in s.413 (Common requirements that apply to industrial action to be protected industrial action):

“...The question whether a person is genuinely trying to reach an agreement requires a subjective assessment of the actual intention of the person and the overall circumstances. It is not limited to an assessment of whether the person is complying with the good faith bargaining requirements”.

In a decision of 7 October¹², Commissioner Roberts of FWA dealt with an application by a union to extend the 30 day period within which industrial action can be commenced. The employer questioned whether the union had met the good faith bargaining requirements (s.228 of the Act) and had met the requirement to be genuinely trying to reach agreement before industrial action is taken.

The Commissioner said that “a finding that a bargaining representative was in breach of s.228 of the Act might, of course, have ramifications for whether that bargaining representative might be capable of demonstrating that it had been and was genuinely trying to reach agreement”.

The Commissioner suggested that an employer wishing to pursue the argument that the 30 day period should not be extended because the good faith bargaining requirements have not been met, should ensure that its submission is accompanied by an application for a bargaining order to address the breach of the good faith bargaining requirements.

This decision increases the likelihood of FWA members questioning why an employer has not applied for a bargaining order when raising non-compliance with good faith bargaining requirements in the context of arguing that a party is not genuinely trying to reach agreement before taking industrial action.

THE PROHIBITION ON INDUSTRIAL ACTION IN PURSUIT OF PATTERN BARGAINING

During the development of the *Fair Work Act*, Ai Group argued strongly for the preservation of the previous laws outlawing industrial action in pursuit of pattern bargaining.

Prior to the introduction of the former laws, union pattern bargaining campaigns were a major problem in the manufacturing, construction, transport and other sectors.

As a result of Ai Group’s strong representations, the *Fair Work Act* continues to outlaw industrial action in pursuit of pattern bargaining.

¹² *AWU v Tyco Water Pty Ltd* [2009] FWA 512, 7 October 2009

In a 19 August decision involving the University of Queensland¹³, SDP Richards of FWA held that the definition of pattern bargaining in the *Fair Work Act* is not significantly different to the definition in the *Workplace Relations Act*. This is consistent with Ai Group's interpretation.

In a 13 August decision involving Tyco Australia¹⁴, SDP O'Callaghan declined to issue a protected action ballot order which the CEPU had applied for as there was no evidence that the union had genuinely tried to reach agreement.

Several meetings had been held between the company and the union. Management gave evidence that the union had insisted that the company pay the same wage rates as its competitors and had refused to examine financial records that the company had offered to provide. SDP O'Callaghan accepted the company's argument that under the anti-pattern bargaining provisions of the *Fair Work Act*, the burden lies on the union to prove that it is genuinely trying to reach agreement and is not pattern bargaining.

THE GOOD FAITH BARGAINING REQUIREMENT TO DISCLOSE CERTAIN INFORMATION

One of the good faith bargaining requirements under the *Fair Work Act* is "disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner".

Since the *Fair Work Act* came into operation, some unions have requested a very extensive amount of financial and other information on the premise that this is required by the *Act*. These unreasonable union claims have been roundly rejected by employers.

To date, FWA has not issued any decisions on the good faith bargaining requirement to disclose information.

NEED TO PARTICULARISE ENTERPRISE AGREEMENT CLAIMS

In a recent decision¹⁵, Commissioner Thatcher of FWA rejected an application by Total Marine Services for a Bargaining Order requiring that the relevant union provide written details on each of the 119 items on its log of claims. The Commissioner held that "*Written detail ...in respect of each of the 119 items seems excessive and oppressive*".

In a later appeal decision¹⁶, against a different decision of Commissioner Thatcher, but relating to the same bargaining situation, a Full Bench of FWA concluded that Commissioner Thatcher had erred in finding that the union had genuinely tried to reach agreement. The reasons given by the Full Bench for overturning the Commissioner's decision included "*Many items were only set out in a list of headings and were not explained or discussed*." This decision is authority for the view that if a party includes an item on a list of bargaining claims, it needs to explain and discuss the item. This decision

¹³ *NTU v University of QLD*, [2009] FWA 90, 18 August 09, SDP Richards.

¹⁴ *CEPU v Tyco Australia Pty Ltd t/a Wormald* [2009] FWA 83.

¹⁵ *Total Marine Services v MUA*, 2009 FWA 290, 16 Sept 09, Thatcher C.

¹⁶ *Total Marine Services Pty Ltd v MUA* [2009 FWA 368, 9 October 2009, VP Watson, SDP Hamberger and C. Roberts.

was dealt with in more detail earlier in this report.

REFRAINING FROM “CAPRICIOUS OR UNFAIR CONDUCT THAT UNDERMINES FREEDOM OF ASSOCIATION OR COLLECTIVE BARGAINING”

At the ACTU Congress in June, the unions reportedly resolved to test the reach of the good faith bargaining obligation to refrain from “capricious or unfair conduct that undermines freedom of association or collective bargaining”

The Explanatory Memorandum for the *Fair Work* legislation gives the following examples of conduct that may be capricious or unfair:

- failing to recognise a bargaining representative,
- not permitting a bargaining representative to attend meetings,
- dismissing or engaging in detrimental conduct towards an employee who is a bargaining representative, or
- preventing an employee appointing a bargaining representative.

Introduction of changes during a period when bargaining is occurring

In a case involving Coca-Cola Amatil, the Liquor, Hospitality and Miscellaneous Union (LHMU) argued that the company was engaging in capricious or unfair conduct by restructuring its Syrup Room while bargaining was taking place, and hence was not complying with the good faith bargaining requirements. The union sought a bargaining order preventing the company from implementing the restructuring proposal until the conclusion of the enterprise agreement negotiations.

In a 31 August decision¹⁷, SDP O’Callaghan refused to grant the order and held that:

- The company’s actions and consultation process relating to the Syrup Room restructuring complied with the relevant award and the Act; and
- The company’s actions did not breach the good faith bargaining requirements.

“Direct dealing” with employees

It is a very important principle that employers have the right to communicate with their employees about relevant issues, including bargaining developments.

Unions from time to time have objected to employers speaking to their employees about bargaining issues, during periods when bargaining is occurring. Employers typically and understandably hold the view that they have every right to communicate with their employees about bargaining issues, provided that no coercion is involved.

So far, this issue has received little focus in FWA cases. although a recommendation issued by Senior Deputy President Drake of FWA raised concerns amongst employers

¹⁷ *LHMU v Coca-Cola Amatil* [2009] FWA153, SDP O’Callaghan, 31 August 200918

and was the subject of considerable media commentary. The recommendation¹⁸, amongst other aspects, recommended that Transfield *“not attempt to bypass the bargaining agent representatives in relation to its proposal by contacting for this purpose the members of the bargaining agent representatives directly, in meetings or by text or other telephonic messages”*.

Recommendations often arise from conciliation proceedings and should not be given weight as precedents.

Paid mass meetings of employees

In a 6 October decision reported in the media¹⁹, SDP Kaufman of FWA rejected an LHMU application for a bargaining order. The order was sought against Fosters on the basis of an assertion that the company had engaged in capricious or unfair conduct because it had refused to allow two further paid mass meetings of employees. The company had already allowed three paid mass meetings this year.

SDP Kaufman rejected the union's application. He decided that:

- It was not necessary for the union to consult with workers at a mass meeting at the present time, and that the officials and delegates could continue to negotiate with the employer;
- It was not capricious for an employer to refuse to allow paid mass meetings when the meetings were (at least in part) to enable the union to convince employees to vote in favour of industrial action.

SDP Kaufman has not yet released written reasons for his decision.

THE USE BY UNIONS OF BARGAINING ORDERS TO FRUSTRATE OR DELAY BALLOTS TO APPROVE AGREEMENTS

FWA has issued Bargaining Orders on a number of occasions preventing an employer proceeding with a scheduled vote of employees to approve the terms of a proposed enterprise agreement and ordering additional meetings with relevant unions.

The Act gives FWA the power to make a bargaining order if an employer is not meeting the good faith bargaining requirements. However, this power is subject to s.255 of the Act which states that FWA cannot make an order that *“requires or has the effect of requiring ...an employee to approve, or not approve, a proposed agreement”*.

During the Senate Committee inquiry into the *Fair Work Bill*, Ai Group argued that s.255 needed to be amended to clarify *“that unions are not able to apply for bargaining orders or scope orders to delay or prevent a vote by employees to approve an agreement. Such a tactic is predictable in circumstances, say, where only a minority of employees are union members and the union does not support all of the content of the agreement.”* Despite, Ai Group's submission, s.255 was not amended.

¹⁸ Recommendation - AMWU v Transfield (Australia) Pty Ltd [2009] FWA 93 (14 August 2009)

¹⁹ *“Mass meeting not a good faith bargaining requirement”*, Workplace Express, 6 October 2009

To date, at least three individual members of FWA have decided that they have the power to order that scheduled votes of employees to approve an agreement not proceed, on the basis that the good faith bargaining requirements had not been met:

- On 29 July, SDP Richards ordered the Queensland Tertiary Admissions Centre not to conduct a ballot to approve an enterprise agreement, and to hold further meetings with the Australian Services Union;
- On 4 August, SDP Watson issued an interim order preventing Abigroup Constructions and its subsidiary, Australian Precast Solutions, from proceeding with a vote of employees to approve a proposed enterprise agreement. Ai Group was granted the right to intervene in this matter but did not have the opportunity to present detailed arguments before SDP Watson withdrew his interim order following a series of conferences between the Abigroup and the CFMEU;
- On 10 August, Commissioner Whelan ordered that a scheduled ballot of employees of Defries Industries to approve an agreement not proceed and ordered that an additional four meetings be conducted between the company and the National Union of Workers over a two week period. The company had met twice with the NUW.

In addition, in the Transfield case referred to earlier²⁰, SDP Drake recommended that a scheduled vote of employees not proceed until at least two more meetings had taken place with the unions, and that Transfield agree with the unions on the time, place and manner in which any subsequent ballot will be conducted.

FWA's powers to issue a bargaining order delaying a scheduled ballot of employees to approve an agreement were considered in detail by Vice President Watson in an 11 September 2009 decision²¹. The Vice President held that:

- "Whether a particular order is contrary to s.255 depends on the nature of the order, and the effect of the order in the circumstances of the case".
- "...an order that delays a vote, provided it be only for a short time and does not in substance deny employees the opportunity to vote for an agreement, is not precluded by s.255.
- "In a given case the facts will need to be considered to determine whether intervention of this nature by deferring a vote has the effect precluded by s.255".

In a further case involving the Australian Nurses Union and aged care facilities in Melbourne²², Commissioner Whelan held on 20 August that a bargaining representative cannot seek bargaining orders once workers have voted on a proposed agreement.

²⁰ Recommendation - *AMWU v Transfield (Australia) Pty Ltd* [2009] FWA 93 (14 August 2009)

²¹ *NUW v CHEP*, [2009] FWA 202, 11 Sept 09, VP Watson.

²² *Mary Mackillop Aged Care and Alphington Aged Care*

REQUIREMENT THAT EMPLOYEES BE GIVEN THE OPPORTUNITY TO MEET COLLECTIVELY TO CONSIDER PROPOSED AGREEMENTS

Whilst relating to the previous bargaining laws, a Federal Court decision of 17 July involving Brisbane electrical contractor *Blue Star Pacific*²³ is of concern, given its implications for bargaining under the *Fair Work Act*.

Justice Reeves of the Federal Court overturned a collective agreement which a majority of employees had approved in a postal ballot, on the basis that the employer had not given its employees the opportunity to meet collectively to consider the company's proposed agreement, and consequently that the agreement was not validly approved.

The decision is of particular concern to employers whose employees are based at diverse locations. In such circumstances bringing the employees together in one location is often extremely difficult and disruptive.

The National Electrical Contractors Association (NECA) has initiated an appeal against the decision to the Full Federal Court.

The Federal Court's *Blue Star Pacific* decision has been relied upon by unions in two recent FWA cases.

The first case involved applications for enterprise agreements applicable to two aged care operators²⁴. Commissioner Whelan refused to approve the agreements because the applications were deficient for various reasons.

FWA does not, in most circumstances, have the power to refuse to approve an agreement on the basis that the good faith bargaining requirements have not been met. Notwithstanding this, Commissioner Whelan said in her decision that "where an employer is aware that there are employees who are union members and the union is a bargaining representative, it would be a breach of good faith bargaining to put an agreement to the vote without notifying the union of its intention to do so". Commissioner Whelan also referred to the Federal Court's *Blue Star Pacific* decision and commented that the decision "suggests that it is inherent in the concept of collective bargaining that the employees who will be affected by the proposed agreement have the opportunity to meet together as a group, to discuss the provisions of the proposed agreement."

The LHMU sought to rely upon the *Blue Star Pacific* Decision and Commissioner Whelan's *Alphington Aged Care* decision in an application for a bargaining order to require Fosters to allow paid mass meetings of its employees. As reported earlier, SDP Kaufman refused the union's application²⁵. He decided that it was not capricious for an employer to refuse to allow paid mass meetings when the meetings were (at least in part) to enable the union to convince employees to vote in favour of industrial action. Written reasons for the decision have not yet been issued.

²³ CEPU v *Blue Star Pacific* (2009) FCA 750.

²⁴ *Alphington Aged Care*, [2009] FWA 301.

²⁵ "Mass meeting not a good faith bargaining requirement", *Workplace Express*, 6 October 2009

MAJORITY SUPPORT DETERMINATIONS

The means by which FWA establishes whether there is majority support for collective bargaining

Under the *Fair Work Act*, FWA can satisfy itself that the majority of the relevant group of employees support the negotiation of a collective agreement “using any method FWA considers appropriate”.

In three of the cases dealt with so far by FWA (Cochlear, Virgin Tech and TRUEnergy) FWA has ordered that a secret ballot be held. In other cases, FWA has been satisfied using alternative methods (eg. a petition signed by the majority of employees at Invocare).

Initiation of bargaining by employers

Employers need to be very careful in initiating bargaining or agreeing to bargain, as once they have done so the good faith bargaining requirements apply regardless of whether the majority of employees support collective bargaining.

In a case involving Coca-Cola Amatil²⁶, SDP O’Callaghan rejected an LHMU application for a Majority Support Determination on the basis that the employer had already initiated bargaining for an agreement.

It is noteworthy that the *Fair Work Act* only permits bargaining representatives of employees to apply for a Majority Support Determination, not employers. An employer does not need to have the right to seek a majority support determination as an employer can simply ask for collective bargaining to take place at any time and the good faith bargaining requirements will apply

SCOPE ORDERS – UPCOMING FULL BENCH PROCEEDINGS

To date there have been only a few applications made to FWA for scope orders.

A union or employer bargaining representative may apply to FWA for a scope order if bargaining is underway and:

- The bargaining representative has concerns that bargaining for the agreement is not proceeding efficiently or fairly; and
- The reason for this is that the bargaining representative considers that the agreement will not cover the appropriate group of employees.

An important Full Bench case relating to scope orders will be heard over 5 days from 7 December 2009. Ai Group and the ACTU have sought leave from FWA to intervene in the proceedings to make submissions about the interpretation of the *Fair Work Act*.

²⁶ *LHMU v Coca-Cola Amatil* [2009] FWA 101, 19 August 2009.

The case pertains to a scope order which has been sought in relation to the scope of agreement/s being negotiated between the UFUA and the Metropolitan Fire and Emergency Services Board. The UFUA is seeking a single agreement covering all employees while the MFESB is pursuing three agreements covering different segments of its workforce. The matter has been referred to a Full Bench.

The Full Bench proceedings will be important in interpreting the concept of a “fairly chosen” group of employees. This concept is a critical aspect of the *Fair Work Act*’s provisions dealing with scope orders, majority support determinations and approval requirements for enterprise agreements.

Applications for a scope order are required to meet certain mandatory requirements. On 18 September, SDP O’Callaghan of FWA rejected an LHMU application for a scope order²⁷ because the union had not complied with the requirements in the Act to:

- Give the company a written notice detailing its concerns about the bargaining process; and
- Provide the company with a reasonable time to respond to the union’s written notice.

On 30 September 2009, Commissioner Roberts rejected an application by Clarence Coal for a scope order²⁸, finding that the application would not “*promote the fair and efficient conduct of bargaining*” as required by s.638 of the *Fair Work Act*. The company sought a scope order for the negotiation of a single agreement to replace two separate agreements which it had negotiated in 2006/07 with the CFMEU.

BALLOT QUESTIONS – PROTECTED ACTION BALLOTS

Some unions have sought ballot orders with a ballot question asking the employees whether they support “one or more” of a list of different types of industrial action (eg. a ban on overtime, an indefinite strike, etc)

In two separate decisions given on the same day, inconsistent positions were adopted by Vice President Watson and Commission Thatcher on the wording of the same ballot question.

In a case involving ACCO²⁹, VP Watson held that the NUW must either ask 12 separate questions to ascertain whether the employees support each of the 12 listed types of industrial action, or alternatively, ask the employees if they support the taking of “all” 12 types of industrial action. On the same day, Commissioner Thatcher held that the NUW’s original ballot question met the requirements of the Act.³⁰ Ai Group believes that VP Watson’s approach is the correct one.

“PERMITTED MATTERS” AND “UNLAWFUL TERMS” IN AGREEMENTS

²⁷ *LHMU v Coca-Cola Amatil* [2009] FWA 320

²⁸ *Clarence Coal Pty Ltd* [2009] FWA 462, 30 September

²⁹ *NUW v ACCO* [2009] FWA 226, 7 September 2009

³⁰ *NUW v Fresh Exchange* [2009] FWA 221, 7 September

So far there have been few FWA cases clarifying the interpretation of the new content requirements of the *Fair Work Act*.

The Act provides that enterprise agreements may be made about “permitted matters”. The permitted matters are:

- Matters pertaining to the relationship between an employer and the employees who will be covered by the agreement;
- Matters pertaining to the relationship between the employer and the union/s that will be covered by the agreement;
- Deductions from wages for any purpose authorised by an employee who will be covered by the agreement; and
- How the agreement will operate

In paragraph 660 to 681 of the Explanatory Memorandum which accompanies the legislation relevant case law is discussed and examples are listed of the types of matters that are intended to be permitted matters.

A Federal Court decision³¹ which deemed a union claim for income protection insurance to be a matter which did not pertain to the employment relationship under the *Workplace Relations Act*, continues to be relevant under the *Fair Work Act* given the judge’s reasoning. The union involved in the case is appealing the decision to the Full Federal Court but a hearing date has not yet been set.

In a Full Bench decision handed down on 12 October 2009 relating to Australian Postal Corporation³². The Full Bench overturned a decision of Senior Deputy President Drake to issue a protected action ballot order.

The Full Bench found that the Communications, Electrical and Plumbing Union (CEPU) was not “genuinely trying to reach agreement” because it was pursuing a claim in relation to contractors which was not a “permitted matter”.

The union was pursuing an agreement provision which would require Australia Post to advertise every position internally and to only contract out a position if it was not wanted by an Australia Post employee.

The Full Bench decided that the substantive terms of an enterprise agreement must be about “permitted matters” and that:

“[44] ...an applicant for a protected action ballot order pursuing a claim as a substantive term of a proposed enterprise agreement which is not about a permitted matter is not genuinely trying to reach agreement with the employer of the employees to be balloted”.

DISPUTE SETTLING TERMS IN AGREEMENTS

³¹ *Australian Maritime Officers Union v Sydney Ferries Corporation* [2009] FCA 231 (18 March 2009)

³² *Australian Postal Corporation v CEPU* [2009] FWAFB 599, SDP Acton, DP Hamilton and C Blair, 12 October 2009.

The *Fair Work Act* requires that enterprise agreements include a dispute settling term but does not require that such term give arbitration powers to FWA.

A model term is set out in the *Fair Work Regulations* but parties are free to include an alternative term.

The ACTU is understood to be encouraging its union affiliates to pursue dispute settling clauses which:

- Give FWA compulsory arbitration powers;
- Give FWA the power to arbitrate in respect of any disputes which arise during the life of the agreement over any issues, not just disputes relating to matters dealt with in the agreement (NB. this is a much wider power than that set out in the model dispute settling term); and
- Give FWA the power to arbitrate disputes over the right of employees (in the National Employment Standards) to request flexible work arrangements and extended parental leave.

Employers would be unwise to agree to the unions' claims given the sweeping nature of the powers proposed.

FLEXIBILITY TERMS IN AGREEMENTS

There has been a great deal of media commentary about flexibility terms, which all enterprise agreements made under the *Fair Work Act* are required to contain.

The concept of flexibility terms arose from the debate, prior to the last Federal Election, about Labor's policy to abolish Australian Workplace Agreements.

Prior to the Election, Labor gave a commitment that all modern awards and all new enterprise agreements would be required to contain a flexibility term which allowed individual employees and their employer to agree on arrangements which depart from those in the award or enterprise agreement, subject to the employee being better off overall.

Last year, in the early stages of the award modernisation process, the AIRC developed a model flexibility term for modern awards. Prior to issuing the model term, there were a number of rounds of submissions and consultations with employer organisations, unions and other interested parties. Ai Group was heavily involved in the proceedings.

The AIRC's model flexibility term for awards balances the interests of employers and employees and contains numerous protections, including:

- The employer and the employee can only agree to vary award provisions

relating to five areas: arrangements for when work is performed; overtime rates; penalty rates; allowances and leave loading;

- The employer and the employee must have genuinely agreed;
- The agreement must be in writing and signed, with a copy given to the employee;
- The agreement must result in the employee being better off overall than if the agreement had not been made;
- An employer seeking to enter into an agreement must provide a written proposal to the employee. Where the employee's understanding of written English is limited the employer must take measures, including translation into an appropriate language, to ensure the employee understands the proposal;
- The agreement may be terminated at any time by the employer or employee giving four weeks' notice in writing;
- The agreement must not require the approval or consent of a person (eg. a union) other than the employer and employee (except for approval by a parent or guardian if the employee is under 18).

The Government largely adopted the AIRC's approach when it drafted the enterprise bargaining provisions of the *Fair Work Act*. Ai Group argues strongly against some of the provisions that were adopted, for example, the right for an employer to terminate a flexibility term with 28 days notice, which we considered far too short for business planning.

The Act requires that all agreements must include a flexibility term, and sets out a number of requirements that all flexibility terms must meet (similar to those listed above for awards), including:

- Genuine agreement by the employer and employee;
- The employee being better off overall;
- No third party approval or consent (other than for an employee under 18);
- Termination of the arrangement by either party with not more than 28 days written notice;
- The arrangement must be in writing and signed, with a copy given to the employee within 14 days of agreement being reached.

Negotiating parties are permitted to agree upon their own flexibility term provided that it meets the above requirements. There is no limit on the provisions in the agreement which can be subject to the flexibility term. Flexibility could be limited to the five areas specified in the award flexibility term or could be wider or narrower.

If an enterprise agreement does not contain a flexibility term, a model flexibility term in

the *Fair Work Regulations* is taken to be a term of the agreement. The model term in the Regulations is very similar to the AIRC's model term for awards, including specifying that the employer and the employee can only agree to vary enterprise agreement provisions relating to five areas: arrangements for when work is performed; overtime rates; penalty rates; allowances and leave loading.

The unions oppose the concept of flexibility terms and are endeavouring to secure clauses in enterprise agreements which have the effect of providing no, or very limited, flexibility.

The ACTU is encouraging its union affiliates not to accept the model flexibility term during bargaining but rather to pursue flexibility terms which:

- Only permit flexibility to be agreed upon in a narrower range of areas than those set out in the model flexibility term;
- Permit more flexibility for employees in higher classifications and less in lower classifications.

The following extract from the flexibility term which the AMWU is pursuing highlights the union's aims. The clause has the effect of providing no added flexibility and removes some flexibilities provided for in most awards:

- “5.** *The terms that may be subject to an individual flexibility arrangement are:*
- (a)** *a 15 minute tea break, paid at the rate prevailing at the time, will be granted 2 hours after the start of an employee's ordinary hours; and*
 - (b)** *up to 5 rostered days off (“RDOs”) may be banked in a 12 month period—the banked RDOs may be taken at a time of the employee's choice on the giving of 4 weeks' notice to the employer.*
- 6.** *The facilitative provisions and the flexibility term in the Award must not be used without the consent of the Union”.*

The AMWU's clause was the subject of a recent dispute at Campbell's Soups which received widespread media attention.

During the period of the dispute at Campbell's Soups, the Deputy Prime Minister, the Hon Julia Gillard MP, released details of the flexibility terms included within the first 81 agreements approved under the *Fair Work Act*:

- 75 per cent of the agreements used the model flexibility term in the Regulations (including some agreements negotiated with AMWU);
- A further 5 per cent used the model flexibility term but omitted leave loading

as an area where flexibility could be obtained (NB. Ai Group believes that this may be because leave loading is incorporated in the rate of pay and not paid separately in the relevant workplace);

- The remaining 10 per cent had a flexibility term which was either more or less flexible than the model term.

CONCLUSION

After 100 days, it is too early to say what the final shape of the new *Fair Work* bargaining laws will be, and the impact on workplaces. Much will depend on how the case law develops and the way that the legislation is interpreted.

Decisions of individual members of FWA are being made every day but so far there have been few Full Bench decisions of FWA and few decisions of the Fair Work Division of the Federal Court and Federal Magistrates Court. These decisions will be particularly significant over the months and years ahead.

Ai Group will continue to monitor developments closely and to pursue legislative amendments if problems become apparent.

It is vital that Australia maintain a fair and productive workplace relations system which enables Australian employers to remain flexible and globally competitive.



www.aigroup.com.au

SYDNEY:

Tel: 02 9466 5566
Fax: 02 9466 5599

MELBOURNE:

Tel: 03 9867 0111
Fax: 03 9867 0199

BRISBANE:

Tel: 07 3244 1777
Fax: 07 3244 1799

ADELAIDE:

Tel: 08 8300 0133
Fax: 08 8300 0134

CANBERRA:

Tel: 02 6233 0700
Fax: 02 6233 0799

ALBURY/WODONGA:

Tel: 02 6021 5722
Fax: 02 6021 5117

BALLARAT:

Tel: 03 5331 7688
Fax: 03 5332 3858

BENDIGO:

Tel: 03 5443 4810
Fax: 03 5443 9785

GEELONG:

Tel: 03 5222 3144
Fax: 03 5221 2914

NEWCASTLE:

Tel: 02 4929 7899
Fax: 02 4929 3429

WOLLONGONG:

Tel: 02 4228 7266
Fax: 02 4228 1898

AFFILIATE PERTH:

Chamber of Commerce & Industry
Western Australia
Tel: 08 9365 7555
Fax: 08 9365 7550