- Workplace Relations
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Agreement or argument:
What faith can we have in good faith bargaining?

Early employer experiences of enterprise bargaining under the Fair Work Act

October 2010

Executive Summary

The introduction of good faith bargaining in Australia

On 1 July 2009, the Fair Work Act 2009 (the FW Act) took effect and put in place the bulk of the industrial relations policy contained in the Rudd Government's Forward with Fairness Policy Implementation Plan[1]. The first changes introduced included "good faith bargaining" as well as new laws regulating workers' ability to take protected industrial action in support of bargaining for a new enterprise agreement.

The United States (US) had introduced good faith bargaining back in 1935, and while the US good faith bargaining system was initially expected to influence to a significant extent how the FW Act's provisions were interpreted, more than 12 months down the track the US jurisprudence has not been a factor in Australian tribunal decisions.

In this paper, AMMA assesses the early experience of good faith bargaining under the FW Act according to whether the needs of the resources sector are being met, and in the process identifies changes needed to the legislation to ensure it delivers a modern and progressive industrial relations framework.

AMMA's own research into members' bargaining experiences

While it is still early days for good faith bargaining in the Australian context, AMMA estimates that around half its members have been involved in enterprise bargaining under the new rules.

In an attempt to find out how members were faring under the Fair Work Act, including the impact of the new good faith bargaining rules, in early 2010 AMMA embarked on the AMMA Workplace Relations Research Project[2] (the Research Project) in collaboration with RMIT University. The first stage of the Research Project involved a comprehensive survey questionnaire and focus group conducted in April and May 2010 on the impacts of the FW Act on resource sector employers during its first months of operation. The first report on the results covered the period from 1 July 2009 to 28 February 2010.

The results identified some of the most unworkable aspects of the legislation for employers, including significant negative impacts arising from the introduction of good faith bargaining.

Bargaining made more difficult by the Fair Work Act

Respondents to the first Research Project survey cited increased difficulty negotiating with union bargaining representatives under the FW Act as well as a negative cultural shift in the way unions were approaching bargaining.

More than half of the respondents that had engaged in enterprise bargaining since 1 July 2009 reported bargaining being more difficult under the FW Act than it had been under the Workplace Relations Act (the WR Act).

Of respondents that had engaged in good faith bargaining:

- 27.3 per cent said bargaining under the FW Act was "significantly more difficult" than under the WR Act;
- 27.3 per cent said bargaining under the FW Act was "more difficult";
- 22.7 per cent said there was "no significant difference"; and
- 22.7 per cent said it was "too soon to tell".

No respondent said bargaining under the FW Act was "easier" or "significantly easier".

Respondents reported the new bargaining regime had led to:

- Having to devote more hours to enterprise bargaining (reported by 90 per cent of survey respondents that had engaged in bargaining during the first eight months of the FW Act);
- Having to devote more time to meeting and negotiating with other bargaining representatives (reported by 80 per cent of relevant respondents);
- Having to devote more time to tribunal processes and bargaining-related tribunal applications (reported by 68.4 per cent of relevant respondents);
- Greater union involvement in bargaining (reported by 65 per cent of relevant respondents);
- Having to negotiate with a larger number of bargaining representatives (reported by 55 per cent of relevant respondents);
- Employees taking more protected industrial action during

bargaining compared with bargaining periods under the WR Act (reported by 25 per cent of relevant respondents); and

- Unions demanding more union-specific clauses in enterprise agreements (reported by 68.4 per cent of relevant respondents).

Respondents said unions were wasting no time in pursuing union-specific clauses in enterprise agreements in addition to other clauses that would have been prohibited content under the WR Act. For instance:

- 76.5 per cent of relevant respondents said unions were now pursuing paid trade union training leave in their bargaining agendas;
- 64.7 per cent said unions were pursuing right of entry clauses;
- 58.8 per cent said unions were pursuing shop stewards' rights clauses;
- 52.9 per cent said unions were pursuing payroll deductions of union fees;
- 29.4 per cent said unions were pursuing clauses relating to the use of contractors; and
- 11.8 per cent said unions were pursuing clauses requiring employers to maintain a union office on-site.

In addition, 52.6 per cent of respondents that had negotiated with a bargaining representative under the FW Act were not made aware of how many employees that person represented.

Reduced agreement-making options under the Fair Work Act

AMMA members have cited increased difficulty negotiating all types of agreements under the FW Act, in particular due to the lack of a statutory individual agreement or a non-union greenfield agreement option.

In the past two decades, the resource sector has been able to access a wide range of agreement-making options in order to improve flexibility and productivity, reward performance and attract and retain the best employees. During that time, statutory agreement making options available to employers and employees have included:

- Union collective agreements;
- Employee collective agreements;
- Australian Workplace Agreements (AWAs);
- Individual Transitional Employment Agreements (ITEAs);
- Union greenfield agreements; and
- Employer greenfield agreements.

The FW Act has reduced that variety of agreement making options down to:

- Collective agreements[3]; and
- Union greenfield agreements.

The limited agreement-making options now available following the removal of the ability to make new AWAs from 28 March 2008[4] and new ITEAs from 31 December 2009[5] mean every agreement has to be negotiated collectively and, more often than not, with a union acting as a default bargaining representative.

AMMA members have reported single-enterprise non-greenfield agreements, multi-enterprise non-greenfield agreements and single enterprise greenfield agreements (the only agreement types available under the FW Act) have become more difficult to negotiate[6].

Difficulties negotiating greenfield agreements ("single enterprise greenfield agreements" as they are known under the FW Act) present a serious problem for resource sector employers who have no choice but to negotiate with a union. If the employer fails to reach agreement with the union, there are no other statutory agreement options available.

Employers seek to make statutory greenfield agreements in the resources sector to achieve a level of stability in industrial relations prior to a project commencing.

Greenfield (or pre-start) agreements remove the ability of construction unions to take protected industrial action during the construction phase of a project and thereby provide certainty to the investor about wages and conditions costs. Mobilising and establishing large resource projects, whether this entails getting new projects off the ground or expanding existing ones, requires a

stable industrial relations environment where the threat of protected industrial action has been eliminated.

AMMA members' experience since 1 July 2009 is that construction unions are using their mandated involvement in greenfield agreements to extract inflated benefits for their members with little or no regard for productivity returns for employers. As there are no employees engaged during negotiations for greenfield agreements, the FW Act's good faith bargaining and dispute resolution provisions do not apply.

AMMA members have reported union attempts to manipulate tender processes by withholding approval of a greenfield agreement from employers they regard as unfriendly to their cause.

Bargaining provisions operating as planned, says Government

In April 2010, 10 months after the FW Act's good faith bargaining rules were introduced, then-Deputy Prime Minister and Workplace Relations Minister Julia Gillard said the Rudd Government would continue to closely monitor the provisions[7]. However, in the Government's view "the new bargaining provisions are operating as they should", she said.

There had been just 69 applications for bargaining orders in the first six months of the FW Act's operation, with Fair Work Australia having issued just 15 bargaining orders in that time, Gillard said:

The vast majority of agreements are being negotiated in good faith from start to finish, without recourse to Fair Work Australia.

AMMA maintains that while the number of bargaining orders Fair Work Australia has issued remains relatively low, employers are nonetheless being put to the time and expense of responding to applications even where they have little chance of success.

Of respondents to AMMA's Research Project who had engaged in good faith bargaining as of the end of February 2010[8], 68.4 per cent reported having to devote more time to tribunal processes and bargaining-related applications under the FW Act than during a comparable period under the WR Act.

Of AMMA members that had been impacted by or involved in bargaining-related applications to the federal industrial tribunal Fair Work Australia:

- 14.3 per cent said the number of applications they were involved in was "significantly higher" than the number under the WR Act during previous bargaining rounds;
- 28.6 per cent said the number of applications was now "higher";
- 28.6 per cent said the number of applications was "about the same"; and
- 28.6 per cent "didn't know".

No respondent said the number of bargaining-related applications they were now subject to was lower.

The Fair Work Act and productivity

The Rudd Government's 2007 pre-election promises included that enterprise level collective bargaining would be an important driver of productivity[9]. In the second reading speech for the Fair Work Bill 2008, then-Deputy Prime Minister Julia Gillard said the legislation:

… aims to achieve productivity and fairness through enterprise level collective bargaining underpinned by the guaranteed safety net, simple good faith bargaining obligations and clear rules governing industrial action.

Despite these stated objectives, the FW Act contains no requirement to link enterprise agreement outcomes with productivity improvements.

A case in point is the 2009/2010 vessel operators and manning agents dispute between employers in the offshore oil and gas industry and the Maritime Union of Australia (MUA). The resulting outcome, which included an increase in the construction allowance to $1,500 a week, an additional five days' pay and a wage increase in excess of 30 per cent over the term of the agreement, were not attached to any productivity improvements or changes in employees' duties. The increases were achieved on the basis it was too damaging for employers to withstand the ongoing industrial action being organised by the MUA through its members. Employers were effectively held to ransom until they conceded to the entirety of the union's wage demands.

AMMA publicly criticised the Rudd Government and the provisions of the FW Act for the excessive wage outcomes that were able to be obtained in this instance through taking protected industrial action without any regard to the exorbitant nature of the claims.

Despite all the obligations imposed on employers as part of good faith bargaining, and the FW Act's stated objectives, there is no effective protection for employers against speculative and inflationary wage claims. Nor is there any requirement for enterprise agreements to contain productivity improvements in exchange for wage outcomes or even for parties to explore the possibility of achieving productivity improvements during bargaining. Employers are faced with a choice between damaging industrial action or capitulating to demands.

Some union bargaining representatives are simply refusing to sign agreements that permit any meaningful use of the mandatory individual flexibility clauses[10], which would otherwise afford employers some flexibility around working arrangements.

Interestingly, 65 per cent of respondents to the first stage of AMMA's Research Project that had finalised an agreement under the FW Act expected it to have a "neutral" impact on labour productivity[11]. Just 10 per cent expected their FW Act agreement to have a "positive" impact on labour productivity, 10 per cent expected it to have a "negative" impact and five per cent expected it to have a "very negative" impact. No respondent expected their new agreement to have a "very positive" impact on labour productivity.

The emerging case law

Fair Work Australia became the new federal tribunal for workplace relations on 1 July 2009, complete with the power to facilitate collective bargaining, ensure good faith bargaining and make orders regulating unlawful and protected industrial action.

Analysing the jurisprudence coming out of Fair Work Australia in the early months of good faith bargaining paints a picture of how the legislation is being applied. This paper analyses significant Fair Work Australia decisions from 1 July 2009 up to and including those handed down in October 2010.

For employers in the resource sector, serious concerns have emerged about some Fair Work Australia decisions to date. While some of those concerns have been alleviated by Full Bench rulings that have overturned initially disturbing decisions, other concerns remain and signal the need for legislative reform.

In analysing the case law to date and AMMA members' stated experiences with bargaining under the new regime, AMMA has identified shortfalls in the legislation and developed the following recommendations for change.

RECOMMENDED CHANGES TO AUSTRALIA'S GOOD FAITH BARGAINING LAWS

Protected industrial action

1. Protected industrial action should not be available during enterprise bargaining unless the party seeking to take the protected industrial action demonstrates to Fair Work Australia that it has embarked on and exhausted genuine bargaining and has reached a real impasse with the other bargaining representatives[12].
2. Employers negotiating a greenfield agreement should have the alternative of having a greenfield agreement approved by Fair Work Australia, free of any union involvement. These agreements would be tested against the relevant modern award, minimum standards and the "better off overall test" so as not to disadvantage prospective employees.
3. The right to take protected industrial action should extinguish for employees earning an annual income above $113,800 (i.e. the current unfair dismissal threshold).
4. All parties to enterprise agreements should be required to identify the proposed productivity improvements that arise from the agreement as part of the certification process before Fair Work Australia or, alternatively, agree that no productivity measures are available.
5. Parties seeking to take protected industrial action must demonstrate their claims are not fanciful and, if the claims were conceded by the employer, that they would not be against the national or public interest.
6. Where notices of protected industrial action are given, employers

should have the right to refuse to accept employees making themselves available for work after the notice has been provided to the employer, except where the employer agrees that work be performed as usual.

7. Where notice is given to take a form of protected industrial action and that action is then not taken and no notice is given of its cancellation, that particular type of industrial action should not be able to be taken for the remainder of enterprise negotiations.

8. The FW Act should be amended to make clear that an employer taking steps to insulate itself from the effects of protected industrial action, such as increasing stockpiles of products or supplies, is not in breach of s.228(1)(e), which prohibits bargaining representatives from engaging in "capricious or unfair conduct that undermines freedom of association or collective bargaining".

9. The definition of "significant harm" to third parties under s.426(3) should be re-defined to exclude any reference to the value of a project in deciding whether the harm caused by protected industrial action is significant[13].

10. The requirement that protected industrial action be occurring at the time a cooling off application is made should be varied to allow an application to proceed where industrial action is threatened or likely to occur[14].

Bargaining orders

11. On filing an application for a bargaining order, the applicant must be able to demonstrate that, prima facie, their case has some merit.

Bargaining content

12. The "matters pertaining to the employment relationship" test should be restricted to matters pertaining to the employment relationship between the employer and its employees and should not extend to the relationship between the employer and the employees' union. Agreement content such as payroll deductions of union dues; trade union training leave; and the provision of on-site facilities for union delegates all concern the relationship between the employer and the union and not the relationship between the employer and the employees.

13. Bargaining representatives should not be able to obtain secret ballot orders for protected industrial action on the assertion they believe they are bargaining for permitted content. The test of whether a bargaining representative is "genuinely trying to reach an agreement" with the employer should be that they are actually bargaining for permitted content, not that they believe they are[15].

Representation in bargaining

14. Bargaining representatives should be required to advise all other bargaining representatives that they have status as a bargaining representative in negotiations.

15. Bargaining representatives should be required to advise all other bargaining representatives of the number, identity, and geographical location of the employees they represent in negotiations.

16. A default bargaining representative should only be able to exercise good faith bargaining rights and have the right to be covered by an enterprise agreement where they have actively participated in negotiations.

17. The concept of default bargaining representative status should be removed, with any appointment of a bargaining representative subject to specific written approval by the employee, with a copy of that approval made available to the employer.

18. Where an employer wishes to limit to a manageable level the number of employee delegates participating in enterprise negotiations, this should not be seen as a failure by the employer to bargain in good faith. Bargaining orders should be able to limit the number of employee delegates that attend negotiations.

19. Where an employee or official of a union acts as a bargaining representative, that person should at all times be deemed to be the bargaining representative of the union rather than an independent bargaining representative acting on behalf of one or more employees[16].

Scope orders

20. Where the coverage of an enterprise agreement is in dispute,

the employer's position with respect to the agreement's scope should be preferred to that of the other bargaining representatives, unless the employer's position is held to be unfair or capricious. The onus should rest with the employee bargaining representatives to displace the employer's position as to scope.

Majority support determinations

21. The Australian Electoral Commission or Fair Work Australia should, as part of all applications for majority support determinations, conduct secret ballots to determine majority support of a workforce for engaging in collective bargaining.

Pattern bargaining

22. The exemption to pattern bargaining that exists under s.412(2) of the FW Act should be removed, which currently allows a bargaining representative to obtain orders for a secret ballot for protected industrial action if they are "genuinely trying to reach an agreement" despite having served pattern claims on two or more employers[17].

References

1 Kevin Rudd & Julia Gillard, Forward with Fairness Policy Implementation Plan, August 2007

2 AMMA Workplace Relations Research Project report by RMIT, June 2010

3 Unions are the default bargaining representatives where they have at least one member who will be covered by an agreement. After that, under s.183 the union has the ability to be covered by that agreement.

4 Workplace Relations Amendment (Transition to Forward with Fairness) Act 2008

5 Fair Work (Transitional Provisions and Consequential Amendments) Act 2009

6 AMMA Workplace Relations Research Project survey results, April and May 2010

7 Julia Gillard speech to Personnel and Industrial Relations Conference, 19 April 2010

8 AMMA Workplace Relations Research Project report by RMIT University, July 2010

9 Deputy Opposition Leader Julia Gillard, Melbourne Press Club speech, 25 June 2007

10 Individual Flexibility Arrangements: The Great Illusion, AMMA Paper, May 2010

11 AMMA Workplace Relations Research Project survey results, April and May 2010

12 B2010/2515, Farstad Shipping (Indian Pacific) Pty Ltd and MUA, 8 January 2010

13 CFMEU v Woodside Burrup Pty Ltd and Kentz E & C Pty Ltd [2010] FWAFB 6021, 6 August 2010

14 Tas Paper Pty Ltd v AMWU and CFMEU [2009] FWA 1872, 22 December 2009

15 Australian Postal Corporation v CEPU [2010] FWAFB 344, 20 January 2010

16 Heath v Gravity Crane Services Pty Ltd [2010] FWA 7751, 5 October 2010

17 John Holland Pty Ltd v AMWU and AWU [2010] FWAFB 526, 28 January 2010

1. The good faith bargaining requirements

The good faith bargaining requirements

Good faith bargaining requirements aim to ensure that all bargaining representatives act in an appropriate and productive manner when working towards a collective agreement. The requirements also facilitate improved communication between bargaining representatives, which is expected to reduce the likelihood of industrial action.

(Explanatory Memorandum to the Fair Work Bill 2008)

1.1 Section 228 of the FW Act outlines the requirements that bargaining representatives have to meet in order to be bargaining "in good faith".

1.2 Importantly, bargaining representatives are not required to make concessions or agree on the content of an agreement in order to meet the good faith bargaining requirements.

1.3 Unlike the WR Act, there is no official notification of a "bargaining period" under the FW Act. Instead, bargaining begins when one of the following happens:

- The employer initiates bargaining or agrees to bargain collectively for a single-enterprise agreement;
- Fair Work Australia makes a majority support determination in relation to a single enterprise; or
- Fair Work Australia makes a low-paid authorisation in relation to a proposed multi-enterprise agreement.

1.4 Under s.228, once negotiations have begun for a proposed enterprise agreement, bargaining representatives are required to:

- Attend and participate in meetings at reasonable times (s.228(1)(a));
- Disclose relevant information in a timely manner, aside from confidential or commercially sensitive information (s.228(1)(b));
- Respond to proposals made by other bargaining representatives in a timely manner (s.228(1)(c));
- Genuinely consider any proposals made by other bargaining representatives and provide reasons for those responses (s.228(1)(d));
- Refrain from engaging in capricious or unfair conduct that would undermine freedom of association or collective bargaining (s.228(1)(e)); and
- Recognise and bargain with other bargaining representatives (s.228(1)(f)).

1.5 All of the above good faith bargaining requirements relate to the conduct of bargaining representatives towards other bargaining representatives, with the notable exception of s.228(1)(e), which prohibits capricious or unfair conduct by a bargaining representative towards anyone related to the bargaining process.

The requirement to attend and participate in meetings at reasonable times

1.6 To date, Fair Work Australia decisions handed down under s.228(1)(a) have clarified that the requirement to attend and participate in meetings at reasonable times is not just a "tick the box" exercise. Before putting an agreement directly to employees, an employer's failure to meet with the other bargaining representatives and actively discuss the other representatives' proposals would likely be held to be a failure to bargain in good faith.

1.7 In National Union of Workers (NUW) v Defries Industries Pty Ltd[18], Fair Work Australia found the employer had failed to attend and participate in meetings at reasonable times with the NUW.

1.8 While two meetings had been held lasting 25 minutes in total, Commissioner Whelan considered them short and said the employer had declined to address any issues at them, instead seeking further information from the union:

> *At no point in either of the two short meetings could it be said that bargaining occurred. While there was an exchange of information and both sides put their proposals, there was little or no discussion of the contents of those respective proposals.*

1.9 The decision confirmed:

> *Participation in a meeting, the purpose of which is to*

negotiate a proposed enterprise agreement … suggests a sharing of information and views and a willingness to discuss the matters about which the other bargaining representative wishes to bargain.

1.10 Declining to discuss the content of the NUW's claims, setting no further meetings for that purpose and moving to distribute the agreement for an employee vote amounted to the employer breaching the good faith bargaining requirements, the Commissioner said.

1.11 The decision also reveals the overlapping and intertwining nature of many of the good faith bargaining requirements under s.228, with a single course of conduct often able to be argued to be in breach of several sub-sections of the FW Act. In this case, the NUW argued the employer had breached s.228(a), (b), (c), (d) and (e).

The requirement to disclose relevant information in a timely manner, except confidential or commercially sensitive information

1.12 To date, there have been few Fair Work Australia decisions involving the s.228(1)(b) requirement to disclose relevant information, and none of any great significance. Those that have been handed down have confirmed that relevant information can cover a breadth of matters including:

- documents outlining an employer's position as to which matters in a union's log of claims are "negotiable" and which are "non-negotiable"[19];
- an employer's assessment of the level of pay rise it can afford to give its workers[20];
- documents relating to an employer's capacity to pay a wage rise[21]; and
- a deadline by which a union is required to respond to an employer's proposals[22].

1.13 The potential for unions to use the disclosure of information provisions to obtain information about the current or future activities of an employer that is unrelated to enterprise bargaining is of concern. Imposing a requirement on employers to identify, search and disclose relevant information unnecessarily increases business costs and taxes the time and resources of employers.

1.14 There is also concern about the potential for disputes to arise over the meaning of "confidential or commercially sensitive information" under s.228(1)(b), although few cases have examined this issue to date.

1.15 In Finance Sector Union of Australia[23], the FSU alleged the Commonwealth Bank of Australia (CBA) had breached the good faith bargaining requirements. The FSU sought bargaining orders requiring the bank to disclose specific financial information to the union.

1.16 The application arose after the CBA refused to nominate a sum for an annual pay rise during enterprise bargaining negotiations with the FSU, then unilaterally gave its staff two pay rises while continuing to bargain.

1.17 In his decision on the matter, Commissioner Smith said:

As to the disclosure of relevant information, other than confidential or commercially sensitive material, the FSU submits that two areas are relevant. The first is its current position on pay and the second is such information as CBA possesses relating to its capacity to pay.

1.18 The Commissioner found the CBA had not met the good faith bargaining requirements for the disclosure of relevant information. He made a limited bargaining order to compensate for the breach: that the CBA advise the FSU within 24 hours of any change in its position of not knowing how much of a pay rise it could afford:

In my view, this is relevant information which should be disclosed in a timely manner. The order I will make is clearly within the scope of the relief sought and over which there has been considerable argument and evidence.

1.19 As for the FSU seeking access to documents about the bank's capacity to pay, including its projected employee budget and expenditure for the next two years, the Commissioner noted

the CBA had said it had no such documents and the FSU had not proved otherwise. Accordingly, no order would be made on that point. However, the Commissioner did not go into what his decision would have been had the sought-after documents existed.

1.20 In National Union of Workers (NUW) v Defries Industries Pty Ltd[24], the union argued the employer had refused to disclose relevant information during bargaining after circulating a draft agreement to employees for a vote while continuing to negotiate with the NUW.

1.21 The employer argued this did not breach the good faith bargaining requirement under s.228(1)(b) to disclose relevant information because the NUW knew it was going to circulate the draft.

1.22 Clarifying the aim of the FW Act's disclosure provisions, Commissioner Whelan said:

> *The reason for the disclosure of information is to allow the other bargaining representative(s) to give consideration to the bargaining representative's position. In my view, the employer failed to provide relevant information on two occasions … By failing to reveal the employer's position, the NUW had no opportunity to consult its members on whether it should continue to pursue "non-negotiable" matters or not or whether to narrow the agenda to the matters which were "negotiable".*

1.23 She said the employer should have, but failed, to disclose:

- a document it had prepared as to which matters in the NUW draft were "negotiable" and which were "non-negotiable"; and
- the deadline by which it needed the NUW's comments on its proposed agreement before putting it to an employee vote.

1.24 In granting the union's application for a bargaining order, Commissioner Whelan noted the employer's failure to provide relevant information not only constituted a breach of s.228(1)(b) but also amounted to "unfair conduct undermining freedom of association and collective bargaining" in breach of s.228(1)(e).

The requirement to respond to proposals by other bargaining representatives in a timely manner AND to genuinely consider any proposals made by other bargaining representatives and provide reasons for those responses

1.25 Under s.228(1)(c) and (d) of the FW Act, employers are required to respond to other bargaining representatives' proposals and genuinely consider any proposals made by other bargaining representatives.

1.26 Employers are also required to give union bargaining representatives reasonable time to propose amendments to employer proposals and then to consider those amendments.

1.27 The case law to date has clarified that an employer cannot simply dismiss a union's proposals as fanciful and expect to be meeting the good faith bargaining requirements. While employers are not required to respond line-by-line to union proposals, their responses do have to be aimed at moving bargaining forward, not stifling it.

1.28 In AMIEU v T&R (Murray Bridge) Pty Ltd[25], Fair Work Australia confirmed that employer responses to union logs of claims must consist of more than a cursory written response.

1.29 The AMIEU had written to the employer advising that it was an authorised bargaining representative and its members wanted to negotiate a new collective agreement with their employer. The employer in response said it was willing to negotiate with the AMIEU, but only as part of overall negotiations with employees through its joint consultative committee.

1.30 The AMIEU accepted that but when it served its log of claims, the employer gave a cursory written response, simply saying the claims were "unrealistic".

1.31 The employer's follow-up response was that its management team had re-considered the log of claims over Christmas and confirmed what was earlier advised:

> *The outcome was simply that the owners found the log of claims to be commercially unrealistic to adopt, either*

wholly or in part.

1.32 In his decision on the issue, Commissioner Hampton said the employer's conduct represented a failure to respond or give genuine consideration to the proposals of another bargaining representative. While the employer had provided a "response of sorts", it was not "genuine consideration" of the proposals:

> *It is clear that there is no obligation on the employer to make any concessions (s.228(2)) and I do not consider that each element of the claim required a comprehensive position to be advanced. However, the response by T&R was dismissive and very general, and did not provide a response to the various claims that could actually assist the parties to advance their negotiations in any way.*

1.33 The employer had therefore failed to meet the good faith bargaining requirements, he said.

The requirement to refrain from engaging in capricious or unfair conduct that would undermine freedom of association or collective bargaining

1.34 Section 228(1)(e) of the FW Act is the only one of the six good faith bargaining requirements that does not relate to the conduct of bargaining representatives towards each other. Its prohibition on "capricious or unfair conduct that undermines freedom of association or collective bargaining" regulates bargaining representatives' behaviour towards anyone related to the bargaining process.

1.35 As to what "capricious conduct" means, the FW Act lacks a precise definition. However, bargaining parties can draw insights from the Explanatory Memorandum, which confirms the term is intended to capture a broad range of conduct:

> *For example, conduct may be capricious or unfair if an employer: fails to recognise a bargaining representative; does not permit an employee who is a bargaining representative to attend meetings or discuss matters relating to the terms of the proposed agreement with fellow employees; dismisses or engages in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining; or prevents an employee from appointing his or her own representative.*

1.36 To date, the case law has confirmed that "capricious conduct" can cover situations including:

- Unions being uncommunicative with an employer during bargaining[26]; and
- Employers failing to allow any workplace delegates to attend bargaining meetings despite them not being officially nominated bargaining representatives under the FW Act[27].

1.37 The case law has also confirmed that capricious conduct does not cover situations where an employer actively seeks to influence employee views about a proposed enterprise agreement[28].

1.38 In Capral Limited v AMWU and CEPU and AWU and Singh[29], Fair Work Australia found the unions had engaged in capricious conduct by applying for a scope order one hour after the employer had put a proposed agreement to its employees. The employer had sought clarification beforehand from the unions as to whether they intended to apply for a scope order after negotiations broke down but received no response. The employer then advised the unions it considered bargaining had reached an impasse and it was going to put its proposed agreement to an employee vote.

1.39 Commissioner Spencer found the unions' actions and lack of communication constituted capricious conduct in breach of the good faith bargaining requirements, especially given they had plenty of time to apply for a scope order without deliberately waiting until the last minute.

1.40 In CFMEU v Tahmoor Coal Pty Ltd[30], a Full Bench of Fair Work Australia rejected a CFMEU appeal against a decision that found the employer had not engaged in capricious conduct.

1.41 Commissioner Roberts in his original decision rejected the CFMEU's application for bargaining orders, finding Tahmoor had not breached s.228(1)(e).

1.42 The employer and the CFMEU had participated in more than 50 meetings during enterprise negotiations but had arrived at a

stalemate, with neither of them willing to budge. It was therefore reasonable for the employer to explain its negotiating position to employees and put its final offer to them for a vote, the Commissioner said. This was not, contrary to the union's claims, capricious conduct.

The requirement to recognise and bargain with other bargaining representatives

1.43 Decisions under section s.228(1)(f) have made clear that recognising and bargaining with other bargaining representatives means attending meetings and discussing issues relating to the proposed agreement. While those meetings can be in conjunction with other meetings, such as via an employee consultative committee[31], each bargaining representative's concerns must be adequately listened to and responded to in whatever forum is chosen. Separate negotiations with union bargaining representatives are not necessary although in some cases might be desirable.

1.44 In Australian Services Union (ASU) v Queensland Tertiary Admissions Centre Ltd (QTAC)[32], Fair Work Australia found QTAC had not met the good faith bargaining requirements because it had failed to recognise the ASU as an authorised bargaining representative.

1.45 The ASU successfully applied for bargaining orders to stop QTAC putting a proposed enterprise agreement to an employee ballot until the employer fulfilled its good faith bargaining obligations and met with the ASU.

1.46 Senior Deputy President Richards found the employer had excluded the ASU from meetings and discussions about the proposed agreement at a time when the deal was still being negotiated with employees.

1.47 The case was unusual in that the agreement had been nearly finalised by the time the FW Act came into force, prior to which the employer had been negotiating directly with employees under the WR Act. However, SDP Richards said that continuing to bargain directly with employees up until mid-to-late July, to the exclusion of the ASU, meant the employer had breached s.228(1)(f).

1.48 He ordered the employee ballot to be cancelled and the parties to schedule an initial four meetings over two weeks to progress negotiations.

1.49 In AMIEU v Woolworths Ltd[33], Fair Work Australia confirmed that not only did s.228(1)(f) mean union bargaining representatives had to negotiate with the employer bargaining representative and vice versa, unions also had to negotiate with all other unions involved if they wanted to meet the good faith bargaining requirements.

1.50 The AMIEU had applied for scope orders seeking to cut meat workers out of a proposed national Woolworths Ltd agreement, claiming negotiations were mainly taking place between Woolworths and the SDA (and to a lesser extent the AWU). This meant the rights of meat workers were being sidelined, the AMIEU said, seeking a separate agreement to cover them.

1.51 Fair Work Australia rejected the AMIEU's scope order application, saying it was not a breach of the good faith bargaining requirements for a union to be marginalised in negotiations as long as the union was negotiated with and responded to. Woolworths had held a series of meetings with the AMIEU, although both parties agreed they had reached an impasse over the scope of the agreement.

1.52 Fatal to the AMIEU's scope order application was the fact it had itself failed to bargain with all the other bargaining representatives (Woolworths, the SDA and the AWU). It had only negotiated with Woolworths and had given up when it realised the retailer was wedded to a single national agreement.

1.53 SDP Richards conceded that sometimes the requirement to negotiate with all other bargaining representatives would be difficult given there was no obligation under the FW Act for bargaining representatives to disclose themselves publicly or reveal how many workers they represented.

1.54 This meant bargaining representatives would have to undertake their own "due diligence" to inform themselves of who the other bargaining representatives were, including those that kept a low profile but whose interests might be represented by another union.

1.55 For the purposes of the current application, the AMIEU knew the identity of the other bargaining representatives and had an obligation to bargain in good faith with them. The fact that the AMIEU and Woolworths had reached an impasse did not absolve the AMIEU of its obligation to meet the good faith bargaining requirements in relation to the other bargaining representatives, he said.

1.56 Because the AMIEU had not met the good faith bargaining requirements under s.228, it could not apply for a scope order under s.238(4)(a).

1.57 Recommendation: Bargaining representatives should be required to advise all other bargaining representatives that they have status as a bargaining representative in negotiations.

References

18 National Union of Workers v Defries Industries Pty Ltd [2009] FWA 88, 18 August 2009, Commissioner Whelan

19 National Union of Workers v Defries Industries Pty Ltd [2009] FWA 88, 18 August 2009

20 Finance Sector Union of Australia [2010] FWA 2690, 9 April 2010

21 Finance Sector Union of Australia [2010] FWA 2690, 9 April 2010

22 National Union of Workers v Defries Industries Pty Ltd [2009] FWA 88, 18 August 2009, Commissioner Whelan

23 Finance Sector Union of Australia [2010] FWA 2690, 9 April 2010

24 National Union of Workers v Defries Industries Pty Ltd [2009] FWA 88, 18 August 2009, Commissioner Whelan

25 AMIEU v T&R (Murray Bridge) Pty Ltd [2010] FWA 1320, 26 February 2010

26 Capral Limited v AMWU and CEPU and AWU and Singh [2010] FWA 3818, 19 May 2010

27 Flinders Operating Services Pty Ltd t/as Alinta Energy v ASU, APESMA, CEPU and AMWU [2010] FWA 4821, 30 July 2010

28 CFMEU v Tahmoor Coal Pty Ltd [2010] FWAFB 3510, 5 May 2010

29 Capral Limited v AMWU and CEPU and AWU and Singh [2010] FWA 3818, 19 May 2010

30 CFMEU v Tahmoor Coal Pty Ltd [2010] FWAFB 3510, 5 May 2010

31 AMIEU v T&R (Murray Bridge) Pty Ltd [2010] FWA 1320, 26 February 2010

32 ASU v Queensland Tertiary Admissions Centre Ltd [2009] FWA 53, 29 July 2009

33 AMIEU v Woolworths Ltd [2009] FWA 849, 16 November 2009

2. Representation in bargaining

Representation in bargaining

Under Labor, it will be entirely possible for an employer which employs both union members and non-union members to make an enterprise agreement that the union plays no role in the making of and with which the union does not agree. Under Labor's system, unions have no automatic right to be involved in collective enterprise bargaining.

(Deputy Opposition Leader Julia Gillard, Queensland Media Club Speech, 30 August 2007)

2.1 The provisions of the FW Act are in many ways contrary to the above statement made by Labor before it won government in 2007. Legislative provisions providing for unions to act as default bargaining representatives for their members with no requirement to inform the employer of how many employees they represent do give unions an automatic right to be involved in collective enterprise bargaining.

2.2 Under the FW Act, bargaining representatives have a more significant formal role in bargaining than they did under the WR Act. Bargaining representatives can now:

- Bargain for enterprise agreements; and
- Depending on the type of agreement, apply for:
- protected action ballot orders;
- bargaining orders;
- majority support determinations;
- scope orders; and
- serious breach declarations.

2.3 For employers in the resource sector, the most significant aspect of the FW Act's rules regarding representation in bargaining are contained in s.176(1)(b). This section states that a union is a bargaining representative by default as long as it has at least one member that will be covered by a proposed enterprise agreement unless the employees appoint someone else and notify the union in writing they do not want it to represent them under s.178A.

2.4 Employees are advised of their rights in this regard via now mandatory notices of employee representational rights, which employers are required under s.174 to give each employee that will be covered by a proposed enterprise agreement.

2.5 The default representation rules and the positive obligation on employees to nominate an alternative bargaining representative fail to recognise that employees choose to become members of a union for a variety of reasons and may not want union representation during bargaining.

2.6 Recommendation: The concept of default bargaining representative status should be removed, with any appointment of a bargaining representative subject to specific written approval by the employee, with a copy of that approval made available to the employer.

2.7 The FW Act's failure to require bargaining representatives to advise which and how many employees they represent places employers in an unenviable position during enterprise bargaining. The weight and regard that should be paid to the respective bargaining representatives' claims can only be determined if the employer knows who is supporting those claims. Should an employer attempt to take any prejudicial action against an employee due to their representation by a union bargaining representative, employees are more than adequately protected under the Act's strengthened General Protections and adverse action provisions.

2.8 Recommendation: Bargaining representatives should be required to advise all other bargaining representatives of the number, identity and geographical location of the employees they represent in negotiations.

2.9 The FW Act also allows a union that has had no involvement in bargaining other than as a default bargaining representative to apply to Fair Work Australia to be covered by an agreement. Once such an application is made, Fair Work Australia has no discretion as to whether the union should be covered by the agreement and must grant the application.

2.10 A default bargaining representative should at a minimum have to actively participate in negotiations and put forward and respond

to the proposals of other bargaining representatives in order to be covered by an agreement.

2.11 Recommendation: A default bargaining representative should only be able to exercise good faith bargaining rights and have the right to be covered by an enterprise agreement where they have actively participated in negotiations.

Union density still minimal

2.12 According to the latest Australian Bureau of Statistics figures[34], union density (the percentage of the workforce belonging to a union) increased across the Australian workforce from 19 per cent in August 2008 to 20 per cent in August 2009. However, union density is still just 14 per cent in the private sector and accounts for only a minority of workers.

2.13 Union membership in the mining industry grew from around 16 per cent in August 2008 to 20 per cent in August 2009, but is still a small minority of the workforce.

2.14 Where a majority of employees on a site want to bargain collectively with their employer and be represented in those negotiations by a union, it is only fair that their union should have a seat at the bargaining table. However, the FW Act goes much further than that by mandating union involvement in bargaining by default as long as there is a single union member in the workplace to be covered by the proposed agreement.

2.15 The case law on representation in bargaining has sparked particular concerns on the part of employers in the resource sector.

2.16 In Flinders Operating Services Pty Ltd t/as Alinta Energy v ASU, APESMA, CEPU and AMWU[35], the employer made five applications for bargaining orders against the unions for allegedly breaching numerous good faith bargaining requirements. This included an allegation that the ASU had engaged in capricious or unfair conduct.

2.17 In particular, the employer had taken issue with the ASU's insistence that all workplace delegates be allowed to attend bargaining negotiations. The delegates had been nominated to participate in bargaining by relevant union members but were not formal bargaining representatives nominated under the FW Act. Consequently, the employer sought to control the number of delegates it had to release from work at any one time to participate in bargaining.

2.18 The employer also argued the appointment of the delegates as bargaining representatives was a "sham" that constituted capricious conduct on the part of the ASU. Commissioner Hampton said:

> *The employer contends that such action is unfair conduct that undermines the process of collective bargaining. It argues that it and other bargaining representatives are entitled to deal with persons who are genuinely appointed under the Act, and should not have to contend with persons appointed purely with tactical or mischievous intent.*

2.19 The union in turn alleged capricious conduct by the employer for failing to recognise the delegates as bargaining representatives.

2.20 Commissioner Hampton agreed that "in most cases" it would be unfair and capricious conduct for an employer not to recognise the role of any union delegates to participate in bargaining where that was sought by a bargaining representative such as the ASU. Provided the attendance of one or more delegates was reasonable and could be accommodated without "undue compromise to the operational requirements of the business", a refusal to allow any delegates to attend negotiations could represent a breach of s.228(1)(e), he said.

2.21 He also said he would be "very reluctant" to find that a party encouraging others to exercise their apparent rights under the FW Act, as the ASU had done to delegates in this case, would be in breach of the good faith bargaining requirements:

> *I would not, however, rule out the prospect that the alleged conduct could in an extreme case lead to a finding that a party had not met the requirements of s.228(1)(e) of the Act. The Act also contemplates that circumstances might arise where the sheer number of bargaining representatives makes the process problematic.*

2.22 In respect of the employer's claim about the excessive number

of workplace delegates the ASU wanted to have attend negotiations, Commissioner Hampton said:

> *… a union is made up of its members and the involvement of site delegates as part of the process of negotiations is, in my experience, itself part of the normal bargaining process. Where a delegate is given a role under the rules of the union to represent the union and is authorised as necessary to do so in relation to a proposed agreement, in my view they might well have rights and obligations but in that case they do so as part of and on behalf of the union which remains the bargaining representative under the Act. Where a delegate is not authorised under the rules but rather by informal nomination from the members short of nomination as a bargaining representative under the Act, they are clearly not bargaining representatives and have no individual rights or obligations in that particular context.*

2.23 He went on to say that even though the delegates were not bargaining representatives in their own right, it would in most cases be unfair and capricious for the employer not to recognise their role to participate in bargaining. Workplace delegates could bring an important perspective that would assist in progressing negotiations, he said.

2.24 In this case, however, he was not satisfied the employer had failed to bargain in good faith by wanting to control the number of delegates who participated in bargaining.

2.25 Recommendation: Where an employer wishes to limit to a manageable level the number of employee delegates participating in enterprise negotiations, this should not be seen as a failure by the employer to bargain in good faith. Bargaining orders should be able to limit the number of employee delegates that attend negotiations.

2.26 In Leane Electrical Pty Ltd[36], Senior Deputy President O'Callaghan refused to approve an agreement lodged by the employer due to flaws he identified in meeting the FW Act's representational requirements.

2.27 The employer had distributed to the 32 employees that would be covered by the agreement a notice of representational rights.

2.28 The notice was presented to employees as mandatory for completion. However, in order to complete it, they had no choice but to opt out of being represented in bargaining by the CEPU. The notice said:

> *I confirm that I do not wish to be represented in bargaining by my union. Instead, I choose to appoint _____ as my bargaining representative.*

2.29 According to SDP O'Callaghan, workers were given no option but to complete the notice, but the notice gave them no option but to revoke their representation in bargaining by the union.

2.30 The CEPU successfully argued this discouraged members from retaining the union as their bargaining representative despite the fact it only had three members amongst the 32 workers.

2.31 SDP O'Callaghan said he was unable to approve the agreement:

> *I have concluded that, whilst Leane may not have intended to do so, the material sent out to employees on 17 July 2009 fundamentally changed the character of the notice of employee representational rights. The covering advice required employees to complete the revocation instrument. This covering advice gave employees the option of identifying a bargaining representative. However, the revocation instrument left employees with no choice other than to select a representative different to the CEPU in order to comply with the employer requirement that the revocation instrument be completed and returned.*

2.32 Had the covering advice simply attached the form as an option for employees to complete, the SDP said he would have arrived at a different conclusion, but the "mandatory nature of the requirement to return a form which relinquishes union representation" was of major concern.

2.33 In Heath v Gravity Crane Services Pty Ltd[37], Deputy President McCarthy rejected an application by an employee of the MUA for a majority support determination on the grounds that, while

he claimed to be acting on behalf of employees, it appeared the applicant was in fact representing the MUA.

2.34 Douglas Heath had applied for the majority support determination claiming he was acting as a bargaining representative for the employees and was therefore entitled to make the application.

2.35 DP McCarthy pointed out that s.176(1) of the FW Act confined those who could be bargaining representatives for a proposed enterprise agreement to unions and those appointed in writing as bargaining representatives by an employee who would be covered by the agreement. The FW Act also precluded a union being a bargaining representative for an employee unless it was entitled to represent the industrial interests of the employee in relation to work that would be performed under the agreement.

2.36 In this case, the employer opposed the application on the grounds that Heath was really "the MUA in disguise".

2.37 DP McCarthy pointed out there was nothing in the FW Act preventing an employee or group of employees from appointing a person who happened to be an employee of a union as a bargaining representative:

> *As stated above, there is no prohibition on an employee of an employee organisation being a bargaining representative and there may be many circumstances where it is appropriate for that to be the case. However, this is not one of those occasions. It can be safely inferred that some employees are members of the CFMEU and the coverage of the employees would seem to be outside the scope of the MUA area of coverage.*

2.38 DP McCarthy went on to say that although Heath argued he was not acting in his capacity as an employee or organiser of the MUA nor on behalf of the MUA:

> *… his testimony was not convincing to me about the relationship between his obligations as an employee of the MUA and the role he would be performing by his representing the employees concerned. Furthermore, there was no satisfactory explanation regarding the role of the MUA, if any, or the reasons it was allowing Mr Heath's role.*

2.39 It was therefore not reasonable to grant his application for a majority support determination, regardless of whether a majority of employees wanted to bargain collectively with their employer, the DP said.

2.40 DP McCarthy's decision appears to contradict an April 2008 decision handed down under the WR Act on exactly the same issue by Commissioner Williams in Canning v Fremantle Port Authority[38].

2.41 In that decision, Commissioner Williams rejected the employer's concerns that the MUA was the driving force behind negotiations because an MUA employee was acting as a bargaining agent and had successfully applied for a protected action ballot order:

> *The [WR] Act does not circumscribe who may act as a bargaining agent for employees who are seeking an employee collective agreement under s.327 of the Act in any way that assists [the employer] in these circumstances. If it was the intent of Parliament that a representative of an organisation of employees that is not entitled to represent the industrial interests of a particular employee was barred from being appointed as that employee's bargaining agent, the legislation could easily have expressly stated this. The legislation does not.*

2.42 Similarly, the FW Act does not expressly state that a union representative is barred from being appointed as an employee's bargaining agent.

2.43 Recommendation: Where an employee or official of a union acts as a bargaining representative, that person should at all times be deemed to be the bargaining representative of the union rather than an independent bargaining representative acting on behalf of one or more employees.

References

34 ABS Employee Earnings, Benefits and Trade Union Membership. Category 6310.0, August 2009 published on 12 May 2010

35 Flinders Operating Services Pty Ltd t/as Alinta Energy v ASU, APESMA, CEPU and AMWU [2010] FWA 4821, 30 July 2010

36 Leane Electrical Pty Ltd [2010] FWA 1605, 5 March 2010

37 Heath v Gravity Crane Services Pty Ltd [2010] FWA 7751, 5 October 2010

38 Canning v Fremantle Port Authority [2008] AIRC 309, 11 April 2008

Communicating with employees during bargaining

> *In my view, communicating with staff is good management practice. If such communications are not accompanied by a refusal to meet and communicate with a bargaining representative, then in my view there is no breach of the good faith bargaining requirements of the [Fair Work] Act … In my view, an employer is free to meet with its employees to discuss employment issues, including matters relevant to enterprise bargaining, in the absence of bargaining representatives. Widespread communication is to be encouraged – not regulated, diminished or monopolised.*
>
> *(Vice President Graeme Watson in LHMU v Mingara Recreational Club [2009] FWA 1442, 1 December 2009)*

3.1 When the FW Act took effect on 1 July 2009, resource sector employers were concerned the good faith bargaining rules would prohibit them from communicating directly with employees while negotiating with a union bargaining representative for a collective enterprise agreement.

3.2 However, the case law to date has shown us that:

- Employers should feel free to communicate directly with their employees while continuing to negotiate with union bargaining representatives;
- Employers are free to try to influence employees' opinions about a proposed agreement in the same way as unions would try to do;
- Employers do not have to invite union bargaining representatives to every meeting at which the employer discusses (as opposed to negotiates) a proposed agreement with its employees;
- Unions are free to meet with their members to discuss the agreement without management present; and
- While concurrent communication with employees during bargaining is to be encouraged, bargaining cannot take place directly and separately with employees once a union bargaining representative has standing under the legislation.

3.3 In the decision at first instance in CFMEU v Tahmoor Coal Pty Ltd[39], Commissioner Roberts confirmed employers were not prevented from putting their views about an agreement directly to employees during bargaining, or from seeking to influence employee views. The Commissioner also confirmed there was no requirement for union bargaining representatives to be invited to every meeting where the employer discussed a proposed agreement with employees, as long as the employer continued to meet with the union to progress negotiations on a reasonable basis.

3.4 Unless the employees were threatened, oppressed or misled about what was in an agreement, the employer was just as entitled as the union to try to influence the ballot outcome, the Commissioner said.

3.5 The CFMEU had unsuccessfully argued that bargaining orders should be made against the employer, claiming:

> *If a bargaining representative is putting a view on behalf of the employees in collective bargaining and the employer communicates directly to those employees in a way that encourages a different view within that group of employees, without the bargaining representative being present, this conduct has the natural effect of weakening or undermining collective bargaining.*

3.6 Commissioner Roberts said the CFMEU had made much of the alleged pressure and intimidation applied to employees by the employer's negotiator. While the Commissioner accepted the negotiator had adopted a "very aggressive approach in such dealings and probably crossed the line of what is reasonable in such circumstances", he said:

> *… this is the coal industry and aggressive tactics appear to be almost the norm.*

3.7 The CFMEU unsuccessfully argued that literature the employer presented at meetings of employees (which it also sent to employees' homes) which argued in support of the employer's position breached the good faith bargaining requirements. The CFMEU also argued there was a "level of intimidation" about the communication because the employer had raised the possibility

3. Communicating with employees during bargaining

of a lockout (i.e. "employer response action") following the employee claim action that had been taking place. The employer had also raised the prospect of "selective re-engagement" of employees.

3.8 The Full Bench decision[40] upheld Commissioner Roberts' original decision, saying:

> *Tahmoor may have been trying to influence employee views, but it does not necessarily follow that its conduct undermined freedom of association or collective bargaining or that it acted capriciously or unfairly. The proposals put to the employees were the same as those put to the employee representatives at the bargaining meetings. The meetings themselves do not appear to have been oppressive for employees and the slides and other material used in the presentation were not deceptive or otherwise objectionable. Indeed, there is no evidence that any of the material provided to employees was misleading or that employees were threatened in any relevant way. Nor is there any reason to believe that the employee representatives did not themselves have adequate access to the workforce in relation to the bargaining process.*

3.9 The employer had therefore not breached the good faith bargaining requirements and no bargaining orders would be made, the Bench said.

3.10 In LHMU v Mingara Recreational Club[41], Vice President Watson confirmed employers could communicate directly with employees during bargaining without breaching the good faith bargaining requirements.

3.11 VP Watson dismissed the union's application for bargaining orders over the employer's refusal to grant the union access to a meeting of employees at which the employer was planning to discuss agreement-making and award modernisation.

3.12 The NSW branch of the LHMU argued that by denying the union access to the meeting, the employer had failed to recognise the union as a bargaining representative and to provide it with relevant information as required under s.228(1)(b) and (f).

3.13 VP Watson dismissed the union's claims, finding that the employer holding a preliminary information session for staff in the absence of the LHMU was not inconsistent with the good faith bargaining requirements, particularly as the employer would shortly meet with the LHMU to continue negotiations:

> *In my view, communicating with staff is good management practice. If such communications are not accompanied by a refusal to meet and communicate with a bargaining representative, then in my view there is no breach of the good faith bargaining requirements of the Act.*

3.14 Contrary to the LHMU's claims, there had been no breach of the FW Act in denying the union access to the meeting, VP Watson said.

3.15 In Alphington Aged Care and Sisters of St Joseph Health Care Services (Vic) T/A Mary Mackillop Aged Care[42], Fair Work Australia confirmed that while employers communicating with employees during bargaining was to be encouraged, bargaining could not be done directly with employees when other bargaining representatives were involved.

3.16 Rejecting the employer's application to approve an enterprise agreement, Commissioner Whelan said there were serious defects in the application which had failed to meet the FW Act's pre-approval requirements. She said the aged care employers in this case seemed to be:

> *… under the misapprehension that they could be both bargaining with the union, through their bargaining representative and seeking to make an agreement as they described it "directly with their employees" on the other.*

3.17 This was a breach of the requirement to recognise, in this case, the Australian Nursing Federation and Health Services Union as bargaining representatives by failing to tell the unions it considered bargaining was at an end, she said, pointing out:

> *… where the employer is aware that there are employees who are union members and the union is therefore their bargaining representative, it would be a*

breach of good faith bargaining to put an agreement to a vote without notifying the union of its intention to do so.

3.18 She could therefore not approve the agreement, she said.

References

39 CFMEU v Tahmoor Coal Pty Ltd [2010] FWA 942, 12 February 2010

40 CFMEU v Tahmoor Coal Pty Ltd [2010] FWAFB 3510, 5 May 2010

41 LHMU v Mingara Recreational Club [2009] FWA 1442, 1 December 2009

42 Alphington Aged Care and Sisters of St Joseph Health Care Services (Vic) T/A Mary Mackillop Aged Care [2009] FWA 301, 17 September 2009

4. When is a bargaining impasse reached?

When is a bargaining impasse reached?

'The employer argues that despite all reasonable endeavours to resolve the outstanding issues, including various concessions made in an attempt to have negotiations proceed after the lodging of these applications, an impasse remains.'

(Hampton C in Flinders Operating Services Pty Ltd t/a Alinta Energy v ASU, APESMA, CEPU and AMWU [2010] FWA 4821, 30 July 2010)

4.1 Under s.181(1) of the FW Act, an employer to be covered by a proposed enterprise agreement is able to go directly to employees and request they approve a deal by voting on it, even if the employer has been bargaining with a union or other bargaining representative.

4.2 However, putting the agreement to a vote before telling the other bargaining representatives they are planning to do so may be held to be a breach of good faith bargaining[43].

4.3 While the employer is required to inform the other bargaining representatives it plans to put a proposed agreement to an employee vote, it does not need the agreement of the other bargaining representatives to do so[44].

4.4 The case law to date has not been prescriptive in terms of when a bargaining impasse is said to be reached and does not provide a rule or formula. However, it does give guidance to employers as to when and in which situations employers can move to put an agreement directly to employees. Generally speaking, this will be after:

- a series of meetings has taken place between the bargaining parties;
- the employer has otherwise met the good faith bargaining requirements;
- the parties have advanced negotiations and reached agreement on some points; but
- there has been no movement in the bargaining parties' respective positions for some time.

4.5 Decisions to date also confirm that employers will not be compelled to keep bargaining indefinitely until they concede to union demands.

4.6 In Alphington Aged Care and Sisters of St Joseph Health Care Services[45], Fair Work Australia refused to approve two aged care agreements that employees had voted up, finding the employer had breached the good faith bargaining requirements by putting the offer directly to workers without telling the union. Commissioner Whelan said that the two aged care employers appeared to be:

> *… under the misapprehension that they could be both bargaining with the union, through their bargaining representative, and seeking to make an agreement as they described it "directly with their employees" on the other.*

4.7 Commissioner Whelan said where an employer was aware some of its employees were union members, and the union therefore had default bargaining representative status, it would be a breach of the good faith bargaining requirements to put an agreement to a vote without notifying the union:

> *Particularly, as occurred in this case, where bargaining is underway with the union, to not notify the union that bargaining is at an end, which a decision to put an agreement to the vote clearly implies, undermines the process of good faith collective bargaining which the objects of the Act support.*

4.8 In the decision at first instance in CFMEU v Tahmoor Coal Pty Ltd[46], Commissioner Roberts confirmed negotiations were said to have reached an "impasse" once it was evident beyond reasonable doubt that the bargaining parties:

> *… are substantially apart on key issues and that neither side is prepared to make further concessions in these circumstances that would provide agreement.*

4.9 The CFMEU had sought bargaining orders against the employer to prevent it from putting a proposed agreement to an employee vote and force it to hold further meetings with the union.

4.10 Commissioner Roberts noted:

> *The history of negotiations between the parties is long and complex. What is not complex is the conclusion that after November 2009 there has been little if any substantive movement in positions taken by each side.*

4.11 This lack of movement, coupled with the fact that around 40 or 50 meetings had been held between the parties, meant there was no reason to defer or cancel the employer's proposed employee ballot, the Commissioner said.

4.12 Consequently, no bargaining orders would be made.

4.13 The CFMEU appealed the outcome to a Full Bench, but the appeal decision[47] upheld Commissioner Roberts' findings, clarifying that:

> *Although there may be circumstances in which the conduct of a ballot without the agreement of other bargaining agents constitutes a breach of the good faith bargaining requirements, it will not always be so. There is no absolute requirement for the agreement of the bargaining agents prior to the conduct of a ballot. In this case, the Commissioner and the parties all referred to the notion of "impasse" as the touchstone by which to judge whether an employer who puts a proposed agreement to a ballot without the agreement of the other bargaining agents thereby fails to observe the good faith bargaining requirements. There was some debate about whether "impasse" had been reached at the relevant time.*

4.14 The original Commissioner and the Full Bench had found that negotiations for an enterprise agreement had reached a stalemate, or using Tahmoor's words, an "impasse". Therefore, negotiations need not continue as there would be little point to them.

4.15 In LHMU v Hall & Prior Aged Care Organisation and Others[48], the LHMU sought bargaining orders to require the employer to:

- continue to participate in negotiations until an agreement was reached or the bargaining period was declared over;
- refrain from circulating a proposed agreement to employees until an agreement was reached or the bargaining period was declared over; and
- not prematurely declare the bargaining period over until all options under the FW Act had been exhausted.

4.16 Commissioner Cloghan noted there had been 13 meetings between the bargaining parties from August 2009 to February 2010 which meant the employer was not acting prematurely in putting the agreement to an employee vote.

4.17 During the course of negotiations, the parties had moved closer on wages, with the LHMU initially seeking 16.5 per cent over three years but revising that to 15 per cent, and the employer initially offering six per cent over three years but subsequently revising that to 11.5 per cent. Commissioner Cloghan said:

> *For the employer to achieve an outcome in negotiations which is less than what is sought by bargaining representatives from the LHMU cannot fall into the category of behaviour that is capricious, unfair or undermining freedom of association or collective bargaining.*

4.18 The Commissioner clarified that Fair Work Australia had no power to compel an employer to participate in negotiations until an agreement was reached or the bargaining period was declared over. Nor did it have the power to order the employer not to prematurely declare the bargaining period over until all options available under the legislation had been exhausted.

4.19 Commenting on negotiations to date, the Commissioner said:

> *During this period, evidence was adduced to demonstrate a fairly thorough, detailed and robust set of negotiations. Evidence was given not only of meetings but repetitive visits by LHMU officials and management to work sites. It is true to say that over this period of time, many issues of negotiation were resolved resulting in a narrow range of outstanding items.*

4.20 Given the circumstances, it was understandable and appropriate for the employer to consider negotiations were at an impasse and

for employees to make a decision on whether to accept the proposed agreement, he said.

4.21 The Commissioner rejected the LHMU's application, finding that bargaining between the parties had reached an end point.

References

43 Alphington Aged Care and Sisters of St Joseph Health Care Services (Vic) T/A Mary Mackillop Aged Care [2009] FWA 301, 17 September 2009

44 CFMEU v Tahmoor Coal Pty Ltd [2010] FWAFB 3510, 5 May 2010

45 Alphington Aged Care and Sisters of St Joseph Health Care Services (Vic) T/A Mary Mackillop Aged Care [2009] FWA 301, 17 September 2009

46 CFMEU v Tahmoor Coal Pty Ltd [2010] FWA 942, 12 February 2010

47 CFMEU v Tahmoor Coal Pty Ltd [2010] FWAFB 3510, 5 May 2010

48 LHMU v Hall & Prior Aged Care Organisation and Others [2010] FWA 1065, 11 February 2010

Bargaining orders

'The process of bargaining is largely a matter for the bargainers but Fair Work Australia (FWA) may make orders to assist or regulate that process to ensure it proceeds fairly and efficiently.'

(Smith C in AMWU & APESMA v DTS Food Laboratories [2009] FWA 1854, 21 December 2009)

5.1 Under s.229 of the FW Act, a bargaining representative can apply for a bargaining order to force another bargaining representative to take a particular action or cease to take a particular action.

5.2 Bargaining representatives can apply to Fair Work Australia for bargaining orders where:

- They allege another bargaining representative has breached the good faith bargaining requirements;
- They have given all the other bargaining representatives notice of their concerns;
- The other bargaining representatives have had a chance to respond to those concerns; and
- They consider the response to their concerns has not been adequate.

5.3 Serious and sustained breaches of bargaining orders can lead Fair Work Australia to impose an arbitrated outcome in the form of a workplace determination, although at the time of writing this paper this had not yet happened.

The types of bargaining orders Fair Work Australia can make

5.4 A bargaining order has to specify the actions to be taken and the requirements to be imposed on the bargaining representatives. An order can, for example:

- specify times and dates when the representatives must attend and participate in meetings;
- require an employer not to terminate the employment of an employee if the termination would constitute capricious or unfair conduct undermining freedom of association; and
- specify appropriate matters, actions or requirements needed to promote the efficient or fair conduct of bargaining in the event of there being multiple bargaining representatives. For example, Fair Work Australia could exclude a bargaining representative who was hindering or disrupting bargaining from participating in the process.

5.5 The case law to date shows that Fair Work Australia can make bargaining orders requiring employer bargaining representatives to:

- participate in a series of meetings with union bargaining representatives, for example, four meetings over two weeks[49];
- give genuine consideration to the proposals of other bargaining representatives[50];
- refrain from taking any action that would constitute capricious or unfair conduct that undermines freedom of association and collective bargaining[51];
- advise a union bargaining representative of the details of any discussions and/or proposed agreements advanced directly with individual employees or groups of employees[52];
- refrain from advancing discussions with individual employees until further meetings have taken place with a union bargaining representative[53];
- cease to conduct an employee ballot until the good faith bargaining requirements have been met[54];
- refrain from putting an agreement to a vote until a further Fair Work Australia order is made[55];
- schedule regular meetings with a union bargaining representative to complete enterprise bargaining as soon as possible[56]; and
- recognise workplace delegates as part of the bargaining team and extend to them the same courtesies and rights as to any other bargaining representative[57].

5.6 Fair Work Australia has also made recommendations in lieu of orders in response to applications for bargaining orders. Recommendations to date have included that an employer:

- provide a document to other bargaining representatives consolidating the proposal it wants to put to employees[58];
- inform the other bargaining representatives which employees, including their number and classification, the enterprise agreement is proposed to cover[59];
- not attempt to bypass a union bargaining representative by contacting members of the union directly, either via meetings or by text or telephone[60]; and
- deal with all officers and delegates of the bargaining representatives who are authorised by their organisations to conduct negotiations[61].

5.7 In Australian Services Union (ASU) v Queensland Tertiary Admissions Centre Ltd (QTAC)[62], Fair Work Australia issued its first bargaining order, instructing the employer to negotiate with the ASU with the aim of reaching a collective agreement.

5.8 The ASU had sought urgent bargaining orders because QTAC was planning to ask its employees to approve a collective agreement. Senior Deputy President Richards found QTAC had not recognised the ASU as a bargaining representative, contrary to the requirements of s.228(1)(f). Other than one ad hoc meeting between the parties at which the ASU was told a rostered day off was likely to be unaffordable, the bargaining process had unfolded between the employer and the employees, he said.

5.9 But SDP Richards rejected union claims that QTAC had also breached s.228(1)(a), which required bargaining representatives to attend and participate in meetings at reasonable times. He found neither bargaining party had expressed a desire to meet with the other so it was hypocritical of the ASU to argue the employer had breached that provision by refusing to meet.

5.10 The SDP made bargaining orders requiring QTAC to call off the employee ballot and meet with the ASU four times in a fortnight, with the aim of negotiating a collective agreement. Following the initial four meetings, the ASU could apply to Fair Work Australia for further meetings unless they were for "capricious purposes" and had "no real and apparent prospect for achieving an agreement".

5.11 In AMIEU v T&R (Murray Bridge) Pty Ltd[63], Fair Work Australia issued bargaining orders against the employer after Commissioner Hampton found it had not met the good faith bargaining requirements.

5.12 The employer had, among other things, failed to properly respond to the AMIEU's log of claims.

5.13 The Commissioner ordered further meetings between the AMIEU, the employer and other bargaining representatives, but stopped short of specifying the forum in which the negotiations should take place. The employer had until then insisted on negotiating with the union as part of the employer's joint consultative committee (JCC), which was made up of a small number of employees who were not official bargaining representatives. According to Commissioner Hampton, this was not necessarily an inappropriate forum as long as the union's proposals were adequately listened to and responded to.

5.14 However, he ordered the employer to postpone putting its agreement directly to employees until:

- it had met with the AMIEU and any other bargaining representatives;
- it had genuinely considered and responded to issues raised by the AMIEU; and
- it had considered meeting with the AMIEU separately from the JCC.

5.15 While the number of applications for bargaining orders in the early months of the FW Act has been relatively low, along with the number of bargaining orders actually made[64], there are concerns about employers being put to the time and expense of having to attend Fair Work Australia to deal with applications, even those that have no merit.

5.16 Recommendation: On filing an application for a bargaining order, the applicant must be able to demonstrate that, prima facie, their case has some merit.

References

49 ASU v Queensland Tertiary Admissions Centre Ltd [2009] FWA 53, 29 July 2009

50 ASU v NCR Australia Pty Ltd [2010] PR500593, 16 August 2010

51 Ibid

52 Ibid

53 Ibid

54 ASU v Queensland Tertiary Admissions Centre Ltd [2009] FWA 53, 29 July 2009

55 AMWU v DTS Food Laboratories [2009] PR992063, 21 December 2009

56 LHMU v Carinya Care Services [2010] PR501295, 2 September 2010

57 Ibid

58 AMWU v Transfield (Australia) Pty Ltd [2009] FWA 93, 14 August 2009

59 Ibid

60 Ibid

61 Ibid

62 ASU v Queensland Tertiary Admissions Centre Ltd [2009] FWA 53, 29 July 2009

63 AMIEU v T&R (Murray Bridge) Pty Ltd [2010] FWA 1320, 26 February 2010

64 Julia Gillard speech to Personnel and Industrial Relations Conference, 19 April 2010

6. Majority support determinations

Majority support determinations

Without the capacity to determine whether majority support exists for collective bargaining, employers can simply refuse to negotiate with employees, often resulting in protracted disputes. Examples of these disputes include those at Boeing and Cochlear.

(Explanatory Memorandum to the Fair Work Bill 2008)

6.1 On 1 July 2009, the FW Act introduced the ability for employees and/or their bargaining representatives to force an employer to bargain collectively for a new enterprise agreement. This would follow an employee bargaining representative's successful application to Fair Work Australia for a majority support determination.

6.2 Section 236 outlines the conditions under which a bargaining representative can apply for a majority support determination and the necessary criteria they must satisfy.

6.3 Section 237(2) requires that, before making such a determination, Fair Work Australia must be satisfied that:

- the majority of employees who are employed by the employer and who will be covered by the agreement wants to bargain;
- the employer or employers that will be covered by the agreement have not yet agreed to bargain or initiated bargaining;
- the employees who will be covered by the agreement have been fairly chosen; and
- it is reasonable in all the other circumstances for Fair Work Australia to make such a determination.

6.4 The Explanatory Memorandum to the FW Act states it is at the discretion of Fair Work Australia what method it uses to work out whether a majority of employees wants to bargain with their employer, suggesting:

> *Methods might include a secret ballot, survey, written statements or a petition.*

6.5 The case law to date shows in most cases Fair Work Australia will accept a union-circulated petition or survey as sufficient evidence of majority support unless there is evidence signatures were obtained under duress or the exercise was in some way compromised.

6.6 In AMWU v Cochlear Limited[65], Fair Work Australia initially declined to issue a majority support determination, saying despite its commendable aims, the AMWU-generated survey was not incontrovertible proof of majority support for collective bargaining.

6.7 The AMWU had argued Cochlear workers at the Lane Cove plant in NSW had wanted to bargain collectively for some years but their employer had consistently refused on the grounds there was no evidence of that.

6.8 Following a union survey distributed over three months in early 2009, the AMWU obtained 177 responses from a workforce of 324, with 171 employees answering "yes" to the question:

> *Do you want to be represented by the AMWU in negotiations for a collective agreement?*

6.9 In the same survey, 167 employees answered "yes" to the question:

> *Do you want a new collective agreement that sets your wages and conditions?*

6.10 During hearings for the AMWU's initial application for a majority support determination[66], the employer argued there were fatal shortcomings in the methodology and document control associated with the survey, namely that:

- The AMWU official responsible for organising and disseminating the survey did not keep a list of the employees he had spoken to or who filled in the survey;
- The AMWU did not offer an interpreting service for the primarily non-English speaking female workers at the plant in order to explain the survey to them;
- The survey asked workers their opinions on a range of matters including paid parental leave and pay rises, which would have coloured their answers to the collective bargaining questions;
- The survey was not conducted at a particular point in time but over three or four months;

- There was little scrutiny of the forms that had been filled in to ensure they were completed by different and relevant employees; and
- There was no evidence of what had been done with the "no" votes, with the AMWU simply stopping once it got a majority of "yes" votes.

6.11 Commissioner Harrison said the survey was a "legitimate exercise" by the AMWU to obtain the views of employees prior to seeking to negotiate an agreement with the employer:

> *I have no reason to doubt the integrity or genuine intent of persons involved in conducting the survey. I am, however, not fully satisfied that the methodology utilised can reasonably withstand the scrutiny required for the purposes of a determination of the type being sought in these proceedings … In all of the circumstances, I have decided to arrange the involvement of the Australian Electoral Commission to conduct a postal ballot of the relevant employees pursuant to s.237(3) of the Fair Work Act.*

6.12 Two weeks later, Fair Work Australia issued the very first majority support determination[67] under the FW Act following the outcome of the AEC's ballot of Cochlear employees.

6.13 Of 324 Cochlear employees, 312 voted in the ballot, with 185 (57 per cent) answering "yes", while 120 answered "no" and seven voted informal to the question:

> *Do you want to bargain for an enterprise agreement with your employer?*

6.14 Cochlear was consequently required to bargain in good faith for a proposed enterprise agreement with the AMWU acting on behalf of some of its employees.

6.15 In CFMEU v Xstrata Glendell Mining Pty Ltd[68], Fair Work Australia confirmed a union petition would usually be adequate to prove majority support, in doing so granting a majority support determination that forced Xstrata to bargain for an enterprise agreement with its production and engineering employees.

6.16 At the time of the union's application, Xstrata's employees were covered by common law employment contracts and were due to be covered by the Black Coal Mining Industry Award 2010.

6.17 The CFMEU presented a petition signed by the majority of the workforce, requesting the employer enter into negotiations. Xstrata in turn conducted its own ballot of employees and argued the results showed a majority of the workforce did not wish to negotiate collectively.

6.18 Xstrata opposed the union's application, suggesting the most effective way to resolve the conflict was for Fair Work Australia or the AEC to conduct a secret ballot to ascertain majority support, thereby removing the potential for the union to exert external pressure on employees.

6.19 However, Fair Work Australia decided to grant the CFMEU's application, finding the petition signed by 76 out of a total of 142 employees was:

> *… sufficient proof that a majority of the relevant employees at Glendell support the making of an enterprise agreement to be negotiated by the CFMEU.*

6.20 In AMWU v Kinkaid Pty Ltd T/A Cadillac Printing[69], Fair Work Australia granted a majority support determination to the AMWU based on the outcome of a union-distributed petition signed by the majority of the workforce.

6.21 The AMWU argued a petition signed by 23 of the 34 relevant employees was sufficient evidence of majority support. The employer argued the signatures were obtained under pressure and Fair Work Australia should conduct its own ballot.

6.22 Senior Deputy President O'Callaghan accepted the union petition, saying:

> *If, for instance, there was some evidence that the petition had been falsely derived or that the signatures had been achieved by duress, an alternative means of establishing employee views would need to be considered. In this case, despite Cadillac's concerns, there is no evidence which discredits the standing of the petition.*

6.23 The next logical step was for the employer to issue notices of

employee representational rights and embark on good faith bargaining, he said.

6.24 In ASU v Regent Taxis Limited T/A Gold Coast Cabs[70], Fair Work Australia rejected the ASU's application for a majority support determination because the union had failed to ensure all relevant employees were accounted for in its petition, including those who were on leave.

6.25 In his decision, SDP Richards said the 25 employees who signed a bargaining pledge did not constitute a majority.

6.26 He found the ASU had failed to include seven administrative staff and employees who were on leave. The total workforce was actually 57, which meant the ASU petition fell short of a majority with 25 signatures.

6.27 SDP Richards also pointed out that although the ASU had collected the pledges in September 2009, s.237(a) of the FW Act required the tribunal to calculate employee numbers from the date it made the determination.

6.28 AMMA is concerned about the time and expense employers are being put to in order to contest union-circulated petitions and surveys where doubts exist as to their accuracy. Using an independent party to ascertain majority support for collective bargaining in all cases would eliminate the perception of external pressure being applied to employees by a union or employer.

6.29 Recommendation: The Australian Electoral Commission or Fair Work Australia should, as part of all applications for majority support determinations, conduct secret ballots to determine majority support of a workforce for engaging in collective bargaining.

65 AMWU v Cochlear Limited [2009] FWA 67, 4 August 2009

66 AMWU v Cochlear Limited [2009] B2009/10335, 3 August 2009

67 AMWU v Cochlear Limited [2009] FWA 125, 20 August 2009

68 CFMEU v Xstrata Glendell Mining Pty Ltd [2009] FWA 1682, 22 December 2009

69 AMWU v Kinkaid Pty Ltd T/A Cadillac Printing [2009] FWA 1123, 16 November 2009

70 ASU v Regent Taxis Limited T/A Gold Coast Cabs [2009] FWA 1642, 10 December 2009

References

Scope orders

> Fair Work Australia may make a scope order if it is satisfied the bargaining for a proposed enterprise agreement is not proceeding efficiently or fairly because the group of employees to whom a proposed agreement will apply has not been fairly chosen.
>
> (The Hon Julia Gillard MP, Second Reading Speech, Fair Work Bill 2008)

7.1 Scope orders are a new addition to the bargaining framework under the FW Act.

7.2 Section 238 outlines the conditions under which a bargaining representative can apply to Fair Work Australia for scope orders and the necessary criteria to be satisfied.

7.3 Under s.238(1), when bargaining for a proposed single-enterprise agreement, a bargaining representative can apply for a scope order if it has concerns that bargaining is not proceeding efficiently or fairly on the grounds:

- the agreement will not cover appropriate employees; or
- it will cover employees that are not appropriate for it to cover.

7.4 A bargaining representative cannot apply for a scope order while bargaining for a multi-enterprise agreement with two or more employers.

7.5 Prior to applying for a scope order, a bargaining representative has to write to the other bargaining representatives outlining its concerns and giving them a chance to respond. If the response is considered inappropriate, it can then apply for a scope order under s.238(3).

7.6 Applicants for scope orders are also required to demonstrate that bargaining is not proceeding efficiently or fairly.

7.7 In order for Fair Work Australia to make a scope order, it must be satisfied under s.238(4) that:

- the applicant has met and is continuing to meet the good faith bargaining requirements;
- the order will promote fair and efficient bargaining conduct;
- the group of employees to be covered by the order has been fairly chosen; and
- it is reasonable in all the circumstances to make the order.

7.8 The requirement that the employees to be covered by an enterprise agreement be fairly chosen is contained in s.186(3) of the FW Act. However, the test only applies if an agreement does not cover all the employees of the employers covered by the agreement, and if the group of employees covered is not "geographically, operationally or organisationally distinct".

7.9 According to the FW Act's Explanatory Memorandum, in deciding whether a group of employees is fairly chosen, Fair Work Australia might consider how the employer chose to organise its enterprise; and whether it was reasonable for excluded employees to be covered by the agreement given the nature of the work they performed and the "organisational and operational relationship" between them and the employees who would be covered.

7.10 Any scope orders Fair Work Australia makes have to specify the employer and employees or class of employees that will be covered by the proposed agreement and can require an employer to include a class of employees in bargaining or exclude a class of employees from bargaining. They can also require an employer to bargain collectively with different classes of employees in relation to separate agreements.

7.11 In Flinders Operating Services Pty Ltd t/as Alinta Energy v ASU, APESMA, CEPU and AMWU[71], a decision in response to an application for bargaining orders, Commissioner Hampton noted the employer and unions were at odds over the scope of the agreement, with the unions objecting to the employer's proposal for coverage. He said agreements in the employer's business in the past had been made on a geographical or "undertaking" basis:

> *On that basis, it is entirely legitimate for Alinta to propose agreements for each of its specific operational sites. The fact that it considers that insufficient attention was afforded to site-specific issues during previous bargaining rounds, is also a legitimate*

7. Scope orders

consideration for its position.

7.12 However, the Commissioner pointed out that in his view the FW Act did not give the employer, or any other party, the power to determine the scope of a final agreement. Scope, in the absence of scope orders made by Fair Work Australia, must be the product of agreement with a group of employees. He added that the issue of coverage of any proposed agreement was itself a "legitimate matter for bargaining between the parties".

7.13 In LHMU v Coca-Cola Amatil (Aust) Pty Ltd[72], Fair Work Australia rejected the LHMU's application for a scope order for a separate agreement to cover Coca-Cola's operations in South Australia. SDP O'Callaghan found the LHMU did not comply with all of the legislative requirements under s.238(3).

7.14 With regards to the requirement to give the other bargaining representatives written notice of its concerns about the scope of the agreement, the LHMU had only expressed its concerns in writing to Coca-Cola on the same day it lodged the application for a scope order. The employer was then given one working day to respond to those concerns.

7.15 The LHMU had also applied for the scope order before the employer responded, so the union had not even perfunctorily considered a response from the employer.

7.16 Senior Deputy President O'Callaghan concluded that:

> *Unless the conditions precedent set out in subsection 238(3) are met, I do not consider that Fair Work Australia is able to exercise the discretion to grant a scope order.*

7.17 Within six weeks of the initial decision, the LHMU again applied for a scope order[73] to require the employer to bargain for a separate agreement to cover its South Australian employees. The application was again rejected for different reasons.

7.18 Senior Deputy President O'Callaghan this time said the LHMU had failed to demonstrate that bargaining was not proceeding efficiently or fairly to warrant the termination of existing negotiations and the granting of a scope order.

7.19 The SDP was not satisfied:

- the order would promote the fair and efficient conduct of bargaining;
- the employees to be covered by the employer's proposal were not chosen fairly; or
- it would be reasonable in all the circumstances to make the order.

7.20 SDP O'Callaghan said negotiations between the parties were continuing and there was no evidence those negotiations were not proceeding in a fair and efficient manner. It was also relevant to his decision that the CEPU and AMWU, who were also involved in negotiations, no longer supported the LHMU's position, he said.

7.21 In United Firefighters' Union of Australia (UFUA) v Metropolitan Fire & Emergency Services Board (MFESB); MFESB v UFUA[74], Fair Work Australia handed down its first Full Bench decision on scope. The bargaining parties had submitted two competing scope order applications in a bid to have Fair Work Australia determine the basis on which wage negotiations for a proposed enterprise agreement should proceed.

7.22 The union, the UFUA, requested that all firefighters, including assisting chief fire officers (ACFOs) who were one rank below the top-ranking chief fire officer, be covered by a single enterprise agreement. It said the majority of employees, including commanders and ACFOs, supported a single agreement and this should add significant weight to the Full Bench's decision.

7.23 The employer lodged its own application for a scope order, contending that any enterprise agreement covering operational employees generally should not cover commanders or ACFOs. Given the differences in managerial responsibilities, there should be two additional agreements covering commanders and ACFOs, it argued.

7.24 With respect to the weight that should be given to the employees' views, the Full Bench said:

> *It may be implied from the legislative scheme that the collective choice of employees is significant. It must be said, however, that while weight should be given to the views of the employees potentially affected, it may be*

that a proper consideration of the matters specified in ss.238(4) and (4A) in a particular case may make it appropriate to make a scope order contrary to the views of the employees potentially affected.

7.25 The Bench also disagreed with the union's view that as a matter of statutory construction preference ought to be given to agreements that covered as much of an enterprise as possible.

7.26 The Bench supported the employer's claim it would be a potential source of conflict for all employees to be covered by a single agreement given that commanders and ACFOs had varying degrees of managerial responsibility that made them organisationally distinct from other firefighters. It cited:

> *… the potential for an entrenched conflict of interest to arise based on managerial responsibility if agreement coverage of operational employees extends into the senior management ranks.*

7.27 The Bench concluded that the separate agreements sought by the employer would promote efficient and fair bargaining, and the scope of employees covered by each of the proposed agreements was fairly chosen. The UFUA and the employer were consequently required to negotiate conditions for three separate agreements, it said.

7.28 Recommendation: Where the coverage of an enterprise agreement is in dispute, the employer's position with respect to the agreement's scope should be preferred to that of the other bargaining representatives, unless the employer's position is held to be unfair or capricious. The onus should rest with the employee bargaining representatives to displace the employer's position as to scope.

7.29 In Capral Limited v AMWU, CEPU, AWU and Singh[75], the employer had been bargaining with the unions for a single agreement to cover 280 production and maintenance workers at its Queensland facility since September 2009. The agreement was put to an employee vote at the beginning of April 2010 but failed to win majority support.

7.30 One week later, the AMWU and CEPU wrote to the employer seeking to negotiate a separate agreement for 20 maintenance workers. The two unions accused the employer of taking an "inefficient and unfair bargaining position", warning that unless the employer addressed their concerns they would apply to Fair Work Australia for a scope order.

7.31 The employer responded by stating it did not agree with the unions' proposal and in two further letters sought clarification as to whether the unions intended to apply for scope orders. The employer received no response and put a second proposed agreement to a vote in May 2010.

7.32 One hour after the agreement was put to a vote, the AMWU and CEPU both lodged applications for scope orders under s.238(1), citing concerns that bargaining was not proceeding fairly or efficiently and that maintenance workers would not receive the entitlements they were seeking if they were covered by a whole-of-workplace agreement.

7.33 In response, the employer applied for a number of bargaining orders, including one to prevent the unions from applying for further bargaining or scope orders before an employee vote took place.

7.34 In reviewing the case, Commissioner Spencer acknowledged the unions had concerns about a single agreement covering all workers but said they had sufficient time to make an application for scope orders without waiting until the eleventh hour. Their choice to do so after the agreement went to employees for a vote undermined the good faith bargaining principles and did not reflect a fair or efficient bargaining position from which to negotiate a separate agreement, she said.

7.35 The Commissioner granted the employer's application for a bargaining order that prevented the unions from applying for any further bargaining or scope orders before a vote took place.

7.36 In the wake of these decisions, concerns remain about the time and expense employers are being put to in defending applications for scope orders brought by union bargaining representatives, even where they don't succeed.

7.37 In Stadium Australia Operations Pty Ltd t/a ANZ Stadium[76], Vice President Lawler approved an agreement lodged by the hospitality industry employer despite arguments by a number of

employees the group of workers it covered was not fairly chosen.

7.38 The employer's declaration said the agreement covered all 1,700 casual employees who performed work in one of the classifications including hospitality, retail, customer service, food and beverage and other operational functions.

7.39 The objecting employees said the employees covered by the agreement fell into two categories – food and beverage staff (about three-quarters of the employees covered) and customer service staff (the remaining quarter).

7.40 The objecting employees argued that customer service staff had not had a pay rise in six years and because the agreement was negotiated with the other employees' union, customer service staff would actually see their pay drop under the agreement.

7.41 They said customer service staff generally disapproved of the agreement but in any vote they would be outnumbered by food and beverage staff who would receive increased pay and conditions under the agreement.

7.42 This was borne out in a subsequent vote in which 560 staff voted on the agreement, with 384 voting in favour of it and 176 voting against it. But according to VP Lawler:

> *The fact that the customer service staff have not received a wage increase for six years and that many or most customer service staff will see their actual income fall under the agreement does not, in itself, provide a basis for refusing approval of the agreement.*

7.43 While an agreement had to pass the no-disadvantage test or the better off overall test, depending on whether it was made before or after 1 January 2010, those tests were measured against an award rather than pre-existing terms and conditions. In this case, terms and conditions would be reduced for customer service staff from what they currently were, but the agreement would still pass the no-disadvantage or better off overall test compared to the award, VP Lawler said.

7.44 He confirmed s.186 of the FW Act was concerned with the fairness of the group of employees chosen, not the fairness of the content of the agreement in relation to those employees:

> *The mere fact that one sub-group of the group of employees covered by an agreement is smaller in number, even much smaller, than another sub-group cannot, of itself, lead to a conclusion that the overall group was chosen unfairly: it would be possible to identify such sub-groups in relation to almost every enterprise agreement.*

7.45 Whether a group of employees had been fairly chosen had nothing to do with whether one sub-group of employees had fared "relatively worse" than another sub-group by way of their eventual terms and conditions, he said. However:

> *It is conceivable that unfairness of the sort complained of by the objectors in this case may be evident at the time the group of employees to be covered by a proposed agreement is chosen because, for example, the employer provides a full draft agreement at or before the time the group is chosen.*

7.46 In this case, VP Lawler noted the group of employees was chosen at the outset of bargaining, saying:

> *The group chosen was a rational choice. It consists of a series of operationally distinct sub-groups, all of whom work at one geographical location. I am not persuaded on the material before me that the group covered was chosen with the intent of prejudicing customer service staff in the way that the objectors complain of. Rather, the company prepared the draft agreement with the intent of removing what it saw as anomalies in the different classifications and rates applicable to the various categories of staff and creating a single set of broad banded classifications covering all of its casual staff and providing for a greater commonality of conditions.*

7.47 The remedy for the objecting employees in this case would have been for their bargaining representatives to apply for a scope order on the grounds that bargaining for the agreement was proceeding unfairly, instead of objecting to the certification of the agreement once it was lodged, VP Lawler said:

In circumstances where there is a clear risk of the tyranny of the majority prejudicing the minority in a proposed agreement, it may well be open to Fair Work Australia to find that if bargaining is proceeding unfairly towards the minority this makes it inappropriate that they be covered by the agreement and appropriate to make a scope order.

7.48 However, the existence of that option would be "cold comfort" to the objecting employees in this case who lacked sufficient knowledge of the legislation to bring a scope order application earlier, the VP said. Given the agreement was now approved, a scope order was no longer available.

References

71 Flinders Operating Services Pty Ltd t/as Alinta Energy v ASU, APESMA, CEPU and AMWU [2010] FWA 4821, 30 July 2010

72 LHMU v Coca-Cola Amatil (Aust) Pty Ltd [2009] FWA 320, 18 September 2009

73 LHMU v Coca-Cola Amatil (Aust) Pty Ltd [2009] FWA 818, 26 October 2009

74 United Firefighters' Union of Australia v Metropolitan Fire & Emergency Services Board; MFESB v UFUA [2010] FWAFB 3009, 14 April 2010

75 Capral Limited v AMWU and CEPU and AWU and Singh [2010] FWA 3818, 19 May 2010

76 Stadium Australia Operations Pty Ltd t/a ANZ Stadium [2010] FWAA 3758, 26 May 2010

8. Protected industrial action

Protected industrial action

The concepts of protected action and a limited right to strike within a bargaining period were introduced in the Industrial Relations Reform Act 1993. The Workplace Relations Act 1996 introduced prohibitions on action during the life of an agreement and payment during strikes and restored the prohibition against secondary boycotts.

(Explanatory Memorandum to the Fair Work Bill 2008)

8.1 When the FW Act took effect on 1 July 2009, it varied the rules by which employees could take protected industrial action as well as the rules for lawfully approving such action.

8.2 Employees can now take protected industrial action:

- after the nominal expiry date of an existing workplace agreement;
- in support of negotiations for a proposed single-enterprise agreement ("employee claim action");
- in response to industrial action taken by their employer ("employee response action"); and
- as long as it is not in support of pattern bargaining (although exemptions exist to this rule that render it almost impossible for union bargaining representatives to be found to be pattern bargaining).

8.3 Employers can now only take protected industrial action in response to industrial action by employees ("employer response action").

8.4 Before employees can take protected industrial action they need to apply, usually via their union, to Fair Work Australia for a secret ballot. To do so, employees and their bargaining representatives have to prove they are genuinely trying to reach an agreement with the employer.

8.5 If the employee ballot succeeds, employees can take industrial action after giving three days' notice to the employer. The action must start within 30 days of the ballot results (or 60 if Fair Work Australia orders). After that, approval for industrial action lapses and action is unprotected.

8.6 The FW Act prohibits employees being paid for any period of industrial action except in the case of partial bans on the performance of work.

8.7 A significant difference between the FW Act and the WR Act is that under the FW Act employers are not able to take pre-emptive industrial action, i.e. lock their employees out before their employees have first taken their own industrial action. However, once employees have taken industrial action, employers can respond by locking them out. Employees can then take "employee response action" in response to the employer's industrial action without having to re-apply to Fair Work Australia for a secret ballot.

Protected industrial action and productivity improvements

8.8 There are numerous obligations on employers to ensure that employees' rights are protected under the FW Act's enterprise bargaining and agreement making rules. This is in stark contrast to the absence of protections for employers when unions and employees embark on protected industrial action without having first exhausted all bargaining options.

8.9 The legislative test that Fair Work Australia has to apply before employees, on application from their union, can take protected industrial action amounts to little more than a "tick the box" exercise. The legislative requirement for a union to be "genuinely trying to reach an agreement" with the employer before applying for a protected action ballot pays no regard to the extravagance of the claims nor whether negotiations have reached an impasse. The FW Act does not require that industrial action be taken only as a last resort[77], with unions having succeeded in obtaining orders for protected action ballots on the basis they have been genuinely trying to reach an agreement while pursuing claims for $500-a-day allowances[78] and 28 per cent a year pay rises[79], with no productivity improvements in return.

8.10 Recommendation: All parties to enterprise agreements should be required to identify the proposed productivity improvements that arise from the agreement as part of the certification process before Fair Work Australia or, alternatively, agree that no productivity measures are available.

Meeting the protected action ballot threshold

8.11 A series of applications to Fair Work Australia involving Total Marine Services Pty Ltd (TMS) and the Maritime Union of Australia (MUA) shed light on the FW Act's secret ballot requirements via two Full Bench decisions, including how far negotiations have to progress before employees via their union can apply to take protected industrial action.

8.12 In response to the MUA's first secret ballot application[80], Commissioner Thatcher found the MUA was genuinely trying to reach an agreement with the employer, despite the employer arguing the MUA had failed to give details of its claims or respond to the employer's request for more information.

8.13 Commissioner Thatcher found the MUA did not have to try to progress as far as possible in bargaining before taking protected industrial action; it only had to prove it was genuinely trying to reach an agreement, which it had done:

> *It is trite to say there is no requirement in the Act that a union must reach an impasse or the like in negotiations for an enterprise agreement before making application for a protected ballot order.*

8.14 While the Commissioner appreciated the employer's frustration that a lot of the detail of the MUA's log of claims was yet to be addressed at the time the MUA applied for a secret ballot order, in his experience an absence of detail at that stage of the bargaining process was not unusual.

8.15 He said the MUA had not acted so prematurely in applying for a secret ballot that it was not genuinely trying to reach an agreement.

8.16 Commissioner Thatcher declined to make the bargaining order sought, noting the parties had been in discussions since November 2008 and had met several times in June 2009, which showed bargaining was still occurring.

8.17 He decided that requiring the MUA to provide written detail to the extent the employer requested would have been "excessive and oppressive":

> *There may well come a stage in negotiations where it is reasonable that significant detail is required of the MUA in writing. However, in my view that stage has not, as yet, been reached.*

8.18 In the subsequent appeal[81] by the employer against the decision to grant the MUA a secret ballot order, the Full Bench found negotiations to date had involved limited face-to-face meetings and limited articulation of many of the claims:

> *Certain matters were being dealt with in concurrent industry negotiations. Many items were only set out in a list of headings and were not explained or discussed. The wage claim had not been specified.*

8.19 While the MUA had been genuinely negotiating, it had not been genuinely trying to reach an agreement, which was different, the Bench said. The pre-requisites for obtaining a secret ballot for protected industrial action had therefore not been met and the union's ballot application should never have been granted.

8.20 The MUA then filed a second and successful secret ballot application[82], with Senior Deputy President Anne Harrison saying while the first application had been overturned due to minimal negotiations having taken place up to that point, the second application would be judged on what had happened since.

8.21 She noted that since the first application was rejected the parties had met face-to-face three times and documents had been exchanged before and after each meeting, including an email detailing the union's wage claim of 10 per cent a year over three years (totalling 30 per cent). However, the SDP paid no regard to the fanciful nature of the MUA's wages claim in deciding whether it was genuinely trying to reach an agreement, which is a matter of great concern to AMMA members.

8.22 The conclusions arising from the above series of decisions and others[83] confirm that union bargaining representatives do not need to have exhausted bargaining under the FW Act before applying for a protected action ballot order. AMMA maintains it should be a pre-requisite for making a protected action ballot order that negotiations have been exhausted.

8.23 Recommendation: Parties seeking to take protected industrial action must demonstrate their claims are not fanciful and, if the

claims were conceded by the employer, that they would not be against the national or public interest.

8.24 Recommendation: Protected industrial action should not be available during enterprise bargaining unless the party seeking to take the protected industrial action demonstrates to Fair Work Australia that it has embarked on and exhausted genuine bargaining and has reached a real impasse with the other bargaining representatives[84].

Misleading notices of protected industrial action

8.25 In Boral Resources (NSW) Pty Ltd and the AWU[85], a Full Bench of Fair Work Australia found the AWU was allowed to provide the employer with a notice of intended industrial action and, on the day the action was scheduled to take place, revoke it and have employees turn up for work expecting to be paid.

8.26 This type of industrial tactic is contrary to the requirement to provide the employer with 72 hours' notice of the intention to take protected industrial action to allow the employer to make arrangements for work to cease and notify its clients accordingly. This loophole should be closed given it has exactly the same effect on the employer as if employees actually took the industrial action, but has the benefit to employees of still being paid and losing no time off work.

8.27 Recommendation: Where notices of protected industrial action are given, employers should have the right to refuse to accept employees making themselves available for work after the notice has been provided to the employer, except where the employer agrees that work be performed as usual.

8.28 Recommendation: Where notice is given to take a form of protected industrial action and that action is then not taken and no notice is given of its cancellation, that particular type of industrial action should not be able to be taken for the remainder of enterprise negotiations.

Protected industrial action and employee remuneration

8.29 The Rudd Government is on the record as saying that employees earning more than $100,000 a year do not need the same industrial protections as employees earning more modest salaries.

8.30 In August 2007, then-Deputy Opposition Leader Julia Gillard told Channel 7 News:

> *What we've recognised is the more you earn and certainly if you earn a six-figure sum, you have some ability, some bargaining power, some ways of looking after yourself in our workplaces. So we are saying, for people who earn those six-figure sums, they can look after themselves. They will have the benefit of Labor's 10 National Employment Standards but if they want to make a common law contract, they can basically bargain for themselves.*

8.31 AMMA agrees that those earning in excess of the current unfair dismissal threshold of $113,800 a year can look after themselves in bargaining and that this should extend to prohibiting them from taking protected industrial action in support of an enterprise agreement.

8.32 There are examples of employees in the resource sector who are covered by enterprise agreements and earning well in excess of $100,000 and $200,000 taking protected industrial action in pursuit of wage increases.

8.33 Recommendation: The right to take protected industrial action should extinguish for employees earning an annual income above $113,800 (i.e. the current unfair dismissal threshold).

Employer protections against industrial action

8.34 Leading up to the introduction of the FW Act, there was some conjecture, including by Federal Government bureaucrats, that an employer seeking to insulate itself against economic harm caused by protected industrial action could be in breach of the good faith bargaining requirements.

8.35 Section 228(1)(e) of the FW Act prohibits bargaining representatives from engaging in "capricious or unfair conduct that undermines freedom of association or collective bargaining".

8.36 While there has been no case law on this issue to date, the Federal Government should amend the legislation to clarify that employers doing their best to minimise the cost to them arising from industrial action would not be in breach of the good faith bargaining laws.

8.37 Recommendation: The FW Act should be amended to make clear that an employer taking steps to insulate itself from the effects of protected industrial action, such as increasing stockpiles of products or supplies, is not in breach of s.228(1)(e), which prohibits bargaining representatives from engaging in "capricious or unfair conduct that undermines freedom of association or collective bargaining".

Terminating or suspending protected industrial action

8.38 Protected industrial action that meets the requirements of the FW Act can continue indefinitely unless suspended or terminated by Fair Work Australia or until agreement is reached between the parties. Fair Work Australia can suspend or terminate protected industrial action on several grounds:

- It can be suspended or terminated on "essential services" grounds if it is threatening to endanger life (s.424);
- It can be suspended or terminated if there is "significant economic harm" to the bargaining parties (s.423) or if it is threatening to cause "significant damage" to the Australian economy (s.424(1)(d));
- It can be suspended but not terminated for a "cooling off" period (s.425); or
- It can be suspended but not terminated if it is causing "significant harm" to third parties (s.426).

8.39 There are major concerns over Fair Work Australia's inability to suspend or terminate "threatened" industrial action under certain provisions of the FW Act that require industrial action to be occurring and, in some cases, for a protracted period. In particular, this rules out Fair Work Australia being able to make an "industrial action-related workplace determination" under s.266 in relation to a greenfield agreement given the criteria for making such a determination is that industrial action is actually occurring.

8.40 Recommendation: Employers negotiating a greenfield agreement should have the alternative of having a greenfield agreement approved by Fair Work Australia, free of any union involvement. These agreements would be tested against the relevant modern award, minimum standards and the "better off overall test" so as not to disadvantage prospective employees.

Suspension or termination of industrial action on essential services grounds

8.41 In Ambulance Victoria v LHMU[86], Fair Work Australia terminated rather than suspended industrial action being taken by ambulance officers on the grounds that Ambulance Victoria was an essential service and the industrial action could seriously endanger the lives of some of the population.

8.42 The employer had applied under s.424(1) of the FW Act for an order terminating the protected industrial action on the grounds it was threatened, impending or probable and would threaten to endanger the life, personal safety or health or welfare of the population or part of it.

8.43 The history of bargaining between the parties was that between April 2008 and June 2009 there had been more than 40 meetings for a proposed enterprise agreement, SDP Kaufman said.

8.44 The LHMU had on 1 July 2009 obtained orders that protected industrial action endorsed before the FW Act took effect was authorised under the FW Act. On 16 July 2009, the union advised the employer of plans to take industrial action, including four-hour stoppages along with three sets of bans on the performance of work.

8.45 SDP Kaufman said he was satisfied it was "probable" the protected industrial action would increase ambulance response times, not only in the areas affected by the strikes but more generally because assets would need to be deployed to cover the banned branches:

> *This is despite the best endeavours that Ambulance Victoria might take to minimise the impact of the protected industrial action. Delayed responses by ambulances would have threatened to endanger the welfare of those awaiting them. In severe cases, the delay would have threatened the life of a person needing urgent medical attention where minutes can mean the difference between life and death. My having attained that degree of satisfaction, s.424 requires that I make an order to suspend or terminate the protected industrial action.*

8.46 In this case the SDP chose to terminate rather than suspend the industrial action.

8.47 He clarified that the scheme of the FW Act now provided for a 21-day period after Fair Work Australia had suspended or terminated protected industrial action for the parties to reach agreement before an arbitrated outcome was imposed:

> *Rather than the threat of strike and lockout, the parties now face the threat of having terms and conditions imposed upon them by an outside body – Fair Work Australia.*

8.48 This prospect should encourage the parties to come to an agreement sooner rather than later, he said.

Suspension or termination of industrial action on the grounds of significant economic harm

8.49 In Sucrogen Australia Pty Ltd v AWU, AMWU and CEPU[87], the employer applied under s.424(1)(d) for an order to terminate protected industrial action on the basis it was causing or threatening to cause significant damage to the Australian economy or an important part of it.

8.50 Commissioner Spencer in her decision noted the industrial action that had already taken place between July 19 and 21, 2010 had prevented the harvest of at least 100,000 tonnes of sugar cane. A further 700,000 tonnes was threatened by the proposed industrial action. Two 24-hour strikes and one 48-hour strike had already been taken, with another 24-hour strike being threatened.

8.51 She said the immediate impact of the threatened protected industrial action would be a loss of $313,000 to the sugar mills involved. The 24-hour stoppage would also entail an extra 18 hours of lost crushing given related harvesting would be deferred as the mills were wound down in preparation for the stoppage.

8.52 Distinguishing between the economic impact of strikes in the sugar industry and other industries, Commissioner Spencer said:

> *Significant damage to the sugar industry cannot be determined on the basis of only a monetary measure associated with the time directly lost from the industrial action in a finite manner. A stoppage of the crushing process on the evidence threatened to have a compounding effect by reducing the optimum harvesting and crushing time. The evidence confirmed that there is particular pressure on the 2010 crushing season given the forecast for this year promised an increased cane production and a recovery from the last three years, where the industry suffered economic and weather-related impacts.*

8.53 She said the evidence showed the sugar industry was a highly significant domestic and export industry and a significant part of the Australian economy. The annual Australian sugar crop was 32 million tonnes and the average price per tonne of sugar was currently $480 a tonne. This put total domestic sales at a value of $480 million and export sales at $1.7 billion. Sucrogen was responsible for 40 to 50 per cent of all sugar produced in Australia, the Commissioner noted:

> *The flow-on effects from the sugar industry, being the major agricultural industry and employer in the area has considerable impact on that part of the economy and communities as was provided in the economic analysis presented. The proposed industrial action threatened to cause "significant damage" to the seasonal employment, the completion of the crushing season and the associated contractual implications.*

8.54 On the evidence, the Commissioner was satisfied the protected industrial action was threatening or would threaten to cause significant damage to an important part of the Australian economy, taking into account the very real possibility the industrial action combined with impending weather conditions would result in cane being left in the fields unharvested.

8.55 The suspension of industrial action would provide a "cooling off" period in the now protracted dispute, she said.

8.56 While in this decision Fair Work Australia suspended protected industrial action based on it causing significant damage to the Australian economy or an important part of it under s.424(1)(d), the case law to date shows the threshold of causing "significant economic harm" to the bargaining parties under s.423 is an extremely high hurdle.

8.57 In Nyrstar Port Pirie Pty Ltd v CFMEU[88], the employer had applied to Fair Work Australia under s.423 to suspend industrial action on the grounds it was causing it significant economic harm.

8.58 Nyrstar operates substantial silver, lead and zinc smelters at Port Pirie and argued the time at which the protected industrial action was threatened to take place would cause it significant economic harm.

8.59 Senior Deputy President O'Callaghan in his decision said:

> *The source, nature and degree of the harm likely to be suffered by Nyrstar is directly related to the nature of the Nyrstar Port Pirie operation. I am satisfied that Nyrstar operates as an exporter who is directly affected by the current Australian dollar exchange rate which, in historically relative terms, makes Nyrstar's trading situation more difficult.*

8.60 He noted the ongoing operation of the smelting function was dependent on the continued functioning of processes to provide essential feedstock to the blast furnace. However, the operation of the blast furnace would potentially be affected by the protected industrial action.

8.61 According to the employer, in the event the blast furnace was shut down, company management might not obtain corporate approval to immediately restart the facility in the current economic climate.

8.62 SDP O'Callaghan found the protected industrial action was threatening to cause significant economic harm to Nyrstar and this harm was "imminent" based on the low sinter stockpile.

8.63 However, s.423(6) also required that the industrial action in question be engaged in for a "protracted" period and that there be no prospect of the dispute being resolved in the foreseeable future in order for Fair Work Australia to intervene:

> *What constitutes a protracted period is subject to debate in the context of a continuous production process of this nature. However, the more fundamental issue is that, at the time of the hearing of this matter, the protected industrial action had not commenced at all.*

8.64 As a result, while there were factors that favoured Fair Work Australia's intervention in the protected industrial action, no suspension or termination could be considered until the action had started and was continuing for a protracted period, the SDP said.

Suspension of industrial action for a cooling off period

8.65 Under s.425 of the FW Act, Fair Work Australia can make an order to suspend protected industrial action that is being engaged in for a "cooling off" period. Before making such an order, Fair Work Australia must be satisfied it would be appropriate taking into account:

- whether the suspension would assist bargaining representatives to resolve matters at issue;
- the duration of the protected industrial action;
- whether suspension would be in the public interest and consistent with the legislation; and
- any other relevant matters it decides to take into account.

8.66 Under s.425, protected industrial action can only be suspended, not terminated.

8.67 In Nyrstar Port Pirie Pty Ltd v CFMEU[89], Fair Work Australia made its first order to suspend protected industrial action to allow for a cooling-off period under s.425.

8.68 After reaching an impasse in negotiations with the employer for a proposed enterprise agreement, members of the CFMEU at Nyrstar's silver, lead and zinc smelting facility at Port Pirie decided to impose overtime and other work bans.

8.69 In two applications to Fair Work Australia, Nyrstar sought orders terminating the industrial action, arguing it would interfere with work on mechanical problems and, given the drastic "sinter shortage", could lead to the furnace being shut down. The employer claimed it would face costs in excess of $6 million plus the risk its parent company would not reopen the furnace.

8.70 In both instances, Senior Deputy President O'Callaghan found the FW Act's requirements under s.423(6) that there had been "protracted" action and no reasonable prospect of resolving the

dispute had not been met. On the second application, however, Nyrstar also sought a suspension of the protected industrial action for the purposes of "cooling off".

8.71 SDP O'Callaghan found the requirements of s.425 had been met and ordered a cooling off period of six days, suspending bans until a scheduled Fair Work Australia-facilitated conference had been held the following week.

8.72 In Tas Paper Pty Ltd v AMWU and CFMEU[90], the employer applied to Fair Work Australia under s.425 for an order suspending protected industrial action for a cooling off period of two weeks during bargaining for a proposed enterprise agreement.

8.73 The day before the application was made, the unions notified the employer of protected industrial action in the form of three sets of one-hour stoppages leading up to Christmas Eve 2009.

8.74 Senior Deputy President Watson rejected the employer's application for a cooling off period, saying there was no industrial action being engaged in at the time that he could suspend:

> *Whilst protected industrial action has been foreshadowed by the unions in their notices of intended industrial action, there is at this time no protected industrial action that is being engaged in. In that circumstance, there is no jurisdiction to make the order sought.*

8.75 Recommendation: The requirement that protected industrial action be occurring at the time a cooling off application is made should be varied to allow an application to proceed where industrial action is threatened or likely to occur.

8.76 In Farstad Shipping (Indian Pacific) Pty Ltd and the MUA[91], Fair Work Australia handed down a decision in transcript in response to the employer's application under s.425 for a cooling off period. Declining to grant the orders the employer sought, the Commissioner said:

> *Perhaps if they keep softening you up and I'm using the vernacular, that may assist a resolution if you bleed too much. I'm not suggesting there's any morality there but this is the scheme of this legislation and that's the question that's being put to you a little more subtly but I'm using the sledge hammer.*

8.77 Farstad unsuccessfully argued the union had not differentiated its claim for $220 a day allowances for all workers on all ships in all companies in the industry and was therefore engaged in pattern bargaining.

8.78 In Mammoet Australia Pty Ltd v CFMEU[92], the employer failed in its bid under s.425 to secure a cooling off period after Fair Work Australia found the employer's lock-out of workers undermined its case for a suspension of all industrial action.

8.79 Mammoet was one of around 60 contractors on the Pluto liquid natural gas (LNG) project on the Burrup Peninsula, its role being to perform heavy lifting and transporting of pre-assembled train modules on the project.

8.80 At the time of Fair Work Australia's 14 June 2010 decision in response to the employer's application for a cooling off period, Mammoet's operations had been at a standstill since 28 April 2010.

8.81 The CFMEU had notified Mammoet that on 28 April its employees would begin a 28-day strike in support of making a new enterprise agreement. Mammoet responded by notifying its own "employer response action" in the form of a 28 day lock-out that would commence the day after the employees' stoppage ended.

8.82 At the start of the employer lock-out, Mammoet applied to Fair Work Australia to suspend both the employer's and the workers' protected industrial action for a 25-day cooling-off period. Deputy President McCarthy, however, rejected the application saying he was not satisfied it would have a "beneficial effect in resolving the matters at hand", particularly as there was just a few months' work left for the employer to do on the project.

8.83 He said despite the employer's argument it was likely that employees would take further industrial action in the absence of cooling off orders, the employer still had not withdrawn its own protected action, which was the biggest downfall in its application:

> *If Mammoet's predictions proved to be right and further*

employee industrial action occurred, then I would give greater weight to Mammoet's position than a circumstance where they rely upon their industrial action to establish the jurisdiction to cause an inability for any protected industrial action to occur.

8.84 Following Mammoet's unsuccessful bid for cooling off orders, Woodside Burrup Pty Ltd, the majority owner and operator of the Pluto LNG project, applied with another contractor to suspend the protected industrial action of Mammoet's employees as affected third parties (see below).

Suspension of industrial action for causing "significant harm" to third parties

8.85 In Woodside Burrup Pty Ltd & Kentz E & C Pty Ltd[93], Woodside and another contractor applied under s.426 of the FW Act to suspend protected industrial action being engaged in by contractor Mammoet's employees on the grounds it was causing "significant harm" to them as third-party contractors on the Pluto LNG project.

8.86 The CFMEU conceded harm was being inflicted on the third parties but disputed the claim it was significant. The union argued that if Fair Work Australia suspended the action it would allow the employer to finish its remaining work on the project without having to strike a new enterprise agreement with its employees.

8.87 Deputy President McCarthy rejected the CFMEU's claim, saying:

In this matter, I consider the harm to be serious. The project is large, there are interdependencies between contractors and the sequential nature of the work deriving from those interdependencies are critical and complex … The potential losses in my view are substantial and appear to me to have a chain reaction effect.

8.88 While there was nothing unlawful in the CFMEU's conduct or that of Mammoet's employees, the extent and significance of the harm that was threatening to be caused to third parties warranted an order suspending the protected industrial action for three months, the DP said.

8.89 On appeal by the CFMEU, a Full Bench overturned[94] DP McCarthy's decision, finding his three-month suspension of industrial action had the same effect as a termination given the employer's work on the project was nearly at an end. This was contrary to the intent of s.426 which only allowed suspension of industrial action upon significant harm to third parties rather than termination.

8.90 Woodside had argued the industrial action would result in a $3.5 million-a-day loss due to the consequent delay in the revenue stream for LNG products. Noting it was the first appeal that called for a consideration of the proper construction of s.426, the Full Bench said Woodside relied on the fact it cost $3.5 million a day to run the project team and site based services:

The amount of potential daily loss identified by Woodside is a function of the enormous size of the project. In our view, those amounts are not significant in the relevant sense when considered in the context of the project as a whole unless the further delays on account of the protected industrial action become very protracted. On the evidence it is more likely than not that the dispute will be resolved before that point is reached.

8.91 The Full Bench assessed the significance of harm to third parties against the overall financial value of the project, finding in that context the losses incurred by Woodside and other contractors would not be "significant".

8.92 It said Woodside and other contractors had already had the benefit of a significant respite from industrial action due to DP McCarthy's earlier orders, but it was only fair that industrial action could now resume. It added that even if it had found the economic harm to the third parties to be significant, it would not have granted a suspension any longer than the four weeks that had already been imposed.

8.93 The Full Bench decision is disappointing on a number of fronts, not the least of which is its finding that millions of dollars a day in financial losses were not significant compared to the size of the project. Over the past two decades, the resources sector has fought hard to remove the stigma that developed in the 1970s

and 1980s that the industry is strike-prone.

8.94 In relation to industrial action at Woodside, Nippon Steel's Australian representative told a meeting in Canberra[95] in early 2010 that Nippon was concerned with escalating industrial action in Australia and had sought assurances there would be no return to the 1970s when Japan was forced to look to Brazil as a more reliable supplier of iron ore than Australia.

8.95 Australia's reputation as a reliable supplier of resources is not easily achieved, and with Australia's north Asian trading partners looking for dependable investment opportunities, our industrial tribunals' sanctioning of lengthy periods of industrial action is an anathema to the perception of reliability.

8.96 Earlier, in August 2009, the Reserve Bank Governor said[96] Australia's cultural and "black letter" legislative changes to industrial relations since the 1990s had helped Australia to weather the global financial crisis. On 18 February 2010, the Assistant Governor Philip Lowe had warned[97] unemployment was the price of excessive wage increases and that business people were expressing concern over union activity in the resource sector in Western Australia.

8.97 The abovementioned Fair Work Australia Full Bench decision ignores this damage being done to Australia's international reputation and distils the "economic harm" test to a plain dollar value. In that particular case, there had already been a period of nine weeks of industrial action before the application was filed, along with the potential for another 28 days of action for which the CFMEU had given notice.

8.98 Recommendation: The definition of "significant harm" to third parties under s.426(3) should be re-defined to exclude any reference to the value of a project in deciding whether the harm caused by the protected industrial action is significant.

References

77 CEPU & AFMEPKIU known as the Australian Manufacturing Workers' Union (AMWU) v Kraft Foods Limited [2010] FWA 4404, 21 June 2010

78 LHMU v MSS Security Pty Ltd [2010] FWA 4470, 21 June 2010

79 Maritime Union of Australia v Total Marine Services Pty Ltd [2009] FWA 187, 1 September 2009

80 Maritime Union of Australia v Total Marine Services Pty Ltd [2009] FWA 187, 1 September 2009, Thatcher C

81 Total Marine Services Pty Ltd v Maritime Union of Australia [2009] FWAFB 368, 9 October 2009, Full Bench

82 Maritime Union of Australia v Total Marine Services Pty Ltd [2009] FWA 815, 26 October 2009, SDP Harrison

83 CEPU and AMWU v Kraft Foods Limited [2010] FWA 4404, 21 June 2010

84 B2010/2515, Farstad Shipping (Indian Pacific) Pty Ltd and MUA, 8 January 2010

85 Boral Resources (NSW) Pty Ltd [2010] FWAFB 1771, 31 March 2010, Full Bench

86 Ambulance Victoria v LHMU [2009] FWA 44, 3 August 2009, SDP Kaufman

87 Sucrogen Australia Pty Ltd v AWU, AMWU and CEPU [2010] FWA 6192, 27 August 2010

88 Nyrstar Port Pirie Pty Ltd v CFMEU [2009] FWA 1148, 16 November 2009

89 Nyrstar Port Pirie Pty Ltd v CFMEU [2009] FWA 1144, 17 November 2009

90 Tas Paper Pty Ltd v AMWU and CFMEU [2009] FWA 1872, 22 December 2009

91 B2010/2515, Farstad Shipping (Indian Pacific) Pty Ltd and MUA, 8 January 2010

92 Mammoet Australia Pty Ltd v CFMEU [2010] FWA 4389, 14 June 2010

93 Woodside Burrup Pty Ltd & Kentz E & C Pty Ltd v CFMEU [2010] FWA 4880, 2 July 2010

94 CFMEU v Woodside Burrup Pty Ltd & Kentz E & C Pty Ltd [2010] FWAFB 6021, 6 August 2010

95 Japanese warn billions of investment dollars at risk, published in The Herald Sun, 19 February 2010

96 Oral submission by Reserve Bank Governor Glenn Stevens to House of Representatives Standing Committee on Economics, Official Committee Hansard, 14 August 2009, Sydney

97 The current economic landscape, Reserve Bank Assistant Governor Philip Lowe, speech to CEDA, 18 February 2010, Sydney

Pattern bargaining

> *Pattern bargaining is a course of conduct by a bargaining representative for two or more proposed enterprise agreements. That course of conduct must involve the bargaining representative seeking the inclusion of common terms in two or more proposed enterprise agreements and that course of conduct must also extend beyond a single employer.*
>
> *(Explanatory Memorandum to the Fair Work Bill 2008)*

9.1 The definition of "pattern bargaining" under s.412(1) of the FW Act remains unchanged in substance from that contained in the WR Act. On the face of it, employees engaged in pattern bargaining are not able to take protected industrial action in support of those claims.

9.2 However, one significant amendment encapsulated in s.412(2) of the FW Act states:

> *The course of conduct, to the extent that it relates to a particular employer, is not pattern bargaining if the bargaining representative is genuinely trying to reach an agreement with that employer.*

9.3 The Federal Court and Federal Magistrates Court can grant injunctions against industrial action if a bargaining representative is engaged in pattern bargaining under s.422 of the FW Act. However, in order to grant an injunction, the courts must be satisfied that "employee claim action" is being engaged in, or is threatened, impending or probable, and a bargaining representative is engaged in "pattern bargaining".

9.4 The case law to date shows this bar is almost impossible to get over, with no claims having yet succeeded.

9.5 In John Holland Pty Ltd v AMWU and AWU[98], a Full Bench of Fair Work Australia referred to the new provision under s.412(2) and conceded it meant pattern bargaining would not prevent Fair Work Australia from granting a union application for a secret ballot order for protected industrial action. A union only had to show it was willing to consider the individual needs of the enterprise and was otherwise meeting its good faith bargaining obligations for a secret ballot to go ahead, despite identical logs of claims having been served on two or more employers.

9.6 The Full Bench found that engaging in pattern bargaining (i.e. serving the same log of claims on multiple employers) did not automatically mean the union was not genuinely trying to reach an agreement.

9.7 The Full Bench rejected all four grounds of John Holland's appeals against earlier decisions granting secret ballots, including the employer's argument that to be satisfied a union was genuinely trying to reach an agreement Fair Work Australia had to be satisfied the union was not engaging in pattern bargaining.

9.8 The Full Bench pointed out that s.412(2) provided that conduct which would otherwise constitute pattern bargaining would not be considered so if the bargaining representative (in this case the union) was genuinely trying to reach an agreement with the employer.

9.9 To determine if the union was genuinely trying to reach an agreement, Fair Work Australia only had to be satisfied it was "demonstrating a preparedness to bargain for the agreement, taking into account the individual circumstances of that employer" and was otherwise meeting its good faith bargaining obligations, the Bench said, adding:

> *There is no fundamental reason why a bargaining representative engaged in pattern bargaining would not be genuinely trying to reach an agreement.*

9.10 The Full Bench went on to clarify:

> *While there might be circumstances in which the terms of the pattern agreement sought are so much in conflict with the employer's operations that the conclusion can be reached that the bargaining representative is not genuinely trying to reach an agreement, that conclusion would be reached without reference to or reliance on the terms of s.412.*

9.11 It dismissed in full the two appeals by John Holland against secret ballot orders for protected industrial action that were previously granted to the AMWU and AWU.

9.12 In CFMEU v Mitolo Constructions Pty Ltd[99], Fair Work Australia

again confirmed a union could engage in pattern bargaining and still be found to be genuinely trying to reach an agreement with the employer.

9.13 The CFMEU had applied for a protected action ballot on behalf of its members, with the employer arguing the application should be rejected because the CFMEU was not genuinely trying to reach an agreement as required under s.443(1)(b). This was partly because the CFMEU was engaged in pattern bargaining, the employer said.

9.14 Commissioner Hampton dismissed the employer's claim, finding that rather than being engaged in pattern bargaining, the CFMEU's approach was more a matter of:

> *… establishing a negotiating benchmark and using comparative material to support its claims.*

9.15 He said pattern bargaining was not in itself a relevant consideration in determining if a union was genuinely trying to reach an agreement. However, depending on the case, the existence of pattern bargaining could cast doubt on whether genuine bargaining had occurred.

9.16 The Commissioner found the CFMEU was genuinely trying to reach an agreement in this case and had met the requirements for a protected action ballot.

9.17 In National Tertiary Education Industry Union (NTEU) v University of Queensland[100], Fair Work Australia found the NTEU was not engaged in pattern bargaining despite having served the same log of claims on the University of Queensland as on numerous other universities, including a claim for a common annual pay rise.

9.18 Senior Deputy President Richards found the FW Act's definition of pattern bargaining required more than seeking the same incremental pay rise with two or more employers. To meet the pattern bargaining test, the NTEU would have to be seeking exactly the same wage rate, not just the same annual wage rise, from several different employers, he said.

9.19 By extension, any and all claims for common wage rises would pass the test of not being pattern bargaining and unions and employees could take protected industrial action in support of them.

9.20 As stated earlier, Fair Work Australia is yet to find a bargaining representative or a union has engaged in pattern bargaining under the FW Act, despite the existence of what looks like pattern bargaining to all involved. Unions merely have to show a "preparedness" to take into account the individual circumstances of the businesses concerned to escape the FW Act's definition of pattern bargaining. Based on the approach taken by Fair Work Australia in applying the pattern bargaining test, it would seem unlikely that a case of pattern bargaining brought by an employer would ever succeed.

9.21 Recommendation: The exemption to pattern bargaining that exists under s.412(2) of the FW Act should be removed, which currently allows a bargaining representative to obtain orders for a secret ballot for protected industrial action if they are "genuinely trying to reach an agreement" despite having served pattern claims on two or more employers.

References

98 John Holland Pty Ltd v AMWU and AWU [2010] FWAFB 526, 28 January 2010

99 CFMEU v Mitolo Constructions Pty Ltd [2010] FWA 4232, 8 June 2010

100 NTEU v University of Queensland [2009] FWA 90, 18 August 2009

Bargaining content

> The [Fair Work Act's] content rule will cut regulation so that matters that historically have been included in agreements which encompass the relationship between an employer and a union but were prohibited under Work Choices can be included where agreed to, for example, union consultation clauses or leave to attend union training. The formulation also makes it clear that provisions for payroll deductions such as salary sacrifice and union fees can be included in agreements. The capacity to include more issues in agreements where the parties agree will make side agreements between employers and unions unnecessary.
>
> (Explanatory Memorandum to the Fair Work Bill 2008)

10.1 The WR Act first introduced the concept of "prohibited content", which at the time was made up of 30 matters that could not be included in enterprise agreements and over which protected industrial action could not be taken. These included matters that did not pertain to the employment relationship between the employer and employees covered by the agreement, as well as provisions:

- breaching freedom of association laws;
- providing unfair dismissal remedies;
- restricting the use of independent contractors or labour hire workers;
- allowing for payroll deductions of union fees;
- providing for trade union training leave; and
- allowing employees to have time off work to attend paid union meetings.

10.2 The rules about what can be included in enterprise agreements are important because they govern the future operation of an enterprise but also because unions and employees have the ability to take protected industrial action over a proposed agreement's content during enterprise bargaining negotiations.

10.3 Since the FW Act took effect on 1 July 2009, unions have made full use of the relaxed agreement making rules and their renewed ability to include union-specific clauses in enterprise agreements. AMMA analysed in detail the rules around agreement content in its August 2010 paper, Finding Fairness: A review of the first 12 months of the Fair Work Act[101].

10.4 Further, according to AMMA's Research Project on the FW Act[102], logs of claims from unions acting as bargaining representatives now commonly include clauses for:

- paid union meetings;
- a requirement to have non-working shop stewards on-site;
- a requirement to have union meeting facilities on-site;
- paid trade union training leave;
- right of entry;
- limitations on the use of contractors; and
- payroll deductions of union dues.

10.5 These provisions produce no measurable productivity improvements and are instead directed towards cementing the role of unions in the workplace at the employer's expense.

10.6 A recent enterprise agreement struck between Pacific Brands (trading as Dunlop Foams) and the National Union of Workers (NUW)[103], which was initially approved by Fair Work Australia[104], was found on appeal to contain non-permitted content in relation to right of entry[105]. The agreement included not just the offending right of entry clause but other clauses that are permitted under the FW Act relating to:

- union rights;
- payroll deductions of union fees;
- delegates' rights;
- trade union training leave;
- paid union meetings; and
- commitments to collective negotiations.

10.7 While these are permissible matters under the FW Act, they commonly add little or nothing to an employer's business, serving only to reassert union influence at the workplace.

10.8 Recommendation: The "matters pertaining to the employment relationship" test should be restricted to matters pertaining to the employment relationship between the employer and its employees and should not extend to the relationship between the employer and the employees' union. Agreement content such as payroll deductions of union dues; trade union training leave; and the provision of on-site facilities for union delegates all concern the relationship between the employer and the union and not the relationship between the employer and the employees.

10.9 Fair Work Australia has confirmed that even if a union is bargaining for content that is not permitted under the FW Act, it can still take protected industrial action over it.

10.10 In Australian Postal Corporation v CEPU[106], a Full Bench of Fair Work Australia confirmed that as long as a union believed it was bargaining for permitted matters, even if it wasn't, it could pass the test of genuinely trying to reach an agreement with the employer.

10.11 The Full Bench dismissed Australia Post's appeal against a successful CEPU secret ballot application, saying that as long as the CEPU believed it was bargaining for permitted matters, it could be found to be genuinely trying to reach agreement and therefore hold a protected action ballot.

10.12 In its reasons for decision, the Full Bench noted the history of bargaining between Australia Post and the union had been "protracted".

10.13 In 2009, the CEPU applied several times for secret ballot orders but all its applications were overturned by a Full Bench. The last attempt succeeded on 9 November 2009 when Commissioner Roberts found the union had eliminated non-permitted matters from its claims and had been genuinely trying to reach an agreement from 30 October 2009.

10.14 Australia Post appealed, arguing the CEPU had only withdrawn its non-permitted matters, which included clauses relating to the use of contractors, on the morning of the 5 November 2009 hearing, which meant the CEPU had not been genuinely trying to reach an agreement earlier. The employer also contended that non-permitted matters relating to contractors were still present in the union's log of claims.

10.15 The Full Bench rejected the employer's appeal, ruling that:

> *... the Commissioner was correct in finding that the CEPU had been and was genuinely trying to reach an agreement with Australia Post.*

10.16 With respect to the employer's arguments about the time at which the permitted matters were withdrawn, the Full Bench said:

> *To suggest that the time at which a union can commence to genuinely try to reach an agreement with an employer is the time at which it makes a claim that in Fair Work Australia's view does not contain prohibited content is to inject an unwarranted degree of artificiality and technicality into what is intended to be "a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action for a proposed enterprise agreement".*

10.17 The Full Bench confirmed it was the CEPU's belief about what it was bargaining for that was important:

> *It is clear that by the time of the last hearing before Commissioner Roberts, and indeed well before, the CEPU reasonably believed that the clauses it was promulgating did not contain non-permitted matters … Because the CEPU reasonably believed that they did not, it was genuinely trying to reach an agreement.*

10.18 In the case of a union proposing an agreement containing clearly non-permitted causes, a union would not be found to be genuinely trying to reach an agreement, the Full Bench said. However, where the union's belief was well-founded, that was enough to meet the test.

10.19 Recommendation: Bargaining representatives should not be able to obtain secret ballot orders for protected industrial action

on the assertion they believe they are bargaining for permitted content. The test of whether a bargaining representative is "genuinely trying to reach an agreement" with the employer should be that they are actually bargaining for permitted content, not that they believe they are.

References

101 Finding Fairness: A review of the first 12 months of the Fair Work Act 2009, AMMA Paper, July 2010

102 AMMA Workplace Relations Research Project report by RMIT, June 2010

103 Dunlop Foams and National Union of Workers 2009-2011 Certified Agreement, November 2009

104 Pacific Brands Limited trading as Dunlop Foams [2009] FWAA 1118, 16 November 2009, Senior Deputy President Watson

105 Australian Industry Group [2010] FWAFB 4337, 11 June 2010

106 Australian Postal Corporation v CEPU [2010] FWAFB 344, 20 January 2010

11. Adverse action during enterprise bargaining

Adverse action during enterprise bargaining

It has never been the case that an employer was prevented by federal industrial legislation from taking prejudicial action against an employee who happened to be a union member or a union official. An employer could not, however, act to the detriment of an employee "by reason of" or "because of" the employee's union membership or associated activities.

(Federal Court Justice Richard Tracey in Barclay v The Board of Bendigo Regional Institute of TAFE [2010] FCA 284, 25 March 2010)

11.1 The FW Act on 1 July 2009 introduced significant reforms under the banner of the General Protections in Part 3-1 of the legislation. Under the provisions, it is unlawful for a person to take "adverse action" against another person on the grounds of their "workplace rights", "industrial activities" or for other "discriminatory" reasons.

11.2 While there were predecessor provisions under the WR Act protecting employees from being unlawfully terminated for prohibited reasons including for discriminatory reasons or in breach of freedom of association laws, they were much more limited than the expansive FW Act provisions.

11.3 Section 341 of the FW Act defines a "workplace right" as:

- an entitlement to the benefit of a workplace law, industrial instrument or order made by an industrial body;
- the ability to initiate or participate in a process or proceedings under a workplace law or instrument; or
- the ability to make a complaint or inquiry to seek compliance with a workplace law or instrument.

11.4 All employees and employers in the federal workplace relations system are covered by the General Protections. This includes unincorporated entities in all states except Western Australia which has not referred its industrial relations powers to the Commonwealth.

11.5 Applicants have 60 days to bring a claim if the adverse action resulted in dismissal, compared to the 14-day time limit for unfair dismissal claims. However, if the adverse action did not result in dismissal, applicants have six years to bring a claim. Potential compensation for successful claims is also unlimited compared to a maximum of six months' pay in the unfair dismissal jurisdiction.

11.6 Parties who are found to have breached the general protections face up to $6,600 fines per breach for individuals or up to $33,000 per breach for corporations. Fines can also be imposed on company directors.

11.7 Under s.545 and s.546 of the FW Act, the Federal Court and the Federal Magistrates Court can impose injunctions against adverse action taking place; make an order awarding compensation for any loss that a person has suffered because of a breach; or order reinstatement.

11.8 It is clear there is now enormous scope for prospective, former and existing employees to bring an adverse action claim that was not previously available. The courts to date have not been overwhelmed with claims and, of the cases so far, most have been dismissed. However, significant concerns remain, particularly in the emerging area where adverse action intersects with good faith bargaining.

11.9 In Jones v Queensland Tertiary Admissions Centre Ltd (No 2)[107], the Federal Court confirmed a chief executive officer (CEO) at the Queensland Tertiary Admissions Centre Ltd (QTAC) had workplace rights that could be subject to an adverse action application despite rejecting her claim those rights had motivated the adverse action her employer took against her.

11.10 The court confirmed the woman's role as QTAC's bargaining representative during negotiations for an enterprise agreement under the FW Act meant she had a workplace right and was entitled to bring a claim under the General Protections.

11.11 She successfully argued her involvement in negotiations for an enterprise agreement constituted an ability to "initiate or participate in a process or proceedings under workplace law or a workplace instrument" as per s.341(1)(b).

11.12 The judge confirmed that even if the woman had not been an official bargaining representative she would still have a workplace

right via her role as a spokesperson for the employer during negotiations. Attending meetings, having discussions and generally taking part in negotiations constituted "participation" in proceedings, the judge found.

11.13 What this means is that anyone involved in the bargaining process, including management, CEOs and all employees, could have the right to bring an adverse action claim against their employer.

11.14 While the courts to date have taken a sensible approach to adverse action claims, there are serious questions about the operation of the General Protections, particularly with regard to the enormous scope to bring an application in the context of enterprise bargaining.

References

107 Jones v Queensland Tertiary Admissions Centre Ltd (No 2) [2010] FCA 399, 29 April 2010, Collier J

ATTACHMENT A

TABLE OF RECOMMENDATIONS

ATTACHMENT A

TABLE OF RECOMMENDATIONS

1. Protected industrial action should not be available during enterprise bargaining unless the party seeking to take the protected industrial action demonstrates to Fair Work Australia that it has embarked on and exhausted genuine bargaining and has reached a real impasse with the other bargaining representatives.
2. Employers negotiating a greenfield agreement should have the alternative of having a greenfield agreement approved by Fair Work Australia, free of any union involvement. These agreements would be tested against the relevant modern award, minimum standards and the "better off overall test" so as not to disadvantage prospective employees.
3. The right to take protected industrial action should extinguish for employees earning an annual income above $113,800 (i.e. the current unfair dismissal threshold).
4. All parties to enterprise agreements should be required to identify the proposed productivity improvements that arise from the agreement as part of the certification process before Fair Work Australia or, alternatively, agree that no productivity measures are available.
5. Parties seeking to take protected industrial action must demonstrate their claims are not fanciful and, if the claims were conceded by the employer, that they would not be against the national or public interest.
6. Where notices of protected industrial action are given, employers should have the right to refuse to accept employees making themselves available for work after the notice has been provided to the employer, except where the employer agrees that work be performed as usual.
7. Where notice is given to take a form of protected industrial action and that action is then not taken and no notice is given of its cancellation, that particular type of industrial action should not be able to be taken for the remainder of enterprise negotiations.
8. The FW Act should be amended to make clear that an employer taking steps to insulate itself from the effects of protected industrial action, such as increasing stockpiles of products or supplies, is not in breach of s.228(1)(e), which prohibits bargaining representatives from engaging in "capricious or unfair conduct that undermines freedom of association or collective bargaining".
9. The definition of "significant harm" to third parties under s.426(3) should be re-defined to exclude any reference to the value of a project in deciding whether the harm caused by the protected industrial action is significant.
10. The requirement that protected industrial action be occurring at the time a cooling off application is made should be varied to allow an application to proceed where industrial action is threatened or likely to occur.

Bargaining orders

11. On filing an application for a bargaining order, the applicant must be able to demonstrate that, prima facie, their case has some merit.

Bargaining content

12. The "matters pertaining to the employment relationship" test should be restricted to matters pertaining to the employment relationship between the employer and its employees and should not extend to the relationship between the employer and the employees' union. Agreement content such as payroll deductions of union dues; trade union training leave; and the provision of on-site facilities for union delegates all concern the relationship between the employer and the union and not the relationship between the employer and the employees.
13. Bargaining representatives should not be able to obtain secret ballot orders for protected industrial action on the assertion they believe they are bargaining for permitted content. The test of whether a bargaining representative is "genuinely trying to reach an agreement" with the employer should be that they are actually bargaining for permitted content, not that they believe they are.

Representation in bargaining

14. Bargaining representatives should be required to advise all other bargaining representatives that they have status as a bargaining representative in negotiations.

15. Bargaining representatives should be required to advise all other bargaining representatives of the number, identity, and geographical location of the employees they represent in negotiations.

16. A default bargaining representative should only be able to exercise good faith bargaining rights and have the right to be covered by an enterprise agreement where they have actively participated in negotiations.

17. The concept of default bargaining representative status should be removed, with any appointment of a bargaining representative subject to specific written approval by the employee, with a copy of that approval made available to the employer.

18. Where an employer wishes to limit to a manageable level the number of employee delegates participating in enterprise negotiations, this should not be seen as a failure by the employer to bargain in good faith. Bargaining orders should be able to limit the number of employee delegates that attend negotiations.

19. Where an employee or official of a union acts as a bargaining representative, that person should at all times be deemed to be the bargaining representative of the union rather than an independent bargaining representative acting on behalf of one or more employees.

Scope orders

20. Where the coverage of an enterprise agreement is in dispute, the employer's position with respect to the agreement's scope should be preferred to that of the other bargaining representatives, unless the employer's position is held to be unfair or capricious. The onus should rest with the employee bargaining representatives to displace the employer's position as to scope.

Majority support determinations

21. The Australian Electoral Commission or Fair Work Australia should, as part of all applications for majority support determinations, conduct secret ballots to determine majority support of a workforce for engaging in collective bargaining.

Pattern bargaining

22. The exemption to pattern bargaining that exists under s.412(2) of the FW Act should be removed, which currently allows a bargaining representative to obtain orders for a secret ballot for protected industrial action if they are "genuinely trying to reach an agreement" despite having served pattern claims on two or more employers.

About AMMA

Established in 1918, the Australian Mines & Metals Association (AMMA) is the national employer association for the mining, hydrocarbons and associated processing and service industries, including construction and maintenance companies operating in Australia's resources sector.

AMMA advocates on behalf of its members for the establishment of a legislative framework for workplace relations that provides for innovation, employee engagement, best practice, productivity and a safe workplace.

Key Policy Priorities

- > Workplace Relations
- > Migration
- > Superannuation
- > Employee Share Schemes
- > Skills & Training
- > Occupational Health & Safety
- > Human Resources
- > Taxation

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