FACT SHEET 4

COLLECTIVE BARGAINING ARRANGEMENTS

For the first time in Australian history, there is now a legislated right for workers to bargain collectively. If the majority of employees wish to collectively bargain, the employer must negotiate in good faith.

If the employer does not agree to bargain then a union can apply to Fair Work Australia for a majority support determination. This determination is issued when FWA is satisfied that a majority of employees within the scope of the agreement want to bargain with their employer. The employer is then obliged to begin bargaining.

Unions will represent their members in bargaining (act as bargaining reps) unless the member indicates otherwise.

The employer is required to notify all employees of their right to appoint a bargaining rep at the beginning of the bargaining process. Employers and employees may appoint any person as their bargaining representative for a proposed enterprise agreement.

If there is disagreement over who will be covered by the proposed agreement Fair Work Australia can issue a scope order which will specify the employer and employees who will be covered by the agreement.

The Act requires all parties to negotiate in good faith. All parties must:

- attend and participate in meetings at reasonable times
- disclose relevant information in a timely manner
- respond to proposals in a timely fashion
- give genuine consideration to the proposals of the other party and provide reasons for responses, and
- refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining

If one party is not meeting the above requirements, FWA may issue a bargaining order. A bargaining order may specify the actions that a party is required to take or it may provide for a party to refrain from engaging in a particular action that would breach good faith bargaining requirements.

If either party refuses to comply with a good faith bargaining order, they will be subject to civil penalties.

If a party consistently breaches good faith bargaining orders in a serious and sustained way, Fair Work Australia may issue a serious breach declaration. When a serious breach declaration has been issued, the parties have 21 days to reach agreement, otherwise FWA may make a bargaining related workplace determination (ie. arbitrate).

When negotiations for a new agreement have concluded, the proposed agreement must go to a ballot of staff. The agreement is approved if more than 50% of votes cast are in favour.

The employees who will be covered by the new agreement must have access to the proposed agreement for at least 7 days prior to the ballot.

The agreement must pass the Better Off Overall Test, which means that employees must be better off under the new agreement than they would be under the relevant modern award. Fair Work Australia may approve an agreement that doesn't pass the BOOT in exceptional circumstances, such as short term business

Every agreement must include:

- a flexibility clause – an agreement made in writing between an employee and their employer, which can be terminated with 4 weeks written notice.
- a consultation clause – allowing for consultation and representation of employees in the event of major workplace change.
- a dispute settlement procedure – outlining a process for settling disputes under the agreement or National Employment Standards. The clause must provide for employee representation. Fair Work Australia will only be able to arbitrate disputes where the DSP in the agreement expressly provides for arbitration.
- A nominal expiry date (4 years or less).

Only one agreement can apply to an employee.

Industrial action: What is it?

Employee industrial action is defined to include not attending work, performing work in a different manner to which it is customarily performed (such as work bans).

FACT SHEET 4 cont
COLLECTIVE BARGAINING ARRANGEMENTS

If an employee refuses to perform work because of a reasonable concern for their immediate health and safety, it is not defined as industrial action. However, the employee must not unreasonably fail to comply with a direction to perform other available work, at the same or another workplace.

Employer industrial action is defined as locking workers out.

What is protected industrial action?

Protected industrial action means that during enterprise bargaining, union members may legally take action. It is against the law for your employer to threaten you, sack you, victimise you, or sue either yourself or the Union office for any loss the company incurs.

Industrial action will be protected where it is taken during bargaining (but after the expiry of the current agreement) and where the bargaining representatives:

- are genuinely trying to reach agreement
- are not engaged in pattern bargaining
- have obtained authorisation through a protected action ballot
- have given the employer 3 days notice

Protected action ballot order

A bargaining representative seeking to take protected industrial action must apply for a protected action ballot order and notify the employer that an application has been made. An application will be able to be made 30 days before the nominal expiry date of an agreement. Fair Work Australia will try to determine the application within 2 days. The applicant must be genuinely bargaining.

Industrial action will be authorised where at least 50% of the employees on the roll of voters vote and more than 50% of votes cast approve the action.

Only industrial action taken by employees who were balloted (and their unions) is protected. To be protected, the action must be taken within 30 days of the date the results of the protected action ballot were declared, unless an extension has been granted by FWA.

Pay during protected industrial action

An employer is prohibited from paying wages during industrial action, but only for the duration of the action. There is no longer a minimum 4 hours deduction of wages.

In the case of partial work bans, the employer has the option of paying wages, advising it won't pay wages or advising employees that it will pay a percentage of wages. Unless the employer gives notice of a reduction in pay or refusal to accept part-performance the employees will be entitled to full pay.

Fair Work Australia can determine if the proportionate reduction is appropriate.

Overtime bans

An overtime ban is not considered industrial action, unless:

- the employer requested or required the employee to work the period of overtime
- the employee refused to work the overtime;
- the refusal was a contravention of the employee's obligations under a modern award, enterprise agreement or a contract of employment

When can protected industrial action be stopped?

FWA must suspend or terminate action within 5 days where the action is threatening to endanger the life, personal safety or welfare of the population or part of it; or to cause significant damage to the Australian economy or an important part of it. FWA, a bargaining representative or the Minister can apply for this order.

FWA may suspend or terminate action where the action has been prolonged, it is causing, or imminently threatening to cause significant economic harm to the employer and employees covered by the agreement, and where the dispute will not be resolved in the foreseeable future. In the case of a lock out, FWA need only be satisfied the action is causing significant economic harm to the employees. FWA, a bargaining representative or the Minister can apply for this order.

If Fair Work Australia terminates industrial action under any of the above grounds, it must make an industrial action related workplace determination (ie arbitrate).

Stopping unprotected action (Stop orders)

Anyone who is affected by unprotected industrial action can apply to FWA to stop the action. FWA must issue a stop order within 2 days. Employees who take unprotected industrial action must have their pay docked for the period of the action, or a minimum of 4 hours.

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