

### Enterprise Bargaining and the Requirements of Good Faith Bargaining

The Fair Work Act ("Act") provides a new framework for bargaining between employers and employees during the process of entering into enterprise agreements. An employer must nominate a bargaining representative (which can be themselves) or if they do not nominate anyone and are a member of a relevant union, the union will become their bargaining representative. It is now possible for unions that acted as a bargaining representative during the negotiations to apply to be covered by the agreement.

The new framework for Enterprise Agreements is based on good faith bargaining. The Act empowers Fair Work Australia ("FWA") to make orders to ensure compliance with the good faith bargaining requirements.

### Bargaining For Single Interest Employers

The main category of bargaining is for single interest employers which include joint ventures, common enterprises, and related bodies corporate and employers specified in a single interest employer authorisation or declaration. A single interest employer authorisation or declaration can be made to bring certain types of employers with a strong commonality of interest (such as franchisees of the same franchisor, or employers who receive substantial public funding) into this stream, but only where those employers seek to be allowed to bargain together.

In the single interest bargaining stream, employees have the right to take protected industrial action. Employees may only take protected industrial action where they are genuinely trying to make agreements at the enterprise level.

### Majority Support Orders

The Act provides that where an employer refuses to bargain with its employees, an employee bargaining representative can ask FWA to determine if there is majority employee support for negotiating an Enterprise Agreement. If so, the employer will be required to bargain collectively with its employees in "good faith".

### Scope Orders

FWA may make a scope order if it is satisfied that bargaining for a proposed enterprise agreement is not proceeding efficiently or fairly and the agreement will not cover appropriate employees or will cover employees not appropriate for the agreement to cover.

### Good Faith Bargaining Orders

The FWA sets out good faith bargaining requirements that a bargaining representative for a proposed Enterprise Agreement must meet, including:

- Attending and participating in meetings at reasonable times;
- Disclosing relevant information;
- Responding to proposals;
- giving genuine consideration to the proposals of the other party and giving reasons for responses to those proposals; and
- Refraining from capricious or unfair conduct that undermines the process.

The FWA specifies that the good faith bargaining requirements do not require a bargaining representative to make concessions during bargaining or to reach agreement on the terms that are to be included in the agreement. Parties are entitled to take a tough stance in negotiations.

Where a negotiating party ignores good faith bargaining orders, the other party may apply to FWA to intervene and to make a workplace determination. The Act hopes this will ensure that there is no advantage to be gained by not complying with the law.

### Multi-Employer Bargaining

The Act provides that where employees or employers genuinely wish to bargain on a multi-employer basis, they will be free to do so. Protected industrial action and good faith bargaining orders are not available in these circumstances. The Act provides that it is unlawful to coerce an employer to make a multi-employer agreement or to discriminate against the employer if they have not made a multi-employer agreement.

### Bargaining - Low Paid Employees

The Act provides for a special low paid bargaining stream. Protected industrial action is not available, but FWA have the obligation to facilitate the making of agreements including a discretionary power to convene conferences, to help identify productivity improvements to underpin an agreement and generally guide the parties through the negotiating process.

The FWA provides for the possibility of a workplace determination in the low paid stream in two circumstances:

- By agreement; or
- If there is no reasonable prospect of an agreement being made then subject to strict criteria including that there is no Enterprise Agreement in place and that the employment conditions of the employees are substantially those set out in the National Employment Standards. When making a determination, FWA must consider how productivity in the business may be improved and the need to maintain the competitiveness of the employer.

### Representation In Bargaining

The Act provides that employees may nominate themselves, another person, or their union as their bargaining representative. If the employee does not nominate someone and they are a member of a relevant union, that union becomes their bargaining representative. Employers may also appoint a bargaining representative.

### Conclusion

Ferguson Cannon Lawyers are experts in all aspects of employment law. Please contact Tony Pattinson to discuss any queries on the bargaining requirements or any other provision of the Fair Work Act.