MTA Employment Relations Fact Sheet

Fair Work Act 2009 – Enterprise Agreements and Bargaining in Good Faith

Updated October 2013

From 1 July 2009 an Enterprise Agreement can now include all matters that "pertain to the employment relationship". This broadens the scope of content for agreements to all the issues previously accepted by the Commission and available prior to WorkChoices.

Types of agreements

- **Single enterprise agreements** – Between a group of employees and an employer or 'single interest employers.'
- **Multi-enterprise agreements** – Between two or more employers and groups of their employees.
- **Greenfields agreements** – For a genuine new enterprise (before employees engaged) with union involvement.

Representation

In workplaces where one employee is a union member (unless the employer is otherwise advised by the employee in writing) the union will automatically become the bargaining agent of all union members. A union that notifies FWA of certain low paying employers for the purpose of securing a Multi Enterprise Agreement through the Low Paid Bargaining stream will automatically become the bargaining agent for employees whether there are union members or not, unless the employee/s notify in writing of an alternative bargaining agent. Further, there is potential for many bargaining agents to be nominated because employees can individually nominate their own bargaining agent, or they can nominate another bargaining agent, and if there are many unions that have members, those unions are automatically nominated as bargaining agents.

"Better Off Overall" Test

All agreements have to be approved by FWA. From 1 January 2010 the agreement is to be compared against the relevant modern award, and if the employee is "better off overall" then the agreement will be approved. Note that the National Employment Standards or Modern Awards when applicable cannot be reduced/removed/altered by an agreement unless the Standard allows such to occur.

Bargaining and bargaining orders

For the first time in Australian employment law there will be requirements for the parties to bargain "in good faith." A bargaining representative, after raising its concerns with the other party in writing

to no avail, may seek these orders from FWA when it considers that the other party is not meeting the "good faith bargaining requirements." Bargaining orders may be issued once a majority support order has been granted upon application by a bargaining agent. This takes place by a bargaining agent seeking a ballot or other vote of the employees to determine if the majority of employees support bargaining for an agreement. Once this is achieved and it is alleged the employer is not bargaining in good faith, an order may be sought with the following possible requirements:

- Attend and participate in meetings at reasonable times;
- Disclose relevant information in timely manner;
- Respond to proposals in timely manner;
- Genuinely consider proposals and give reasons for responses given;
- Refrain from capricious or unfair conduct that undermines freedom of association and collective bargaining.

Representatives can apply to FWA for:

- Majority support determination- where employer does not agree to bargain with its employees such an order from FWA would then require an employer to commence to bargain in good faith
- Bargaining order – specifies actions required for parties to meet the requirements of good faith bargaining
- Serious breach declarations - (For serious and sustained non-compliance with bargaining order)- settle matters within 21 days or FWA must make a determination
- Scope order regarding the appropriate coverage of an agreement
- FWA may also deal with bargaining disputes (dealt with below)

Limiting Exposure to Bargaining

A union must be appointed a bargaining agent for most agreements. Therefore maintaining good relations with employees will minimise union activity. MTA Employment Relations suggests members adopt the following approach:

- Quality management practices that may include regular appraisals of employees with appropriate monetary rewards.
- Regular meetings with employees individually or in small groups maybe on department lines to promote communication and the raising of concerns so there is no need for employees to seek outside assistance.
- Where an employer receives Individual or collective claims, where commercially possible and reasonable, employers should seriously consider making a local agreement.
- Any such local agreement should gain a commitment from employees to no further claims for the period of the agreement and any further claims will invalidate agreed future increases and/or make existing agreements and commitments null and void.

Note: The Fair Work Act provides that employers can say "no" but can be forced to negotiate with legal strike action

Negotiating Strategy

MTA Employment Relations suggests the following approach if a bargaining agent has been appointed and claims received, members should appoint a bargaining agent such as the MTA to represent them and manage the process. The following actions may be appropriate:

- Actions may include meetings with employees to determine issues and respond pre-emptively by meeting employee demands at an early stage – this could include a no further claims commitment
- Oppose majority support bargaining orders and protected industrial action
- Examine and consider claims – responding to each demand expecting a productivity improvement
- If the claim has no validity or will not productively add value to your business reject the proposal
- Set reasonable timelines that accord with your business needs
- Insist upon employee input for those not represented – broaden scope of employee coverage of the proposed agreement to minimise the chance of a majority support order forcing you to bargain
- Constant contact with MTA Employment Relations during the process – use FWA – bargaining in good faith is a two way street

Arbitration

It will be open to parties seeking an enterprise agreement through the general bargaining stream to ultimately agree to have unresolved issues arbitrated. Only a Full bench of FWA will be able to make a workplace determination for an enterprise agreement. See also discussion below on "Bargaining related workplace determinations".

Low Paid Bargaining stream Multi Enterprise Agreement

The legislation introduces a new "low pay bargaining stream" which allows a bargaining representative, to rope-in a number of enterprises paying near award rates and/or that have not previously entered into agreements, into a bargaining process. In such circumstances FWA will actively participate to promote bargaining. Through this process the parties jointly may agree to arbitration; or in the case of a "special low-paid determination" when after all reasonable attempts to reach agreement have failed the FWA may make a workplace determination but must have regard to the promotion of productivity, efficiency, competitiveness of the enterprise/s and the public interest.

The purpose of this bargaining stream is to assist and encourage low paid employees and their employers to collectively bargain. A bargaining representative must obtain a low- paid authorisation which allows them access to the low-paid multi-enterprise bargaining stream.

It should be noted that employers may not be "coerced" into agreeing. This could be a basis to oppose such determinations on an individual employer basis.

The role of the FWA will assist bargaining representatives with mediation, conciliation, making recommendations, compulsory conferences, and directing third parties. This again is a two way street so members should contact the MTA Employment Relations for assistance.

Low paid bargaining strategy

MTA Employment Relations recommends:

- If a union approaches a range of employers in a location such employers need to appoint an agreed bargaining agent such as the MTA Employment Relations to manage the process
- Employers must not ignore such claims or reject out of hand, rather appropriate evidence will need to be prepared to oppose a low-paid bargaining authorisation, prove coercion, – prove no genuine effort to negotiate
- Oppose the making of a workplace determination – essentially a local award

Industrial action related workplace determinations

In the circumstances of damaging industrial action where FWA has terminated the negotiation period or following a Ministerial declaration stopping industrial action. Such situations may occur when industrial action is protracted and public interest issues arise, including employer or employee economic hardship.

Bargaining related workplace determinations

Where a "serious breach declaration" regarding a failure/s to comply with a bargaining order (often arising out of failure to bargain in good faith) has been made by a bargaining agent/s, FWA can make a "bargaining related workplace determination". Any determination by FWA must take into account the merits of the case, interests of employers and employees, public interest, how productivity might be improved, extent of reasonable conduct by bargaining representatives, extent to which good faith bargaining has been applied and incentives to continue to bargain into the future.

NOTE: This system assumes that if "good faith bargaining" is applied then it will bring about enterprise agreement outcomes.

Industrial action

Industrial action is illegal or unprotected unless the following applies:

- Protected action has been sought by a bargaining agent and remains available only whilst bargaining for an enterprise agreement
- Pre-condition - the participants are trying to "genuinely" reach agreement
- Orders may be sought to stop protected action if significant economic harm to the employer or endangering life

Employee industrial action:

- Employee claim action or employee response action
- Performance of work in a different manner
- A ban, limitation or restriction on the performance of work
- A failure or refusal to attend or perform work

Employer industrial action:

- Limited to lock-outs
- Only protected where lockouts are in response to employee industrial action
- Bans/limitations – may reduce pay with written notice
- Must withhold pay for period of industrial action

Approval of agreements

A bargaining agent or employer must apply to Fair Work Australia within 14 days of the making of an agreement.

Approval requirements include:

- Genuinely agreed (21 days' notice to employees of right to be represented by bargaining agents and access to proposed agreement)
- Employer may not be "coerced" in a multi enterprise agreement
- Does not contravene National Employment Standards (from 1 January 2010)
- Passes the "better off overall test" (from 1 January 2010- against relevant modern award)
- Scope of employees to be covered by the agreement to be fairly chosen

Agreement variations and terminations

The following steps must be followed:

- Must be approved by majority of employees covered by the agreement
- Variations must also be lodged within 14 days and approved by Fair Work Australia
- Terminations must be approved by Fair Work Australia at any time during operation if employers and employees agree to terminate. After nominal expiry date- employer, employee or employee organisation may apply to FWA to terminate.

Members who require further assistance utilising this information should contact MTA Employment Relations on (02) 9016 9000.