THE FAIR WORK ACT REVIEW AND KEY DEVELOPMENTS IN ENTERPRISE BARGAINING

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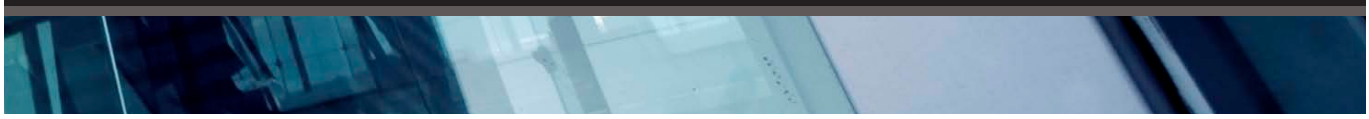
By Anthony Forsyth & Val Gostencnik



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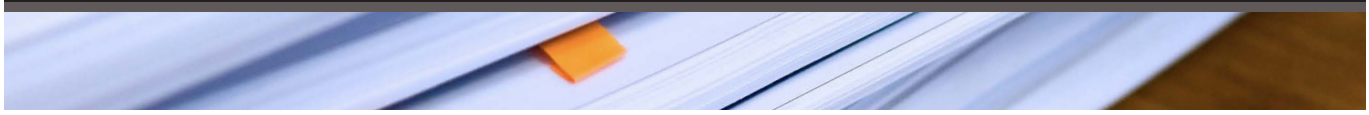


The first few months of 2012 have seen much activity on the part of unions, employers and business groups on two fronts: making submissions to the independent Review of the *Fair Work Act 2009* (Cth) (**FW Act**), and continuing to utilise the legislation's bargaining and protected action framework in novel and interesting ways.

In this paper, we provide an update on the progress of the FW Act Review,[1] and a round-up of some significant recent decisions dealing with enterprise bargaining and protected industrial action (**PIA**).

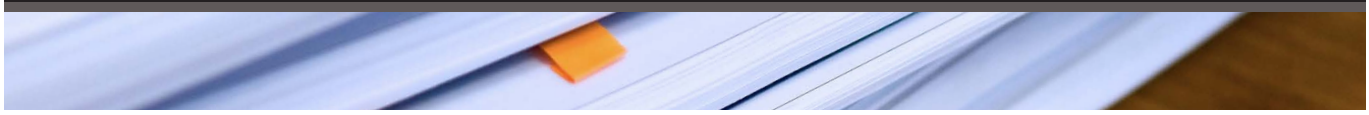
FW Act Review – The Process and Submissions

The independent Review Panel appointed by the federal Government has now received 194 written submissions, and 38 submissions in reply (these may be accessed here).

The following are some of the key concerns about the operation of the FW Act highlighted in submissions to the Review by employer organisations (including the Australian Chamber of Commerce and Industry (**ACCI**), Australian Mines and Metals Association (**AMMA**), Australian Industry Group (**Ai Group**) and Business Council of Australia (**BCA**)):

- The 'veto' power exercised by unions over the making of greenfields agreements for new projects, especially in the resources and construction sectors. Ai Group wants employers to have the ability to negotiate a greenfields agreement with any eligible union, while AMMA and BCA suggest that the good faith bargaining (**GFB**) requirements should be extended to greenfields negotiations.
- Mandatory union involvement in negotiating enterprise agreements, often disproportionate to the level of union membership in the workplace. Ai Group wants to return to a 'voluntary' enterprise bargaining system, without any provision for the making of bargaining orders, majority support determinations (**MSDs**), scope orders or other forms of intervention by Fair Work Australia (**FWA**).
- Impediments to obtaining productivity/efficiency improvements through enterprise bargaining. ACCI argues that agreements should be tested by FWA not just against the 'better off overall test', but also whether they include productivity trade-offs for any improvements in wages and conditions.
- The inability to use individual flexibility agreements (**IFAs**) to negotiate genuine flexibility arrangements under awards and agreements. AMMA contends that employers should be able make IFAs with employees prior to their commencing employment, and IFAs should operate for a fixed period of up to four years.

1 For background on the objectives and terms of reference for the FW Act Review, see our earlier In Brief at: http://www.corrs.com.au/publications/corrs-in-brief/what-to-expect-from-fair-work-review/.



- The expanded subjects of bargaining, with unions frequently making claims (and taking PIA in support of claims) for restrictions on the use of contractors, outsourcing, and business reorganisation. Ai Group wants these kinds of issues to included within a broader definition of 'unlawful terms' in enterprise agreements.
- The increased likelihood of employees/unions taking PIA during bargaining (the latest ABS industrial disputes data confirm the perception of greater resort by unions to industrial action in 2011,[2] although it should be noted that there has also been an increase in the incidence of employer lockouts). Ai Group and ACCI propose changing the definition of the 'genuinely trying to reach agreement' requirement for obtaining a protected action ballot order (**PABO**) and taking PIA, so that industrial action is only utilised as a last resort.
- The increasing burden of general protections claims. Ai Group suggests that the reverse onus of proof applicable in general protections cases should be removed, a 14-day time limit should apply to the bringing of all general protections claims, and such claims should be subject to the same limit on compensation as applies to unfair dismissal claims.
- The ongoing practice of employers having to pay 'go away money' to settle unmeritorious unfair dismissal claims. ACCI wants conciliation proceedings in unfair dismissal matters to be conducted by FWA members (rather than the current telephone conciliation process).

Many employer submissions also raised problems about the practical operation of aspects of the National Employment Standards, and modern awards. However, the latter fall outside the scope of the Review, and will be addressed in the modern awards review process currently being conducted by FWA (click here for more information).

For their part, the Australian Council of Trade Unions (**ACTU**) and a number of unions highlighted, in their submissions, the following main areas where they consider changes to the FW Act are necessary:

- Expanding the possible subjects of bargaining, to ensure that all matters affecting employees' social and economic interests can be included in enterprise agreements, especially provisions relating to job security.
- Greater powers for FWA to arbitrate when bargaining is deadlocked, implementing the ACTU's policy to allow arbitration where an employer is 'surface bargaining', or in negotiations for a first collective agreement. The Australian Manufacturing Workers Union calls for the introduction of 'majority support arbitration', ie: 'where bargaining is either prolonged (for example, beyond 120 days), or where a bargaining representative has failed to bargain in good faith, we propose that a majority of employees to be covered by an agreement can vote to require FWA to arbitrate the content of a proposed agreement.'
- Clearer articulation of what constitutes both good and bad faith conduct in agreement negotiations, eg the use of replacement labour by an employer during a bargaining dispute should constitute a breach of the GFB obligations.
- Requiring employers to give three days' notice of a lockout, and removing the ability of employers to object to the granting of PABOs by FWA.

The Review Panel is currently holding a series of consultation meetings with industrial relations stakeholders, and must provide a report and recommendations for any legislative changes to the Government by 31 May 2012.

2 Australian Bureau of Statistics, Cat. No. 6321.0.55.001, Industrial Disputes, Australia, December 2011.

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FW Act Review – Outcomes

The terms of reference require the Review Panel to assess the operation of the FW Act, and whether its effects have been consistent with the objects stated in section 3 of the legislation. The Panel must also make recommendations about areas where the operation of the FW Act could be improved.

As to the possible outcomes of the Review process, these depend on three key factors:

1. What the Review Panel recommends – this is the hardest factor to make any predictions about, as the three panel members are quite independent-minded.
2. The Government's response to the Panel's recommendations – it is likely that the Government would want to ensure that any proposals for legislative amendments are perceived as balanced (ie not favouring union over employer interests, or vice versa). On that basis, likely proposed changes include:
    - some response to employer concerns about greenfields agreements (recent changes to the Construction Industry Code Guidelines, making project agreements easier,[3] provide a further indication of possible action in this area);
    - easier access to arbitration in protracted disputes (which some employers have also pressed for) – although questions remain as to how to make mandatory arbitration fit within a system premised on agreement-making;
    - a GFB 'Code' or similar mechanism to address the limited impact of the good faith requirements to date;
    - some relaxation of the procedural restrictions on entering into IFAs.

    It is less likely that we will see proposed changes to the agreement content rules or any new constraints on the ability of unions to take PIA.
3. The prospects of getting any legislation through the delicately-balanced federal Parliament. It is clear that the Greens would not agree to any proposals that seem 'anti-union',[4] while the independents in the lower house are unlikely to pass amendments that significantly elevate union over business interests.

3 See Department of Education, Employment and Workplace Relations, *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry*, May 2012, at: http://www.deewr.gov.au/WorkplaceRelations/Policies/BuildingandConstruction/Pages/NationalCodeandGuidelines.aspx.

4 See eg Adam Bandt MP's private member's bill currently before the Parliament, the *Fair Work (Job Security and Fairer Bargaining) Amendment Bill 2012*, which seeks to respond to the Qantas dispute by amending the FW Act to (among other things) require employers to give three days' notice of a lockout or operational changes preparatory to a lockout (such as Qantas's grounding of its world-wide fleet on 29 October 2011), see: http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber%2Fhansardr%2Fdfa1725a-aa28-48db-ba56-7995bad31f8c%2F0093%22.

Developments in Enterprise Bargaining

Good Faith Bargaining

Applications to FWA for orders to enforce the GFB obligations in section 228 have featured in several recent high-profile disputes. For example, both the Victorian Hospitals Industrial Association (**VHIA**) and the Australian Nursing Federation (**ANF**) applied for bargaining orders at various stages of the Victorian nurses' dispute:

- *VHIA v ANF* [2011] FWA 9068: Commissioner Jones found that the union had breached certain 'bargaining protocols' that had been agreed upon in section 240 conciliation proceedings before FWA, by publicly releasing confidential documents. However, it was found that this conduct did not amount to a breach of section 228(1)(e) (the prohibition of capricious/unfair conduct undermining collective bargaining), partly because the union had given an undertaking that the conduct would not occur again.
- *ANF v VHIA* [2012] FWA 285: Commissioner Jones rejected the union's bargaining order application, which was based on allegations including that the VHIA was not sufficiently independent of the Victorian Government to be able to comply with the GFB requirements; and that the VHIA failed to provide information in breach of section 228(1)(b). More significant was the union's claim that the VHIA had sought to delay the negotiations with a view to engineering the circumstances for an arbitrated outcome to occur (in accordance with a leaked Victorian Cabinet document). Commissioner Jones found that the strategy outlined in that document set out a number of options, including arbitration, but also 'an acceptable agreement' as the Government's preferred outcome. Adherence to the strategy did not amount to a breach of the GFB obligations.

Some other recent decisions examining the GFB requirements have addressed the following issues:

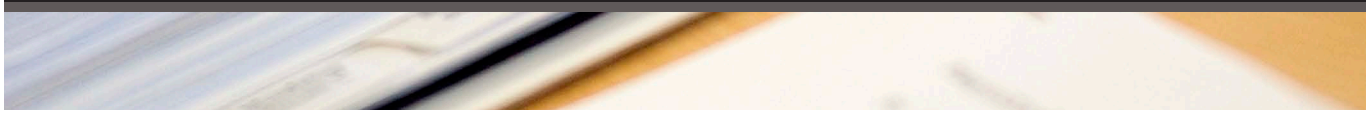
Timing of ballots

- *CFMEU v Baulderstone Pty Ltd* [2012] FWA 1356: an employer was entitled to put a proposed agreement to a ballot of employees, after five months of discussion and seven meetings with the union, even though the union wanted further negotiations. Senior Deputy President Richards observed that: 'It does not appear to me that there is any legislative requirement that the bargaining representatives must reach a mutually agreed impasse or objectively discernible stalemate in the conduct of their agreement negotiations before such time as a proposed agreement may be put to the workforce.'
- Similarly, in *Broken Hill Town Employees' Union v Barrier Social Democratic Club Ltd* [2012] FWA 1096, Vice President Watson endorsed the employer's actions in submitting an agreement to ballot after consulting with all employees and their bargaining representatives (including the union).
- Overall, however, the approach adopted by the Full Bench of FWA in *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 – and in a number of other FWA decisions – indicates that an impasse in negotiations is the point at which an employer is safest in requesting employees to vote on a proposed agreement (despite a union's desire to negotiate further).

Communications during bargaining

- In *Jupiters Limited v United Voice* [2011] FWA 8317, the employer failed to obtain a bargaining order against the union, which had distributed material highlighting the employer's lowest wage offer in the negotiations. Commissioner Asbury found that this information did not amount to misrepresentation by the union, which had done no more than exercise its right as a bargaining representative to criticise the employer's approach in the negotiations.
- This confirms the wide latitude given by FWA to all parties in respect of their communications during bargaining, allowing robust statements to be made in the 'rough and tumble' of negotiations[5] – as long as such communications are not factually inaccurate or a deliberate misrepresentation: see eg *TWU v Veolia Transport Qld Pty Ltd* [2011] FWA 5961, where the employer had put out incorrect information about the rights of employees to take PIA.

5 See eg *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510; *NUW v Patties Foods Limited* [2011] FWA 4103.



Surface bargaining

- In *APESMA v Endeavour Coal Pty Ltd* [2012] FWA 13, Commissioner Roberts upheld the union's complaint that the employer had breached section 228, by refusing to put any proposals of its own or to provide information reasonably requested by the union. In effect, this amounts to a finding (the first made by FWA) that parties cannot engage in 'surface bargaining' under the FW Act, ie going through the motions without ever really intending to reach an agreement.
- A Full Bench of FWA recently upheld Commissioner Roberts' findings: *Endeavour Coal Pty Ltd v APESMA* [2012] FWAFB 1891. In this important decision, the Full Bench determined that the GFB obligations in section 228(1)(d)-(f) go beyond procedural matters: 'In effect, the parties must take reasonable steps and make reasonable efforts towards making an enterprise agreement.' Further, an employer will breach the GFB requirements by engaging in conduct that 'is a mere sham or pretence, such as going through the motions of bargaining without any real intention to enter into an agreement'. FWA is able to make bargaining orders to address an employer's failure to bargain in good faith and to assist the parties to get over an impasse in negotiations. Such orders can include a requirement that a party put its negotiating position (without requiring that the party make any concessions).
- The issue of surface bargaining will be tested further in competing bargaining order applications brought by the AMWU and Cochlear (currently before FWA).

Notices of PIA and Applications for 'Stop Orders'

Several decisions dealing with applications to stop or prevent unprotected industrial action (under section 418) remind parties that FWA will closely scrutinise any PIA specified in a notice under section 414, to ensure that it falls within the parameters of the PIA authorised by a secret ballot of employees. For example:

- In *Production Services Network Pty Ltd v AWU* [2012] FWA 1200, Senior Deputy President Watson held that the PIA notified by the union (seven consecutive 24-hour stoppages), came within the ballot question asking employees to authorise: 'organising and/or engaging in separately, concurrently and/or consecutively ... an unlimited number of stoppages of work for a duration of 24 hours'. The fact that the combined effect of the seven 24-hour stoppages was a one-week stoppage did not alter its character as seven separate stoppages; therefore, no section 418 order was issued.
- *ASC Pty Ltd v AMWU* [2012] FWA 418: Commissioner Steel found that action taken by supervisory employees was not within the PIA endorsed in the ballot, ie 'an indefinite ban on the use of the [employer's] bar-coding system for any other purpose than employee time collection'. The supervisors sought to implement their ban by also refusing to provide information that would have enabled other employees to utilise the bar-coding system. This was considered to be an attempt 'to effectively stop others using the system'; a three-month stop order was issued to prevent the taking of industrial action not authorised by the ballot.

Interaction of PIA and GFB

In *FWA v Union of Christmas Island Workers; Phosphate Resources Pty Ltd* [2012] FWA 1081, Commissioner Cloghan issued a stop order under section 418 in respect of both the union's PIA and the employer's lockout, on the basis that the parties had not been bargaining in good faith. It was found that a bargaining representative could not be genuinely trying to reach agreement if they were not bargaining in good faith.

This decision is a departure from FWA's approach (to date) to the interaction between the GFB requirements and rights to take PIA, in which both processes are regarded as legitimate features of the bargaining framework under the FW Act.[6] As a result, the taking of PIA is not generally regarded as a breach of the GFB requirements. Further, the requirement to genuinely try to reach agreement should not be conflated with the obligation to bargain in good faith.[7]

Given the weight of authority on these issues, employers would be well-advised not to seek a section 418 order on the basis that a union (or employees) have taken PIA 'prematurely' and/or are not bargaining in good faith.

6 See *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2010] FWAFB 9963; *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia* [2011] FWAFB 3377.
7 *Transport Workers Union of Australia v CRT Group Pty Ltd* [2009] FWA 425.

Suspension or termination of PIA

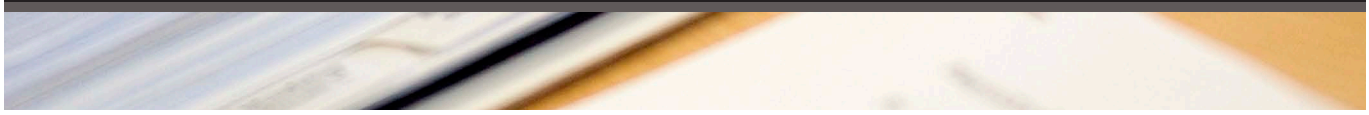
Since the Qantas dispute, applications to FWA to suspend or terminate PIA have been more frequent – as termination provides one of the avenues to arbitration (ie the making of an industrial action related workplace determination by FWA under section 266, if the parties are unable to reach agreement during the 21 (or 42)-day negotiating period following termination).

Significant economic harm to the bargaining parties: section 423

- In *POAGS Pty Ltd v MUA* [2012] FWA 114, Commissioner Cloghan dismissed the employer's application to suspend PIA for 120 days, or terminate it. Under section 423(2), FWA had to be satisfied that the 48-hour stoppage and unlimited work bans imposed by employees were causing (or threatening to cause) significant economic harm to the employer and any of the employees. It was found that any harm being suffered by the employer was partly a result of its own decision not to accept the performance of any labour that was subject to the bans. Further, the employer had not led any financial evidence to prove the harm that was being caused (or threatened), so that FWA was unable to form the view that such harm would be 'significant' as required by section 423.
- *Schweppes Australia Pty Ltd v United Voice* [2011] FWA 9329: Senior Deputy President Kaufman initially rejected the employer's application under section 423 to terminate its own lockout. In this instance, FWA had to be satisfied under section 423(3) that the PIA was causing/threatening significant economic harm to any of the employees. The employer led economic modelling evidence that showed the likely economic impact on employees of receiving no income due to a 5-6 week lockout. Senior Deputy President Kaufman was persuaded by this evidence, to some degree; however, he was also presented with a petition signed by a clear majority of the employees opposing the ending of the lockout: 'That the very employees who are losing income oppose the termination of the lockout is a powerful factor against exercising my discretion in favour of Schweppes.'
- Almost two months later, Senior Deputy President Kaufman granted Schweppes' second application to terminate its lockout under section 423. This time, the application was supported by the union and the employees, with evidence showing that after a 58-day lockout, the workers had lost (on average) around 20% of their annual wages. Based on an agreement reached between the parties to enter into arbitration (after the expiry of the 21-day negotiating period), Senior Deputy President Kaufman took the view that termination of the lockout would lead to a resolution of the bargaining impasse (*Schweppes Australia Pty Ltd v United Voice*, decision on transcript, 10 February 2012).

Harm to the community, or to the Australian economy: section 424

- In *VHIA v ANF* [2011] FWAFB 8165, a Full Bench of FWA suspended (for 90 days) PIA being taken by nursing staff which had had the effect of closing 969 beds and postponing 311 elective surgery cases across the Victorian public health service. In finding that the ground of suspension in section 424(1)(c) (industrial action threatening life, personal safety, or the health or welfare of the population) was made out, the Full Bench observed that: 'Conduct that delays or puts off the efficient supply of public health services has the capacity to impact adversely upon the welfare of at least some of the persons who require those services. The impact of the conduct must, however, be more than merely to cause inconvenience to the persons concerned - it must be such as to expose them to danger.' The Full Bench accepted that there was 'substantial evidence about the serious impact' of the nurses' action on the safety, health and welfare of some patients, which was likely to continue.
- The decision in *VHIA v ANF* [2011] FWAFB 8165 also illustrates that, where the section 424(1)(c) ground is made out, FWA will suspend – rather than terminate – PIA, if a suspension will provide the parties with a basis to continue negotiating (possibly with the tribunal's assistance). However, FWA will terminate PIA where it forms the view that nothing will be gained from a suspension, and there is no real prospect of an agreement being reached: see *State of Victoria v CPSU* [2011] FWA 9425.
- Having PIA suspended or terminated under section 424(1)(d) – action threatening to cause significant damage to the Australian economy (or an important part of it) – is more difficult than under the 'community harm' ground. In *Application by Minister for Tertiary Education, Skills, Jobs and Workplace Relations* [2011] FWAFB 7444 (the *Qantas*



decision), the Full Bench found that sustained PIA by the three airline unions over many months was 'unlikely …, even taken together, [to be] threatening to cause significant damage to the tourism and air transport industries …'. It was only Qantas's proposed lockout of employees that formed the basis for the Full Bench's decision to terminate all PIA, demonstrating the extreme circumstances that will be necessary to obtain a suspension or termination of PIA under section 424(1)(d).

Bargaining and PIA – Lessons for Employers

1. Employers need to be very clear about:
    - who their bargaining representatives are in agreement negotiations – and the relationship between bargaining representatives and third parties who may influence bargaining outcomes (eg funding bodies);
    - who will be bound by any agreed bargaining protocols, and the reach of any confidentiality commitments made.
2. Be careful with the timing of submitting an agreement to a ballot of employees – don't end negotiations precipitously, or breach any commitments to continue discussions with a union.
3. Communications with employees during bargaining can be robust, and an employer can put its strongest position – but communications must not be factually inaccurate, for example don't mislead employees about their rights to take PIA (as well as the potential for bargaining orders, there are risks under the General Protections provisions[8] in doing so).
4. Be sure to respond properly to a union's claims in the negotiation process, and to put the employer's position/proposals for terms to be included in the agreement. Failure to do so could result in a finding that the employer has not made a reasonable effort to reach agreement, in breach of the GFB requirements.
5. When making an application for suspension or termination of PIA under section 423 or section 424:
    - ensure that you have evidence in support of the relevant ground for suspension/termination – where economic harm or damage is being alleged, you will need solid financial evidence of the adverse impact of PIA on the business/operation;
    - don't take any action that undermines the argument for suspension/termination, by contributing to the harm that it is alleged is being suffered (eg refusing performance of work that is subject to bans).
6. Before positioning for arbitration, carefully weigh up the potential risks and benefits – can you live with an adverse outcome on *any* of the outstanding issues?

8 FW Act, Part 3-1.

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