

Rights and Powers of Unions in the Bargaining Process

By Tracey Jessie, Partner

At our employment law seminar earlier in the year, we promised our attendees information in relation to the rights and powers of unions under *the Fair Work Act 2009* (Cth) (the "*Fair Work Act*"). We are pleased to now provide this in our summer newsletter to clients and contacts.

The bargaining process

The term "bargaining" describes the process through which employers and employees negotiate the terms and conditions of an enterprise agreement. Generally, the bargaining process will begin when the employer agrees to or initiates bargaining. This is known as the "notification time".

Employers and employees may be represented in the bargaining process by a "bargaining representative" under the *Fair Work Act*.

The employer must notify employees of their right to be represented by a bargaining representative as soon as practicable, and not later than 14 days after the notification time (that is, not later than 14 days after the employer agrees to or initiates bargaining). To notify employees of their right to be represented by a bargaining representative, the employer must complete a "Notice of Employee Representational Rights" form, which is located in Schedule 2.1 of the *Fair Work Regulations 2009* (Cth).

If an employer decides not to enter into a bargaining process with its employees, the employees or their bargaining representatives may seek a determination from Fair Work Australia as to whether there is majority support within the workplace for the bargaining process. Fair Work Australia will then ascertain whether there is majority support for the bargaining process by whatever means it considers appropriate. If it concludes that there is majority support for the bargaining process, Fair Work Australia may, in effect, order the employer to bargain with the employees.

Bargaining representatives

There are a number of avenues for the appointment of bargaining representatives on behalf of employees.

An employee may nominate, in writing, a bargaining representative who may be a colleague, a union or another person.

The employee may be the bargaining representative themselves, although the employee is required to nominate themselves as a bargaining representative in writing under the *Fair Work Act*.

If any union (called an "employee organisation" under the *Fair Work Act*) has a member who would be covered by the enterprise agreement, the union is automatically a bargaining representative, unless the member has specified in

writing that they do not wish to be represented by the union. Unions will be, in effect, default bargaining representatives who will be entitled to be involved in the bargaining process unless expressly excluded by the member employee. That is, an employee who is a member of a union will be automatically represented in the bargaining process by their union unless:

- the employee has nominated another bargaining representative; or
- the employee has provided written notice that they do not wish to be represented by the union.

Good faith bargaining

One of the significant changes under the *Fair Work Act* is the requirement for bargaining representatives to bargain in good faith. If you attended our seminar, you may recall that we discussed this.

The stated purpose of the good faith bargaining provisions of the *Fair Work Act* is to encourage the parties to communicate openly. The *Fair Work Act* lists good faith bargaining obligations for all bargaining representatives, including:

- attending and participating in meetings at reasonable times;
- disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;
- responding to proposals made by other bargaining representatives in a timely manner;
- giving genuine consideration to the proposals of other bargaining representatives and giving reasons for the bargaining representative's responses to those proposals;
- refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- recognising and bargaining with the other bargaining representatives.

The good faith bargaining obligations do not require a bargaining representative to make concessions or to agree to include particular terms in the enterprise agreement.

If a dispute arises between the parties based on allegations that the bargaining is not being conducted in good faith or is not proceeding efficiently or fairly, a bargaining representative may apply to Fair Work Australia for assistance. If Fair Work Australia determines that there has been a breach of the good faith bargaining obligations, it may make bargaining orders which could, if necessary, be enforced by the courts. If there is a serious and sustained breach of the bargaining orders by a bargaining representative, Fair Work Australia may arbitrate the matter by making a workplace determination.

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