Your *Partners* in Workplace Law

Strateg-Eyes: Workplace Perspectives

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The Industrial Relations Edition

A message from our Managing Principal

The recently released review of the Fair Work Act was, while comprehensive, disappointingly light-on as to the critical issues of concern for employers at present.

One can only hope that the real issues can be properly debated in the lead-up to the next Federal election. We can safely assume that some of the issues in bargaining and the making of agreements will be ventilated in that debate and it is timely that we have dedicated this issue of Strateg-Eyes: Workplace Perspectives to "IR". Our firm's approach to IR is, as it is in all things, innovative and deliberately refreshing: we think the days of the IR club are long gone and our lawyers are advisers and business partners who integrate traditional IR problem-solving into a modern employee engagement and broader cultural framework.

Our firm was recently successful in acting for Mars Australia's Chocolate business in Australia in having its Enterprise Agreement approved by Fair Work Australia and creating ground-breaking law in the procedural aspects of making an Agreement, once again confirming our standing as experts in industrial relations litigation. Recent discussions with clients have highlighted a capability gap in the market of providers who can do more than the operational issues of IR law and advice.

If you are looking for genuinely strategic advice that marries up your IR strategy with your overall people strategy give me or one of my fellow Directors a call and we will tell you clearly what we think.

Joydeep Hor, Managing Principal ●

A Word on Webinars

If you missed our last webinar on *Enterprise Agreements: pros and cons* and would like a copy of the recording please email Sophie Simonsen at sophie.simonsen@peopleculture.com.au (there is a small cost for non-PCS clients).

We also invite you to join our next webinar on ***Issues in Executive Employment*** **on Tuesday, 4 September 2012 at 12pm** which is being hosted by Kathryn Dent, Director. ●

Fair Work Act Review

In what is a timely development for this Industrial Relations issue, the review of the Fair Work Act, Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation, was released on 2 August 2012.

The review makes 53 recommendations, some of which, if legislated as amendments to the Fair Work Act, will have an impact on bargaining and agreement making.

Key recommendations include allowing Fair Work Australia to initiate compulsory conciliation where bargaining has stalled (including for greenfields agreements), prohibiting "opt out" clauses in enterprise agreements that currently allow employees to remove themselves from agreement coverage, and requiring enterprise agreement flexibility terms to include the model flexibility term as a minimum requirement. ●

The Government is currently considering the review and we will keep you up-to-date via our Strateg-Eyes: Alerts.

Inside this issue:

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"Direct dealing" – employers' obligations under the Fair Work Act

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A number of the cases before Fair Work Australia ("FWA") alleging breach of the "good faith bargaining" obligations in s 228 of the *Fair Work Act 2009 (Cth)* ("FW Act") have involved union complaints that employers have communicated directly with employees about a proposed enterprise agreement, instead of working only through the union bargaining representatives.

These complaints of "direct dealing" misconceive the FW Act's enterprise bargaining framework.

Unlike enterprise bargaining in the United States, where a collective bargain is struck between an employer and the single trade union that has secured the right to represent the entire workforce, enterprise bargaining under the FW Act requires the employer to make an enterprise agreement directly with employees. Under the FW Act there are no longer any agreements (apart from greenfields agreements[1]) made between employers and unions. Agreements must be voted up by a majority of the employees. Unions will only become parties to enterprise agreements if they specifically request to be named as a party when FWA approves the agreement.

Unions play an important role in the Fair Work bargaining system as bargaining representatives, but ultimately agreements are made directly with employees, and employers must be mindful of their obligations to inform employees directly of the content of any proposed enterprise agreement, and the arrangements for voting. It is useful to think of enterprise agreement-making as a two stage process: the bargaining phase, and the agreement-making phase.

Employers' obligations during bargaining

In the bargaining phase, it is the employer's responsibility to take all reasonable steps to notify employees of their right to appoint a bargaining representative for the purpose of negotiating the terms of an enterprise agreement. The employer must give this notice no more than 14 days after the employer has initiated bargaining, or agreed to bargain. So even if the employer begins to engage in enterprise bargaining only because it has been asked to do so by a union, or because it has been ordered to do so by FWA issuing a majority support determination,[2] it is still the employer's responsibility to notify all employees of their right to appoint a bargaining representative.

Every employee has a right to appoint his or her own bargaining representative. Even employees who are members of trade unions are entitled to appoint a different bargaining representative if they wish. The union will be their default bargaining representative if they make no explicit appointment.

It has become more common since the commencement of the FW Act for employers to bargain with a number of different bargaining representatives. For example in *Qantas Airways Ltd* [2011] FWA 3632, the employer bargained with the Australian Services Union, and also with a separate group of part-time employees based in Brisbane, who were represented by two individual bargaining representatives, in order to reach an agreement covering flight attendants. The independent bargaining representatives unsuccessfully challenged approval of the agreement on a number of grounds. Fortunately for Qantas, it was able to demonstrate that it had bargained in good faith with all representatives in order to secure approval of the agreement. In *Bowers v Victorian Police* [2011] FWA 2862, the Victorian Police department was required to bargain with the Police Federation of Australia, and also with Sergeant Richard Bowers who represented himself and another 132 police prosecutors.

The good faith bargaining obligations in s228 require that all bargaining representatives (including employees, unions, and any other person appointed as a bargaining representative) engage cooperatively in negotiations for an agreement. An employer cannot exclude any bargaining representative from negotiations, and cannot act in a way that undermines employees' rights to freedom of association. However that does not mean that employers cannot speak directly to their staff during negotiations for an enterprise agreement. The Full Bench decision in *CFMEU v Tahmoor Coal Pty Ltd* [2010] FWAFB 3510 at [29] makes it clear that so long as the employer does not seek to mislead or deceive employees, and puts forward the same information as has been provided to bargaining representatives, it will not be a breach of the good faith obligation for an employer to hold its own meetings

[1] A "greenfields agreement" is made before any employees are engaged at a site. Greenfields agreements can be made by an employer with a union or unions who are entitled to represent the industrial interests of the occupations who will be engaged when the site commences operations.

[2] A "majority support determination" is an order by FWA that the employer must agree to bargain collectively with employees, because a bargaining representative has convinced FWA that a majority of employees want to engage in collective bargaining: s 237.

directly with employees to explain its bargaining position.

Employers' obligations in the agreement-making phase

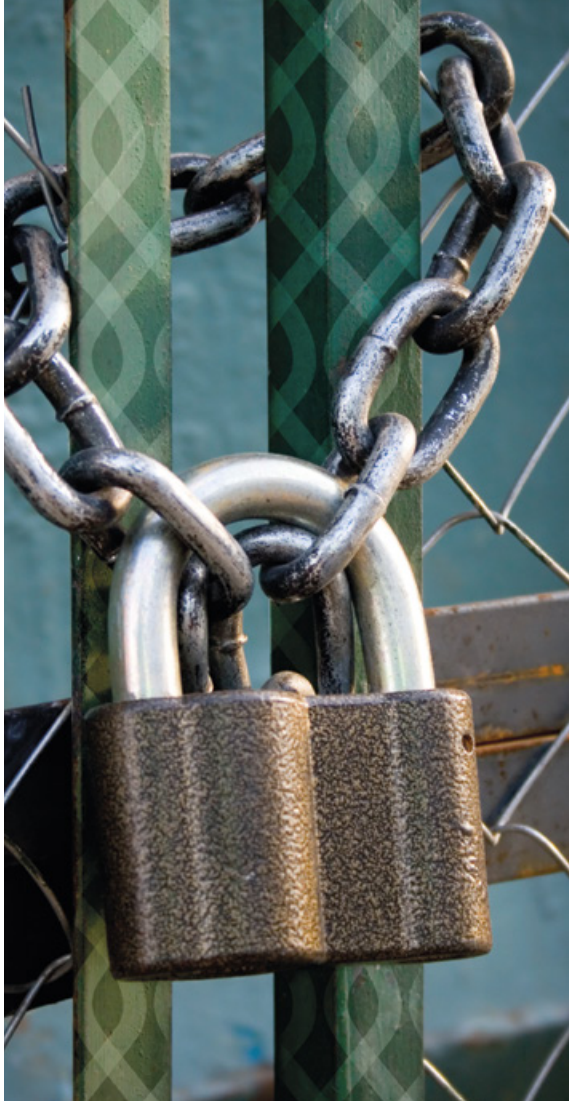
Once negotiations for an agreement are either settled, or have reached an impasse, the employer may put a proposed enterprise agreement to a vote of the employees who will be bound by the agreement. A vote cannot take place until at least 21 days have passed since employees received notice of their right to appoint a bargaining representative. A decision to put an agreement to a vote may be delayed by an FWA bargaining order if a bargaining representative is able to persuade FWA that the employer has not met its good faith bargaining obligations. This occurred in *Alphington Aged Care* [2009] FWA 301 where a nursing home employer put an agreement to a vote of employees without telling the union bargaining representative that it intended to do so. FWA refused to approve the agreement in these circumstances. Nevertheless, so long as the employer has continued to communicate with bargaining representatives and believes that an impasse has been reached, the employer is entitled to put an agreement to a vote of the employees.

Before putting an agreement to a vote, the employer must take reasonable steps to ensure that employees either have a copy of, or access to a copy of, the proposed agreement. Employees must have access for at least a seven-day period before the time that the vote is taken. The employer must also take all reasonable steps to inform employees of when, where and how, the vote will be taken. If employees are on leave during this time, the employer should make reasonable attempts to contact them by mail, phone or email.

The employer also bears the responsibility of taking reasonable steps to explain to employees the terms of the agreement and the effect of those terms. Typically, these explanations will include information about which terms and conditions of employment will change as a result of making the new agreement. These explanations need to be appropriate to the employees' circumstances. The FW Act stipulates that what steps are "reasonable" must take account of language and cultural diversity in the workplace, and the needs of young people. The employer cannot leave it to unions or other bargaining representatives to explain the agreement, although the extent to which an employee has been actively represented by a union will be a circumstance that is taken into account in determining whether the employer has taken reasonable steps to inform those employees.

Clearly, the framework of the FW Act positively requires employers to deal directly with their employees. While it is important that employers respect the role of unions as bargaining representatives, and do not act in ways calculated to undermine the unions' participation in negotiations, ultimately, it is the employer who bears the onus of ensuring that employees are informed at the agreement-making stage. Union representatives also need to appreciate that employers bear these responsibilities under the FW Act. It is a misconception that unions have a monopoly in representing employees in collective bargaining. The Fair Work system is very different in this respect from North American enterprise bargaining systems. ●

Lessons from Qantas: Industrial action available to employers



The grounding of the Qantas fleet, and the lockout of employees at Schweppes in recent times, has highlighted one of the less utilised bargaining strategies that employers can use in countering employee industrial action during enterprise bargaining.

A lockout is considered by many employers as a last resort which can result in significant losses to profitability, negative publicity and the disturbance to relationships with customers and suppliers. Below we examine other options employers can consider when they are not willing to concede to union demands.

1. Withholding Wages

The *Fair Work Act 2009 (Cth)* ("**FW Act**") prohibits employers from making wage payments to employees while they are taking protected industrial action. This obligation applies if an employee refuses to attend for work or refuses to perform any work at all. Prohibition on paying wages during the strike period has often been a disincentive for employees to take strike action. However, more employee organisations are organising industrial action which falls short of a full scale strike. This is known as a partial work ban in which employees stop performing their full range of duties for a short period of time. When employees take part in a partial work ban, an employer has the option to:

- pay employees in full;
- withhold a portion of the employees pay; or
- not pay the employees at all.

Providing employees with partial pay, however, can mean that employees who refuse to do crucial tasks, but which take a short amount of time, will not suffer a significant wage penalty by engaging in industrial action. Employers will therefore need to consider whether it is more appropriate to pay employees partially or not at all during partial work bans.

2. Payments in Kind

As well as withholding wages during industrial action, an employer can withhold various payments in kind. This can be a useful bargaining tool during negotiations. In the recent case of *CFMEU v Mammoet Australia Pty Limited* [2011] FMCA 802 Fair Work Australia ("**FWA**") ruled that employer-provided accommodation was a form of payment which the employer was prohibited from making while the workers were on strike. Employers should carefully review any additional payments in kind they make to employees and consider whether they should be withheld during industrial action.

3. Standing Down Provisions

In addition to the above provisions, the FW Act also allows employers to stand down employees in circumstances where they cannot be usefully employed. In particular, these provisions allow employers to stand down an employee during a period of industrial action. Employers need to ensure that if their workforce is covered by an enterprise agreement they review any stand down provisions contained in it and comply with those provisions instead. In particular, an enterprise agreement may impose more obligations on an employer in relation to consultation and notice prior to a stand down occurring.

Requirements for partial pay

- Written notice must be provided to the employee advising them of the proportion by which their pay will be reduced.
- Where an employee refuses to perform a specific task, an employer may estimate the amount of time employees would usually spend on that task, and reduce the pay by that time.

Requirements for no pay

- Written notice must be provided to the employee advising them that they will not be paid.
- The written notice must also advise the employee that the employer refuses to accept the performance of any work by the employee until the employee is prepared to perform all of their normal duties.

4. Fair Work Australia Orders

An employer who is faced with ongoing industrial action during a bargaining period can also apply to FWA to suspend or terminate the industrial action. However, recent cases suggest that FWA is reluctant to issue such an order unless there are exceptional circumstances.

Qantas grounded its fleet in preparation for a full scale lockout in response to industrial action taken by three trade unions representing licensed aircraft maintenance engineers, baggage handlers and pilots. Partial work bans had been taking place for some time which delayed flights, and due to the lockout, the Federal Government applied to FWA to terminate the industrial action engaged in by Qantas. The Federal Government argued that Qantas' response threatened to cause significant damage to the Australian economy. It was held that Qantas' action did not have to be reasonable, proportionate or rational - the only requirement was that it had a causal link to the employee action.

A decision to lock out employees does have significant legal consequences, including the risk that FWA will move to compulsory arbitration of the industrial dispute and make a workplace determination binding on the parties. Full scale lockouts also cause disruption and attract negative publicity. Most employers consider the lock out provisions a last resort when bargaining has completely stalled and employee industrial action is already disrupting the business.

Dealing with industrial action can be difficult and challenging, and an employer's response to such action should always be carefully considered. ●

In the recent case of *AMWU v McCain Foods (Aust) Pty Ltd* [2011] FWA 6810, maintenance employees went on strike at a McCain Foods manufacturing site. As a result, McCain Foods stood down some of the production employees on the day of the strike. FWA stated that the employees that were stood down could not have been usefully employed as the work they performed would have been of no benefit to McCain Foods and a threat to safe and productive operations.

This case illustrates how an employer can minimise economic loss in situations where only part of the workforce is engaging in industrial action. Standing down other employees may also encourage those striking to return to work.

Five communication tips for employers during Enterprise Bargaining

JOELLEN RILEY,
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MISA HAN,
GRADUATE ASSOCIATE

Some employers are concerned about communicating directly with employees during enterprise bargaining.

Difficulties of communicating with a large workforce, objections from the union and the fear of breaching the good faith bargaining provisions in the *Fair Work Act 2009 (Cth)* ("**FW Act**") are a few of the reasons why some employers prefer to channel their communication through the employee bargaining representatives.

However, as workplaces become more diverse and include members from a number of employee organisations as well as non-union members, it has become important to engage with employees directly. Having a clear communication strategy and being aware of the workplace law in this area will help employers gain employees' trust during bargaining negotiations.

1. Plan and strategise

It is wise to have a clear plan for communicating with employees so as not to alienate employees and their bargaining representatives. In addition, miscommunication or direct dealing with employees could, in some circumstances, result in a good faith order from Fair Work Australia ("**FWA**") and delay the enterprise bargaining process or prompt rejection by FWA of approval on the ground that the agreement has not been "genuinely agreed to". Having a communication strategy for each step in the process, from the initiation of the enterprise bargaining process through to the approval of the agreement, can help an employer communicate more effectively with employees and avoid any legal or practical hurdles.

2. Directly communicate with employees

The introduction of the good faith bargaining provisions in the FW Act raised questions as to whether employers can communicate directly with staff during enterprise bargaining negotiations. Cases such as *LHMU v Mingara Recreation Club*

Ltd [2009] FWA 1442 and *Lourdes Home for the Aged* [2009] FWA 1553 suggest that not only are employers allowed to directly communicate with their employees, but concurrent communication and discussions with employees should be encouraged as a good management practice. However, employers should note that these communications should not be accompanied by a refusal to meet and communicate with a bargaining representative as this could result in breach of good faith bargaining provisions.

Cases such as *CFMEU v Tahmoor* [2010] FWAFB 3510 show that there is scope for employers to directly communicate with employees particularly when there is a long and complex history of negotiation. In this case, the coal company organised a number of meetings with employees during which the company informed the employees about its bargaining position. The company also mailed a package of material to employees' homes, providing further information about its bargaining position. The Full Bench of FWA noted that in the particular circumstances of the case, there was no breach of good faith bargaining given that some forty or fifty meetings had occurred between the employer and the union and the bargaining meetings continued during and after the employee meetings. In the circumstances of the case, holding small group meetings was a legitimate way for the company to ensure maximum access to its workforce.

3. One size doesn't fit all

As workplaces become more diverse, the "one size fits all" approach may no longer be effective in communicating with employees. For example, a growing number of workplaces now have employees from culturally diverse backgrounds or employees who speak English as a second language. This means that an employer may need to explain the proposed agreement in simple English, use an interpreter to explain the agreement or even make translated materials available. When the agreement covers young employees, employers may need to explain the agreement to both the employee and their parent or guardian. An employer may also need to provide a more detailed explanation of the agreement when negotiating with employees without a bargaining representative.

Addressing the various needs of employees is important not only to gain their support at the voting booth, but also to gain approval from FWA once the agreement is made. When determining whether to approve a proposed agreement, FWA must consider whether the employer took into account the different circumstances and needs of specific employees. Using communication strategies tailored to different employee groups could help an employer get through the final legal hurdle in getting the agreement approved.

4. Think about using a joint consultative committee

Increasingly, large workforces use a joint consultative committee to discuss a range of matters, from remuneration policies to the cafeteria menu. A joint consultative committee is typically made up of both employee and employer representatives and it can

be a great forum for employers to directly communicate a bargaining position. In *Australian Meat Industry Employees Union v T & R (Murray Bridge)* [2010] FWA 1320, the employer insisted on negotiating through its joint consultative committee rather than dealing directly with the union. The company's joint consultative committee was made up of elected employee representatives and management, none of whom were bargaining representatives, and had been established for over 10 years. FWA noted that in the circumstances, it was "reasonable for the employer in a large workplace such as T&R Murray Bridge to utilise the joint consultative committee to consult with the broader workforce, hear and consider workplace concerns and seek feedback on proposed terms of any agreement".

The company also gave the union advance notice of the meetings. This case shows that employers can use a joint consultative body to communicate its position during industrial bargaining, provided that the role of the union as the bargaining representative is genuinely recognised.

5. Be aware of direct negotiation dealings

Employers cannot bypass the good faith bargaining requirement by directly negotiating with employees. In *AMWU v Coates Hire* [2012] FWA 3357, the employer sought to directly bargain with the employees when it reached a deadlock with the union. The company sent out to its branch managers a flyer entitled "Get Ready to Vote", which offered to backpay a 4.5% pay increase if the agreement was approved. At the Union's request, FWA issued a bargaining order to halt the voting until the employer put the offer to the bargaining representatives for consideration. This case suggests that an employer cannot bypass the bargaining representatives and offer a new bargaining item to employees as an inducement to seal a deal.

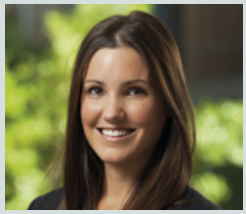
Next Steps

Communicating with employees during enterprise bargaining can be a challenging task. However, as workplaces become increasingly diverse, it is important that employers engage directly with employees, within legal bounds, to make the enterprise bargaining process as collaborative as possible. ●

Do's and Don'ts of Employer Communication Strategy

DO		DON'T	
✓	Have a communication plan for each step of the enterprise bargaining process	✗	Try to bypass the union or other bargaining representatives
✓	Use a variety of communication channels, including noticeboards, intranet, internal emails and social media	✗	Engage in direct dealing with employees to the exclusion of union
✓	Form a joint consultative committee to discuss enterprise agreement if there are a large number of employees	✗	Distribute misleading or deceptive materials
✓	Appreciate the growing diversity in the workforce and take measures to accommodate specific employees' needs	✗	Use legal jargon when communicating with employees

PCS at the forefront of law-making: pre-approval steps and Enterprise Agreements



KIRRYN WEST, ASSOCIATE

Mars Australia Pty Ltd T/A Mars Chocolate Australia v CEPU & AMWU [2012] FWAA 4482

PCS recently represented one of its clients, Mars Australia Pty Ltd ("Mars"), before Fair Work Australia ("FWA") in a significant case that concerned an area of the Fair Work Act 2009 ("FW Act") which has remained largely untested.

The central issue in the case was whether Mars had satisfied the pre-approval steps required by the FW Act in relation to its proposed Enterprise Agreement.

The specific pre-approval step in issue required Mars to provide a 7-day access period ending immediately before the start of the voting process during which Associates have a copy of the Enterprise Agreement (Mars refers to its employees as Associates). A dispute arose between Mars and the Unions in relation to whether the access period provided was in fact a 7-day period.

The facts

Mars had engaged in negotiations with its Associates and the Unions in relation to the content of its Enterprise Agreement. Following a lengthy consultation period, Mars decided to put the proposed Enterprise Agreement to vote. Mars works a shift work pattern and provided all Associates with an access period equivalent to 7 x 24 hours.

The Unions argued that the access period provided by Mars was insufficient on the basis that the day on which the voting process commenced could not be counted when calculating the 7-day access period. In practice, this would require an 8-day access period to be provided and the Unions relied upon a previous decision of FWA where this interpretation of the access period had been adopted.

The decision

Vice President Watson of FWA held that the 7-day period referred to in the FW Act does not exclude the day during which the voting process commenced. As such, providing Associates with a 7 x 24 hour period satisfied the definition of the access period under the FW Act.

Fair Work Australia specifically noted that:

"I have considered all of the submissions in the matter and the alternative submissions regarding previous decisions of this Tribunal and its predecessor and the application of the Acts Interpretation Act 1901. In my view in all of the circumstances, given the wording of s.180(4), the seven day period referred to therein does not exclude the day during which the voting process commenced. In other words, the seven day period operates from that point of time being, midday on 22 February 2012 and goes backwards to midday on 15 February 2012."

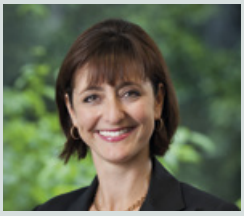
Mars was found to have complied with all pre-approval steps required by the FW Act, and its Enterprise Agreement (of which a majority of Associates had voted in favour) was approved. ●

Key Learnings for Employers

This case shows that the 7-day access period does not include the day on which the voting process commences and, as such, the access period can be a period equivalent to 7 x 24 hours. This is particularly important for workplaces where the majority of workers are shift workers who work a continuous shiftwork roster.

Unions now able to force employers to bargain through fear of industrial action

The impact of the JJ Richards & Sons case on enterprise bargaining



KATHRYN DENT, DIRECTOR

DIMI BARAMILI, GRADUATE ASSOCIATE

Bargaining under the Fair Work Act

The *Fair Work Act 2009 (Cth)* ("FW Act") provides a specific process which must be followed in order for industrial action to be "protected". The requirements for protected action are quite rigid, with any action taken outside this process deemed "unprotected" thus exposing individuals to liability.

In order for industrial action by employees to be protected the first step is for a protected action ballot, which requires a vote to be held as to the form of industrial action before it can be legally commenced. Section 443 of the FW Act further provides that Fair Work Australia ("**FWA**") can order a protected action ballot once an application has been made under s437 and the applicant has been "genuinely trying to reach an agreement" with the relevant employer. In practice, it had been commonly held that attempts to "genuinely reach an agreement" could only occur once formal bargaining had commenced.

However, as the recent case of *TWU v JJ Richards & Sons Pty Limited* [2012] FWA 5609 ("**JJ Richards & Sons**") demonstrates, bargaining need not be commenced before a protected action ballot order can be obtained. In effect, the lowered threshold of what is "genuinely trying to reach an agreement" means that it will be easier for "applicants", such as unions, to successfully obtain a protected action ballot which, in theory, makes it easier for protected industrial action to take place.

The background to the JJ Richards & Sons case

In this case, the Transport Workers Union ("**TWU**") initially wrote a letter to the relevant employer, JJ Richards & Sons, requesting that it enter into negotiations for a relevant enterprise agreement. JJ Richards & Sons refused to enter negotiations as it deemed the entitlements under the existing enterprise agreement to be sufficient. Several months later the TWU applied to FWA for a protected action ballot which was successfully granted. JJ Richards & Sons appealed this decision on the basis that s443(1)(b) of the FW Act only allows a protected action ballot order to be made where the applicant has "genuinely tried to reach an agreement."

Therefore, JJ Richards & Sons argued that in order to be deemed to have attempted to "genuinely reach an agreement" bargaining had to have actually commenced between itself and the TWU. JJ Richards & Sons argued that as bargaining had not commenced this element was not satisfied, and in addition, no majority support determination had been made. A majority support determination is available to employees to force an employer to bargain if they refuse. Therefore, it was expected that in line with common practice, the TWU would seek a majority support determination prior to taking industrial action so as to formally commence the bargaining process.

The full bench decision of Fair Work Australia

On appeal, the Full Bench of FWA upheld the initial decision and protected action ballot order. It held that s443 (the discretion to issue a protected action ballot order) is focused on whether the applicant was "genuinely trying to reach an agreement", which was based upon an interpretation of the ordinary words used and did not impose a requirement that bargaining already be commenced. The Full Bench looked at the FW Act more generally and

agreed with the first instance decision that the "genuinely trying to reach agreement" requirement is a broad requirement, and that to establish parties was not "genuinely trying to reach an agreement" is a question of fact to be determined by the relevant circumstances. The Full Bench held that there was no legislative intention to require bargaining to be commenced before seeking an order, as otherwise the legislature would have used words to that effect in the section.

The Federal Court decision

JJ Richards & Sons and the Australian Mines and Metals Association ("**AMMA**") appealed for a judicial review of the Full Bench decision. They argued that when looking at the FW Act more broadly, s443 (the ability to issue a protected action ballot order) was crucial to the bargaining process, therefore bargaining needs to have been commenced for an order to be available.

The Federal Court dismissed this argument, instead, upholding FWA's interpretation of s443, and the order. The Federal Court was of the view that bargaining was not required to have commenced before a protected action ballot order could be made, as it was not a specifically stated pre-condition in the FW Act. The Federal Court was of the view that if this were a pre-condition it would have been stated explicitly in the section, therefore, they were not willing to imply this extra condition. The only two pre-conditions as to the making of a protected action ballot order are that an application under s 437 had been made and that the FWA was satisfied that each applicant has been and is genuinely trying to reach agreement with the employer of the employees who are to be balloted. They also noted that other provisions in the FW Act could be used to force an employer to bargain.

Lessons for employers

This case represents a fundamental shift away from the commonly held belief as to when the enterprise bargaining process under the Act has commenced and therefore, the point of time in the process when an employee or a bargaining representative on their behalf can more forcefully agitate claims based on a threat of industrial action. The consequence of this decision is that industrial action can potentially be taken where negotiations have not yet commenced, or at a minimum be threatened so as to force employers to come to the table. Employers need to be prepared to seriously entertain requests to bargain and to ensure if they are of the view that the attempts to reach an agreement are not genuine they have the evidence ready to demonstrate this in order to oppose the granting of a protected action ballot. ●

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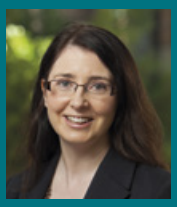

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