



DISPUTE RESOLUTION

The *Fair Work Act 2009* (Cth) (FW Act) places emphasis on employers and employees undertaking good faith bargaining in order to make an enterprise agreement. This Fact Sheet examines disputes about making the bargain and disputes once the bargain has been struck. Builders should also refer to Master Builders Fact Sheet 3 which contains important information about the appointment of bargaining representatives and the requirements for good faith bargaining.

Disputes about making the bargain

Fair Work Australia may make orders or arbitrate where a dispute arises during bargaining for a proposed enterprise agreement. Bargaining can only commence once the nominal expiry date of any existing agreement has been reached (that is once the agreement has ended). During bargaining is the only time when lawful industrial action can occur (save for some occupational health and safety (OH&S) issues which are not considered to be industrial action).

Resolving disputes during bargaining

Bargaining representatives are not obliged to make concessions during bargaining or to reach agreement on the terms to be included in the agreement. However, the FW Act provides for a series of steps where a bargaining representative considers that the requirements for good faith bargaining are not being met or where the bargaining is not proceeding efficiently or fairly.

Initially the FW Act envisages that, in most cases, the bargaining agent (eg the employer or the union) will provide a written notice to the relevant bargaining representatives setting out the concerns and giving them a reasonable time within which to respond to those concerns.

If the concerns are unresolved, a bargaining representative may apply to Fair Work Australia for a bargaining order. A bargaining agent can apply for a bargaining order without going through the written notice step mentioned above, and Fair Work Australia may decide to issue a bargaining order if it is appropriate in the circumstances. A bargaining order can exclude a bargaining agent from bargaining, specify action the representative must take, or require the representative to cease particular action. A failure to comply with a bargaining order is a contravention of the FW Act and a financial penalty may apply. (A failure to comply with a bargaining order may also be relevant to an application for the suspension or termination of protected industrial action – for example where employees are on strike.)

Fair Work Australia may make a serious breach declaration where there are serious and sustained contraventions of bargaining orders that have significantly undermined bargaining for an enterprise agreement and Fair Work Australia is satisfied that:

- the representatives have exhausted all avenues to reach agreement;
- agreement is unlikely to be reached in the foreseeable future; and
- it is reasonable in the circumstances.



A serious breach declaration is essentially an arbitrated determination about the issues between the parties in dispute. It is a last resort. Employers should do their utmost to comply with the good faith bargaining requirements and the requirements of bargaining orders issued by Fair Work Australia to avoid an arbitrated outcome being imposed on them. If Fair Work Australia issues a serious breach declaration, the parties have a further 21 days to make an agreement. If agreement is not reached in this period Fair Work Australia must determine the matter through a workplace determination.

Protected action

Protected industrial action is lawful. It is certain action during bargaining by employees or their bargaining agents (and sometimes employers) to support or advance claims about a proposed enterprise agreement or to respond to industrial action of the other parties.

There are a number of requirements that must be met for industrial action to be protected:

- the bargaining representatives must be genuinely trying to reach agreement;
- the industrial action must not have been organised or engaged in before the nominal expiry date of the enterprise agreement;
- a secret ballot has validly approved the action unless it is in response to employer industrial action (see below for discussion of secret ballots);
- the bargaining representatives must have given proper notice of the industrial action. Where the industrial action is initiated by employees or their bargaining representatives, the notice must be at least 3 working days;
- the bargaining representatives must not have contravened any orders in relation to the industrial action or bargaining. For example, the bargaining representatives must be complying with a good faith bargaining order made by Fair Work Australia;
- there must be no suspension or termination order of the industrial action or serious breach declaration in operation;
- it is not taken in support of pattern bargaining¹;
- it does not relate to a greenfields or multi-enterprise agreement;
- it is not taken in support of or to advance claims that include unlawful terms in the agreement (see Master Builders Fact Sheet 3 for further information on unlawful terms);
- it does not relate to a significant extent to a demarcation dispute.

Protected industrial action will no longer become unprotected if it is taken in concert with an unprotected person eg workers in another enterprise engaging in a 'sympathy' strike. Only the unprotected person will be subject to sanctions that apply to unprotected action.

Employer industrial action is limited to lockouts and it is only protected where the lockout is in response to industrial action taken by employees. The employer must give written notice of the intention to lock out employees to each employee bargaining representative. The employer must also take all reasonable steps to notify the employees of the lockout.

¹ Pattern bargaining is where a party negotiating two or more enterprise agreements seeks common wages and condition of employment and the party's course of conduct affects more than one business.



Protected OH&S Action

An employee's action based on reasonable OH&S concerns is NOT industrial action as long as:

- the action was based on a reasonable concern of the employee about an imminent risk to his or her health or safety; and
- the employee does not unreasonably fail to comply with the employer's direction to perform other available work that is appropriate and safe for the employee to perform.

The FW Act does not specify who bears the onus of proving that the OH&S exemption to industrial action should apply. This differs to the approach in the *Building and Construction Industry Improvement Act 2005* (Cth) which specifies that the employee must prove that the OH&S exemption to industrial action for the purposes of that Act should apply.

Protected action ballots

A bargaining representative of an employee covered by a proposed enterprise agreement or two or more bargaining representatives acting jointly may apply to Fair Work Australia for an order allowing a protected action ballot to be conducted. The application must specify the group or groups of employees who are to be balloted and the questions to be put to the employees, including the nature of the proposed industrial action. The application cannot be made more than 30 days prior to the nominal expiry date of the relevant enterprise agreement.

A copy of the application must be provided to the employer within 24 hours of the application being made.

Fair Work Australia will make an order for a protected action ballot to be conducted where it is satisfied that each applicant has been and is genuinely trying to reach agreement with the employer.

The ballot must be conducted in accordance with the relevant provisions in the FW Act and the Fair Work Regulations 2009. The Australian Electoral Commission will generally conduct the ballot, unless Fair Work Australia agrees to a request from the bargaining representative to appoint another person to conduct the ballot. It is recommended that employers seek professional advice about the technical requirements relating to protected action ballots.

Protected industrial action may only be taken where it is approved by the secret ballot. At least 50% of the employees on the roll of voters must have voted in the ballot and more than 50% of the valid votes must have been votes to approve the action. The protected industrial action must commence within 30 days of the date of the declaration of the results of the ballot, unless Fair Work Australia approves a longer period.

Termination and suspension of protected industrial action

Fair Work Australia has the power to suspend or terminate protected industrial action in certain circumstances.

Where the protected industrial action is causing, or threatening to cause, significant economic harm to the employer(s) covered by the agreement or any of the employees who will be covered by the agreement, Fair Work Australia may issue an order to suspend or terminate the industrial



action. Fair Work Australia must be satisfied that the economic harm is imminent, that the protected industrial action is protracted and that the dispute will not be resolved in the reasonably foreseeable future.

Where the protected industrial action has threatened, is threatening or would threaten to endanger the life, personal safety, health or welfare of the population or part of it, or cause significant damage to the Australian economy or an important part of it, Fair Work Australia must make an order to suspend or terminate the industrial action.

Fair Work Australia may also suspend protected industrial action where the suspension would assist in resolving the matters at issue (cooling off) or where the protected industrial action is threatening to cause harm to a third party.

Building industry specific protected action

The *Building and Construction Industry Improvement Act 2005* (Cth) also deals with this subject. Industrial action that is protected action under the FW Act is not unlawful action under the *Building and Construction Industry Improvement Act 2005*.

Unprotected industrial action

Fair Work Australia can order that unprotected industrial action must stop, not occur or not be organised for a certain length of time known as a 'stop period'.

Strike pay

Under the FW Act it will continue to be unlawful for an employer to pay or an employee to request pay for periods of industrial action, except in relation to partial work bans. Where unprotected action takes place, employers must withhold at least 4 hours of pay for action of 4 hours duration or less, or the total duration of the action if the action is greater than 4 hours.

Disputes once the bargain has been struck

Dispute resolution

An enterprise agreement must include a dispute resolution term which outlines the procedure for settling disputes about matters arising under the agreement and in relation to the National Employment Standards. The dispute resolution term in an agreement must require or allow Fair Work Australia, or another person who is independent of the employers, employees or employee organisations covered by the agreement to settle disputes. The dispute resolution term must also allow for the representation of employees covered by the agreement.

Fair Work Australia will not approve an agreement that does not contain a dispute resolution term.

If a builder wants to enter into an agreement, tailoring of a dispute resolution clause that best suits the business is advised. Employers and employees (and their bargaining representatives) can refer to the model dispute resolution term in the Fair Work Regulations for guidance, and may agree to include the model term, or part of it, in a proposed agreement. However, the model term will not be taken to be a term of an agreement if the parties fail to include one.



FOR FURTHER INFORMATION

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Disclaimer: This information is provided as general advice on the workplace relations system. It does not constitute legal advice and it is always advisable to seek further information regarding specific workplace relations issues.