



FAIR WORK
AUSTRALIA

Good faith bargaining and industrial action

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Commissioner Ingrid Asbury

Good faith bargaining requirements

– s. 228

- Attending and participating in meetings at reasonable times;
- Disclosing relevant information (other than confidential or commercially sensitive) in reasonable time;
- Responding to other side's proposals in timely manner;
- Giving genuine consideration to other side's proposals;
- Refraining from capricious conduct that undermines freedom of association or collective bargaining;
- Recognising and bargaining with other bargaining representatives.

Good faith bargaining requirements

– s. 228

- Good faith bargaining requirements **do not** require:
 - Concessions or agreement;
 - A bargaining representative to reach agreement on terms that are to be included in the agreement.

Bargaining Orders – s. 229

- Application may be made by bargaining representative;
- Must not be made in relation to proposed multi-enterprise agreement without low paid authorisation;
- Application may only be made:
 - If one or more enterprise agreements apply to relevant employees:
 - Not more than 90 days before nominal expiry date; or
 - After employer has requested approval of agreement and before approved;
- Otherwise – at any time.

Bargaining Orders – s. 229

- Bargaining representative may only apply for order if:
- Concerned that:
 - One or more representatives have not met or are not meeting good faith bargaining requirements;
 - Bargaining process not proceeding efficiently or fairly because there are multiple bargaining representatives; and
- Has given written notice of concerns to relevant bargaining representatives; and

Bargaining Orders – s. 229

- Has given them reasonable response time; and
- Considers they have not responded appropriately.
- FWA may consider application for orders that does not comply with notification requirements if appropriate in all of the circumstances to do so.

When FWA may make bargaining order – s.230

- FWA may make bargaining order if:
 - Application has been made;
 - Requirements of s. 230 met in relation to agreement; and
 - Reasonable in the circumstances.
- FWA must be satisfied in all cases that one of the following applies:
 - Employer or employees have agreed to bargain or initiated it;
 - Majority support determination in relation to agreement in operation;
 - Scope order in relation to agreement in operation;
 - All employers specified in low paid authorisation that is in operation.

When FWA may make bargaining order – s.230

- FWA must in all cases be satisfied that:
 - One or more relevant bargaining representatives have not met or are not meeting good faith bargaining requirements; or
 - The bargaining process is not proceeding efficiently or fairly because there are multiple bargaining representatives; and
 - That the applicant has complied with notification requirements unless non-compliance permitted by FWA.

What bargaining order must specify

– s. 231(1)

- Bargaining order must specify all or any of the following in relation to bargaining representatives:
 - Actions to be taken by and requirements to be imposed to ensure that they meet good faith bargaining requirements;
 - Requirements not to take action that would constitute capricious or unfair conduct;
 - Actions to be taken to deal with effects of capricious or unfair conduct;
 - Matters, actions or requirements FWA considers appropriate (taking into account issues relating to multiple representatives) for the purposes of promoting efficiency and fairness.

Kinds of bargaining orders – s. 231(2)

- FWA may make orders including:
 - Excluding a bargaining representative from bargaining;
 - Requiring some or all bargaining representatives to meet and appoint one of their number as a representative;
 - Employer not to terminate employment of an employee or to reinstate employee if termination would constitute or relate to failure to meet good faith bargaining requirements in relation capricious or unfair conduct that undermines freedom of association or collective bargaining.

Operation of bargaining order – s. 232

- A bargaining order in relation to a proposed enterprise agreement:
 - Comes into operation on the day on which it is made;
 - Ceases to be in operation at the earliest of:
 - If revoked – at time specified in instrument of revocation;
 - When agreement approved by FWA;
 - When workplace determination comes into operation;
 - When bargaining representatives agree bargaining has ceased.

Contravening bargaining order – s. 233

- Person to whom bargaining order applies must not contravene a term of the order.
 - Note that this is a civil penalty provision
- Sections 234 and 235 deal with serious breach declarations where contraventions are serious and sustained and have significantly undermined bargaining for the agreement.

Majority support determination – s. 236 and s. 237

- Bargaining representative may apply:
- FWA must make determination if application made and satisfied of matters set out in s. 237(2).
- FWA must be satisfied that:
 - Majority of employees want to bargain;
 - Employer has not agreed to bargain or initiated bargaining;
 - Group of employees to be covered fairly chosen;
 - Reasonable in all circumstances to make determination.
- FW can work out whether majority want to bargain using any method considered appropriate.

Majority support determination

- If agreement will not cover all employees FWA must take into account whether group is organisationally or operationally distinct
- Determination operates from day made
- Note that there is no requirement for applicant to be meeting good faith bargaining requirements.

Scope orders – s. 238

- Bargaining representative may apply if concerned bargaining not proceeding efficiently or fairly; and
- Reason is that agreement will not cover appropriate employees or will cover employees not appropriate to cover;
- Notice of concerns must be given and reasonable time for response; and
- Bargaining representative considers response not appropriate.

Scope orders – s. 238

- FWA may make scope order if satisfied:
 - Bargaining representative who has made application meeting good faith bargaining requirements;
 - Making the order will promote fair and efficient conduct of bargaining;
 - Group of employees fairly chosen; and
 - Reasonable in all of the circumstances.
- FWA must consider whether group of employees fairly chosen, taking into account whether operationally or organisationally distinct.

Dealing with a bargaining dispute – s.240

- Any bargaining representative can apply
- Parties unable to resolve dispute
- Must seek assistance of FWA before applying for a serious breach declaration
- FWA can use any powers available to it
- FWA can only arbitrate by consent of all bargaining representatives
- No reference to good faith bargaining.

Protected action ballot – chapter 3

Part 3-3 Division 8

- Object to establish a fair, simple and democratic process to allow a bargaining representative to determine whether employees wish to engage in particular protected industrial action: s. 436
- Bargaining representative/s or employee who will be covered by proposed enterprise agreement may apply: s. 437(1)
- Does not apply to greenfields or multi-enterprise agreements: s. 437(2)

Protected action ballot – chapter 3 Part 3-3 Division 8

- Application must specify:
 - Groups to be balloted; and
 - The question or questions to be put including the nature of the industrial action: s. 437(3)
- Application must specify name of alternative agent if not AEC: s. 437(4)
- Group to be balloted taken to include only employees:
 - Who will be covered by proposed agreement; and
 - Are represented by bargaining representative who is applicant for protected action ballot: s. 437(5)

Protected action ballot – chapter 3

Part 3-3 Division 8

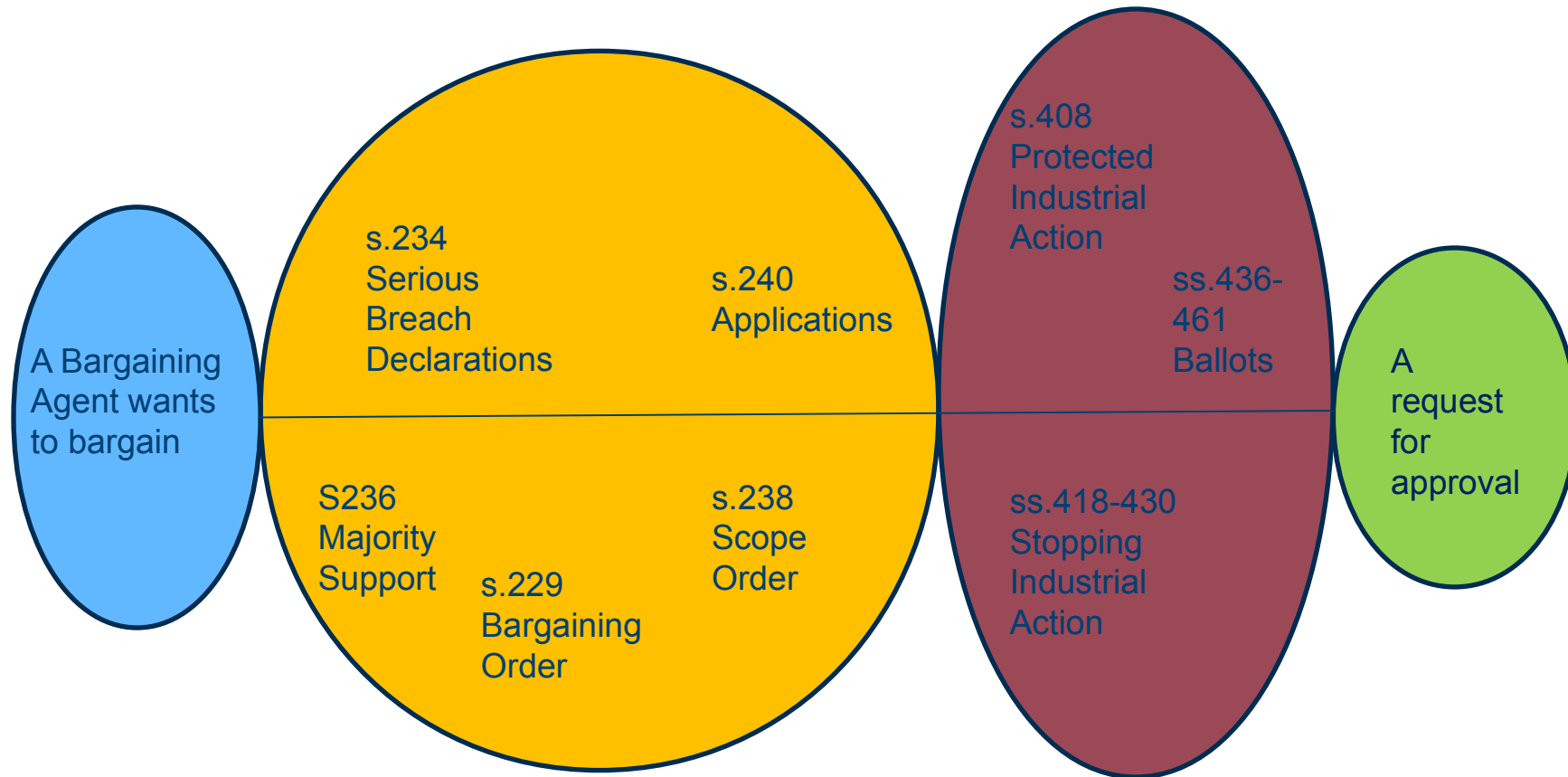
- Copy of application to be given to employer and AEC (or alternative ballot agent) within 24 hours after it is made: s.440
- FWA as far as practicable, must determine application within two days after it is made, except where not satisfied notice given with 24 hours of making application: s. 441
- FWA can deal with multiple applications together where they relate to same employer or workplace; and will not unreasonably delay the determination of any of the applications.

Protected action ballot – chapter 3

Part 3-3 Division 8

- FWA must make protected action ballot order:
 - If application made; and
 - FWA satisfied that each applicant has been, and is genuinely trying to reach an agreement with the employer of the employees who are to be balloted: s. 443(1)
- FWA must not make ballot order except in the circumstances referred to in s. 443(1): s. 443(2).
- FWA can extend the period of written notice of taking industrial action from three days to a period of up to seven days in exceptional circumstances: s. 443(5).

Bargaining provisions



Good faith bargaining

- Cornerstone of new laws on agreement making;
- Touches a range of provisions of the *Fair Work Act 2009*;
- Sits alongside other concepts such as “genuinely trying to reach an agreement”, “genuine agreement” and “fair and efficient conduct of bargaining” and may be relevant in cases where those provisions are being considered.

Can FWA refuse to approve agreement on the basis of good faith bargaining requirements?

- S. 187(2) provides that:
 - FWA must be satisfied that approving agreement would not be inconsistent with or undermine good faith bargaining by one or more bargaining representatives for a proposed enterprise agreement or an enterprise agreement in relation to which a scope order is in operation.
- Held in *Aegis Aged Care Staff Pty Ltd* [2010] FWA 3715 that provision applies only when a scope order is in place.

Can FWA refuse to approve agreement on the basis of good faith bargaining requirements?

- Full Bench in *Appeal by Philmac* [2011] FWAFB 2668 confirmed that s. 187(2) applies only where scope order under s. 238 in operation, but went on to state:
- *“The ACTU and the unions argued that although s. 187(2) only applies to agreements in relation to which a scope order is in operation, whether or not the good faith bargaining requirements in s. 228 have been met may be relevant to determining whether the agreement has been genuinely agreed to. In the circumstances it was not necessary to decide this issue, but our tentative view is that good faith bargaining requirements may be relevant in deciding whether there has been genuine agreement.”* (at [7])

Provision of information

- Union sought order compelling employer to provide pertinent answers to questions and delay finalisation of draft agreement in interim period;
- Bargaining representative is not required to provide information sufficient to satisfy requirements of another bargaining representative but to provide “relevant information”;
- Not accepted that bargaining representative can never be required to compile information – question of reasonableness: *AMACSU v ATO [2011] FWA 5407*

Employer dealing directly with employees

- FWA not precluded from making order to delay ballot for approval of agreement provided short time and does not in substance deny employees right to vote for agreement: *NUW v Chep* [2009] FWA 202
- Order restraining employer from balloting employees and requiring meetings with union where it had precluded union involvement in discussions about proposed agreement: *AMACSU v QTAC* [2009] FWA 53

Employer dealing directly with employees

- Order made to delay ballot where employer made misleading statements about protected action to put Union in position in relation to time frame, that it would have been in had statements not been made: *TWU v Veolia* [2011] FWA 5961.
- Order to delay ballot not made where Union becomes involved late in the process, did not take up opportunities participate in negotiations, did not have legitimate standing as bargaining representative and did not represent a majority of employees: *NUW v Chep* [2009] FWA 202

Employer dealing directly with employees

- May be circumstances where conduct of a ballot without agreement of other bargaining parties will constitute breach of good faith bargaining requirements, but not always so.
- Impasse required? Way of making progress?
- Aggressive conduct of employer in meetings not determinative.
- Decision not to grant order endorsed by Full Bench where employer trying to influence employee views but putting same proposals as put at bargaining meetings and no deceptive, objectionable or misleading conduct:
CFMEU v Tahmoor Coal [2010] FWA 3510

Protected action ballot application

- No reference to good faith bargaining in context of protected action ballot application
- Genuinely trying to reach agreement:
 - Give words ordinary meaning: *JJ Richards* [2011] FWA FB 3377.
 - All relevant circumstances must be considered including nature of claims, ability to legitimately pursue their inclusion in agreement, intention and efforts to ensure claims are about permitted matters: *Asurco v CFMEU* [2010] FWA FB 6180
 - Permitted content only: *Airport Fuel Services* [2010] FWA FB 4457.
 - No requirement to first take all steps available under Act to compel employer to bargain – majority support determination, good faith bargaining or scope orders – before making protected action ballot application: *JJ Richards* [2011] FWA FB 3377.

Protected action ballot application

- Circumstances of particular stage of negotiations relevant to whether genuinely trying to reach agreement;
- All relevant circumstances must be assessed;
- Extent of progress in negotiations and the steps taken to try to reach agreement;
- At very least expect the applicant to be able to demonstrate that it has clearly articulated major items it seeks in agreement and to have provided considered response to items sought by the other side;
- Premature applications where sufficient steps not taken to satisfy test cannot be granted: *Total Marine* [2009] FWAFB 368