228 Bargaining representatives must meet the good faith bargaining requirements

(1) The following are the ***good faith bargaining requirements*** that a bargaining representative for a proposed enterprise agreement must meet:

(a) attending, and participating in, meetings at reasonable times;

(b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner;

(c) responding to proposals made by other bargaining representatives for the agreement in a timely manner;

(d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals;

(e) refraining from capricious or unfair conduct that undermines freedom of association or collective bargaining;

(f) recognising and bargaining with the other bargaining representatives for the agreement.

(2) The good faith bargaining requirements **do not require**:

(a) a bargaining representative to make **concessions** during bargaining for the agreement; or

(b) a bargaining representative to reach **agreement on the terms** that are to be included in the agreement.

230 When FWA may make a bargaining order

Bargaining orders

(1) FWA may make a bargaining order under this section in relation to a proposed enterprise agreement if:

(a) an application for the order has been made; and

(b) the requirements of this section are met in relation to the agreement; and

(c) FWA is satisfied that it is **reasonable in all the circumstances** to make the order.

Good faith bargaining requirements not met

3) **FWA must in all cases be satisfied**:

(a) that:

(i) one or more of the relevant **bargaining representatives** for the agreement **have not met, or are not meeting**, the good faith bargaining **requirements**; or

(ii) ....

Bargaining order must be in accordance with section 231

(4) The bargaining order must be in accordance with section 231 (which deals with what a bargaining order must specify).

231 What a bargaining order must specify

(1) A bargaining **order** in relation to a proposed enterprise agreement **must specify** all or any of the following:

(a) the **actions to be taken by**, and **requirements imposed upon**,

the bargaining representatives for the agreement, for the purpose of ensuring that they meet the good faith bargaining requirements;

(b) requirements imposed upon those bargaining representatives not to take action that would constitute capricious or unfair conduct that undermines freedom of association or collective bargaining;

(c) the actions to be taken by those bargaining representatives to deal with the effects of such capricious or unfair conduct;

(d) such matters, actions or requirements as FWA considers appropriate, taking into account subparagraph 230(3)(a)(ii) (which deals with multiple bargaining representatives), for the purpose of promoting the efficient or fair conduct of bargaining for the agreement.

(2) The kinds of bargaining orders that FWA may make in relation to a proposed enterprise agreement include the following:

(a) an order excluding a bargaining representative for the agreement from bargaining;

(b) an order requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint one of the bargaining representatives to represent the bargaining representatives in bargaining;

(c) an order that an employer not terminate the employment of an employee, if the termination would constitute, or relate to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining);

(d) an order to reinstate an employee whose employment has been terminated if the termination constitutes, or relates to, a failure by a bargaining representative to meet the good faith bargaining requirement referred to in paragraph 228(1)(e) (which deals with capricious or unfair conduct that undermines freedom of association or collective bargaining).

234 Applications for serious breach declarations

A bargaining representative for a proposed enterprise agreement may apply to FWA for a declaration (a ***serious breach declaration***) under section 235 in relation to the agreement.

235 When FWA may make a serious breach declaration

Serious breach declaration

(1) FWA may make a serious breach declaration in relation to a proposed enterprise agreement if:

(a) an application for the declaration has been made; and

(b) FWA is satisfied of the matters set out in subsection (2).

Matters of which FWA must be satisfied before making a serious breach declaration

(2) FWA must be satisfied that:

(a) one or more bargaining representatives for the agreement has contravened one or more bargaining orders in relation to the agreement; and

(b) the contravention or contraventions:

(i) are serious and sustained; and

(ii) have significantly undermined bargaining for the agreement; and

(c) the other bargaining representatives for the agreement (the ***designated bargaining representatives***) have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement; and

(d) agreement on the terms that should be included in the agreement will not be reached in the foreseeable future; and

(e) it is reasonable in all the circumstances to make the declaration, taking into account the views of all the bargaining representatives for the agreement.

Factors FWA must take into account in deciding whether reasonable alternatives exhausted

(3) In deciding whether or not the designated bargaining representatives have exhausted all other reasonable alternatives to reach agreement on the terms that should be included in the agreement, FWA may take into account any matter FWA considers relevant, including the following:

(a) whether FWA has provided assistance under section 240 in relation to the agreement;

(b) whether a designated bargaining representative has applied to a court for an order under Part 4-1 in relation to the contravention or contraventions referred to in paragraph (2)(a) of this section; and

(c) any findings or orders made by the court in relation to such an application

What declaration must specify

(4) The declaration must specify:

(a) the proposed enterprise agreement to which the declaration relates; and

(b) any other matter prescribed by the procedural rules.

‘In my view FWA should be slow to interfere in the legitimate tactics undertaken by parties during the bargaining process unless an applicant for a bargaining order has demonstrated that there are sound reasons for so doing. There needs to be satisfaction that the good faith bargaining requirements are not being met. An order under s.230 is discretionary and may only be made if FWA is satisfied that it is reasonable in all the circumstances to make the order.’

LMU v Fosters Australia Ltd [2009] FWA 750 per SDP Kaufman at [20]

‘Section 228(1)(b) refers to bargaining representatives being required to disclose relevant information in a timely manner. A decision to put an agreement directly to employees while ostensibly still bargaining with a bargaining representative, representing at least some of them, appears to me to be relevant information which was not disclosed at all to the union.’

Re: Alphington Aged Care and Mary Mackillop Aged Care [2009] FWA 2009 per C Whelan at [26]

‘Section 228(1)(b) refers to disclosing relevant information in a timely manner. The reason for the disclosure of information is to allow the other bargaining representative(s) to give consideration to the bargaining representative’s position. In my view, the employer failed to provide relevant information on two occasions. First, prior to the meeting on 24 July 2009 Mr Poxon had prepared a document which included the company’s position on what matters in the NUW draft were ‘negotiable’ and what were ‘non-negotiable’. By failing to reveal the employer’s position, the NUW had no opportunity to consult its members on whether it should continue to pursue ‘non-negotiable’ matters or not or whether to narrow the agenda to the matters which were ‘negotiable’.’

NUW v Defries Industries Pty Ltd [2009] FWA 88 per C Whelan at [64]

‘Second, the failure to indicate to the NUW that any changes to the employer’s draft provided to them on 30 July 2009 could only be considered if they were provided by 2 August denied the employees represented by the NUW the ability to put a position which could be considered by the employer, prior to a final document being distributed.’

NUW v Defries Industries Pty Ltd [2009] FWA 88 per C Whelan at [65]

‘Unlike the situation in the United States, where an employer cannot communicate about issues in dispute with its employees during a bargaining process, there is nothing to prevent either the union or the company from canvassing the views of employees on shift hours. Ultimately the parties will either reach agreement on the issue or the employees will indicate their position in a vote.’

AFMEPKIU v H J Heinz Company Australia Ltd [2009] FWA 322 per C Whelan at [16]

‘Some of those communications could well be robust, controversial and at times even disrespectful or mistaken. In my view, in the absence of a pattern of deliberate improper communications, an applicant will find it difficult to establish that a single communication constitutes capricious or unfair conduct of the requisite type.’

NUW v Patties Foods Ltd [2011] FWA 4103 per VP Watson at [21]

‘In my view, communicating with staff is good management practice. If such communications are not accompanied by a refusal to meet and communicate with a bargaining representative, then in my view there is no breach of the good faith bargaining requirements of the Act.’

‘In my view, an employer is free to meet with its employees to discuss employment issues, including matters relevant to enterprise bargaining in the absence of bargaining representatives. Widespread communication is to be encouraged – not regulated, diminished or monopolised.’

LHMU v Mingara Recreational Club Pty ltd [2009] FWA 1442 per VP Watson at [18] - [19]

‘During this process Transfield will not attempt to bypass the bargaining agent representatives in relation to its proposal by contacting for this purpose the members of the bargaining agent representatives directly, in meetings or by text or other telephonic messages.’

AFMEPKIU v Transfield Pty Ltd [2009] FWA 93 per SDP Drake at [7]

‘Although the employer provided a response of sorts to the log of claims including at the JCC meeting conducted on 21 January 2010, I do not consider that this indicated a genuine consideration of the proposals as contemplated by s.228(c) of the Act. It is clear that there is no obligation on the employer to make any concessions (s.228(2)) and I do not consider that each element of the claim required a comprehensive position to be advanced. However, the response by T&R was dismissive and very general, and did not provide a response to the various claims that could actually assist the parties to advance their negotiations in any way.’

AMIU v T & R Pty Ltd [2010] FWA 1320 per C Hampton at [54]

‘The Commissioner was entitled to conclude that after a very long period of negotiation the parties were simply unable to agree. In those circumstances the conclusion was open to the Commissioner that it was not capricious or unfair conduct for Tahmoor to seek to explain its negotiating position to the employees directly.’

CFMEU v Tahmoor Coal Pty Ltd [2010] FWA 3510 per P J Giudice at [28]

'Tahmoor may have been trying to influence employee views, but it does not necessarily follow that its conduct undermined freedom of association or collective bargaining or that it acted capriciously or unfairly. The proposals put to the employees were the same as those put to the employee representatives at the bargaining meetings. The meetings themselves do not appear to have been oppressive for employees and the slides and other material used in the presentation were not deceptive or otherwise objectionable. Indeed, there is no evidence that any of the material provided to employees was misleading or that employees were threatened in any relevant way. Nor is there any reason to believe that the employee representatives did not themselves have adequate access to the workforce in relation to the bargaining process. It is also relevant that the bargaining meetings continued during and after the employee meetings and that Tahmoor took various steps, referred to above, to facilitate consideration of its proposals by the employee representatives. In the circumstances of this case holding the employee meetings and sending material to the employees' homes was not capricious or unfair conduct that undermined freedom of association or collective bargaining.'

CFMEU v Tahmoor Coal Pty Ltd [2010] FWA 3510 per P J Giudice at [28]

‘robust documentation by both parties describing each others’ position. By “robust”, I mean: the LHMU portraying the Employer as “frightening” employees; describing negotiators as “monkeys” (in words and caricature); misleading or inaccurate information (according to the Employer) and the caricatured black suited, cigar smoking “fat capitalist” dragging a trolley load of money. For the Employer, by “robust”, I mean the use of such words as “unfair”, “unreasonable” and “un-Australian” to describe the LHMU as well as portraying their role as wanting “to cause trouble” and providing misleading or inaccurate information (according to the LHMU)’

LHMU v Hall & Prior Aged Care Organisation [2010] FWA 1065 per C Cloghan at [15]