

EMPLOYMENT UPDATE

MAY 09

GOOD FAITH BARGAINING

As with previous Employment Updates we have been focusing on the changes under the new *Fair Work Act*, this Update continues by discussing the changes to workplace bargaining laws

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Just to recap the key elements of the new system: There are 6 key policy areas which will impact on employers and employees under the new legislation:

1. **Modern awards** - a simplified system of awards. Australian Industrial Relations Commission.
2. **Changes to the unfair dismissal laws**, particularly pertaining to small business.
3. Reintroduction of an enterprise level collective bargaining system through **Good Faith Bargaining**. We have already covered Modern Awards and unfair dismissal changes. In this update we focus on 'Good Faith Bargaining' and what the changes mean for you as an employer
4. The safety net under the 10 **National Employment Standards** setting the minimum employment standards for employees.
5. Significant changes to the institutional framework governing workplace relations with the implementation of **Fair Work Australia** as a 'one stop shop' replacing seven separate agencies including the
6. **Industrial action** processes and role of the ombudsman as arbiter.



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What is Good Faith Bargaining?

Good Faith Bargaining is about promoting open communication in the work place. There were no requirements under the WorkChoices legislation to bargain in good faith. Even where the majority of employees wanted a Collective Agreement the employer could decline. Good Faith Bargaining is a significant feature of the new legislation. Negotiating parties will be expected to meet together, exchange information and consider and respond to proposals in a timely manner.

One of the objectives of the *Fair Work Act* is to achieve productivity and fairness. There is an emphasis on enterprise-level collective bargaining underpinned by 'Good Faith Bargaining' obligations. This is accompanied by clear rules governing industrial action.

The obligations of both parties engaged in Good Faith Bargaining include:

- Attending and participating in meetings at reasonable times;
- Disclosing relevant information in a timely manner;
- Responding to proposals throughout the bargaining process in a timely manner;
- Giving genuine consideration to proposals and bargaining representatives and providing not only responses but reasons;
- Refraining from unfair or difficult conduct that undermines freedom of association or collective bargaining.

Under Good Faith Bargaining parties are not required to accept agreements they do not agree to. The intention is that both parties work together to establish a mutually acceptable outcome.

If the parties are unable to achieve this then Fair Work Australia is empowered to make a 'Good Faith Bargaining order' that will be binding on the parties. It is envisaged that arbitration will not play a major part in this process but instead will be limited to circumstances concerning industrial action, issues where there is a threat to health and safety, a threat to the economy, or significant harm to the parties.

Who can apply for a bargaining order and how?

Either of the parties can apply for the bargaining order. The requirements for applying for the order are if one of the representatives is not meeting the good faith requirements listed above or the process is not proceeding efficiently or fairly. Before an application can be made to Fair Work Australia a written notice of the concerns must be given to the party and a reasonable time given for them to have responded to those concerns.

Fair Work Australia firstly requires that there is a majority support for the negotiations for a collective agreement to take place. Majority support will be recognised, where a workplace collectively wishes to commence negotiations and an employer is unwilling. Fair Work Australia has the right to determine the need for collective negotiations. They can do this by holding a ballot or petition or other appropriate method.

The employer is then obliged to notify workers of their right to have a bargaining representative. 14 days notice must be given. A bargaining representative can then be appointed. A bargaining representative may be a colleague, a union, or someone else – for example, an accountant or a consultant.

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It is thought, in most workplaces that employers and employees can bargain in good faith. However, if it is found that Good Faith Bargaining is not occurring then Fair Work Australia may step in and make orders.

If the bargaining orders are still ignored then Fair Work Australia may in extreme circumstances arbitrate and make a workplace determination. This may happen, for example, where an employer refuses repeatedly to recognise a bargaining representative, or seriously and repeatedly flouts the bargaining process. Arbitration is, however, a last resort for Fair Work Australia.

If Fair Work Australia does make an order then it is effective immediately from the day on which it is made.

It's worth mentioning that the Act gives employers as well as employees the opportunity to collectively bargain. Division 10 of *Fair Work Act* sets out how employers can bargain together cross an industry to have a multi-enterprise agreement.

Industrial Action during Bargaining

The new laws distinguish between protected and unprotected industrial action. Protected action will be allowed in the course of bargaining, however strict rules apply. These include a secret ballot of employees and 3 days notice of the intention to take industrial action. Employers will not be permitted to provide strike pay.

Unprotected industrial action will not be allowed in any circumstances. Employees will face a mandatory minimum deduction of 4 hours pay for any incident of unprotected industrial action. It will also be unlawful to pay or demand to be paid for this period.

Bargaining for the Low Paid

There are new provisions in the *Fair Work Act* to encourage low paid employees and their employers to participate in collective bargaining. It was considered by the Government that under the WorkChoices legislation, low skilled, low paid employees saw an increase in managerial prerogative and an erosion of wages and conditions through the shift to individual agreements. The multi-employer facilitation of bargaining to make multi-enterprise agreements for low paid industries is particularly designed to assist employees working in child care, aged care,

community services, security, cleaning and food process workers.

A bargaining representative or an employee organisation entitled to represent the industry may apply to Fair Work Australia for a 'low-paid authorisation'. If an agreement is successfully negotiated for the relevant group of low paid employees, it will apply to that particular industry overriding any relevant award.

If a failure to reach agreement in one of these industries occurs there is potential for arbitrated wage outcomes.

New freedom of association protections

All workers will be free to join a union. Workers may choose to participate in activities such as collective bargaining and protected industrial action. It will be unlawful to try and stop workers exercising this free choice. It will be unlawful for an employer to discriminate against anyone who represents colleagues in a dispute or to terminate or otherwise disadvantage any employees making enquiries about their pay or entitlements.

Better Off Overall Test

From 1 January 2010, a new test will be used to assess workplace agreements, being the Better Off Overall Test ('BOOT'). The

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BOOT implies by its name that it will require a higher standard than the current test of whether an employee is disadvantaged against the award – that is, it will require the employees to be better off overall against the award. The Federal Government does not consider this is necessarily the case. Ultimately, it will be up to Fair Work Australia as to how the BOOT is applied.

Main implications for employers

The Good Faith provisions introduced under the *Fair Work Act* will see a return to collective bargaining in the workplace.

After 1 July 2009 it will become more difficult to have an agreement without union involvement. If one employee is a member of a union or eligible to be a member and they want that union to be party to the agreement, then the union will be able to be a party upon application to Fair Work Australia.

If you have union involvement in your workplace it will be easier to negotiate a collective agreement with your employees prior to 30 June 2009. However, if you have no history of union involvement then the new bargaining laws should not cause too much grief.

Any businesses that are concerned about the higher penalty rates, overtime rates, etc in the Modern Award relevant to their industry should consider entering into a collective agreement with their employees. Where this is lodged before 31 December 2009 it will be assessed using the No Disadvantage Test against the current award, not the Modern Award. Any agreement lodged from 1 January 2010 will be assessed using the Modern Award and using the new Better Off Overall Test.

Lisa Aitken
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