Collective negotiations, bargaining and enterprise agreements (week 8)

1. Collective Bargaining

- Collective bargaining is the process of negotiating a collective agreement.
- A collective agreement is an agreement between an employer (or employers) and a group of workers concerning wages and employment conditions.
- Collective bargaining usually (but doesn't always) involve a trade union representing workers.

2. Enterprise bargaining under the *Fair Work Act 2009*

Part 2-4 of the *Fair Work Act 2009* ('FW Act'):

- sets out a framework which promotes *enterprise bargaining,* underpinned by a safety net of minimum wages and conditions of employment (found in the FW Act and modern awards).
- seeks 'to provide a simple, flexible and fair framework that enables collective bargaining in good faith, particularly at the enterprise level, for enterprise agreements that provide productivity benefits' (s. 171)

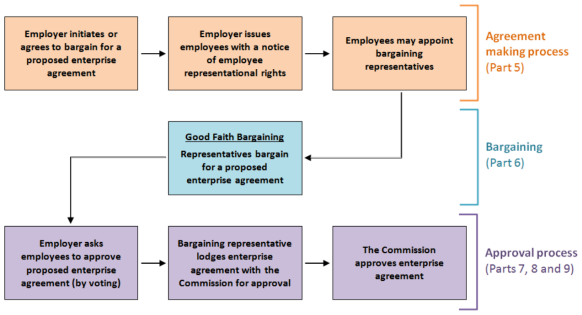
Part 2-4 of the FW Act provides for the making of three types of *enterprise agreements:*

1. Single-enterprise agreements
2. Multi-enterprise agreements
3. Greenfield agreements

Single-enterprise agreements

- can be made by an employer and a group of employees.
- It can also be made by two or more employers, providing they are 'related corporations, or conduct a joint venture or common enterprise, or have obtained a 'single-interest authorization' from the FWC or the Minister (s. 172(2),(5)).
- One employer may have more than one enterprise agreement (e.g. covering workers at different locations, or doing different work).
- But only one enterprise agreement can apply to a given employee (FW Act, s. 58(1)).

Making an enterprise agreement – overview



STAGE ONE

- The point at which the parties start the bargaining and agreement making process is called the **notification time.**
- Under s. 173(2), the **notification time** for a proposed enterprise agreement is the time when:
  - The employer agrees to bargain, or initiatives bargaining, for the proposed agreement
  - A **majority support determination** in relation to the proposed agreement comes into operation
  - A **scope order** in relation to the proposed agreement comes into operation.

What happens if employees want to bargain but the employer doesn't?

- Under s. 236, an employee bargaining representative can apply to the FWC for a determination that a majority of the employees who will be covered by the agreement want to bargain with the employer ('a *majority support determination*')
- Under s. 237, the FWC must make an **MSD** where it is satisfied that a majority of the employees who are employed by the employer at the time and who will be covered by the agreement want to bargain.
- The FWC may work out whether a majority of employees want to bargain using any method the FWC considers appropriate (s. 237(3)).
  - The FWC may order a ballot (e.g. *AMWU v Cochlear* (2009)).
  - But other forms of evidence can also be submitted by BRs and relied upon by the FWC: e.g. signed petitions (*CFMEU v Xstrata Ulan* (2012)).
- If an MSD is made, then the employer is obliged to bargain (and to notify employees of their representational rights under s. 173).

What if the employer & employees/ union disagree over who the agreement will cover?

- Where a BR has concerns over the proposed coverage of a single-enterprise agreement, they can apply to the FWC under s. 238 for a **scope order.**
- The FWC may make a scope order if it is satisfied that:
  - the bargaining representative who made the application has met, or is meeting, the good faith bargaining requirements
  - The making the order will promote the fair and efficient conduct of bargaining

- the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen,* and
- it is reasonable in all the circumstances to make the order.

* If the proposed agreement will not cover all of the employees of the employer (or employers), the Commission must, when deciding whether the group of employees who will be covered by the agreement was fairly chosen, take into account whether the group is geographically, operationally or organizationally distinct.

- A **scope order** will specify the employer (or employers), and the employees who will be covered by the proposed agreement.
- E.g. *UFUA v Metropolitan Fire & Emergency Services Board* (2010)

Employer must issue employees with Notice of Representational Rights

- An employer that will be covered by a proposed enterprise agreement must take all reasonable steps to provide employees with a **notice of employee representational rights,** informing them of their right to be **represented by a bargaining representative** (ss. 173-174).
- This Notice must be given to each employee who:
  - will be covered by the agreement, and
  - is employed at the notification time for the proposed agreement (ss. 173-174).
  - The Notice must be given as soon as practicable, and no later than 14 days, after the notification time. If the Notice is issued after the 14 day period it is invalid.
- This Notice is set out in Schedule 2.1 to the *Fair Work Regulations.*

Employees may appoint a bargaining representative

- An employee who will be covered by a proposed enterprise agreement has the right to appoint a **bargaining representative** to represent the employee in bargaining for the proposed agreement or in a matter before FWC about bargaining for the agreement.
- An employee bargaining representative must be free from control by or improper influence from the employee's employer or another bargaining representative (FW Reg 2.06).
- An employer is automatically treated as a BR for itself, but it can appoint another BR to represent it if it wants to.

Note: Bargaining representatives are important because they are given certain rights and responsibilities under the FW Act.

- **So a bargaining representative for a proposed single-enterprise agreement may be:**
  - an employer that will be covered by the agreement
  - a representative appointed by an employer
  - an employee that will be covered by the agreement
  - a representative appointed by an employee, or
  - a union (by default if an employee is a member)(ss. 176-177).

STAGE TWO

Bargaining must be undertaken in good faith

s228 *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.*

'capricious or unfair conduct' in s.228(1)(e) meaning

- The requirement in section 228(1)(e) ('refraining from capricious or unfair conduct ...') is intended to cover a broad range of conduct. E.g. where an employer:
  - fails to recognise a bargaining representative
  - does not permit an employee who is a bargaining representative to attend meetings or
  - discuss matters relating to the terms of the proposed agreement with fellow employees
  - dismisses or engages in detrimental conduct towards an employee because the employee is a bargaining representative or is participating in bargaining, or
  - prevents an employee from appointing his or her own representative.

The good faith bargaining requirements in s. 228 – IMPORTANT!

Note section 228(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.

Some examples of failing to bargain in good faith

- Employer refusing to negotiate with union reps or excluding them from meetings (*ASU v Qld Tertiary Admissions Centre (2009)*)
- Putting a proposed agreement to a vote without notifying the BRs or before bargaining has a reasonable chance to occur (*Re Alphington Aged Care (2009)*)
- Granting a pay rise to employees but not putting the pay offer to the union (*Financial Sector Union of Australia* [2010] FWA 2690)
- Employer unilaterally withdrawing from bargaining *(ASU v NCR Australia* (2010))

What happens if a party fails to meet the GFB requirements in s.228?

- Section 228 is not a civil remedy provision. So it can't be directly enforced.
- However if a bargaining representative is not meeting one or more of the GFB requirements in s. 228(1), the other bargaining representative can apply to the Fair Work Commission under s.229 for a **bargaining order.**
- A bargaining order made by the FWC must specify the actions that must be taken by the representatives concerned to remedy the problem (s. 231).
- A person to whom a bargaining order applies must not contravene the order (s. 233). Failure to do so may result in civil penalties or other court orders under Part 4-1.

What type of bargaining orders can the FWC make?

- The FWC has wide discretion here. It can, for example: make an order:
  - excluding a bargaining representative for the agreement from bargaining;
  - requiring some or all of the bargaining representatives of the employees who will be covered by the agreement to meet and appoint a single bargaining representative to represent them in bargaining;
  - 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 requirements.

The parties can ask the FWC for assistance during bargaining (s.240)

- During the process of negotiating a enterprise agreement, a bargaining representative can make an application under s. 240 for the Commission to deal with a dispute between bargaining representatives about the agreement
- Applying for the Commission to deal with a bargaining dispute can be a way to advance negotiations if the bargaining representatives have reached an impasse or deadlock, or are encountering difficulties in their negotiations.
- The Commission may deal with a bargaining dispute (other than by arbitration) as it considers appropriate, including by:
  - mediating or conciliating the dispute, or
  - making a recommendation or expressing an opinion (s. 595(2)).
  - The Commission may only arbitrate the dispute if all of the bargaining representatives for the proposed agreement have agreed that it may do so (s. 240(4)).

<u>STAGE THREE</u>

Employees must approve the proposed enterprise agreement

- A proposed agreement must be submitted to the employees for their approval.
- This vote must not take place until at least 21 days after the last representation notice has been given (s. 181).
- Only employees that fall within the coverage of the proposed agreement, that are employed at the time of the vote and that are likely to have a job after the agreement takes effect can vote.
- The employer must take all reasonable steps to ensure that each eligible employee has a copy of the agreement (or access to one) at least 7 days prior to the vote. They must reasonable efforts to explain the terms & effect of the proposed agreement to the employees (s. 180).
- A proposed single-enterprise agreement must be approved by a majority of those employees casting a valid vote.

The FWC must approve the enterprise agreement

- Once an agreement is made, one or more of the bargaining representatives must lodge a signed copy with the FWC for approval (s. 185).
- An enterprise agreement cannot come into operation until at least 7 days **after** it has been approved by the FWC (s. 54(1)).
- The FWC will only approve an agreement if it meets a number of requirements.
- These include, e.g.:
  - That the agreement has been 'genuinely agreed to' by the employees concerned (s. 188)
  - The group of employees covered by the agreement was 'fairly chosen' (s. 186(3))

- The agreement does not have any terms that are inconsistent with the NES
- The agreement passes the 'better off overall test' (the 'BOOT') (s. 193).

The Better Off Overall Test (BOOT)

- Under s. 193, the FWC must not approve an enterprise agreement unless it is satisfied that each award-covered employee will be **better off overall** under the agreement than they would be if the relevant award applied.
- The BOOT requires 'the identification of terms that are more beneficial for an employee, terms which are less beneficial and an overall assessment of whether an employee would be better off under the agreement' (*Re Armacell* (2010); *ALDI Foods v SDA* (2017)).
- The FWC is allowed to assume that where a 'class' of employees are better off, this would be true for every employee in that class (subject to any evidence to the contrary).

Mandatory, unlawful and non-permitted terms in enterprise agreements

As well as being satisfied that the proposed agreement passes the BOOT, before approving a proposed agreement, the FWC must be satisfied that the agreement:

- Contains **mandatory terms**
  - *a nominal expiry date (s. 186(5); a dispute resolution procedure (s. 186(6)); a flexibility term (s. 202); a consultation term (s. 205).*
- Does not contain certain **unlawful terms** (s. 186(4)).
  - E.g. discriminatory terms (s. 194)
- Does not contain **non-permitted terms** (s. 172(1)).

3. Industrial action under Part 3-3 of the FW Act

Industrial action is defined in s. 19 of the FW Act to include the following actions when taken by **employees**:

- Performing work in a manner different from how it is customarily performed
- Adopting a practice that restricts, limits or delays the performance of work
- A ban, limitation or restriction on performing or accepting work
- Failing or refusing to attend for work or perform work.

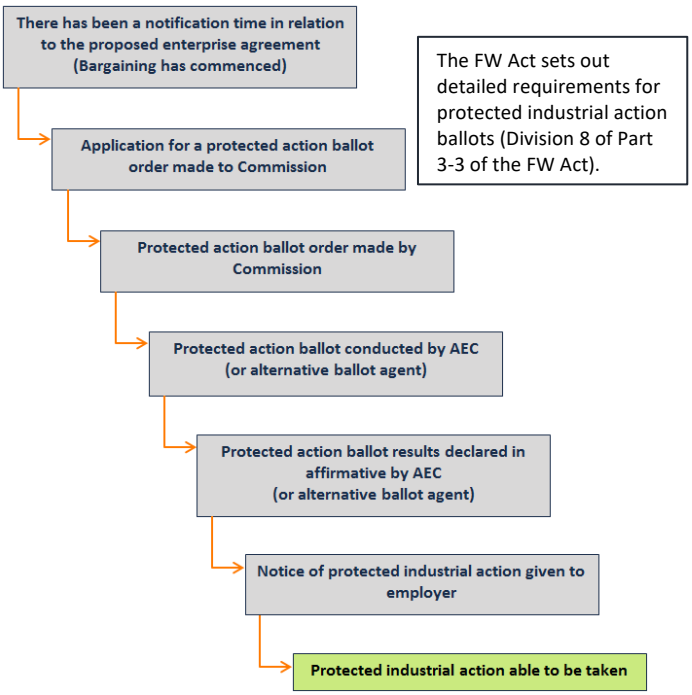
Under section 19(3), industrial action also includes when an **employer locks out** its workers (refuses to allow them to come to work and so denying them the opportunity to earn wages).

The concept of 'protected' industrial action

- At common law, industrial action is unlawful, because it constitutes a breach of contract or a tort.
- The Fair Work Act '**protects**' certain industrial action. If the action is 'protected':
  - any party taking or organising it has statutory immunity from the various forms of liability that may otherwise arise, such as breach of contract or economic tort. This immunity extends to liability under both legislation and the common law (s. 415).
  - An employer can not dismiss, discipline or otherwise impose a penalty on employees for taking part (because this would constitute a breach of s. 340 – which prohibits adverse action against a person for exercising a 'workplace right'.)

The FW Act sets out requirements that a party must meet before they can take protected industrial action

- For any industrial action taken by employees to be protected, it must be authorised by **a secret ballot of the employees** (s. 409(2)).
  - A ballot is not needed if the employees are merely responding to **employer industrial action** (i.e. a lockout).
- A protected action ballot order can only be sought after an employer has become obliged under s. 173 to issue a notice of representational rights (s. 437(2A)).



Are employees paid when they are taking protected industrial action?

- Under s. 470 of the FW Act, if an employee engaged, or engages, in protected industrial action against an employer on a day the employer **must not** make a payment to the employee in

relation to the total duration of the industrial action on that day.

- In the case of partial work bans (i.e. industrial action that falls short of a total stoppage of work), the employer has the discretion to either:
  - accept the partial performance of work and pay an employee in full, or
  - make a reduced payment to an employee based on the partial performance of work by the employee, or
  - refuse to accept the performance of any work by an employee, until the employee is prepared to perform all of his or her normal work, and not pay the employee during the period of the industrial action (s. 471(4)).

What happens if workers take <u>unprotected</u> industrial action?

- If a party engages in industrial action without meeting all the requirements laid down in the FW Act, their industrial action is **unprotected.**
- A person affected or likely to be affected by unprotected industrial action can apply to the FWC under section 418 of the FW Act for an order that the industrial action cease, not be taken or not be organised ('**a stop order**').
- The FWC must hear and determine an application under s. 418 (for a stop order) within 48 hours, if at all possible.
- Failure to comply with a stop order will result in civil penalties (s. 421(1)). A court may also issue an injunction to restrain an actual or potential contravention.
- Seeking a stop order under s. 418 is the most common legal response by employers when faced with unprotected industrial action.

Stopping <u>protected</u> industrial action under the FW Act

- Even in cases where employees are engaging or proposing to engage in 'protected industrial action', the FW Act provides the FWC with the power to put an end to the action in certain circumstances.

Ways to stop <u>protected</u> industrial action under the FW Act

- Under s**. 423**, protected industrial action may be suspended or terminated where it is causing 'significant economic harm' to both parties (or, in the case of an employer lockout, to the employees alone).
- Under **s. 424**, protected industrial action ***must be*** suspended or terminated where:
  - it is threatening *to endanger personal health, safety or welfare* (e.g. action by nurses or power workers); or
  - it is likely to cause *significant damage to the Australian economy or an important part of it.*
  - Applications under s.424 may be brought by a bargaining representative, a federal or State Minister or under the FWC's own initiative.
- Under **s. 425**, the FWC may order a 'cooling off' period where it is satisfied that suspension of the industrial action would be 'beneficial' to the parties.
- Under **s. 426**, the FWC may suspend industrial action that is both 'adversely affecting' the employer or employees involved, and threatening to cause 'significant harm' to a third party.

What happens if FWC terminates protected industrial action?

- If Fair Work Australia terminates protected industrial action:
  - No bargaining representative can take protected industrial action
  - Parties have 21 day negotiating period
  - If no agreement is reached Fair Work Australia must make an arbitrated workplace determination (s.266)

4. The operation of enterprise agreements

How are terms in enterprise agreements enforced?

- An employer must not contravene any term of an enterprise agreement that applies to it (FW Act, s. 50).
  - This is a civil penalty provision.
- *Compliance* with an enterprise agreement must be enforced in the courts.
  - Remember: only the courts can impose a civil penalty. The FWC cannot.
- But a dispute over the *meaning or effect* of an agreement may be referred to the FWC or a private arbitrator (depending on the terms of the dispute resolution procedure in the agreement).
- Under the FW Act, a union that is covered by an enterprise agreement has standing to bring disputes to the FWC concerning the application of the agreement, and to bring claims for non-compliance with its terms in a court.

How does an enterprise agreement interact with <u>an award</u>?

- Once approved by the FWC, an enterprise agreement covers any employers and employees who fall within its scope including those hired after it comes into operation (s. 53).
- While it is in operation, an enterprise agreement applies to the **complete exclusion of the relevant modern award** (s. 57).

- An enterprise agreement may be replaced by another agreement (when old agreement has passed its nominal expiry date)(s. 54(2)).
- An enterprise agreement may also be terminated (by mutual consent of the parties or by the FWC in very limited circumstances).
- If an enterprise agreement is terminated and not replaced with another, the employees will fall back onto the relevant modern award.

How does an enterprise agreement interact with the minimum wage?

- Section 206 of the FW Act provides that the base rate of pay for each employee covered by an enterprise agreement can not fall below the minimum wage rate set by any relevant award or national minimum wage order.
- If, over the lifetime of an agreement, the negotiated wage rate is overtaken by adjustments to the minimum wage, it is automatically increased to match the new minimum.