

4 May 2010

## Employment Law e-alert

### The bargaining representative you didn't know you had ...

The Federal Court has determined that a bargaining representative can be appointed by an employer to bargain for agreements under the Fair Work Act without any formal appointment documents being drawn up. Under the Act, an appointment must be "in writing", including the date of the appointment. The Court has determined that so long as the date of the appointment can be discerned from the document, the appointment does not need to have any particular formality. It must also be in a form that can (on request) be given to an employee's bargaining representative.

In *Jones –v– QTAC (No 2)* [2010] FCA 399 (29 April 2010), Justice Collier determined that the Chief Executive Officer (**Ms Jones**) of the employer (**QTAC**) had been appointed as a bargaining representative for enterprise bargaining negotiations. QTAC argued that it had not made the appointment at all, but the Court found appointment was made by a combination of Board minutes and a letter to the employee bargaining representative (the **ASU**) which each mentioned that Ms Jones would act as QTAC's bargaining representative. That was, for the Court, enough to amount to an appointment in writing.

The case arose because Ms Jones argued that a subsequent bullying investigation initiated by QTAC was motivated by the ASU's attitude to her actions as QTAC's bargaining representative. In effect, she argued that the ASU engineered the investigation to ensure her capacity to act as an effective bargaining representative was blunted. The Court did not agree with this second argument. It determined the initiation of a bullying investigation was not because of her "workplace right" (that is, status as a bargaining representative) but simply because QTAC legitimately believed that it had an obligation to deal with the bullying complaints it had received, and chose to discharge this obligation by conducting an investigation. Evidence of subjective reasons for taking action is relevant in deciding what motivated the employer.

A key part of successful negotiations is to use the good faith bargaining obligations to try to ensure that other bargaining representative place only justified and reasoned positions on the table for consideration. All bargaining representatives owe each other the obligation to conduct themselves in line with the good faith bargaining obligations. The accidental appointment of an individual means employee bargaining representatives may not recognise they owe those obligations to the employer's representative.

#### Key points:

- Documents dealing with the bargaining process can amount to a "written instrument" appointing an individual as the employer's bargaining representative, although the employer itself continues to be its own bargaining representative.
- An appointment as a bargaining representative can also be revoked by "written instrument". An unintentional revocation of the appointment might occur without any formality. Care needs to be taken when corresponding with other bargaining representatives.
- Negotiating an enterprise agreement under the Fair Work Act deserves a well thought-out strategy. Deliberate appointment of a bargaining representative (either internal or external) who can take best advantage of the good faith bargaining obligations and be a channel for information is a key consideration. Accidental appointment of an unsuitable or inexperienced person may mean this advantage is lost.

#### Contacts

Martin Dunne, Sydney (City)	+61 2 9391 3211	<a href="mailto:mdunne@hunthunt.com.au">mdunne@hunthunt.com.au</a>
Ian Miller, Sydney (North West)	+61 2 9804 5704	<a href="mailto:imiller@hunthunt.com.au">imiller@hunthunt.com.au</a>
David Thompson, Melbourne	+61 3 8602 9252	<a href="mailto:dthompson@hunthunt.com.au">dthompson@hunthunt.com.au</a>
Tim Lange, Melbourne	+61 3 8602 9208	<a href="mailto:tlange@hunthunt.com.au">tlange@hunthunt.com.au</a>
Andrew Knott, Brisbane	+61 7 3292 9760	<a href="mailto:aknott@macrossans.com.au">aknott@macrossans.com.au</a>
Chris Sharp, Adelaide	+61 8 8414 3385	<a href="mailto:csharp@hunthunt.com.au">csharp@hunthunt.com.au</a>
Darren Miller, Perth	+61 8 9488 1300	<a href="mailto:darren.miller@marksandsands.com.au">darren.miller@marksandsands.com.au</a>
Sarah Sealy, Hobart	+61 3 6231 0131	<a href="mailto:ssealy@huntingtas.com.au">ssealy@huntingtas.com.au</a>
Chris Osborne, Darwin	+61 8 8924 2600	<a href="mailto:cosborne@huntnt.com.au">cosborne@huntnt.com.au</a>
Justine Matthews, Newcastle	+61 2 4925 5500	<a href="mailto:jmatthews@hunthunt.com.au">jmatthews@hunthunt.com.au</a>

© Hunt & Hunt 2010

Disclaimer: The information contained in this e-alert is not advice and should not be relied upon as legal advice. Hunt & Hunt recommends that if you have a matter that is legal, or has legal implications, you consult with your legal adviser. If you no longer wish to receive this e-alert or any other publication from Hunt & Hunt, please email us at [unsubscribe@hunthunt.com.au](mailto:unsubscribe@hunthunt.com.au)