

11 December 2009

## Employment Law e-alert

# Industrial Action under the Fair Work Act

There has not been any significant increase in industrial action since commencement of the Fair Work Act 2009 (“FW Act”). This is because it retains some of the more stringent features of WorkChoices, including:

- outlawing industrial action during the life of an enterprise agreement;
- the requirement to obtain a protected action ballot order before being able to put proposed industrial action to a vote;
- the requirement for voting for industrial action to be conducted by secret ballot, as opposed to a show of hands in the tea room; and
- the retention of a number of mandatory pay docking requirements when employees are taking industrial action.

The FW Act also retains the philosophy of endeavouring to achieve industrial peace throughout the life of an enterprise agreement whilst encouraging industrial action (through a complex process) during bargaining for a new agreement.

The FW Act retains the concepts of protected and unprotected industrial action. Protected action is confined to bargaining for a proposed enterprise agreement. Protected action is now split into 3 subcomponents – employee claim action, employee response action and employer response action. Whilst protected action can be taken during the bargaining process, it will not be protected if it is intended to advance claims for the agreement about matters that are not permitted, unlawful terms or pattern bargaining.

Applications to Fair Work Australia made by a union/employees to obtain a protected action ballot order can be successfully opposed if it can be shown that the relevant bargaining representative has not genuinely been trying to reach agreement, prior to the application being made. The LHMU failed in an application for a protected action ballot on this ground because it was found to be keeping its options open by requesting to vary an existing enterprise agreement containing prohibited content (*Liquor, Hospitality and Miscellaneous Union –v– Fosters Australia Ltd – AIRC* 1 June 2009).

There is also a new ground upon which Fair Work Australia may order the suspension or termination of protected industrial action. This is where the action is causing or threatening to cause significant economic harm to the employer and any employees (for employee claim action) or any employees (for employer/employee response action). The harm must also be imminent.

Protracted industrial action can also lead to Fair Work Australia making a workplace determination. This means that Fair Work Australia determines the terms and conditions to be contained in the enterprise agreement. If this occurs, all terms and conditions already agreed between the parties must be included.

In relation to strike pay, mandatory pay docking remains for most forms of industrial action. Pay must be docked for the duration of time that the action lasts (or, in the case of unprotected action, for a minimum period of 4 hours, where the duration of the action is less than this). The primary exception to these requirements relates to partial work bans that are protected action. Here, employers have the choice of making no deductions, reducing pay or not paying wages at all. However, prior notice must first be given of any intention to reduce or not pay wages.

There is little change in the notice requirements when industrial action is about to be taken. It is important for employers to obtain legal advice as to whether a notice of intended action satisfies the statutory requirements. If it does not, then any action taken will not be protected action.

## 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>
Rachel Drew, Brisbane	+61 7 3292 9717	<a href="mailto:rdrew@macrossans.com.au">rdrew@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>
Gregory Geason, Hobart	+61 3 6231 0131	<a href="mailto:ggeason@hunttas.com.au">ggeason@hunttas.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>