

## Enterprise Agreements Fail – Good Faith Bargaining Obligations Continue Despite Approval of Agreement by Employees

Fair Work Australia (“FWA”) has recently dealt with two (2) different applications to approve an Agreement under the *Fair Work Act 2009* (“FW Act”) – the applications made were to approve the *Alphington Aged Care Employee Enterprise Agreement 2009–2012* and the *Sisters of St Joseph Health Care Services (VIC) Employee Enterprise Agreement 2009–2012*.

Both applications were dismissed by FWA, as neither application met the criteria expressed in the FW Act.

The ANF initially sought good faith bargaining orders from FWA because, it was submitted, that neither of the above employers had complied with the FW Act. FWA rejected the ANF’s application because the application did not satisfy the criteria set out in the FW Act, in that the application for the good faith bargaining orders had been made after the employees had approved the Agreement.

However, the Commissioner indicated that the arguments and complaints raised by the ANF were better dealt with when FWA considered whether or not to approve the two (2) Agreements. FWA subsequently heard the applications for approval of the two (2) Agreements on 1 September 2009.

### Lessons to be learnt from the FWA Decision

FWA did not approve the agreements because the employer had not bargained in good faith, by putting an agreement to a vote of employees without notifying the union, who was the employee’s bargaining representative.

The decision made by FWA clearly demonstrates that a bargaining representative (whether that is a union or another person) is an integral component of the bargaining process. The employer must deal with the bargaining representative in good faith. If the employer doesn’t deal with the union in good faith by seeking to “sideline them” then the bargaining representative is entitled to bring an action to FWA. The Commissioner said that:

*“Where an employer seeks to make an agreement with its employees and some of those employees are members of a union, unless the employees appoint another bargaining representative, the union will be recognised by the (FW) Act as their bargaining representative.” and*

*“In my view, where the employer is aware that there are employees who are union members and the union is therefore their bargaining representative, it would be a breach of good faith bargaining to put an agreement to a vote without notifying the union of its intention to do so. Particularly, as occurred in this case, where bargaining is underway with the union, to not notify the union that bargaining is at an end – which a decision to put an agreement to the vote clearly implies – undermines the process of good faith collective bargaining which the objects of the (FW) Act support.”*

The Commissioner further noted in her decision:

*“Any single enterprise agreement under the (FW) Act is an agreement between an employer and its employees. The union however, has status as a bargaining representative, by virtue of its right to represent those employees who are its members. The bargaining in good faith requirements include recognising and bargaining with the other bargaining representatives for the agreement”*

Finally, this decision makes it clear that if an Agreement has been approved by the employees, a bargaining representative cannot make an application to FWA for good faith bargaining orders. However, if there are procedural objections by a bargaining representative (including those pertaining to good faith bargaining) these may be dealt with by FWA at the time of the application for the approval of the Agreement.

**Require further information or assistance?**

Contact your local consultant at either our Adelaide Office or Melbourne Office on the phone numbers noted below.

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