



Fair Work Bargaining Guide

Interim version

(1 July 2009)

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1. INTRODUCTION

The good faith bargaining regime established by the Fair Work Act 2009 (the FW Act) presents opportunities for unions to recruit, to bargain, and to achieve better outcomes for their members.

The FW Act expands the opportunities for unions to:

- bargain with employers who have not bargained before;
- bring recalcitrant employers to the bargaining table, and apply pressure upon them to reach an agreement;
- bargain more effectively, by gaining access to company information;
- ensure greater protection for delegates in the course of bargaining; and
- boost recruitment, by showing potential members that unions can achieve important bargaining outcomes for them.

The changed legal framework for bargaining also creates some challenges, including:

- the obligation on unions to bargain in good faith;
- the requirement, in some cases, for unions to bargain alongside other unions and/or alongside non-union bargaining representatives;
- dealing with employers who merely ‘go through the motions’ of bargaining, with no intention of reaching agreement;
- securing the inclusion of important clauses in agreements (such as a DSP that results in arbitration);
- responding to cases in which employers simply bypass bargaining by making direct offers to employees;
- the danger that beneficial provisions in the new laws will be interpreted narrowly, or against our interests, by FWA and the courts; and
- the risk that effective industrial action will be stopped by FWA.

This kit presumes that unions are familiar with the content of the Fair Work Act. Unions that need a refresher, should consult the ACTU’s consolidated summary of the new laws (including the transitional legislation) in **ACTU Guide to the Fair Work Act**.

This kit provides advice on how to maximise the opportunities afforded by good faith bargaining and how to avoid some of the obvious traps. In using the Act, unions are reminded that their actions have the potential to affect the development of legal precedent on the new provisions. The new laws must be used strategically, so as to ensure that beneficial provisions are interpreted broadly by FWA (and the courts) and enable us to secure maximum benefits from the new laws.

This guide is predominantly written for unions seeking an enterprise agreement. However unions should consider whether there are industrial advantages in seeking a multi-employer agreement.

Multi-employer agreements are available:

- by consent without having to prove that they are in the public interest;
- following the making of a single interest declaration by FWA;
- for low paid employees.

The final version of this kit will include guidance for these agreements.

2. CHECKLIST

Before initiating bargaining unions should answer the following questions:

- Is the employer a national system employer? The FW Act applies to national system employers, including: constitutional corporations; the Commonwealth; specified employers engaged in interstate trade and commerce (employing flight crew, maritime employees or waterside workers); employers in the Territories; and employees in Victoria.
- Is the employer covered by an award? If not, which award will be designated to underpin the agreement and be the benchmark for the BOOT test?
- Are there any transitional instruments in place at the workplace, including AWAs and ITEAs? If so, when do they expire?
- Are there other unions with coverage and members at the workplace? If so, are there cooperative arrangements in place regarding the coverage of agreements and the conduct of bargaining?
- Has the union chosen the appropriate scope for the agreement (in terms of which areas of the business it will cover)? Will the employer challenge this scope? Can the union show that the scope is fairly chosen?
- Is the employer likely to refuse to bargain? If so, can the union show that a majority of workers support bargaining?
- Are the terms being sought lawful and 'permitted' (or at least reasonably believed to be permitted)?
- When will bargaining start? What are your plans if it becomes deadlocked?

3. TRANSITIONAL ISSUES

If you commenced negotiating a union collective agreement prior to 30 June 2009, then if the employees vote the agreement up before the end of 30 June, the agreement can be lodged (within 14 days) and made as a Work Choices agreement.

However, if you have not been able to conclude an agreement, then you must re-start the bargaining after 1 July, under the new system. In other words:

- you will need to tell the employer (preferably in writing) you want to bargain for an enterprise agreement under the new laws;
- the employer must send the 'representation notice' out to affected employees. This may bring other bargaining representatives (including other unions) to the table, and you will have to engage with them;
- you must consider whether you want to maintain the same claim, or whether you want to add new matters (for example, those which used to be 'prohibited');
- you might have to amend your claim so that it is consistent with the new bargaining rules (such as the prohibitions on unlawful content, and the requirements for the mandatory clauses); and
- you must bargain in good faith towards the making of the agreement. However, you do not have to start from scratch; you can rely on the progress of bargaining prior to 30 July. FWA is allowed to take this into account if you apply for a good faith bargaining order.

Finally, if you had authority to take protected industrial action under a ballot conducted before 30 June, you cannot rely on that authority to take action under the new system. Only unions that began to organise industrial action after 1 March 2009 can apply to FWA for an order deeming the action to be taken after 1 July to be authorised under the FW Act (as if it had been approved through a ballot under the new law) (Transition Act, sch 13, section 14A). The application must be made before 28 July 2009, and no action can be taken before the order is made.

4. PREPARING TO BARGAIN: TIMING

Deciding when to commence bargaining is a tactical as well as technical decision for unions.

Under the new laws, negotiations can start with the employer(s) at any time, and an agreement can be made and approved prior to the nominal expiry of any existing agreement. Making the new agreement will override any existing agreements.

However good faith bargaining orders (“bargaining orders”) are only available:

- 90 days before the latest nominal expiry date of a collective agreement that applies to any of the employees to be covered by the proposed new agreement; or
- where an employer has submitted a proposed agreement to the workforce for approval.¹

The requirement that FWA have regard to the latest expiry date will be relevant where a union proposes to expand the scope of a proposed agreement to cover employees that are currently covered by a number of agreements with different expiry dates.

From a tactical perspective unions may wish to wait until all the employees to be covered by the agreement are free to bargain and participate in protected industrial action. Where this would unduly delay bargaining it may be possible to bargain for a scope clause, which expands as the various agreements expire or are terminated.

The initial agreement would apply to those employees whose agreement has expired, with other employees being covered as their agreements are terminated. (This matter is discussed in more detail under the heading Scope of the agreement).

Applications for a protected action ballot can be made 30 days before the latest nominal expiry date of any collective agreements applying to the group.² This means that the union can plan to begin protected industrial action on the very day after the existing agreement(s) expire.

5. PREPARING TO BARGAIN: SCOPE OF AGREEMENT

Careful consideration of the scope of the proposed agreement (ie which workers are covered by the agreement) is more important under the FW Act than has historically been the case, and the Act now includes several provisions whereby the scope of an agreement can be challenged.

FWA cannot approve an agreement unless the scope of the agreement was fairly chosen.³ Where an agreement does not cover all the employees, (we think of the employer), FWA must have regard to whether the group is geographically, organisationally or operationally distinct. This requirement was a late amendment to the Act,⁴ and seems designed to preserve the capacity for agreements to cover part of an enterprise as they have historically done.

Unions should also consider the following tactical factors in deciding the scope of the agreement:

- The possibility that the employer might refuse to bargain unless majority support is proven – in which case care should be taken to ensure that bargaining for an agreement is supported by the employees for whom the union proposed to bargain;
- The possibility that people currently on AWAs or ITEAs who will not be covered by the agreement in the first instance may later wish to be covered by the collective agreement;
- The fact that any union with properly enrolled member is automatically a bargaining representative for that member and may be covered by the agreement. In workplaces where there are two or more unions the unions should cooperate and agree the scope of agreements and, if required, the operation of joint union bargaining arrangements;
- The possibility that the employer may later apply for a scope order to bargain for an agreement covering a different group or sub group of employees.⁵ While this cannot occur until bargaining has started⁶ unions should consider whether the scope of the agreement proposed by the union would withstand such an employer application. Note that FWA has broad discretion but must consider whether the group is fairly chosen, and whether it is a geographically, organisationally or operationally distinct part of an enterprise.

Is there majority support?

There is no legal requirement for majority support to commence bargaining and, once bargaining has commenced, there is no opportunity for an employer to require a union to show that there is majority support.

However, an employer seeking to frustrate bargaining can refuse to bargain. If bargaining has not commenced a union cannot obtain a bargaining order unless FWA is satisfied that at least 50 per cent of employees within the proposed scope would support bargaining for a collective agreement.⁷

Note this does not require 50 per cent union membership, but does require a majority to support bargaining towards an agreement.

To be ready to bargain a union should be satisfied that there is evidence that objectively justifies the union's confidence in the support of the workforce.

In considering whether there is evidence of majority support, questions to consider may include:

- How many employees within the proposed scope are union members (including other unions)?
- Did the union(s) undertake member research in developing the bargaining claim? This might include surveys, workplace meetings, or consultations via delegates. Were these consultations well supported in the workplace?
- Has the claim been endorsed by the workforce and/or union members? Note that it is not necessary to ballot employees to show that there is majority support for collective bargaining.
- What proportion of employees currently depend on bargaining to set their terms and conditions of employment?
- How many people voted in the last bargaining round?

Where unions are not confident that 50 per cent or more of employees within the proposed scope of the agreement want to bargain collectively unions should take action to secure support for the claim prior to initiating bargaining. This helps to ensure the union could win a majority support ballot, but more importantly ensures that the union is pursuing a claim that has the support of the workforce.

Employees on AWAs/ITEAs

Employees on AWAs and ITEAs cannot participate in bargaining unless they first terminate their agreements or sign a 'conditional termination agreement' with their employer.⁸ Until then, they cannot be formally represented in bargaining or vote on the agreement.

However, many AWAs/ITEAs may expire during the life of the new enterprise agreement. What happens to these employees depends on how the scope clause of the agreement is drafted.

If the agreement has a clause that covers these employees (eg by their classification or occupation), they will be entitled to terminate their individual instrument and fall back onto the collective agreement. (See sample clause below)

However, if the scope clause excludes these people (expressly, or simply by referring to the coverage of the previous collective agreements) they will fall back onto the NES and relevant modern award.⁹

Sample clause

This agreement shall apply to the classes of employees set out in XXX.

This agreement shall also apply to any other employee performing the type of work set out in XXX who is covered by an agreement based transitional instrument that is terminated during the operation of this agreement.

In order to transition employees to this agreement, the employer shall, at the request of the union, [and / or an employee's bargaining representative] consent to terminate any agreement based transitional instrument.

Any decision to include or exclude employees on individual instruments must be 'fair' since they, or the employer, may dispute that the scope of the agreement has been fairly chosen. The scope of the agreement cannot discriminate against an employee because they are on an AWA or have accepted one in the past.¹⁰

It may be necessary for unions to consider transitional clauses that address the way in which employees whose AWAs and ITEA's expire can become covered by the agreement. This might involve preservation of certain AWA terms in the collective agreement. This will depend on the workplace and the reason why AWAs were offered by employers and accepted by employees. For example unions may negotiate an acceptable regime for some individual pay setting that is transparent and equitable and which receives collective endorsement.

Employees on high income guarantees

A high income guarantee lapses when a collective agreement starts to apply to the employee. Unions should consult with employees on these guarantees before setting the scope of the proposed agreement to ensure that the agreement adequately protects any additional guarantees or commitments that have may have been given to these employees.

Other bargaining representatives

Any employee within the proposed scope of the collective agreement has the right to appoint themselves, or somebody else, as their bargaining representative.

Where members of another union are within the proposed scope of the agreement, the unions should agree the bargaining arrangements. In some cases it may be tactically desirable to alter the scope of the proposed agreements to bargain for separate agreements. In other cases this would fragment the employees' collective bargaining advantage, and a single bargaining unit would be preferred. The ACTU is available to assist unions if agreement cannot be reached.

If the proposed agreement covers employees with strong individual interests that are not represented by the union (e.g. if the proposed scope covers the CEO), the individuals may appoint their own bargaining representatives. Unions need to balance the advantage of a comprehensive agreement against the need for efficient bargaining.

6. PREPARING TO BARGAIN: AGREEMENT CONTENT

The FW Act introduces three new concepts: permitted matters,¹¹ unlawful terms¹² and mandatory terms.¹³ In addition, there are certain terms that are not mandatory, but without which FWA will not approve the agreement.

‘Permitted’ matters are matters that are about: the relationship between the employer and its employees; the relationship between the employer and the union(s) that will be covered by the agreement; wage deductions; or ancillary matters.

‘Unlawful terms’ are terms that are discriminatory, objectionable terms, or certain terms that deal with unfair dismissal, industrial action or right of entry.¹⁴ These are described below. FWA will not approve an agreement that contains unlawful terms¹⁵ and such terms are not enforceable. Like the current “prohibited content” a bargaining representative cannot organise, and employees cannot take, protected industrial action in support of the claim that includes an unlawful term.

‘Mandatory terms’ are terms set out in the Act which must be included in enterprise agreements. Every agreement must contain:

- a flexibility clause;¹⁶ and
- a clause that requires the employer to consult with the employees about major change in the workplace.¹⁷ The clause must allow for employees to be represented.

Where an agreement does not contain such a clause, the Model clause provided in the Regulations will apply. **Appendix 3** contains clauses drafted by the ACTU as well as the government’s models.

Permitted and non-permitted matters

The Act specifies that agreements may deal with matters pertaining to the relationship between the employer and its employees; the relationship between the employer and the union(s) that will be covered by the agreement; wage deductions; or ancillary matters.

Unlike the current Act, non-permitted matters may be included in an enterprise agreement and unlike the “post Electrolux” environment, FWA is not required to remove non-permitted matters from agreements prior to their approval. However:

- protected industrial action is not available in support of matters that a bargaining representative does not reasonably believe are permitted;¹⁸ and
- non-permitted clauses are of ‘no effect’.¹⁹ A court cannot enforce them. Nor, presumably, can they be dealt with by FWA under a disputes procedure.

It is possible that a person claiming a non-permitted matter could face an application to withdraw the matter on the ground that they are undermining bargaining, or failing to respond to proposals put. However, it is not clear that such an application would succeed, as it may overreach the notion of good faith, and intrude into the merits of the bargaining claims.

What are not permitted matters?

Some matters are clearly non-permitted, because the High Court (or the AIRC) has ruled on them.

These include clauses prohibiting the hiring of contractors²⁰ (in contrast to clauses concerned with the terms of their engagement);²¹ and bargaining fees.²² Bargaining for these matters may be difficult, but it is legally open to employers and employees to agree these matters in the knowledge that, if tested, the particular term will not be enforceable.

Other clauses fall in the grey zone: it is unclear whether they will or will not be found to be ‘matters pertaining’.

To maximize the prospect that a claim pertains to the employment relationship unions need to link the claim back to employees’ legitimate interests (as employees, not as citizens), or to link the claim back to the way work is performed.

Clauses that link changes in work processes to reduced use of energy or water in the workplace will clearly pertain to the employment relationship. Similarly, clauses that reward frontline employees (individually or collectively) for improvements on a customer reputation index will clearly pertain.

However clauses requiring the employer to reduce its impact on the environment; or clauses requiring the employer to contribute to the local community should be drafted to reflect the employees’ desires to work for an employer that is a responsible corporate citizen; this has reputation effects which directly affect employees.²³

Even if this direct link to employees’ interests cannot be made out, it is possible to draft the claim in such a way that employees’ or the union’s interests are indirectly engaged for example by making these goals a ‘shared commitment’ (and so imposing obligations on the employer and employees/unions), or by imposing procedural requirements (such as consultation) on the employer rather than committing them to achieve particular outcomes.

What happens if the union seeks non-permitted matters?

An employer may, at any time, challenge a union to show why the union reasonably believes that matters in the ‘grey zone’ are permitted.

Unions should be ready – from the commencement of bargaining – to give reasons (and potentially disclose documents) supporting the union’s belief. Reasons may include:

- The union has received legal advice on the matter. The good faith bargaining obligations do not appear to override legal privilege, so unions are not obliged to disclose legal advice to the employer or to FWA, but the existence of such advice will bolster a claim that the union reasonably believed the claim was permitted.
- The union has received advice from the ACTU. The ACTU will provide periodic advice regarding the case law on permitted and non permitted matters.
- The union has conducted its own legal research on the matter. Be prepared to cite, or hand over, copies of AIRC or court decisions supporting the union’s claims.
- Workplace-specific considerations. For instance, the clause may have been included in past collective agreements or may have been the subject of previous bargaining (or even consultation with unions). These factors suggest that management has conceded that the matter does ‘pertain’ to the employment relationship in that specific workplace (the test in section 172 of the Act) rather than pertaining to the relationship between employers, generally, and their employees (the test used under the 1904 and 1993 legislation).

Appendix 2 contains draft clauses seeking:

- Broader rights of entry;
- Delegates’ rights; and
- Restrictions on the use of contract labour.

Mandatory clauses

Appendix 3 provides templates for the mandatory clauses required under the FW Act. It also provides the model clauses set out in the regulations. Below is a discussion of the features that unions may wish to include in their proposed clauses dealing with individual flexibility, consultation; and dispute resolution.

Unions should note that agreements must also include a nominal expiry date that is not longer than 4 years after the date of approval of the agreement by FWA.

Features of a flexibility clause

Unions should pay particular attention when drafting agreements to include a flexibility provision. This is because the government’s model flexibility clause is very broad. It is modelled upon the individual flexibility clause in modern awards, and permits individual flexibility on a range of matters, including hours of work.

The only way to avoid this clause applying in the agreement is to agree to an alternative flexibility clause.

Form

The Act requires every agreement to have a term that ‘set[s] out the terms of the enterprise agreement that may be varied by an individual flexibility agreement’ (IFA).

On its face, this seems to require a separate clause of the agreement (a ‘flexibility term’), perhaps with a separate heading, that does not deal with a substantive workplace right but instead regulates the process for entering into an IFA. However this is not strictly necessary; and it is possible that a ‘flexibility term’ can be added to an existing clause of the agreement that deals with a substantive matter, such as an amenities or allowances clause. Our model uses the standard flexibility clause relating to taking of annual leave.

Content

The government model clause, which is drawn from the modern award clause, adopts a very broad approach to flexibility. Unions are reminded that the Act provides that it is up to the parties to decide which ‘terms’ of the agreement can be varied through an IFA. However it is probably not open to the parties to agree that no terms shall be varied in this way. It is likely that FWA will take the view that section 203(2)(a) mandates that at least one term of the agreement be subject to an IFA. But it is legally open to agree that flexibility will be limited to trivial terms of the agreement or, as the ACTU model clause does, to wrap the mandatory safeguards around existing flexibility provisions in awards.

Safeguards

The Act requires the flexibility term to contain ‘warnings’ about the use of IFAs. These are generally straightforward, and the ACTU model adopts the government’s model safeguards. However, it is open to the parties to add additional safeguards. These include: a cooling off period, a right to resign from the arrangement by giving a shorter period of notice; and removal of the employer’s right to initiate the use of an IFA. The ACTU sample clause does not adopted any of these devices in our sample clause, because the scope of our clause is so narrow.

Features of a consultation clause

The model consultation clause in the Regulations is not problematic. However the ACTU Model clause at **Appendix 3** suggests some enhancements to the consultation clause that can be pursued in bargaining. These are explained below.

Scope

The Act requires the employer to consult about ‘major workplace changes that are likely to have a significant impact on employees’. Our clause adopts the government definition but adds changes in the legal or operational structure of the business.

Timing

The Act does not say when the employer must consult. The government model clause requires consultation after a decision has been made. There is no reason why the parties should limit consultation in this way. Indeed consultation is only truly ‘consultation’ (rather than ‘notification’) if it occurs before a final decision has been taken. For this reason, our template clause requires the employer to consult at the time that it begins to ‘seriously consider’ a change.

Parties

The Act and the government model clause require the employer to consult with the ‘affected employees’; the union is involved only as a representative of those employees. The ACTU clause imposes a direct obligation to consult with the union prior to a decision being made, and to ‘consult’ (really, to notify) employees once a definite decision has been made.

Process

The Act clause is silent about matters of process. The ACTU clause adopts the procedural requirements from the governments model clause and attaches an additional obligation to consult ‘in good faith’ to the clause. By referring back to some of the good faith bargaining requirements, it is possible to import some procedural requirements, including meeting quickly, giving genuine consideration to alternatives, etc. In fact, we go further than the statutory requirements by deleting reference to the employer’s rights to withhold confidential or commercially sensitive information. Our clause does not exempt the employer from providing confidential information.

Status quo

It is open to unions to claim an express ‘status quo’ clause that forbids the employer from implementing the change until the consultation process is finished. This would enable a union to obtain injunctions against the employer to stop the implementation of the decision. In the ACTU clause the question of status quo is a subset of the question of whether the employer has acted in good faith. After all, implementing a decision while the parties are still consulting would seem to be ‘capricious and unfair’ conduct that ‘undermines consultation’. However the status quo clause from the DSP could be used in this clause.

Features of a disputes clause

FWA cannot approve an agreement unless it contains a dispute settlement procedure (DSP). The clause must provide for FWA or another independent person to settle disputes about the agreement and about the NES. It must also allow for employees to be represented.²⁴ A model DSP is in the Regulations, but parties may agree an alternative procedure.²⁵ The government's model clause, and a model clause drafted by the ACTU are located at **Appendix 3**.

Coverage

The Act only requires a DSP to cover disputes over matters 'arising under' the agreement, and in relation to the NES. The government model DSP provides for this.

However, there is nothing to stop the parties agreeing on a broader scope for the clause, for example, to cover:

- **Rights to request:** the employer's right to refuse requests for flexible working conditions, or extended unpaid parental leave, under the NES is not reviewable unless an agreement's DSP expressly confers power on FWA to examine those issues;
- **All work-related disputes:** note that this would allow 'extra claims' about wages, etc, to be dealt with during the life of the agreement; and/or
- **Claims that the agreement has been breached:** this would allow FWA to decide, in lieu of a judge, whether or not the agreement had been breached, and to award a remedy. Of course, as an administrative tribunal, FWA's findings of fact and rulings of law are not binding in any court. So, for example, if you wanted to then seek a penalty against the employer in the court, the court would not automatically adopt FWA's findings that the agreement had been breached.

Process

The Act does not mandate a process, except a requirement that a dispute ultimately be dealt with by an independent person. The government model term provides for 2 stages of DSP: conciliation, followed by arbitration. Unions may wish to also include:

- **Workplace resolution:** it makes sense that the first step is to seek resolution of the dispute at the workplace. However, our clause requires the employer to act 'in good faith'. This hopefully will import some of the concepts from the good faith bargaining regime, such as the notion that the employer will not do anything capricious or unfair which has the effect of undermining the disputes resolution process.

Referral to FWA

In most cases FWA will be the preferable ‘independent body’, although it is open to refer the matter to another independent person. The clause should stipulate that FWA can use all of its powers (including arbitration) to resolve a dispute. The government model does this.

When FWA is handling the dispute, it can do anything it considers ‘appropriate’, such as conciliating, making recommendations, and (ultimately) arbitrating.²⁶

Procedural orders made can be enforced as normal orders of FWA. However, the arbitral decision is not counted as a public law ‘decision’.²⁷ This means that the decision cannot be directly enforced in FWA or in a court. However, a failure to abide by the decision would be a breach of the agreement, for which the normal remedies are available. The model clause specifically requires the parties to abide by the outcome as a term of the agreement.

Second, it is prudent to specifically agree in an enterprise agreement that a single member’s decision can be appealed to the Full Bench.

Note that you can limit FWA’s powers in dealing with a dispute. For example, you can seek to remove its power (in section 596) to permit an employer to be represented by a lawyer (although by doing so you might attract an appeal to the Federal Court). You can also seek to remove FWA’s power (in section 593) to suppress confidential material.

As well as removing procedural requirements, you can add them. For example, you can require the employer to act ‘in good faith’ when participating in FWA proceedings. If the employer does not comply, this will be a breach of the agreement.

Representation

The Act requires every clause to provide for employee representation in the disputes process.

Agreements can stipulate that the union is the representative of every employee, but this imposes an obligation on unions to represent non-members.²⁸ Alternatively, the agreement can provide that the union is the default representative for its members, but that non-members can ask the union to represent them too.

Agreements can confer a right upon the union to participate in dispute resolution procedures. In the past unions have relied upon the implication that, as representative, the employer must recognise you, let you enter premises, deal with you honestly, in good faith, etc. However some unions have been required to specify these matters in their agreements. If there is a risk the employer will seek to frustrate the union role it would be prudent to make these obligations explicit. In particular, you may think it necessary to stipulate a right of entry to premises for the purposes of representing people.

Status quo

The Act does not say anything about what happens while a dispute process is occurring. On the one hand, you can choose to remain silent on the matter, in the hope that if anything untoward occurs, you can seek an interim order from FWA to rectify the situation and preserve the status quo (see s 589).

However it is preferable to mandate in the agreement that the employer must respect the status quo. The government draft requires employees to work as normal while a dispute is resolved but does not impose any obligations on the employer. The ACTU draft requires all parties to maintain the status quo while the dispute is resolved.

Unlawful terms

Agreements cannot contain unlawful terms. These are described below.

Discriminatory terms

Discriminatory terms are defined as terms that discriminate because of a persons' sex, race, colour, sexual preference, age, physical or mental disability, marital status, family or carers responsibilities, pregnancy, religion, political opinion, national extraction or social origin.

There are some lawful excuses for discrimination, such as where the reason relates to the inherent requirements of the job or religious beliefs. Junior, trainee and disability wages may also not be discriminatory.²⁹

Unions should not only consider the terms that they are seeking in agreements, but should scrutinise terms proposed by employers for discrimination, including indirect discrimination.

For example, unions should ensure they do not seek terms that mean that women are paid less than men for performing work of equal or comparable value. Unions should examine whether proposals for long shifts, and inflexible start and finish times discriminate against people with family or caring responsibilities.

Objectionable terms

Objectionable terms are defined³⁰ as terms that have the effect of requiring or permitting a breach of the general protections in the Act, or terms that requires or permit a bargaining fee.

Unions need to be familiar with the general protections. In summary these provisions:

- prohibit an employer from disadvantaging an employee because he or she has a workplace right or on any discriminatory grounds; and

- protect the right of employees to join or not join a union, to be represented or not be represented by a union and to participate or not participate in industrial activities.

Unions should not include terms that confer any additional rights on trade union members over non-members.

However, it seems that the very broad interpretation of “objectionable terms” that the Workplace Authority has imposed will be replaced with a more relaxed interpretation.

The Explanatory Memorandum that accompanied the FW Act in the Parliament says that agreements can contain clauses that provide for: leave to attend trade union training; paid time off to attend union meetings and participate in union activities; union involvement in disputes procedures; unions’ use of company facilities such as notice boards to promote the union in the workplace; the employer to provide material to employees about the union or to the union about employees; union officials to attend the workplace (subject to the provisions re unlawful content)³¹

This provides a strong indication that these clauses will not be considered objectionable, even though they arguably give rights to union delegates or members that are not available to non-members. However to avoid challenge unions should continue to draft clauses as broadly as possible, and confer equal rights on employees to participate in consultation.

Unfair dismissal

Agreements cannot contain terms that gives an unfair dismissal remedy to an employee who has not yet served their qualifying period.

Arguably this prohibition only prevents agreements conferring a remedy to the employee affected. It would be lawful to negotiate pre-dismissal discipline procedures, and it may be lawful to agree that an employer that unfairly dismisses an employee who is serving their qualifying period must make a payment to a third person (such as an employee benefits fund or the union).

Industrial action

Agreements cannot contain terms that are ‘inconsistent’ with the rules in the Act for taking industrial action.

A term that allows employees to take industrial action during the nominal life of the agreement would be unlawful. However a term that allows employees to stop work with the consent of the employer in given circumstances (such as to attend a political rally) is not industrial action and so would not be unlawful.

It is also not unlawful for the employer to waive some of its rights under the Act – for example, if the employer agreed that it would not seek to stop unprotected industrial action that took place after the nominal life of the agreement, or would not oppose a protected ballot application in respect of a replacement agreement.

Right of entry

Agreements cannot contain terms that gives the union a right to enter premises for one of the 3 purposes in a way that is not ‘in accordance with’ the statutory right of entry provisions. The Explanatory Memorandum suggests that it is not unlawful to seek terms allowing a right of entry (i) for the purposes of a DSP or consultation clause; (ii) to attend inductions; or (iii) to meet with the employer. The Explanatory Memorandum seems to be hinting that the distinction is one of form, not substance. A clause titled ‘Right of Entry’ may be unlawful, whereas a right of entry tied to specific clauses in the agreement (dealing with inductions, consultation over rosters or major changes at work, dispute settling) may be lawful. Ultimately, it will be up to FWA and the courts to decide.

Bargaining fees

Unions cannot seek a fee to be paid to the union (or anybody else) for ‘bargaining services’.

However there is nothing to stop a union seeking a clause that requires employees (or the employer) to pay the union money for any other purpose that relates to the union-employer relationship. (As always, to be included in the agreement, employees must vote in favour of it, and the employer must agree).

What happens if the union seeks an unlawful term?

Until the case law develops there will be a ‘grey zone’ regarding what is and isn’t lawful.

Until there is certainty, unions should consider initiating bargaining with general claims, rather than the precise terms sought. For example, a description of the claim might be:

- Right of entry for all purposes connected to the agreement;
- Right of entry for the purpose of inductions, consultation over changes at work, dispute settling, etc; or
- Right of entry to consult with employees (but not to hold discussions of the kind referred to in section 484 of the Act).

Where an objection is raised by the employer during bargaining it is possible they may apply to FWA for a bargaining order against the union (on the basis that the union claim is capricious or unfair and undermines bargaining) and an order that the union withdraw the claim.

Unions should be prepared to defend the decision to include the contested terms, or to withdraw or redraft that part of the claim.

Will FWA simply delete unlawful terms?

It is possible that, where a union does not seek industrial action, no objection will be raised until FWA assesses the agreement for approval.

It is not yet clear whether FWA will refer clauses back to the bargaining representatives to remedy defective clauses, or simply reject the agreement. However the Act does allow for FWA to hold a hearing and unions should seek to be heard before an agreement is rejected.

What effect will seeking unlawful terms have on industrial action?

It is also not yet clear whether an application for a protected action ballot will require unions to declare that they are not seeking unlawful terms.

While seeking unlawful terms is not a specified ground to refuse a ballot, it is possible that seeking unlawful terms will be considered to fail the test of genuine bargaining.

In any event, if a union is seeking unlawful terms, the action cannot be protected, and unions need to factor in the risk of subsequent claims in tort.

Relationship with the safety net

Unions are reminded that an agreement cannot undercut the award rate of pay or the NES (this is generally a line by line assessment). When compared to the modern award employees must be better off overall (or until December 31 2009, not disadvantage employees against their existing award).

As it is not open to the parties to an agreement to waive or vary NES entitlements in return for other entitlements unions should check any proposed clauses that changes the way in which an award or NES entitlement is to be taken or paid. The ACTU can provide specific advice on the NES and award intersection rules.

Special rules for some

Finally there are some limits on the content of agreements for:

- **Victorian public sector employees:** which depend upon whether the employer is a referred public sector employer (and subject to express exclusions) or a public sector employer that is a trading corporation (and subject to implied exclusions).

- **TCF employees:** who have some additional protections against loss of some award conditions in bargaining.
- **Construction employees:** whose employers are currently refused government funded contracts if their agreements do not comply with the Construction industry code.

Contact the ACTU for further advice regarding these rules.

7. STARTING BARGAINING

Union initiated bargaining

Under the new system there is no requirement for a formal bargaining notice to start bargaining. However the commencement of bargaining triggers certain other statutory rights and obligations, and it will be important to be able to identify when and whether bargaining has commenced.

Bargaining only begins (and bargaining orders and scope orders are only available) when the employer 'agrees to bargain'. Once they have given this indication, they cannot change their mind and withdraw from bargaining.

Unions are advised to seek written confirmation from the employer that it agrees to bargain with the union. A template letter is provided (**Appendix 4**). This letter has 3 purposes.

- First and foremost, the letter is to secure the acknowledgement of the employer that bargaining has started.
- Second, the ACTU template includes a draft notice to be given to employees. The draft notice supplements the model notice provided in the Regulations. It emphasises the role of the union as the exclusive employee bargaining representative, and facilitates employee consultation with the union. The draft notice complies with the statutory requirements but is preferable to the notice contained in the Regulations. While it is desirable that this form of notice be used, the model notice in the Regulations does not prejudice a union in representing its members.
- A third (optional) purpose of the template letter is to set some ground rules for bargaining, in anticipation of problems that may otherwise arise later on in bargaining. This supplements the FW Act, by seeking early agreement to adhere to good faith principles and is achieved by inviting the employer to sign up to Good Faith Bargaining Principles (which may or may not take effect as a deed at common law). Unions will need to make a tactical decision about whether to pursue the third part of the template letter. On the one hand, by supplementing the FW Act this approach potentially provides additional common law rights if bargaining later becomes bogged down. On the other hand, making this claim adds a layer of complexity and a source of disagreement with the employer that may simply delay discussions on the substantive claims on behalf of members.

Representation notices

As noted above the Act requires the employer to provide a representation notice to every employee who will be covered by the proposed agreement. The notice must be sent within 14 days of the employer agreeing to bargain. In practice, the sending of the notice

will be evidence of the employer's agreement to bargain, and will indicate which employees the employer believes are within the scope of the proposed agreement. The Regulations specify the means by which the notice may be given to employees, and the government model notice. This is attached in **Appendix 4**, along with the ACTU draft notice.

Content of claim

As with the WR Act, unions will need to put to the employer the full range of topics that the union wish to bargain on. This will avoid disputes if the union later adds new claims during bargaining. There is no need to provide a full draft of the proposed agreement, but nor is there any real advantage in not providing a draft agreement. In any event the claims should have enough specificity that the employer can understand the demand and be drafted so that it does not suggest that the claim include unlawful or clearly non-pertaining content.

At the end of the draft agreement or the list of topics (as the case may be), the union may want to add a caveat to the effect that the union reserve the right to add additional claims as bargaining progresses.

What if the employer refuses to bargain?

In most cases, the employer will simply agree to bargain and the union will be able to conclude a favourable agreement. However, it is possible that employers will refuse to bargain. This is particularly likely in workplaces where the employer is hostile to union involvement. With the abolition of "take it or leave it" AWAs, anti-union employers will look to alternative tactics.

An employer's refusal to bargain may be reflected in an outright refusal to negotiate or in a conditional refusal (e.g. 'we won't bargain for scope X, but would be prepared to bargain for scope Y').

In the case of an outright refusal the union can apply to FWA for a majority support declaration. This will require the union to show majority support for bargaining (not necessarily majority support for the union's claim). FWA has broad discretion as to how it determines whether there is majority support and the Act does not require a ballot to show majority support for collective bargaining. Indeed, given the ability of employers to apply pressure (despite this being unlawful) a ballot may be the least effective way to ascertain the level of support. Unions should consider other forms of evidence such as:

- the number of union members at the workplace.
- support for bargaining in the past (including evidence about the number of people who voted in the last ballot);

- the fact that employees' conditions are already determined collectively (if that is the case), such that it can be inferred that they want bargaining to continue;
- attendance figures at union meetings that discuss bargaining;
- a show of hands at a meeting;
- evidence from the delegate or official about the level of support for bargaining that they have encountered at the workplace (which can be given in affidavit form or on oath); and/or
- workplace petitions.

Unions can avoid a test of majority support if they can convince the employer that it would clearly win such an order in FWA if the union were to apply for one. A template letter is available at **Appendix 6**, which suggests setting out all the evidence showing that employees want to bargain, states that forcing a majority support process will undermine the spirit of future good faith negotiations, and indicates that the refusal to bargain could lead to a hardening of employees' bargaining position.

Finally it is possible to "jump-start" bargaining in a workplace where the union cannot demonstrate majority support across the whole group by initiating bargaining for an agreement to cover a smaller group where the union can demonstrate majority support.

Once bargaining has commenced, one of the union claims could be: 'That the employer must provide the same terms and conditions to other employees employed by the Company'. This is 'permitted content' as it affects the job security of the employees' in the bargaining group, and the High Court has accepted that it is a 'matter pertaining' for employees to seek to have everybody working on site paid at the same rates.³²

However unions should use this tactic with care. The smaller group must be fairly chosen (see above). More importantly, this approach could fragment the workplace, and leave the union members covered by the agreement isolated.

Serious breach declarations

If a party consistently and repeatedly refuses to meet the good faith bargaining requirements, the other party can apply to FWA for a serious breach declaration.

FWA will only make a serious breach declaration where a party has contravened one or more bargaining orders in a serious and sustained way and where there is no chance that the parties will agree on the terms of the proposed agreement in the foreseeable future.

Where a serious breach declaration has been issued, the parties have 21 days to reach agreement. If agreement has not been reached, FWA may make a bargaining related workplace determination (i.e. arbitrate).

What if the employer disputes the scope of the agreement?

It is important that the employer acknowledge that bargaining has started before the union ventilates a disagreement about coverage of the agreement.

It is only once bargaining has started that FWA can make a scope order to resolve the dispute about the correct scope for bargaining.³³ If the employer has not yet agreed to bargain, it appears that the union cannot get a scope order (unless the union first get a majority support determination).

The difference can be one of form rather than substance. If the union tell the employer 'We would like to bargain with the union for an agreement to cover the production workers' and the employer says 'OK, but we think that the agreement should cover office workers too', then it appears that the employer has agreed to bargain, and the union can get a scope order to resolve the dispute about the scope of the agreement. On the other hand, if the employer answered 'No, but we are happy to discuss the possibility of an agreement to cover the entire workforce' then the employer has (arguably) not agreed to bargain with the union (at least in respect of the agreement that the union have proposed) and so the union probably can't get a scope order.

A template letter (see **Appendix 7**) that the union can send to the employer after the union has sent the initial request to bargain deals with this problem.

The purpose of the letter is, first, to get the employer to confirm that bargaining has commenced, second, to have them explain their reasons for rejecting the union's proposed scope and preferring theirs (remembering that providing reasons is a good faith bargaining requirement) and, thirdly, to provide notice that the union object to their scope (which is a pre-requisite for applying for a scope order under the Act).

If the employer replies to this letter and denies that it has agreed to bargain, the union have two options. First, the union can seek a majority support determination to force bargaining to begin. Alternatively, if the employer has indicated its preferred scope, the union could commence bargaining for that scope without prejudice to future arguments regarding the final scope of the agreement. If both parties agree that bargaining has commenced, then the union can then apply for a scope order to try to resolve the issue in the union's favour.

Employer initiated bargaining, variations and terminations

It is open to employers to initiate bargaining. Employers are not required to notify a union that they intend to bargain, even if the employer is aware that some or all of the workforce belong to a union. All that is required is that the employer provide employees with a representation notice. This must be done within 14 days of the employer deciding it wishes to make an agreement. It is up to employees to contact their union, and unions

should constantly re-enforce the desirability of delegates and activists responding promptly to receipt of a representation notice.

Once the employer has initiated bargaining, both bargaining orders and scope orders are available. The employer may submit the proposed agreement for approval 14 days after the notice of representation has been given. Bargaining orders remain available up until the time an agreement is approved, but not following approval.

The Act does not provide any formal right to be employees to be represented in bargaining for the variation or termination of an agreement. While any variation or termination must be approved by the employees, there is no legislative role for unions.

It is therefore prudent to require an employer to commit to re-negotiate the next agreement with the union. At the same time unions should ensure that they are involved in any proposed variation or termination of the agreement.

Sample clause

[The employer] agrees to commence negotiations with [the union(s) covered by this agreement] for a new collective agreement to succeed this agreement at least 6 months before the nominal expiry date of this agreement with the intention of concluding these negotiations prior to the nominal expiry date.

Before submitting a variation, termination or replacement agreement for the approval of the employees covered by the agreement, [the employer] will negotiate in good faith with [the union(s) covered by this agreement].

Should negotiations for a new collective agreement not be finalised prior to the nominal expiry date of this agreement, existing rates of pay and conditions will continue to be observed for all employees by the parties.

8. UNDERSTANDING GOOD FAITH BARGAINING

The Act specifies six behaviours that constitute good faith bargaining. These can be paraphrased as follows:

- Bargain with the other representatives;
- Participate in meetings;
- Disclose relevant information;
- Give genuine consideration to proposals;
- Respond to proposals with reasons; and
- Refrain from unfair conduct that undermines bargaining.

Dealing with other bargaining representatives

The Act imposes obligations on all representatives to recognise and bargain with other representatives bargaining for the agreement. While this means employers must recognise a union that is a bargaining representative, it also means unions must respect other unions and other employee bargaining representatives as the table.

Other unions

Where the ‘other’ bargaining representative in this category is another trade union, unions should work together cooperatively. You might, for example, agree on one or more of the following arrangements:

- that the union will both sit at the bargaining table and put separate claims;
- to form a single bargaining unit (and put joint claims);
- that one union will remain at the negotiating table and put both unions’ claims (not necessarily joint claims), while the other union withdraws from the negotiating process (but with the right to remain covered by any agreement reached); and/or
- that one union will withdraw from the negotiating table but will pursue its claims in writing.

The new laws should not be a catalyst for any of the following behaviour:

- Unions seeking to bargain in workplaces that they have agreed to stay out of, by private demarcation agreement;
- Unions fighting at the negotiating table;
- Unions seeking good faith bargaining orders against each other;
- Unions seeking representation orders against each other.

Other employee representatives

Employee bargaining representatives must be validly appointed by an employee within the scope of the proposed agreement, and meet qualifications that are prescribed by the regulations, including that the representative is 'free from control by, or improper influence from' the employer. If management has control over an employee representative it would also constitute unfair behaviour that undermined collective bargaining and FWA might order the representative be excluded from bargaining.

If the number or relative inexperience in bargaining causes the bargaining process not to proceed 'efficiently or fairly', FWA may also make a bargaining order limiting bargaining rights.

However, FWA will presumably be very reluctant to reduce or remove anybody's bargaining rights, and such an application would need to be supported by very good evidence that the non-union representative's participation in bargaining is causing unreasonable delays and is unfair (perhaps in the sense that it is unfair to the members that bargaining is being frustrated by a non-union bargaining representative who only represents a small number of workers).

Remember unions must recognise the right of an employee to appoint a bargaining representative, and should not apply any undue pressure on them to withdraw from bargaining. This type of behaviour would breach the good faith bargaining requirements and the general protections provisions. Unions should not:

- refuse to meet with them, or excluding them from meetings with the employer;
- refuse them the opportunity to express views on the union's claim;
- refuse to respond to their claims, with reasons; or
- pressure the employees that have appointed them to terminate their appointment, or appoint somebody else.

Participation in meetings

The Act requires representatives to attend and participate in meetings at reasonable times. It will generally be up to the parties to program their own discussions. We anticipate that there may be problems with employers who object to union requests for meetings, on the ground that the number of meetings is excessive; that the meetings are pointless (for example, because of a deadlock in bargaining); or that the timing of meetings is inappropriate (for example, because the relevant people are busy or away). Unions will need to be prepared to back up an application for a bargaining order with reasons as to why it is reasonable to hold the meeting.

The requirement to 'participate' in meetings probably prohibits a party from turning up to a meeting but refusing to engage with the process. It is unclear how far the obligation to

'participate' extends. However, if a party's lack of enthusiasm for the process is capricious or has the effect of undermining bargaining, then another party can certainly apply for a bargaining order.

Disclosure of information – financial data

The Act requires representatives to disclose relevant information in a timely manner. Confidential or commercially sensitive information need not be disclosed.

Traditionally, unions have had to bargain blind with little or no access to information about the financial position of the employer and its capacity to pay for wage increases. This may change under the new system, and unions should consider seeking information early, even prior to finalisation of their claim.

Information about the wages currently paid to staff, the financial position of the company, and its plans for the coming period over which the enterprise agreement will be in place are clearly 'relevant'.

However much of this information may be confidential (according to the legal definition) or, at least, commercially sensitive and so the employer will not be obliged to share the information with the union.

Unions should seek the information in a way which maintains confidentiality, but which makes it useful in bargaining. It would appear to be open to unions to ask employers to disclose employees' pay, pay structure, recruitment and promotion criteria and so forth.

It is likely that FWA will use its discretion in determining what burden an employer might bear in removing personal information from records, but unions should feel free to seek any information that would have been compiled for other purposes such as EOWA reports on the position of women in the firm, internal and external audits, reporting to the ATO or superannuation funds on employee numbers and payrolls, and shareholder reporting.

Unions should also consider offering the employer an undertaking to keep the material confidential, and not to disclose it to anybody (or anybody except the union members). A template letter is attached (**Appendix 5**). If this proposal is acceptable to the employer then the union will at least have access to valuable material, even if the union is restricted in the way they can use this information.

What is confidential information?

It is likely that FWA will be called upon to determine the scope of the exception for confidential or commercially sensitive material early in the life of the new laws.

At common law, information is only regarded as confidential in a limited range of cases, including where:

- It is a ‘trade secret’: that is, in cases where the information is not generally known to the public; this secrecy confers an economic advantage on its holder; and the holder has taken reasonable efforts to maintain its secrecy.
- It was generated for the purpose of seeking advice from a professional who is under an express or implied duty of confidence. This includes communications with lawyers, accountants, doctors, etc (‘professional privilege’);
- It would reveal that the person has committed a criminal offence (‘the privilege against self-incrimination’);
- It would reveal the content of negotiations to settle litigation that is on foot, or reasonably anticipated (‘settlement privilege’); or
- It would reveal state secrets, cabinet secrets, or would otherwise be damaging to the public interest (‘public interest immunity’). This limb is obviously most relevant for public sector employers.

In relation to these last four privileges, the Act does not expressly preserve these confidences as exceptions to the obligations of disclosure, but it is usually presumed by the courts that Parliament does not intend to override these privileges when it legislates.

In relation to trade secrets, it is important to note that, at common law, it is not enough to render a document ‘confidential’ that the document is labelled ‘confidential’ (if nothing else is done to ensure it is kept secret). Nor is the mere fact that its disclosure might embarrass the company sufficient.

What is commercially sensitive information?

The FW Act does not merely protect genuinely confidential material, but also ‘commercially sensitive’ information. This phrase is not defined in the FW Act, but did appear in the WR Act.³⁴ It is also found elsewhere in current Commonwealth law,³⁵ and in State and Territory statutes.³⁶ The concept is intended to be broader than the notion of ‘confidential’ information, but litigation will have to settle just how broad it is. Where an employer opposes release of information on grounds of commercial sensitivity unions should consider signing a deed of confidentiality.

ASX listing rules are not a barrier to disclosure

A listed company may claim that the ASX Listing Rules somehow prevent them from disclosing confidential or commercially sensitive information. This is not correct. Listing Rule 3.1 merely provides that the company must disclose to the market any information that a reasonable person would expect would have a material effect on the share price. Rule 3.1A provides an exception for information that is confidential (and remains confidential) but that:

- concerns an incomplete proposal or negotiation;
- comprises matters of supposition or is insufficiently definite;

- is generated for internal management purposes; or
- is a trade secret.

In other words, a company is free to tell the union of confidential plans (that may affect its share price, if disclosed); and negotiate over future wage costs without having to tell the ASX anything about its plans or the progress of negotiations.

However, if the union discloses that information to the general public, the information is no longer protected from disclosure by Listing Rule 3.1A, and the company must report any relevant information to the share market. Of course, a company will not want to be placed in this position, and so may require an undertaking from the union not to disclose the information provided. If the union provides this undertaking, then the company is essentially protected from having to disclose its plans to the market.

Can the employer seek information from the union?

As the good faith bargaining orders are mutual it appears open for the employer to ask the union to disclose 'relevant' information. Claims may be made for:

- **Information about who the union represents in the workplace** (including proof that members are validly enrolled). This information is relevant to the unions' role as a bargaining representative, and it may be bad faith to deny an employer's honest (not capricious) request for the union to give further details as to whom it purports to represent.

However industrial law has traditionally protected an individual's right to keep their union membership private. Unions need not provide the employer with a list of members or copies of signed membership applications, to satisfy its good faith obligations. We think that all the union need to do is disclose enough information to the employer so that they can tell the types of employee that the union represent and the approximate level of membership – eg "about 20% of the employees within the scope of the agreement" or "most employees in the maintenance division".

The worst thing that can happen is that the employer seeks a good faith bargaining order requiring the union to disclose who the union represents. If the matter goes to FWA, the union should argue that the information about the union's members be disclosed to FWA only.

- **Copies of executive resolutions, minutes of meetings**, or other documents that disclose the union's strategy in dealing with the employer. Unions may be able to resist this request on the ground that the material is confidential or commercially sensitive. This claim will be easier to maintain if the union adopts internal procedures that would make it clear to an outside observer that the material produced was intended to be kept confidential.

- **Information about whether the union is seeking similar claims in other workplaces.** Unions should be able to resist this request on the ground that it is irrelevant to the bargaining at hand.

Unfair or capricious conduct

A breach of the obligation to refrain from capricious or unfair conduct that undermines freedom of association or collective bargaining is probably the most serious breach of the good faith bargaining requirements.

The law does not elaborate on what type of actions would breach this obligation, although the Act and the Explanatory Memorandum suggests that it includes:

- taking adverse action against a delegate who is a bargaining representative; and
- refusing to allow a delegate who is a bargaining representative to discuss a proposed agreement with fellow employees.³⁷

In fleshing out the good faith obligations regard should be had to:

- the General Protections provisions in the Act;
- international (ILO) jurisprudence on collective bargaining rights and freedom of association; and
- precedents from foreign legal systems about what constitutes bad faith, or ‘unfair labour practices’ to use the American expression.

In the United States, it is an unfair labour practice for an employer to:

- make unilateral changes to working conditions during bargaining, without the permission of the union;
- engage in ‘surface bargaining’: going through the motions of bargaining with no intention of ever reaching agreement;
- threaten employees with loss of jobs or benefits (or insinuate that the company might be ‘forced’ to close a plant) if the employees support a union’s bargaining claim;
- promise benefits to employees to discourage support for the union; or
- question employees about whether they support the union, where this is designed to, or has the effect of, intimidating employees.³⁸

Arguably, none of the counter-organising strategies listed above are prohibited by the General Protection provisions of the Act, but they may constitute bad faith.

Misrepresentations

The good faith bargaining requirements imply that the parties must act honestly, and must not knowingly (or probably even negligently) misrepresent facts to the other side, or to employees. To do so would constitute 'unfair or capricious' conduct.

The General Protections provisions of the Act now impose on all persons (including unions) a duty not to make a false or misleading representation about:

- another person's workplace rights (including the effects of exercising those rights);
- another person's obligation to engage or not engage in industrial activity; or
- a person's obligation to disclose whether they (or a third person) are a union member or official, or have engaged in industrial activity.

Misleading statements by officials, employees, agents and delegates

Unions are liable for misleading statements made by:

- any officials, employees or agents of the union;
- any delegates (or groups of members acting on the authority of an official or delegate), unless the union has taken all reasonable steps to prevent the action.

Unions need to ensure that delegates understand their duties not to mislead in bargaining.

Moreover, the danger of the union being found liable for the action of a delegate is heightened by the fact that the legal burden of proof (in all General Protections matters) lies against the defendant: the delegate will be presumed to have misled the victim unless they can prove otherwise.

This means union officials should be careful about purporting to tell an employer what they are obliged to do, or prohibited from doing, under the law. Care should also be taken in talking to employees about the progress of bargaining – especially to non-members.

Officials should avoid making positive statements to the effect that:

- the union is the only body that can represent non-members;
- non-members cannot participate in bargaining, or can only participate if they first join the union;
- the employer is required to reach agreement with the union;
- the union is required to sign off on any offer;
- a member cannot sack the union as its bargaining representative.

In some cases maintaining silence might be construed as a ‘misrepresentation’. Imagine, for example, that union members are taking protected action. Some non-members email the union and ask if they can join the action. You know if they join they will be unprotected, but it suits the union to have as many people on strike as possible. You don’t reply to the email. The non-members participate but are then sacked by their employer (assuming this is lawful for the employer to do).

The other person must rely on the misrepresentation

A union may be able to take some comfort from the statutory defence that exists to a General Protections misrepresentation claim, namely, that the person to whom the representation was made would not be expected to rely on it.

Large companies with expert lawyers and IR managers would not, in practice, rely on gratuitous legal advice from unions. On the other hand, small businesses (especially those who are not members of industry associations) and non-members probably do rely on advice from unions. It may be possible, when dealing with these people, to increase the availability of the defence if the union repeatedly warn them that ‘You should not rely on this as legal advice and should seek your own advice’.

Misleading statements by employers

Finally, the prohibition against an employer misleading employees can be used strategically as part of bargaining, against counter-organising efforts made by the employer.

For example, if the employer proposes to deal directly with employees during bargaining, the union can warn the employer that the union will scrutinise their words carefully and will prosecute them for any misleading statements (and remember, the burden of proof lies in your favour). Moreover, if the employer ‘threatens’ employees that certain consequences will flow from collective bargaining (eg the employer will be forced to make redundancies, close the plant, etc), the union might be able to take a case that this constitutes misleading employees about the effect of exercising their rights to collectively bargain.

Obtaining bargaining orders

Where a union believes the employer has breached any of these obligations, it should write to the employer and ask them to rectify the breach. A template letter for this purpose is attached (**Appendix 8**). If the employer does not rectify its behaviour after receiving this letter, the letter can be used as evidence that the union have satisfied the pre-requisites for seeking a good faith bargaining order.

If the employer's breach is such that the union urgently need a bargaining order (e.g. an employer does something the day before a vote on an agreement), a union can apply directly to FWA without having written a letter to the employer first.

Before filing the application check:

- Has the employer agreed to bargain? If not, did the employer initiate bargaining?
- If neither of these apply, is there a majority support order in operation?
- If not, is there a scope order or low paid bargaining order in operation?
- Has the union notified the employer of its concerns?
- If not, is the matter urgent?

Types of orders available

The orders that FWA can make are limited by section 231(1). These are:

- Orders that require a person to take actions, or impose requirements upon them to meet the good faith obligations;
- Orders to refrain from unfair or capricious conduct that undermines bargaining (injunctive type orders) and orders to deal with such unfair conduct (remedial type orders); and
- Orders for efficient bargaining (including excluding representatives from bargaining).

The orders are generally positive orders to do something, rather than negative orders to stop doing something. The exception is section 231(1)(b) which allows FWA to make orders that a person not engage in unfair or unfair or capricious conduct that undermines bargaining or freedom of association.

It does seem that FWA can also 'impose requirements' upon a bargaining representative (under section 231(1)(a)). Where a union is seeking an order that an employer not do something (such as an order to refrain from putting an agreement out for a vote), and there is no breach of the requirement to refrain from 'unfair or capricious conduct', then the union should draft the orders with s321(1)(a) in mind.

For example the order might include a requirement that the employer meet with the union on Friday, and that, in order to allow the bargaining requirement in clause 1 to occur, the employer be directed to not conduct the ballot scheduled for Wednesday.

Where unfair or capricious conduct is found to have occurred FWA can make orders to prevent further unfairness (eg to prevent a roster change that disadvantages the employees who took part in a protected action ballot) and to remedy the effect of the action. This might include reinstatement of an employee or previous roster.

Injunctions and remedial court orders

If the employer's breach (or threatened breach) would also be a breach of the general protections provisions or a breach of a modern award or enterprise agreement, the union can bypass FWA and apply direct to the courts to seek an interim injunction to restrain the conduct (if it has not yet occurred), or reverse the conduct (if it has already occurred).

9. TAKING INDUSTRIAL ACTION

The Act retains most of the existing rules about the taking of protected and unprotected industrial action. This section identifies a few important changes which present both strategic opportunities and potential threats.

Shorter timeframes

First of all, the Act now allows the union to seek a protected action ballot 30 days before the last nominal expiry date of any agreements applying to the group of employees the union is bargaining for. If the ballot is successful, the union can begin the protected action the day after the last agreement passes its nominal expiry date.

The effect of this is that bargaining can now occur on a more compressed timescale. For example, a union could seek to bargain with the employer 90 days before the nominal expiry date of the agreement. If the bargaining is not progressing well, the union can organise protected action to commence immediately upon expiry of the agreement.

Payment possible during protected work bans

The Act abolishes the 4 hour rule in relation to protected action, and instead provides that, in relation to a strike or overtime ban, employees only lose pay for the actual time during which they have withdrawn their labour. In relation to partial work bans, the employer can either: (i) ignore the ban and pay wages in full, (ii) accept the partial work but deduct an appropriate percentage of the wage; or (iii) reject the partial work and lock employees out (without any pay).

The effect of these changes is that short stoppages, and partial work bans, become attractive forms of low-level industrial action to take, in that they are unlikely to result in significant wage losses.

Unprotected action

Industrial action taken during the nominal life of an agreement remains both unprotected and attracts civil penalties (fines)

Unprotected action taken outside the nominal life of an agreement was lawful under Work Choices (except for building workers) but resulted in a 4 hour loss of pay. Because such action was a breach of contract it was understood that an employee could be disciplined or dismissed (or even sued) for taking the action. The union could be sued for organising the action, because doing so constituted the tort (a civil wrong) of 'inducing a breach of contract'.

The situation may be different now. The General Protections provisions of the Fair Work Act expressly forbid an employer from taking adverse action against an employee who participates in ‘lawful activity’ organised by a union. Taking unprotected action outside the nominal life of an agreement is lawful (even though it is a breach of contract). Therefore it seems that an employer cannot retaliate against an employee who participates in a lawful but unprotected union-organised strike.³⁹ On the other hand, it seems as if the employer still retains their right to sue the union for inducing the employees to breach their contracts.

Industrial action and good faith

Two points are important to note:

- taking protected industrial action is not a bad faith act; and
- it is not necessary to bargain with an employer before taking protected industrial action.

This means bargaining orders will not lie against unions seeking to organise action during bargaining.

This position is supported by:

- the fact that the requirements for good faith are different to the requirements for industrial action (ie that the person be genuinely bargaining);
- the structure of the Fair Work Act (in that industrial action is dealt with in a separate Part, which should be regarded as exclusively regulating all aspects of the right to take industrial action);
- as a sub set of this argument, the specified grounds for suspending or stopping protected action suggest these constitute an exclusive code in relation to the prevention, suspension or cessation of protected industrial action;
- the fact that the bargaining regime is supposed to promote freedom of association (which is expressly mentioned in section 228(e), and that taking collective action cannot logically constitute an act that ‘undermines freedom of association’;
- the fact that FWA cannot make a bargaining order unless it is ‘reasonable’ to do so – and it is not reasonable to stop employees exercising a workplace right conferred in the Act; and
- international law and the right to strike, as recognised in the objects to the Act (section 3(a)).

It is likely that employers will nonetheless seek orders to stop protected action. Unions should oppose any employer suggestion to the effect that taking protected industrial

action during bargaining is an act of bad faith, or that a union must ‘exhaust’ good faith bargaining before it can organise protected action.

On the other hand, it is probably open to FWA to order parties to meet and bargain during a period of industrial action. It is arguable that, while ‘industrial warfare’ is taking place, it is not reasonable to require the adversaries to meet. Indeed many employers refuse to bargain until action is lifted. However, there does not appear to be any provision banning or discouraging FWA from making bargaining orders while protected action is on foot.

Ballots

Most of the rules relating to ballots remain unaltered. However, there are a few changes which pose some strategic threats as well as opportunities.

Who is protected?

Unions can now only ballot employees whom they represent as a bargaining agent (and who will be covered by the proposed agreement). This means that, in general, a union can only ballot its members at the workplace and the members can take protected action.

Some unions have seen organising potential in encouraging non-members to participate in industrial action. Unions that want to involve non-members in a ballot will have to ensure that they have been appointed as the bargaining representative of those people. Non-members must either join the union, or appoint the union as their representative, by the day that FWA makes the protected action ballot order in order to vote in the ballot, and gain protection if they take any authorised action.⁴⁰

Similarly, new employees can only vote (and gain protection for their industrial action) if they join the union, or appoint it as their bargaining representative, before a ballot order is made.

Ballot agents and independent advisors

If the union proposes to appoint its own ballot agent, FWA can now decide that the agent should be supervised by an ‘independent advisor.’ It is unclear who this person might be. The only requirements are that they consent to act in the role and that they are independent of the union.

If an adviser is appointed, it is not quite clear what their role would be. The Act only expressly contemplates a role for the adviser in investigating complaints about the ballot process and providing reports to FWA.⁴¹ However, it seems that FWA can also impose specific obligations on the ballot agent to co-operate with, or report to, the adviser.⁴² If the union has a track record of running elections without incident the advisors role may be minimal.

10. VOTING ON AN AGREEMENT

A proposed agreement is made when it is approved. The employer can ask employees to vote on a proposed agreement 21 days after it issued the representation notice (see above). The employer can select the voting method.

- employees must have access to the proposed agreement for at least 7 days prior to the vote.
- the agreement is made if more than 50% of votes cast are in favour of the agreement.
- voting for a multi-enterprise agreement occurs on an enterprise by enterprise basis.

This section sets out some strategies for dealing with a vote on a proposed agreement. The strategy adopted will depend on whether the union was involved in bargaining and, if so, whether it supports the proposed agreement put to the employees.

Where a union was involved in bargaining

Union and employer have agreed the terms

Where the union has agreed with the employer on the terms of the proposed agreement to be put to a vote the union may be able to secure the following advantages from the employer:

- naming rights: that is, agreement to call the document the ‘Employer X and Union Y Agreement 2010’;
- campaigning rights: rights to access the workforce in support of a ‘yes’ vote (and to recruit); and/or
- lodgement rights: the ‘right’ to lodge the agreement, so that the union can be sure that the final copy of the agreement has been lodged for approval.

Union and employer have not agreed the terms

An employer who wants to put a proposed agreement to a vote without the agreement of the union may be in breach of their good faith obligations, depending upon the circumstances.

If an employer puts a proposed agreement to their employees without informing a union that has been involved in bargaining it could constitute an act of bad faith. . This has yet, however, to be confirmed in the case law.

Where the employer does tell you that it wants a vote but you think that bargaining is not yet exhausted and so the vote is premature, you have two options.

First, you could accept the employer's decision but then run a 'no' campaign.

Alternatively, or at the same time, you could seek a bargaining order requiring the employer to withdraw the agreement from the vote, on the grounds that putting the agreement to employees prematurely is unfair or capricious.

It is unlikely that FWA will accept the argument that it is necessarily bad faith to put an agreement to vote without the consent of all the bargaining representatives. You may, however, be able to argue that the particular circumstances of the case make it unfair for this agreement to go to the vote. This might be because of one or more of the following reasons:

- the employer had not yet considered and responded to fresh proposals that you had put;
- there is something unfair about the timing of the vote (for example, votes held over the Christmas period);
- new bargaining representatives had just joined the bargaining table, or have expressed interest in joining the table (perhaps prompted by the union), and have not had a chance to be heard;
- the employer had previously agreed not to put an agreement out without the union's consent (see the Principles of Good Faith that we propose getting the employer to sign); and
- the 7 day access period is too short for the workforce to properly understand the proposal (either because it is a complex proposal, or because the workforce are young, non-English speakers, etc) and more time is needed to inform them about what is at stake.

If you decide to seek a bargaining order, you must act quickly.

Although the Act allows you to go directly to FWA in an urgent case, it is advisable to put your concerns to the employer in writing and asked them to call off the vote. Writing to the employer is also important in case the employer does not attend the FWA hearing. A union is more likely to get an ex parte order (an order made in the absence of the other party) if FWA is satisfied that the other party is aware of the problem and have been given an opportunity to respond.

If you do not manage to stop the vote and the agreement is approved, you have two choices. If you accept that the employees understood the agreement and the ramifications of their vote but still voted for the agreement then it is probably not in your members' interests to seek to undo the deal. In this case, your only decision is whether to apply to FWA to be covered by the agreement. Some unions may decide that they do not wish to be covered by an agreement they didn't approve. Other unions may decide that it is still better to be covered by an agreement even if they do not like the deal. In making your

decision, remember that the only real benefit of coverage is that you have a direct right to enforce the agreement. Even if you are not covered, you have the right to:

- enter the premises for investigation and discussion purposes;
- represent members in the workforce (if the agreement confers such rights on an ‘employee representative’); and
- enforce the terms of the agreement on behalf of a member.

Your second option is to oppose the approval of the agreement by FWA. Given that the employees have already expressed support for the agreement, you should really only consider this option if you think the employees were misled or if you think the agreement does not pass the Better Off Overall Test (BOOT).

As a bargaining representative, you have the right to ask FWA for a hearing to make submissions as to why the agreement does not meet the approval requirements. Presumably FWA will grant this request (although it might just ask you to put in written submissions). You will have to be quick - we expect that FWA will approve agreements within a week or so of lodgement. At the very least, you need to apply for a hearing and request that FWA not approve the agreement until your objection has been heard. If you act slowly and FWA approves the agreement, then your only option is to go to the Federal Court seeking injunctions against FWA and/or orders setting the agreement aside. This is an expensive and last resort option.

Where a union was not involved in bargaining

Where an employer initiates bargaining directly with its employees, it is hoped that a member or employee will get in touch with the union after they receive the representation notice. You will then be involved in bargaining from the start. There is a real risk, however, that employees (even members) will simply disregard the representation notice. They might only realise that they really need to call the union at the point when they receive the proposed agreement and the employer calls the vote (in 7 days’ time).

If you only learn about a proposed agreement 7 days prior to the proposed vote, you are probably well placed to ask the employer to withdraw the agreement and bargain with you. If the employer refuses, FWA may issue good faith bargaining orders to require genuine bargaining to occur. But there is no guarantee that FWA will not simply let the ballot proceed and tell you that you can run a ‘no’ campaign. This is most likely where there has been some consultation or bargaining about the content of the agreement: for instance if the employer organised meetings to discuss the terms of the agreement or if some of the employees nominated a (non-union) bargaining representative to represent them. As with all applications before FWA, the more people you represent, the better the odds will be that FWA will decide that the employer needs to bargain with you before it can put an agreement out to vote. You would be wise to organise a petition or mass appointments of you as a bargaining agent before you front up to FWA.

11. APPROVAL OF THE AGREEMENT

Once an agreement is voted up, a bargaining representative (which may be the union) must apply to FWA for approval of the agreement, generally within 14 days (section 185). The FWA rules will contain the relevant forms and declarations. Unions should always be careful to ensure that the correct copy of the agreement is lodged.

At the same time, unions who want to be covered by the agreement should ensure that they give notice to FWA that they want to be so covered. Once again, the FWA rules will prescribe the form to be used. If a union forgets to ask to be covered and FWA approves the agreement, it will be too late.

FWA must be satisfied that the agreement meets all of the statutory requirements (sections 186-192). It is not clear, at this stage, whether FWA will hold a hearing in every case to determine this. Perhaps if the approval of the agreement is supported by both the employer and the union, FWA will simply approve it on the papers. However, if the union who was a bargaining representative for the agreement wants a hearing, they have the right to apply to FWA for one.

The scenario where a union insists on a hearing is most likely to arise where the union was not involved in bargaining, and does not support the approval of the agreement. If the union is a technical bargaining representative for the agreement (ie if it had a member at the workplace) it clearly has standing to ask for a hearing and object to the approval of the agreement. However, a union that does not have a member at the workplace will have a more difficult time in convincing FWA that it should have a right to be heard about the agreement.

Nevertheless, because FWA is obliged to ensure that the statutory requirements have been met, it seems that it cannot ignore material that comes to its attention which casts doubt on whether the agreement can be validly approved. In other words, if a letter or written submission comes to the attention of the Member considering the agreement, and suggests that the agreement is not validly made, then the Member probably has a duty to make further inquiries (at least of the employer, employees and bargaining representatives).

Another potential way to ensure that you are heard by a FWA is to sign up one member in that workplace. It seems that this suffices to make the union a 'bargaining representative', even if the agreement has already been voted up by employees.

APPENDIX 1 SAMPLE AGREEMENT CLAUSES

1.1 Rights of entry or access

While right of entry clearly pertains to the employer-union relationship, the Act says that it is unlawful for an agreement to purport to give unions rights to enter premises to investigate breaches of workplace law, or have ‘discussions’ with eligible members.

The Explanatory Memorandum suggests that it is lawful to have a right of entry ‘for a range of reasons connected to the terms of the agreement, such as:

- to assist with representing an employee under a term dealing with the resolution of disputes or consultation over workplace change;
- to attend induction meetings; and
- to meet with the employer when bargaining for a replacement to the current agreement.’

The Senate Committee that considered these provisions reported that “There is no blanket prohibition on right of entry terms in agreements but certain terms about right of entry are unlawful.”

DEEWR clarified that “the term of an agreement is unlawful if it provides an entitlement that is inconsistent with the right of entry part of the bill in relation to:

- entry to premises to investigate suspected breaches of the Bill or an industrial instrument; or
- entry to premises to hold discussions with employees who are eligible to be union members”

DEEWR noted that enterprise agreements could provide an entitlement to enter the employer's premises for specific reasons connected to the terms of the agreement such as to represent an employee in workplace disputes or for consultation over workplace change. These are terms which have historically fallen within the 'matters pertaining' rule.

Sample clause

An official of [the Union] may enter [the Employer's premises, at any time, for any purpose connected to this Agreement, including:

- consultation with persons covered by the agreement about their rights and obligations under the agreement;
- consultation with persons covered by the agreement about the operation of the agreement;
- to deal with disputes arising under the agreement;
- to consultation with employees about the negotiation of a replacement agreement;
- to participate in induction meetings for new employees of [the employer]; and
- for any other purpose connected to the work of the employees covered by this agreement, or the relationship between [the Union] and [the employer].

However, nothing in this clause provides [the Union] with a right to enter premises contrary to section 194(f) or (g) of the Fair Work Act.

According to the explanatory memorandum such a clause should be lawful. However, in the first few months under the FW Act regime, unions may want to adopt a more cautious approach to drafting, particularly if protected industrial action is being organised.

A more cautious approach would see the union right of access “attached” to substantive clauses of the agreement. For example a clause that confers a right for an official to represent employees in grievances could include a right of access for the purpose of meeting the employee, preparing for the grievance procedure, attending meetings with management, and so forth. Another clause might confer a right on the union to attend and make a presentation to staff inductions, and at the same time note that the officials of the union are able to enter the employers’ premises in order to do so.

1.2 Delegates’ rights

Delegates’ rights pertain to the union-employer relationship (and probably pertains to the employee-employer relationship of the delegate as an employee). They are therefore permitted matters for bargaining.

However unions need to take care not to draft delegates’ rights that are objectionable terms and rendered unlawful.

There are two types of delegates’ clauses that might be objectionable.

- A clause which gives the delegate significant powers to help members to the detriment of non-members might offend section 340, which makes it unlawful for a person (the delegate) to directly or indirectly prejudice a non-member in

their employment. There is a risk that giving too much power to delegates (for example, power to decide who should be selected for redundancy) will prejudice non-members.

- A clause that indirectly obliges the employer to discriminate between its employees on the basis of their union membership may be objectionable (see section 342 item 1). This argument was advanced by the Workplace Authority in assessing agreements for prohibited content. On the widest view, any employer co-operation with the delegate (such as by providing time off work, use of company facilities for union purposes, etc) indirectly discriminates in favour of members and, consequently, against non-members.

The ACTU is confident such clauses conferring delegates' rights can survive challenge, and unions should contact the ACTU for advice. One drafting technique is to ensure that the delegate is always acting on behalf of the union, not on behalf of members.

The following clause is based on the ACTU Charter of Delegates' Rights:

Sample Clause

General recognition

The employer will treat delegates fairly and to allow them to perform their role as union delegate without any discrimination in their employment. The employer recognises and respects that endorsed union delegates speak on behalf of union members in the workplace.

The employer will grant X number of delegates paid time off work to:

- Prepare for and participate in collective bargaining on behalf of those they represent;
- Participate in consultations and access to reasonable information about the workplace and the business;
- [specified period of time per month] of paid time off work to represent the interests of members to the employer and industrial tribunals;
- reasonable paid time during normal working hours to consult with union members;
- reasonable paid time off to participate in the operation of the union;
- reasonable paid time off to attend accredited union education;
- address new employees about the benefits of union membership at the time that they enter employment;
- reasonable access to telephone, facsimile, photocopying, internet and e-mail facilities for the purpose of carrying out work as a delegate and consulting with workplace colleagues and the union;
- place union information on a notice board in a prominent location in the workplace;

- take reasonable leave to work with the union.

Alternatively unions might seek a more specific clause such as the following clause modelled on trade union training leave provisions.

Sample Clause

Union delegates or elected workplace representatives [with more than x months continuous service], with approval of the union and upon application in writing, shall be granted up to X days leave with pay each calendar year, non cumulative, to:

- represent members in bargaining;
- represent the interests of members to the employer and industrial tribunals;
- consult with union members and other employees for whom the delegate is a bargaining representative;
- participate in the operation of the union;
- attend union education;
- address new employees about the benefits of union membership at the time that they enter employment;
- attend courses conducted by an approved training provider, that are designed to provide skills and competencies that will assist the delegate or workplace representative contribute to the prompt resolution of disputes and or grievances in the workplace.

Without limiting the above, leave shall be available as follows:

Number of employees covered by the agreement	Number of delegates or workplace representatives eligible for 5 days paid leave in any 12 month period
Between 1 and 15	1
More than 15 but not more than 30	2
More than 30 but not more than 50	3
More than 50 but not more than 100	4
More than 100	5

The application to the employer must be in writing, include the nature, content and duration of the course to be attended, and normally be provided with 14 days notice of the proposed training.

The granting of leave pursuant to this clause shall be subject to the employer being able to make adequate staffing arrangements amongst current employees during the period of

such leave. The employer shall not use this subclause to avoid an obligation under this clause.

Leave of absence granted pursuant to this clause, shall count as service for all purposes of this Agreement.

Each employee on leave approved in accordance with this clause, shall be paid all ordinary time earnings. For the purpose of this subclause "ordinary time earnings" for an employee means the classification rate, over-award payment, superannuation and shift loading, which otherwise would have been payable.

All expenses (such as travel, accommodation and meals) associated with or incurred by the employee attending a training course as provided in this clause shall be the responsibility of the employee or the union.

An employee may be required to satisfy the employer of attendance at the course to qualify for payment of leave.

An employee granted leave pursuant to this clause shall, upon request, inform the employer of the nature of the course attended and their observations on it.

In the event of a disagreement arising from the outcome of this clause, the matter may be settled using the dispute settlement procedures of the agreement.

None of these items prejudice non-members in their employment, since they are free to seek the same representation rights and advice that delegates provide from other sources. If this clause requires the employer to discriminate against non-members (by authorising more favourable treatment of members), the discrimination is minor and should be disregarded by a court.

However, if you are particularly nervous to avoid objectionable content, you can end the clause with the following disclaimer:

Sample Clause

Nothing in this clause authorises the delegate to prejudice non members in their employment or authorises the employer to discriminate against non members.

1.3 Restrictions on the use of contract labour

It is our view that if a union wanted to re-litigate the issue in the High Court, there is a good chance that a Court, with all of the precedents before it, would uphold Re Cram.

However, in the absence of this new decision vindicating Re Cram, it may be prudent to draft contractor clauses in line with the rulings in Cocks and Moore. It seems to us that these decisions would let us

- (i) require the employer to consult before engaging contractors; and
- (ii) compel the employer to afford contractors the same terms and conditions as employees.

It is less certain whether we could:

- (iii) require the employer to pay the contractors more than employees (or pay some other penalty for using them); or
- (iv) compel the employer not to use contractors unless it cannot find regular employees to perform the work.

Sample clause:

If the Employer wishes to engage independent contractors to perform work that might be performed by current or future employees, the Employer must first consult in good faith with affected employees and with the Union.

If, after consultation, the Employer decides to engage contractors, those contractors must be afforded the same terms and conditions of employment as they would receive if they were engaged as employees performing the same work.

APPENDIX 2 MANDATORY CLAUSES

2.1 Dispute Resolution Procedure

ACTU MODEL

1. If a dispute arises about this agreement, the NES (including subsections 65(5) or 76(4)), or any other work-related matter (including a dispute about whether a workplace rights have been breached), the parties to the dispute will attempt to resolve the dispute at the workplace level.
2. If the matter cannot be resolved, a party may refer the dispute to Fair Work Australia for resolution using any of its powers (including powers under section 739(4)).
3. Union members are entitled to be represented by their union. Non-members are entitled to be represented by the Union (if it agrees) or by any other person they choose. The employer shall recognise the representative for all purposes involved with the resolution of the dispute.
4. The parties to the dispute and their representatives must act in good faith in relation to the dispute.
5. While the dispute is being resolved, the parties will respect the status quo. However, the employer may direct an employee to perform different work or work at a different location, on full pay, if it is reasonable to do so to protect the safety, health or welfare of employees.
6. The parties to the dispute agree to be bound by a decision made by Fair Work Australia in accordance with this term.

GOVERNMENT MODEL – NOT RECOMMENDED

Schedule 6.1 Model term for dealing with disputes for enterprise agreements

(regulation 6.01)

- (1) If a dispute relates to:
 - (a) a matter arising under the agreement; or
 - (b) the National Employment Standards;this term sets out procedures to settle the dispute.
- (2) An employee who is a party to the dispute may appoint a representative for the purposes of the procedures in this term.
- (3) In the first instance, the parties to the dispute must try to resolve the dispute at the workplace level, by discussions between the employee or employees and relevant supervisors and/or management.
- (4) If discussions at the workplace level do not resolve the dispute, a party to the dispute may refer the matter to Fair Work Australia.
- (5) Fair Work Australia may deal with the dispute in 2 stages:
 - (a) Fair Work Australia will first attempt to resolve the dispute as it considers appropriate, including by mediation, conciliation, expressing an opinion or making a recommendation; and
 - (b) If Fair Work Australia is unable to resolve the dispute at the first stage, Fair Work Australia may then:
 - (i) arbitrate the dispute; and
 - (ii) make a determination that is binding on the parties.

Note If Fair Work Australia arbitrates the dispute, it may also use the powers that are available to it under the Act.

A decision that Fair Work Australia makes when arbitrating a dispute is a decision for the purpose of Div 3 of Part 5.1 of the Act. Therefore, an appeal may be made against the decision.

- (6) While the parties are trying to resolve the dispute using the procedures in this term:

- (a) an employee must continue to perform his or her work as he or she would normally unless he or she has a reasonable concern about an imminent risk to his or her health or safety; and
 - (b) an employee must comply with a direction given by the employer to perform other available work at the same workplace, or at another workplace, unless:
 - (i) the work is not safe; or
 - (ii) applicable occupational health and safety legislation would not permit the work to be performed; or
 - (iii) the work is not appropriate for the employee to perform; or
 - (iv) there are other reasonable grounds for the employee to refuse to comply with the direction.
- (7) The parties to the dispute agree to be bound by a decision made by Fair Work Australia in accordance with this term.

2.2 Consultation Clause

ACTU MODEL

1. If the Employer is seriously considering major workplace changes that are likely to have a significant effect on the employees covered by this agreement, the Employer must consult with the Union and any employees who will be affected by the decision.
2. As soon as practicable the employer must discuss with the union and relevant employees the introduction of the change; and the effect the change is likely to have on the employees. The employer must discuss measures to avert or mitigate the adverse effect of the change on the employees
3. For the purposes of the discussion the employer will provide the union and relevant employees in writing: (i) all relevant information about the change including the nature of the change proposed; and (ii) information about the expected effects of the change on the employees; and (iii) any other matters likely to affect the employees.
4. The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.
5. As soon as a final decision has been made, the Employer must notify the Union and the employees affected, in writing, and explain the effects of the decision.
6. The Employer must act in good faith in relation to the consultation process provided in this clause.

[[OPTIONAL CLAUSE: Unions could insert here the status quo provision from the model disputes clause to ensure that change is not implemented until the consultation has occurred)

7. In this clause:

‘Good faith’ includes obligations to meet, disclose relevant information, genuinely consider proposals and respond with reasons, and to refrain from capricious or unfair conduct that undermines consultation.

“A major change is likely to have a significant effect on employees” if it results in:

- (a) the termination of the employment of employees; or
- (b) major change to the composition, operation or size of the employer’s workforce or to the skills required of employees; or

- (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
- (d) the alteration of hours of work; or
- (e) the need to retrain employees; or
- (f) the need to relocate employees to another workplace;
- (g) the restructuring of jobs; or
- (h) changes to the legal or operational structure of the employer or business.

GOVERNMENT MODEL – NOT RECOMMENDED

Schedule 2.3 Model consultation term

(regulation 2.09)

- (1) This term applies if:
 - (a) the employer has made a definite decision to introduce a major change to production, program, organisation, structure, or technology in relation to its enterprise; and
 - (b) the change is likely to have a significant effect on employees of the enterprise.
- (2) The employer must notify the relevant employees of the decision to introduce the major change.
- (3) The relevant employees may appoint a representative for the purposes of the procedures in this term.
- (4) If:
 - (a) relevant employee appoints, or relevant employees appoint, a representative for the purposes of consultation; and
 - (b) the employee or employees advise the employer of the identity of the representative;the employer must recognise the representative.
- (5) As soon as practicable after making its decision, the employer must:
 - (b) discuss with the relevant employees:
 - (i) the introduction of the change; and
 - (ii) the effect the change is likely to have on the employees; and
 - (iii) measures the employer is taking to avert or mitigate the adverse effect of the change on the employees; and
 - (c) for the purposes of the discussion — provide, in writing, to the relevant employees:
 - (i) all relevant information about the change including the nature of the change proposed; and

- (ii) information about the expected effects of the change on the employees; and
 - (iii) any other matters likely to affect the employees.
- (6) However, the employer is not required to disclose confidential or commercially sensitive information to the relevant employees.
- (7) The employer must give prompt and genuine consideration to matters raised about the major change by the relevant employees.
- (8) If a term in the enterprise agreement provides for a major change to production, program, organisation, structure or technology in relation to the enterprise of the employer, the requirements set out in subclauses (2), (3) and (5) are taken not to apply.
- (9) In this term, a major change is likely to have a significant effect on employees if it results in:
 - (a) the termination of the employment of employees; or
 - (b) major change to the composition, operation or size of the employer's workforce or to the skills Required of employees; or
 - (c) the elimination or diminution of job opportunities (including opportunities for promotion or tenure); or
 - (d) the alteration of hours of work; or
 - (e) the need to retrain employees; or
 - (f) the need to relocate employees to another workplace; or
 - (g) the restructuring of jobs.
- (10) In this term, relevant employees means the employees who may be affected by the major change.

2.3 Flexibility Clause

ACTU MODEL

Single Day's Annual Leave (as an example*)

1. The Employer will allow each employee to take up to 5 days annual leave in single day absences.
2. Clause 1 may be varied in the following way. An employee may request the Employer that up to 10 days annual leave may be taken in single day absences. They employer may agree to the request, provided the employee and the Employer genuinely agree to the arrangement, and the employee is better off overall]
3. The employer must ensure that the individual flexibility arrangement:
 - (a) is in writing; and
 - (b) includes the name of the employer and employee; and
 - (c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and
 - (d) includes details of:
 - (i) the terms of the enterprise agreement that will be varied by the arrangement; and
 - (ii) how the arrangement will vary the effect of the terms; and
 - (iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and
 - (e) states the day on which the arrangement commences.
4. The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.
5. The employer or employee may terminate the individual flexibility arrangement:
 - (a) by giving no more than 28 days written notice to the other party to the arrangement; or
 - (b) if the employer and employee agree in writing — at any time.

6. The Employer is responsible for ensuring that all of the requirements of clause #.2 are met.
7. The Employer must provide copies of all flexibility arrangements made under this clause to the Union, upon request.

*Unions should include such terms as are agreed can be the subject of individual flexibility. The terms can be as significant or as trivial as the parties agree, and may be used to limit any individual flexibility in the award – eg to provide that time off in lieu must be taken at penalty rates and within a certain period.]

GOVERNMENT MODEL – NOT RECOMMENDED

Schedule 2.2 Model flexibility term

(regulation 2.08)

- (1) An employer and employee covered by this enterprise agreement may agree to make an individual flexibility arrangement to vary the effect of terms of the agreement if:
 - (a) the agreement deals with 1 or more of the following matters:
 - (i) arrangements about when work is performed;
 - (ii) overtime rates;
 - (iii) penalty rates;
 - (iv) allowances;
 - (v) leave loading; and
 - (b) the arrangement meets the genuine needs of the employer and employee in relation to 1 or more of the matters mentioned in paragraph (a); and
 - (c) the arrangement is genuinely agreed to by the employer and employee.
- (2) The employer must ensure that the terms of the individual flexibility arrangement:
 - (a) are about permitted matters under section 172 of the Fair Work Act 2009; and
 - (b) are not unlawful terms under section 194 of the Fair Work Act 2009; and
 - (c) result in the employee being better off overall than the employee would be if no arrangement was made.
- (3) The employer must ensure that the individual flexibility arrangement:
 - (a) is in writing; and
 - (b) includes the name of the employer and employee; and
 - (c) is signed by the employer and employee and if the employee is under 18 years of age, signed by a parent or guardian of the employee; and
 - (d) includes details of:

- (i) the terms of the enterprise agreement that will be varied by the arrangement; and
 - (ii) how the arrangement will vary the effect of the terms; and
 - (iii) how the employee will be better off overall in relation to the terms and conditions of his or her employment as a result of the arrangement; and
- (e) states the day on which the arrangement commences.
- (4) The employer must give the employee a copy of the individual flexibility arrangement within 14 days after it is agreed to.
- (5) The employer or employee may terminate the individual flexibility arrangement:
 - (a) by giving no more than 28 days written notice to the other party to the arrangement; or
 - (b) if the employer and employee agree in writing — at any time.

APPENDIX 3 LETTER TO EMPLOYER (TO INITIATE BARGAINING) AND RELEVANT ATTACHMENTS

3.1 Letter to Employer

ACTU MODEL

[Date]

Dear [insert employer name],

Commencement of bargaining

As you may know, the Fair Work Act 2009 makes a number of important changes to the industrial relations framework in Australia. In the new environment:

- Employees have a right to join a union, to meaningful union representation and to participate collectively in workplace issues; and
- Employers have an obligation to bargain in good faith with unions towards the making of a collective enterprise agreement for the business.

We have consulted with the employees in your business and they desire a collective agreement, in the terms set out in the draft enterprise agreement attached to this letter.

This draft agreement reflects standard conditions that prevail in the industry, as well as special provisions tailored to the needs of your employees. The agreement will also provide your business with certainty for five years, since no further claims will be pressed while the agreement is in force.

Now that bargaining has commenced, the law requires you to provide a 'representation notice' to your employees, within 14 days of the date of this letter. A copy of this notice is attached.

The law also requires you to meet us for discussions. Please advise us, in writing, of the earliest time at which you are available to meet.

While we are negotiating, we insist that all parties observe the Good Faith Bargaining Principles (attached) to ensure that the process is fair. Please confirm that you will observe these Principles, by signing the enclosed copy of the Principles in the place indicated and returning the copy to us.

We look forward to negotiating with you and to quickly concluding a collective enterprise agreement that gives your employees a fair deal and that gives your business certainty.

We remind you that the law prohibits you from victimising or taking adverse action against your employees because they are seeking to bargain collectively, or from misleading employees about their legal rights. Fines of up to \$33,000 apply [for a corporation].

Yours sincerely

XXX

3.2 Notice of Enterprise Bargaining

ACTU MODEL (ADAPTED FROM GOVERNMENT MODEL)

[Name of employer] gives notice that it is bargaining in relation to an enterprise agreement ([name of the proposed enterprise agreement]) which is proposed to cover employees that [proposed coverage].

What is an enterprise agreement?

An enterprise agreement is an agreement that sets the wages and conditions of those employees for a period of up to 4 years. It is negotiated in good faith between the company/employer and the union. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Australia.

Any agreement reached must leave the employees better off overall compared to what they would receive under government minimum standards, which are set in the Fair Work Act and in awards made by Fair Work Australia.

If you are an employee who would be covered by the proposed agreement:

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Australia about bargaining for the agreement.

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union's status as your representative. If you are not a union member, and you want to be represented in bargaining (including in proceedings before Fair work Australia) you can appoint yourself, the union or another person who is independent of the employer.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. In either case you must give a copy of the appointment to your employer.

[If the employee is covered by an individual agreement-based transitional instrument — include:]

If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if:

- the nominal expiry date of your existing agreement has passed; or

- a conditional termination of your existing agreement has been made (this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).

What happens next?

A Union official will visit the workplace shortly to discuss the Union's claim with you. [Note the union should ensure it will be in the workplace soon after the notice is delivered].

The Company gives you permission to attend these meetings during working time.

Management and the union will keep you updated on the progress of negotiations.

When a draft agreement is ready, management will arrange a vote on the proposed agreement, and will explain the effect of the proposal to affected employees. You will have at least 7 days to consider the proposal before the vote. The agreement will come into operation if a majority of employees vote in favour of the agreement, and if Fair Work Australia approves the agreement.

If a majority of employees do not vote in support of the agreement then your current terms and conditions of employment will continue.

Questions?

If you have any questions about this notice or about enterprise bargaining, please speak to either your union, your bargaining representative or go to www.fairwork.gov.au, or contact the Fair Work Australia Infoline on [insert number].

If you are not sure which union can represent you call Unions Australia on 1300 4 UNION (1300 486 466).

Under Australian law you have a right to join and be represented by a union in bargaining. Management respects these rights.

GOVERNMENT MODEL: NOT RECOMMENDED

Schedule 2.1 Notice of Employee Representational Rights

(regulation 2.05)

Fair Work Act 2009, subsection 174 (6)

[Name of employer] gives notice that it is bargaining in relation to an enterprise agreement [name of the proposed enterprise agreement] which is proposed to cover employees that [proposed coverage].

What is an enterprise agreement?

An enterprise agreement is an agreement between an employer and its employees that will be covered by the agreement that sets the wages and conditions of those employees for a period of up to 4 years. To come into operation, the agreement must be supported by a majority of the employees who cast a vote to approve the agreement and it must be approved by an independent authority, Fair Work Australia.

If you are an employee who would be covered by the proposed agreement:

You have the right to appoint a bargaining representative to represent you in bargaining for the agreement or in a matter before Fair Work Australia about bargaining for the agreement.

You can do this by notifying the person in writing that you appoint that person as your bargaining representative. You can also appoint yourself as a bargaining representative. In either case you must give a copy of the appointment to your employer.

[If the agreement is not an agreement for which a low-paid authorisation applies — include:]

If you are a member of a union that is entitled to represent your industrial interests in relation to the work to be performed under the agreement, your union will be your bargaining representative for the agreement unless you appoint another person as your representative or you revoke the union's status as your representative.

[If a low-paid authorisation applies to the agreement — include:]

Fair Work Australia has granted a low-paid bargaining authorisation in relation to this agreement. This means the union that applied for the authorisation will be your bargaining representative for the agreement unless you appoint another person as your representative, or you revoke the union's status as your representative, or you are a member of another union that also applied for the authorisation.

[if the employee is covered by an individual agreement-based transitional instrument — include:]

If you are an employee covered by an individual agreement:

If you are currently covered by an Australian Workplace Agreement (AWA), individual transitional employment agreement (ITEA) or a preserved individual State agreement, you may appoint a bargaining representative for the enterprise agreement if:

- the nominal expiry date of your existing agreement has passed; or
- a conditional termination of your existing agreement has been made (this is an agreement made between you and your employer providing that if the enterprise agreement is approved, it will apply to you and your individual agreement will terminate).

Questions?

If you have any questions about this notice or about enterprise bargaining, please speak to either your employer, bargaining representative, go to www.fairwork.gov.au, or contact the Fair Work Australia Infoline on [insert number].

3.3 Good Faith Bargaining Principles

ACTU MODEL

The Employer and the Union have agreed to bargain in good faith towards the making of a collective enterprise agreement. The Parties agree to abide by the following Good Faith Bargaining Principles:

Good faith: the Parties will negotiate with each other in good faith. They will genuinely try to come to an agreement. They will not do anything capricious or unfair which undermines collective bargaining or employees' freedom of association.

Negotiations: the Parties will meet at reasonable times, and will genuinely participate in meetings. The Parties will give genuine consideration to each other's proposals, and will give reasons for their responses to proposals. The Employer will disclose all relevant information to the Union in a timely manner. If the Parties agree that certain information should be kept confidential, then they will not disclose that information to any third party without permission.

Status quo: while the Parties are negotiating, the Employer will maintain the status quo in the workplace. The Employer will not alter the pay and conditions of employees, nor make any individual or collective offers to the workforce.

Representation rights: the Employer will allow the Union to enter the workplace and meet with employees at reasonable times to discuss the progress of negotiations. The Union may make reasonable use of the Employer's equipment (including photocopiers, noticeboards and email systems) in order to communicate with employees. The Employer will not interfere with employees' rights to speak to their Union.

Disputes: if the Parties become deadlocked over one or more matters, Fair Work Australia will decide the matter in dispute.

The Parties agree that a breach of these Principles entitles the other Party to remedies under the Fair Work Act 2009 and the common law.

The Employer agrees that the Union's members are intended to be a beneficiary of this agreement, and that the Union may enforce this agreement on their behalf.

Signed as a deed on [insert date]:

.....

The Company

.....

The Union

APPENDIX 4 LETTER TO EMPLOYER (CONFIDENTIAL INFORMATION)

ACTU MODEL

[Date]

Dear [employer],

Good faith bargaining: request for information

In order to better formulate our collective bargaining claim, we require further information about the financial position of the business and its plans for the future.

Accordingly, we request that you provide us with the following information:

- The latest consolidated financial accounts for the business (and all related entities).
- The budget for the business over the next 4 years.
- Any proposals for changes to the way the business operates (including restructures, redundancies, outsourcing or in-sourcing plans) in the next 4 years.
- Any proposals for changes in the ownership or management of the business in the next 5 years.
- Any information on the financial position of the competitors of the business.

We understand that some of this material may be genuinely confidential. If that is the case, we undertake to keep that material strictly confidential between ourselves. We would be prepared to sign a legal undertaking to that effect.

[Insert for a listed company: We note that ASX listing rule 3.1A allows you to provide information to us, on a confidential basis, without triggering your obligation to disclose that information to the market.]

For other material that is not genuinely confidential, we undertake to treat that material sensitively, and to treat any personal information in accordance with privacy principles. We would only disclose that information to members for their feedback, and not to anybody else. Again, we would be prepared to sign a legal undertaking to that effect.

Please confirm, within 7 days, that you will provide us with the information we are requesting. If you would like us to sign any undertakings as to confidentiality in respect of particular documents, in your response please identify:

- which documents you would like to be treated confidentially; and
- your explanation as to why the documents are genuinely confidential.

We look forward to receiving your response.

Kind regards

XX

APPENDIX 5 LETTER TO EMPLOYER (MAJORITY SUPPORT)

ACTU MODEL

[Date]

Dear [employer],

Good faith bargaining: majority support

We refer to our letter dated [date] seeking to bargain with you.

We are disappointed that you refused to bargain collectively with your employees, as evidenced by [your letter dated [date]/your comments on [date]].

The Fair Work Act does require you to bargain collectively with the Union, so long as a majority of the employees within the scope of the proposed agreement want collective bargaining to occur.

Accordingly, we put you on notice that we intend to seek a majority support determination in Fair Work Australia. Once this order is made, you will be legally obliged to bargain with us in good faith. If you then refuse to do so, you will face fines of up to \$33,000 [for a corporation].

Given the inevitability of bargaining, we are making one final request that you agree to bargain with us, in the hope that we can avoid expensive litigation over this issue. We request that you write to us, within 7 days, and either agree to bargain with us, or else explain why it is fair that your employees should be denied the right to collectively bargain.

In the meantime, we remind you that the Fair Work Act prohibits you from taking any adverse action in retaliation against employees who seek to join the Union or who express their support for the Union or for collective bargaining. Once again, serious penalties apply.

Yours sincerely

XX

APPENDIX 6 LETTER TO EMPLOYER (SCOPE)

ACTU MODEL

[Date]

Dear [employer],

Good faith bargaining: scope of agreement

We refer to our letter dated [date] seeking to bargain with you.

We are pleased that you have agreed to bargain, as evidenced by [your letter dated [date]/your comments on [date]].

However, we acknowledge that we are in dispute about which employees the proposed agreement should cover.

We have proposed that the agreement cover [insert union scope]. You have rejected this proposal and counter-proposed that the agreement cover [insert employer scope].

Your counter-proposal is inappropriate because it [undermines the freedom of employees to choose with whom they associate for industrial purposes/ does not reflect the structure of the business / fragments the workforce / will lead to employees performing similar work being treated differently / departs from historical practice].

We request a written response, within 7 days, which either withdraws your counter-proposal, or else provides a full explanation as to why you think our proposal is inappropriate, and why your counter-proposal is fair to your employees (as required by section 228(d) of the Fair Work Act 2009).

Yours sincerely

XX

APPENDIX 7 LETTER TO EMPLOYER (BAD FAITH)

ACTU MODEL

[Date]

Dear [employer],

Good faith bargaining: bad faith

We refer to the good faith bargaining round that began on [date].

We are concerned that you [have not met / are not meeting] the good faith bargaining requirement set out in section 228[(a), (b), (c), (d), (e) or (f)] of the Fair Work Act, because you [refuse to meet at reasonable times / refused to disclose relevant information, etc].

The history of the matter is as follows. [Insert the facts – eg on 1 July 2009 we requested X. You said no. Etc etc.]

We request that you write to us, within 7 days, confirming that you will comply with your good faith bargaining obligations by [giving us document X / agreeing to meet on date Y /etc] or, alternatively, explaining why you think that your conduct does not breach the good faith bargaining requirements set out in the Fair Work Act.

If you do not respond appropriately to our concerns, we reserve the right to seek a bargaining order from Fair Work Australia which will require you to meet your legal obligations. The penalty for breaching such an order is \$33,000 [for a corporation].

Yours sincerely

XX

¹ Section 299(3)

² Section 438]

³ Section 186(3)

⁴ Section 186(3A)

⁵ Employer organisations are on record that they may seek to exclude managerial employees from the coverage of agreements.

⁶ Section 238(4)

⁷ Section 230(2)

⁸ FW Act (Transitional Provisions and Consequential Amendments) Bill Schedule 3 c18.

⁹ From 1 July 2009 to 31 December 2009 they would be covered by the AFPCS and the existing award or NAPSA.

¹⁰ Part 3-1, Division 3 Workplace Rights.

¹¹ Section 172

¹² Section 194, 195

¹³ Sections 202-205

14 Section 194

15 Section 186(4)

16 Section 202

17 Section 205

¹⁸ The definition of employee claim action at Section 409 says the action is organised to support claims in relation to an agreement that are “only about, or reasonably believed to be about permitted matters”

¹⁹ Section 253

²⁰ R v Commonwealth Industrial Court; Ex parte Cocks (1968) 121 CLR 313

²¹ R v Moore; Ex parte Federated Miscellaneous Workers Union of Australia (1978) 140 CLR 470.

²² Electrolux Home Products Pty Ltd v Australian Workers Union (2004) 78 ALJR 1231.

23 For example, employees seem prepared to accept a wage discount to work for progressive employers (like unions), whereas they seem to insist on a wage premium to work for ‘evil’ employers. From this, it can be inferred that employees do put a (monetary) value on working for a company with a good social reputation. Accordingly, if a company commits to improve its social reputation, employees’ economic welfare will generally increase.

24 Section 186(6)

25 Section 737

²⁶ Section 595(2).

²⁷ Section 598(1).

²⁸ Note that strictly a union can only take on this role if it is permitted by the union constitution. Note also that the General Protections forbid a union from doing anything that prejudices a person in their employment, so refusal to assist a non member in this circumstances might contravene these provisions.

29 Section 195

³⁰ Section 12

³¹ FW Act Explanatory Memorandum Paragraph 676, page 109

³² Since you have a permitted claim, you are allowed to take protected industrial action against the employer (using the employees in the small group). If the industrial action is effective, you then have two options. First, you could get the employer to agree to the agreement you have put to it. Alternatively, you could insist that the employer agree that the scope of the agreement you are seeking be extended to encompass other classes of employees. There is not much difference between these two options in practice: both result in employees in the wider group receiving the benefit of the agreement. However, one important difference exists: under the second approach, the employees outside the small group remain agreement-

free. They therefore remain free to take protected industrial action at a later date. Also, any unprotected industrial action they take remains lawful (since it does not take place during the nominal life of an agreement that applies to them).

³³ FWA can only make a scope order if the employer ‘has met, or is meeting’ the good faith bargaining requirements: section 238(4)(a).

³⁴ WR Act s 668(3)(e) (orders to consult trade union about terminations does not extend to disclosing commercially sensitive information)

³⁵ Aboriginal and Torres Strait Islander Act 2005 (Cth) s 191N; National Greenhouse and Energy Reporting Act 2007 (Cth) s 71; Northern Territory National Emergency Response Act 2007 (Cth) s 120; Nuclear Non-Proliferation (Safeguards) Act 1987 (Cth) sch 3; Privacy Act 1988 (Cth) sch 3 (National Privacy Principles); Water Act 2007 (Cth) s 127.

³⁶ Australian Capital Territory: Civil Law (Wrongs) Act 2002 (ACT) s 204; Housing Assistance Act 2007 (ACT) s 14. Queensland: Government Owned Corporations Act 1993 (Qld) s 121; Local Government Act 1993 (Qld) s 664; Parliament of Queensland Act 2001 (Qld) S 102; South East Queensland Water (Restructuring) Act 2007 (Qld) s 41; Workers’ Compensation and Rehabilitation Act 2003 (Qld) s 413; Water Act 2000 (Qld) s 1010A; Water Supply (Safety and Reliability) Act 2008 (Qld) s 580. Victoria: Energy Safe Victoria Act 2005 (Vic) s 31; Essential Services Commission Act 2001 (Vic) s 45; Transport Act 1983 (Vic) s 190. Western Australia: Electricity Corporations Act 2005 (WA) s 109; Economic Regulation Authority Act 2003 (WA) s 36; Land Information Authority Act 2006 (WA) s 68; Port Authorities Act 1999 (WA) s 70; Public Transport Authority Act 2003 (WA) s 29; Water Corporation Act 1995 (WA) s 62; Waterways Conservation Act 1976 (WA) s 80; Western Australian Land Authority Act 1992 (WA) s 25C.

³⁷ Section 231(2)(c) and Explanatory Memorandum, para 951.

³⁸ See www.nlr.gov/nlr/shared_files/brochures/engulp.pdf

³⁹ Although see section 476. The Explanatory Memorandum says that this preserves the employer’s right to stand striking workers down.

⁴⁰ Section 453(b)

⁴¹ Section 458(2).

⁴² Section 450(2)(e).