HERBERT SMITH FREEHILLS

BARGAINING UNDER THE FAIR WORK ACT

LEGAL GUIDE
SECOND EDITION

1 JULY 2009 – 31 DECEMBER 2017

Contents

1 Introduction

1.1 The "*Guide*"

In August 2010, Freehills published its first volume of "*Bargaining under the Fair Work Act*" entitled "*12 months on: A Freehills retrospective*". This publication was intended to assist our clients by providing a comprehensive summary of Australia's new collective bargaining regime, and an analysis of how FWA (as it then was) and the Courts were interpreting the laws. It was also designed to help with the transition from bargaining under the former WR Act. For this reason, "*Bargaining under the Fair Work Act*" was not expected to be an ongoing publication, but rather one that was only going to be necessary for the first year or two whilst the laws started to settle. Contrary to these initial expectations, the law relating to collective bargaining and industrial action remains in a state of flux.

Between 2010 and 2013, Freehills, and later Herbert Smith Freehills, published a further three volumes of "*Bargaining under the Fair Work Act*", each analysing the decisions handed down over the preceding 12 months. The feedback that we received from our clients about these publications was exceptional. Our clients were using these publications to guide them throughout the various stages of their bargaining rounds, and viewed them as a valued resource. In 2015, this led to Herbert Smith Freehills publishing "*Bargaining under the Fair Work Act – A Herbert Smith Freehills Guide 2015*", which consolidated and expanded upon the previous four annual volumes. "*The Guide*" provided our clients with an unprecedented single point of reference for understanding the current state of collective bargaining and industrial action law.

We are now pleased to present our latest update, "*Bargaining under the Fair Work Act – A Herbert Smith Freehills Guide 2018*". It includes a comprehensive commentary of legislation relevant to collective bargaining and industrial action, and analyses over 1700 decisions handed down between 1 July 2009 and 31 December 2017.

Whilst the resources invested in the production of the Guide were significant, the Guide demonstrates the significant expertise that Herbert Smith Freehills is fortunate enough to have access to, through its talented team of lawyers.

1.2 Current observations from Herbert Smith Freehills

The Fair Work Act brought significant change to Australia's collective bargaining regime. It introduced new concepts (MSDs, scope orders, proposed agreements) and re-introduced the obligation to bargain in good faith. Bargaining participants have grappled with these changes, and decisions of the Courts, FWA, and now the FWC, have attracted great interest.

Seven years on, five key things are apparent:

- there has been, and will continue to be, legislative change. For instance, since the 2015 Guide:
  - the *Fair Work Amendment Act 2015* (Cth) implemented significant bargaining-related legislative amendments relating to greenfields agreements and protected action ballot orders;
  - significant changes have been made in the building and construction industry with the introduction of the BCIIP Act and the Commonwealth Building Code 2016. The BCIIP Act introduced new causes of action to deal with picketing and unlawful industrial action in the building industry, and significantly increased penalties for breaches of the BCIIP Act;
  - amendments to the FW Regulations from April 2017[1] implemented changes to the notice of employee representational rights. Further changes to the Act were also proposed by the Coalition to allow the FWC to approve an agreement even though there were minor or procedural errors with the notice or the pre-approval process (as long as the employees were not likely to have been disadvantaged). However, at the time of publication, these amendments were yet to pass through parliament;[2] and
  - the *Fair Work Amendment (Corrupting Benefits) Act 2017* requires bargaining representatives (employers, employer organisations, and unions) to disclose financial benefits that the bargaining representative, or a person or body reasonably connected with it, would or could reasonably be expected to derive because of a term of the proposed agreement;
- there remain many unresolved questions about the operation of aspects of the bargaining regime. It has become very complex, and is resulting in many cases progressing to the Full Court of the Federal Court and the High Court;
- the bargaining regime has proven to be challenging for employers. In particular:
  a. agreements seem to be taking longer to reach than they have in the past and are becoming even more 'resource intensive' on the employer-side. Employers are simply not in a position to agree as easily as in the past given economic factors, and above-inflation pay increases are often not tolerable;
  b. employers often have little leverage given it is relatively easy for unions to organise protected industrial action, yet relatively hard for employers to suspend or terminate it. Employers also remain hesitant to respond to employee industrial action with a lock out (predominantly due to the impact on workplace culture); and

- unions are also calling for an overhaul of the bargaining framework. Many unions appear to be of the view that it has become too easy for employers to terminate existing agreements in bargaining and lock out employees;
- we are seeing more time and resources being invested in pre-bargaining planning (but there is room for improvement). Increasingly, employers are recognising the significant recurring cost impact of bargaining outcomes, and value the exponential impact of even small gains. This is resulting in a greater degree of sophistication from employers, who are looking to achieve change and avoid the all too common "*rollover agreement with a 4% annual wage increase*". For example, employers are increasingly looking to:
  a. "*unwind*" agreements that have become unsustainable;
  b. obtain productivity offsets and reduce labour costs, including by building in competitive tension through enabling access to alternate workforces;
  c. avoid costly industrial action through contingency planning; and
  d. exercise wage restraint through wage freezes or implementing performance based pay systems.

1.3 Observations from our clients

Our observations from our clients are that:

- enterprise bargaining is becoming even more resource-intensive. For instance:
  a. it is not uncommon for employers to have 10 or more operative enterprise agreements, which places them in a state of 'permanent bargaining';
  b. many employers take, on average, over 20 bargaining meetings to reach agreement;
  c. whilst the vast majority of bargaining meetings have under 11 attendees, some employers do see over 20 attendees;
  d. it appears to be standard behaviour for employees to reject the first (or second) vote in order to secure improvements to the employer's offer – single vote agreements are becoming less common;
  e. many employers find the procedural steps for bargaining, and the requirements for enterprise agreement content (the BOOT in particular), difficult to follow;
- scope (or coverage) of the agreement is a complex area that is a common source of disagreement between employers and employee bargaining representatives;
- achieving productivity improvements and other meaningful change is hard:
  a. the bargaining framework under the Act is not seen as an enabler for organisations to secure productivity and efficiency improvements as employers feel that they do not have enough leverage in bargaining to achieve this;
  b. many employers see reaching agreement with employees on acceptable terms an impossibility, and would instead prefer the FWC to arbitrate their next agreement;
- nevertheless, employers are seeking meaningful change to agreements that have become unsustainable. Most employers are looking for some change to remove unproductive or inefficient terms (including by looking at wage reductions, freezes, or only nominal wage increases), and many are seeking significant change. In doing so, many employers are increasingly looking at the option of terminating existing agreements;
- despite the desire to secure meaningful change, and the difficulty in achieving it, there remains an under-investment in pre-planning, communications, and seeking third party assistance:
  a. many employers would not consider using the FWC's conciliation services to assist in resolving bargaining deadlocks;
  b. most employers feel that union communications are more effective than their own;
  c. many employers have changed their pre-planned bargaining strategy once industrial action has been taken;
  d. many employers feel their organisation does not invest enough time and resources in planning its industrial action mitigation strategy; and
  e. many employers feel their organisation does not invest enough time and resources in planning its enterprise bargaining strategy more generally; and
- given this acknowledged under-investment in pre-planning, legal, industrial relations and human resources practitioners are increasingly spending more time prior to and during the bargaining process on stakeholder management by ensuring that executive leadership have not only endorsed ultimate bargaining outcomes, but also the path that might be taken by the employer to get there (i.e. 'plotting the course' before bargaining commences). This includes:
  a. performing a cost/benefit analysis of bargaining tactics and outcomes to determine which tactics should be implemented by the employer. For instance, sustained periods of industrial action might be palatable if the cost can be mitigated with alternate labour and if the employer is successful at achieving the agreement flexibilities (or wage restraint) it is seeking;
  b. identifying when, in what order, and for how long each tactic is to be used. For example, at what point do lock outs become palatable (or necessary)? At what point will the employer apply to terminate the existing agreement? At what point will the employer simply concede to the employee and union claims (as the short term cost is not sustainable)? As far as possible, this decision making should be undertaken before bargaining commences so as to set clear boundaries for the negotiation team and minimise the risk of knee-jerk decision making during times of pressure;
  c. most importantly, challenging existing organisational assumptions about these bargaining tactics. If change is needed, all such tactics need to remain on the bargaining table – it is then simply a question of when, in what order, and for how long to use them (based on the cost/benefit analysis referred to above).

1.4 Developing your bargaining strategy

Why did we produce the Guide?

Generally speaking, those that prepare early, and have a detailed knowledge of the bargaining framework and its underpinning case law, will have a significant advantage, and will achieve better outcomes.

But developing a successful enterprise bargaining strategy for an employer is not easy, particularly for those looking to achieve the types of change mentioned above. There is no "*template*". It can only be done with full knowledge of the employer's objectives and appetite for risk, the paths to obtaining and reducing bargaining leverage, the legal boundaries, and, most importantly, experience. These are the building blocks of an enterprise bargaining strategy.

This Guide is one of those building blocks – we trust that you will find it useful. For the other building blocks, Her Honour Senior Deputy President Acton has said:[3]

"*In the 20 years I have been a member of FWA and its predecessor, I have facilitated the resolution of many industrial relations matters. Often the parties have been willing to settle their matters without insisting that their rights or the other party's obligations be met. However, I have always thought it important that the parties understand the extent of the compromises they are making. That can only happen if the parties are aware of their legal rights and obligations. In that regard, a specialist practitioner with broad and in-depth knowledge of industrial relations law can be of help.*

I am not suggesting that no industrial relations move should be made by a party without an industrial relations lawyer by their side. However, it can be prudent for a party to consider whether the industrial matter they are dealing with warrants, at least, advice from such a specialist."

Finally, preparing a publication of this nature is only possible due to the great experience and dedication of our people. We would like to acknowledge the contributions of all the lawyers and support staff from the Herbert Smith Freehills team who helped with this volume of the publication. In particular:

Rohan Doyle, Wendy Fauvel, Rachel Dawson, Adam Lambert, Catherine Russo, Jessica Brivik, Brad Popple, Rachel Loughland, Adam Ray, Priya Parghi, Katie Bull, Rommo Pandit, Jessica Irving, Sophie Beaman, Kristen Hammond, Jeremy Leith, Lisa Soo, Giacomo Giorgi, Starr Brenton, Chris Shelley, Melissa Hogg, Keisha Wilds, Jane Quinlan, Tamsin Lawrence, Elizabeth Veljkovic and Marco Fedeli.

A special mention is made to Adam Ray for his assistance in the final editing of the Guide.

If you require any assistance in the development of your enterprise bargaining strategy, please contact a member of our team listed in **Part 14**.

This Herbert Smith Freehills publication was written and edited by Rohan Doyle and Wendy Fauvel.

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14 How Herbert Smith Freehills can help

14.1 Enterprise bargaining assistance

Developing and advising on bargaining strategy, including key objectives and risks and options for dealing with them, the approach to bargaining representatives and unions, the communications and engagement strategy, planning for negotiations (including the structure of meetings and other logistical issues), avoiding (or engineering) arbitration, compliance with good faith bargaining obligations, and developing contingency plans the minimise or prevent the impact of industrial action

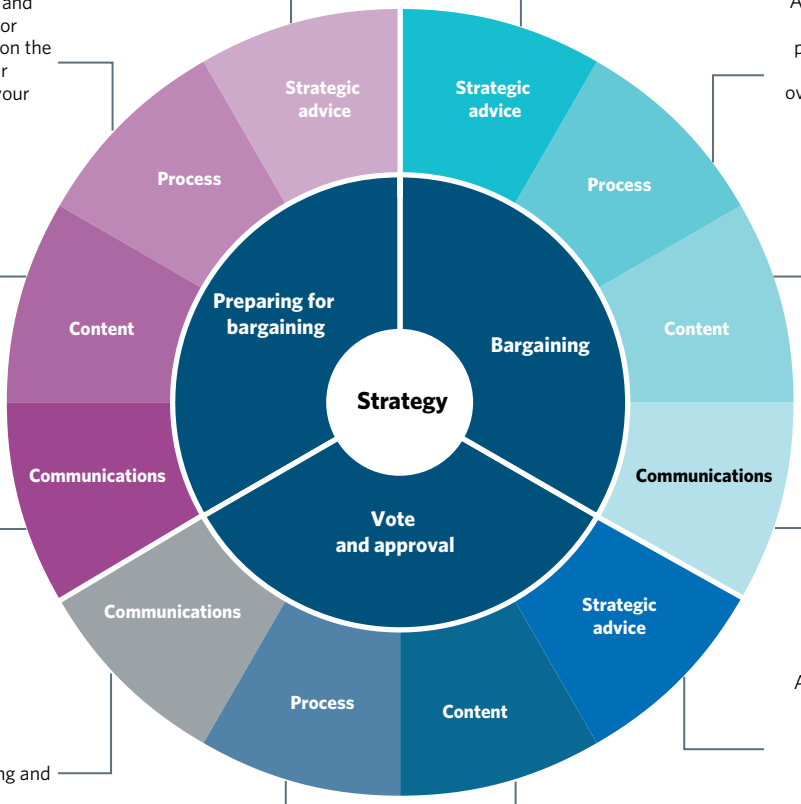
Developing bargaining protocols and conducting a tailored workshop for your negotiating team focussing on the current legislative framework, our observations on current trends, your objectives and developing the bargaining strategy

Drafting and reviewing the proposed enterprise agreement, your claims, and the unions likely claims, and developing responses

Drafting communications to likely bargaining representatives in relation to the communcement of bargaining, maintaining a communications tracker throughout the bargaining negotiations, and assisting with internal stakeholder management through tailored briefings

Drafting communications to the bargaining representatives and employees in relation to the voting and approval process

Advising in relation to the pre-approval steps, arranging for the application to approve the enterprise agreement ot be filed and served, and liaising with the FWC and bargaining representatives in relation to the approval process



Developing and advising on bargaining strategy, including key objectives and risks and options for dealing with them, the approach to bargaining representatives and unions, the communications and engagement strategy, planning for negotiations (including the structure of meetings and other logistical issues), avoiding (or engineering) arbitration, compliance with good faith bargaining obligations, and developing contingency plans to minimise or prevent the impact of industrial action

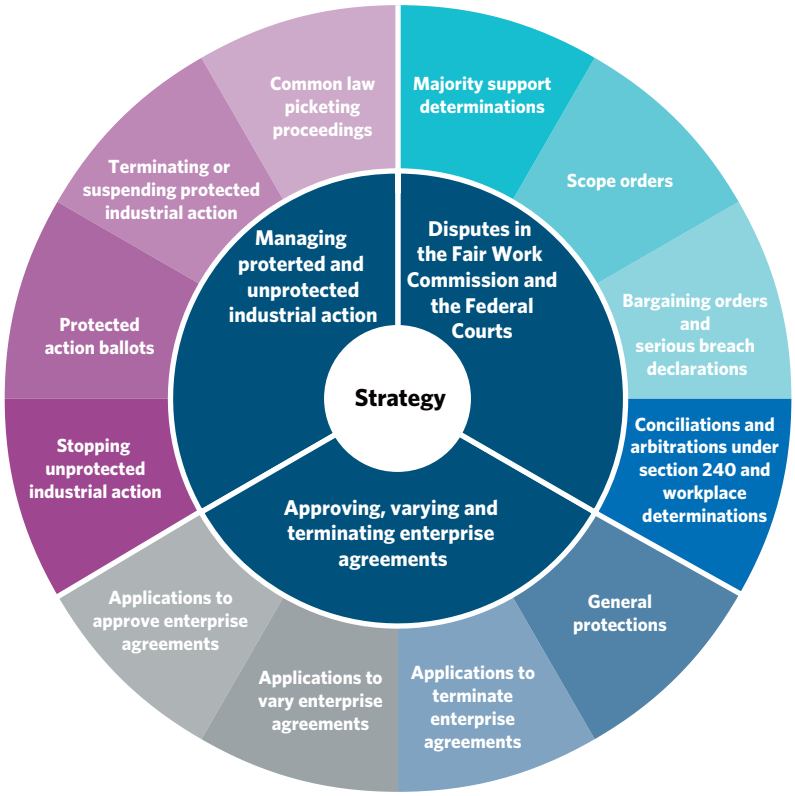
Attending bargaining meetings as a bargaining representative, or providing support to those who do, with a view to implementing the overarching bargaining strategy and using the good faith bargaining requirements to full effect

Drafting and amending the proposed enterprise aggrement, and developing responses to clauses propposd by the bargaining representatives

Drafting notice of employee representational rights and communications to the bargaining representatives and employees

Advising in relation to the vote and approval process and communications strategy, and providing assistance with the implementation of the enterprise agreement

Reviewing the enterprise agreement for compliance with Fair Work Act, Construction Codes, better off overall test, or best practive, and preparing documentation for lodging the agreement with the FWC


Common law picketing proceedings
Majority support determinations
Terminating or suspending protected industrial action
Scope orders
Managing proterted and unprotected industrial action
Disputes in the Fair Work Commission and the Federal Courts
Bargaining orders and serious breach declarations
Protected action ballots
Strategy
Conciliations and arbitrations under section 240 and workplace determinations
Stopping unprotected industrial action
Approving, varying and terminating enterprise agreements
Applications to approve enterprise agreements
General protections
Applications to vary enterprise agreements
Applications to terminate enterprise agreements

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