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## Employment Law e-alert

# Collective bargaining and enterprise agreements

Most of the relevant provisions in the new *Fair Work Act 2009* ("Act") relating to collective bargaining and enterprise agreements commenced operation from 1 July 2009. This is a reminder of some of the more significant provisions that employers need to be aware of:

### Content

The old prohibited content rules no longer exist. Agreements may include content about "permitted matters". Most significantly, this includes matters pertaining to the relationship between the employer and union (as well as between employer and employees). This has already seen the reintroduction of many old prohibited content items onto union shopping lists for agreement negotiations.

### Flexibility and consultation re workplace changes clauses

Each agreement must include a flexibility term that enables the employer and an individual employee to agree to an individual flexibility arrangement to meet the genuine needs of both parties. A consultation clause is also mandatory, requiring the employer to consult about major workplace changes likely to have a significant effect on employees.

### Employee notification re right to be represented

Employers must take all reasonable steps to notify employees of their right to be represented by a bargaining representative. Here, even if the employee does not formally nominate the union as his/her bargaining representative, the union will become the bargaining representative **by default** if the employee is a member of a relevant union and does not appoint anyone else as their bargaining representative. This is an extremely significant change. It will bring unions into the bargaining process in many workplaces that have traditionally had non-union collective agreements in place. It also has the potential to bring multiple unions into the bargaining process, in workplaces that have only dealt with 1 union in the past.

### Good faith bargaining

An employer must not refuse to bargain with a union that is a bargaining representative. Prior to 1 July 2009, an employer could refuse to bargain with a union, on the basis that it wished to reach agreement directly with its employees for a non union agreement or it preferred to bargain with a different union. Good faith bargaining also contains a number of specific requirements in relation to the conduct of parties during the bargaining process. For example, they must attend and participate in meetings; disclose relevant information and respond to proposals in a timely manner; genuinely consider proposals; and refrain from capricious or unfair conduct.

Fair Work Australia ("FWA") has the power to make a wide variety of prescriptive orders, where one party is not meeting the requirements for good faith bargaining.

### Approval

Whilst an agreement is made when it is voted up by a valid majority of employees who vote, application must be made to FWA to approve agreements. From 1 January 2010, agreements must pass a new "better off overall" test, that replaces the existing no disadvantage test. The test requires employees to be better off overall, when compared with the relevant modern award. It does not however require FWA to enquire into individual employees circumstances, as the test can be applied to classes of employees.

### Arbitrated outcomes

FWA retains the power to arbitrate the terms and conditions of employment in an enterprise, via a workplace determination. The power to make a workplace determination can be triggered by the issue of a Serious Breach Declaration, relating to good faith bargaining issues, or by an order to terminate protected industrial action for the proposed agreement. Significantly, a new ground exists under which application can be made for an order to terminate protected industrial action – namely, if the action is causing/threatens to cause significant economic harm to the employer or to any employees who will be covered by the agreement. This has the potential to fast track the bargaining process through to a workplace determination.

### Injunctions

Injunctions can now be granted by the Federal Court/Federal Magistrates Court to enforce the terms of an enterprise agreement. This may mean, for example, that a union will seek an injunction against an employer to restrain it from proceeding with major workplace change until it has complied with the consultation and redundancy provisions in the enterprise agreement.

For further information please contact:

Martin Dunne, Sydney (City)	+61 2 9391 3211	<a href="mailto:mdunne@hunthunt.com.au">mdunne@hunthunt.com.au</a>
Ian Miller, Sydney (North West)	+61 2 9804 5704	<a href="mailto:imiller@hunthunt.com.au">imiller@hunthunt.com.au</a>
David Thompson, Melbourne	+61 3 8602 9252	<a href="mailto:dthompson@hunthunt.com.au">dthompson@hunthunt.com.au</a>
Rachel Drew, Brisbane	+61 7 3292 9717	<a href="mailto:rdrew@macrossans.com.au">rdrew@macrossans.com.au</a>
Chris Sharp, Adelaide	+61 8 8414 3385	<a href="mailto:csharp@hunthunt.com.au">csharp@hunthunt.com.au</a>
Darren Miller, Perth	+61 8 9488 1300	<a href="mailto:darren.miller@marksandsands.com.au">darren.miller@marksandsands.com.au</a>
Gregory Geason, Hobart	+61 3 6231 0131	<a href="mailto:ggeason@hunthunt.com.au">ggeason@hunthunt.com.au</a>
Chris Osborne, Darwin	+61 8 8924 2600	<a href="mailto:cosborne@huntnt.com.au">cosborne@huntnt.com.au</a>
Justine Matthews, Newcastle	+61 2 4925 5500	<a href="mailto:jmatthews@hunthunt.com.au">jmatthews@hunthunt.com.au</a>

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