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Negotiating for an Enterprise Agreement – what is good faith bargaining?

Enterprise bargaining

The Fair Work Act regulates the making of enterprise agreements (see our fact sheet on Enterprise Agreements – what are they and how to make one).

Enterprise bargaining is the process of negotiation between an employer and its employees (and their bargaining representatives) with a view to reaching a collective agreement setting minimum wages and other terms and conditions of employment within an enterprise, i.e. a business, activity, project or undertaking.

A touchstone of the regulated enterprise bargaining scheme is the requirement for negotiations to be conducted in a manner which is consistent with the good faith bargaining rules, in default of which the Fair Work Commission may intervene and make bargaining orders in relation to the future conduct of negotiations.

The rules of the game

Bargaining will usually commence when an employer agrees to bargain or initiates bargaining with its employees (although an employer may be forced to commence bargaining in some limited circumstances).

If an employee is a member of a trade union, then they will be automatically represented by the union and its officials in the bargaining process.

Employer and employee bargaining representatives alike are obliged to bargain in "good faith" in accordance with the following rules:

- they must meet at reasonable times and participate in meetings;
- they are required to disclose relevant information (other than confidential or commercial sensitive information) in a timely manner;
- they are required to respond to proposals made by other bargaining representatives in a timely manner;
- they are to give genuine consideration to the proposals of other bargaining representatives and explain their position in relation to those proposals;
- they must not to engage in capricious or unfair conduct that undermines freedom of association or collective bargaining; and
- they must recognise and bargain with other bargaining representatives for the agreement.

However, the duty to bargain and negotiate in good faith does not mean that one party must make concessions, during the bargaining process, and nor do the parties have to ultimately reach a consensus on the terms to be included in an enterprise agreement, i.e. conclude a negotiated agreement.

Bargaining practices

It is not always black and white as to which types of practices will contravene the good faith bargaining rules. Whilst the law in this area is still very much developing, the Fair Work Commission and the Courts have already ruled on the legitimacy or otherwise of certain tactics and conduct, as summarised in the table below:

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Conduct	Commentary	Breach
Submitting a proposed agreement to ballot without the approval of other bargaining representatives.	The Commission has considered in a number of cases situations where an employer has submitted a proposed agreement to a vote of employees without the approval of the employee bargaining representatives involved in the negotiations.	No, not if the negotiations have reached an impasse.
Direct dealing – simultaneously conducting two sets of negotiations – one with a union and one with employees	Some direct dealing with employees such as direct offers and unilateral alteration of existing conditions have found to be in breach of the good faith bargaining requirements. However, the Commission has given employers some latitude to communicate directly with employees during bargaining.	Maybe
Unilateral changes in the workplace	The Commission has found employers who have unilaterally changed the terms and conditions of employees during the bargaining process to be in breach of the good faith bargaining requirements.	Yes
Changing position on previously agreed matters	The Commission found that the conduct of a union was capricious and inconsistent with good faith bargaining requirements, after it sought orders varying the scope of an agreement that was just about to be voted on.	Possibly, if changes made late in the bargaining process
Lack of engagement in the process / surface bargaining	The Federal Court has held that bargaining representatives and parties cannot adopt the role of a "disinterested suitor". In this particular case, the employer's attitude was that it was for the union to convince the company that they should enter into a collective agreement in the first place, despite the fact that the majority of employees wanted a collective agreement to be put in place.	Yes, if bargaining proposals are rejected without any consideration or if no genuine engagement takes place.

For further information

For more information about enterprise agreements, please refer to our fact sheet *Enterprise Agreements – what are they and why make one?*

Alternatively, contact HopgoodGanim's Industrial and Employment Law team via www.hopgoodganim.com.au.