

## **/// Chief Minister's Department - Governance Division**

### **GUIDELINES: INDUSTRIAL ACTION AND THE REQUIREMENTS OF THE FAIR WORK ACT**

- **Directorate Heads**
- **HR Directors/Managers**
- **Shared Services Centre**

#### **Purpose**

1. To provide Directorates with guidelines about the requirements of the Fair Work Act (FW Act) concerning industrial action and how Directorates should deal with industrial action in their own workplaces.

#### **Application**

2. These Guidelines will apply to all ACTPS Government Directorates.

#### **Summary of Changes Under the Fair Work Act**

3. The key elements of the regulation of industrial action under the Workplace Relations Act have been retained in the FW Act.

4. However, the FW Act introduces some important changes. For purposes of these Guidelines, the main changes are:

- there is no longer any requirement to create a bargaining period before a union can give notice to the employer of industrial action;
- the range of matters over which protected industrial action may be taken is wider;
- new terms have been introduced - employee claim action, employer response action and employee response action;
- the grounds for seeking termination or suspension orders in relation to industrial action have changed;
- an application for a protected action ballot order may be made up to 30 days before the expiry date of the current applicable collective agreement;
- generally the processes for applying for and conducting a ballot have been simplified and the AEC will now fund ballots it conducts;
- the employee no longer bears the onus of proving that industrial action was taken on occupational health and safety grounds; and
- there are new provisions about strike pay in cases where protected industrial action involved partial bans or refusal to work overtime.

5. These provisions are considered in more detail in these Guidelines.

## **What is industrial action for purposes of the FW Act?**

6. The FW Act retains a very broad definition of “industrial action” (s19).

7. It includes:

- performing work in a manner that is different from how it is normally performed, or a restriction, limitation or delay in the performance of the work;
- a ban, limitation or restriction on the performance of work;
- a failure or refusal to attend for work or a failure or refusal to perform any work at all by employees who attend for work; and
- a lockout by an employer.

8. Industrial action does not include:

- action by employees that is authorised or agreed to by, or on behalf of, the employer or vice versa; or
- action by employees where there is a reasonable concern by employees about an imminent risk to their health and safety.

## **When does an employee claim action become protected industrial action?**

9. The scope of protected industrial action is broader under the FW Act. The action must be in support of claims in relation to a proposed agreement that are about, or reasonably believed to be about, permitted matters. Permitted matters now expressly include matters pertaining to the relationship between an employer and a union (eg union involvement about change or redundancy action) and deductions from wages for any purpose authorised by an employee (eg union dues).

10. An employee claim action may be made by any bargaining representative for a proposed single enterprise agreement or by an employee who is included in the group specified in a protection action ballot order for the enterprise agreement.

11. An employee claim action for a proposed enterprise agreement will only be protected industrial action if certain requirements have been satisfied. These include:

- the industrial action is authorised by a protected action ballot;
- when any current applicable enterprise agreement has reached its nominal expiry date; and
- when the industrial action is in support of claims made in relation to a proposed new single enterprise agreement; and
- the industrial action is not in support of the inclusion of unlawful terms in the proposed enterprise agreement;
- the bargaining representative must be genuinely trying to reach an agreement; and
- the bargaining representative has given the employer at least 3 full working days notice before the employee claim action commences.

12. An application for a protected action ballot may be made up to 30 days from the nominal expiry date of the current collective agreement. The application may be made by a bargaining representative of the employee to be covered by the agreement. The bargaining representative must give the employer a copy of an application for a ballot within 24 hours of making an application to FWA. FWA

must give the employer a copy of a protected action ballot order as soon as practicable after making the order.

13. Before making a protected action order, FWA must be satisfied that each of the applicants for the order is genuinely trying to reach agreement with the other parties to the bargaining. The protected action ballot may be conducted either by the Australian Electoral Commission, or by another person specified in the protected action ballot order.

14. An employee may vote in a protected action ballot if the employee:

- will be covered by the proposed enterprise agreement;
- is represented by a bargaining representative who applied for the ballot order; and
- is included in the group of employees specified in the protected action ballot order.

15. Industrial action is authorised by a protected action ballot where:

- the action was the subject of a prior protected action ballot; and
- in the case of union initiated action, at least 50% of those eligible to vote (ie members of that union who are to be covered by the new agreement ) voted in the protected action ballot; and
- more than 50% of those who voted approved the proposed industrial action; and
- the action commences within a 30 day period following the declaration of the ballot results.

### **Strike Pay**

16. The limitations on paying strike pay to an employee who has engaged in unprotected industrial action continue under the new legislation. In such cases the employer must not pay the employee for either the duration of the action or for at least 4 hours.

17. The requirements on an employer in relation to strike pay to staff who engage in protected industrial action have been changed in 3 main ways:

- Where protected industrial action is taken, an employer must withhold payment for the actual period of industrial action.
- However, where a partial work ban is applied, the employer may decide to either pay full pay, or reduce the employee's wages proportionate to the duties not performed, or withhold payments altogether for the industrial action period.
- In relation to overtime bans, payment may only be withheld where the employer requested the employee to work overtime and the employee refused in contravention of the employee's obligations under an employment contract, award or enterprise agreement.

18. If an employer decides to withhold payments altogether or to reduce the payments in proportion to the period of industrial action in the case of an employee who imposes a partial work ban, the employer must give each employee written notice to that effect. If an employer does not give such a notice in the case of a partial work ban then no

deduction in pay can be made; the Fair Work Regulations set out the method for determining the proportion of pay that may be deducted, the mandatory contents of the notice and how the notice is to be given – see Regulations 3.21 to 3.24.

19. Directorates should take the following steps to ensure they meet these requirements when industrial action occurs:

- identify the nature of any action that employees are taking;
- document the action and those who are participating;
- put in place arrangements to cease payments to those employees who are taking industrial action for the period that action is taken;
- in the case of partial work bans determine whether to withhold pay or reduce pay proportionately and, if they so determine, give affected employees the required notice;
- decline approval for employees to take leave (including access to flextime credits) for the purposes of participating in industrial action.

## **OPTIONS FOR DIRECTORATES IN DEALING WITH INDUSTRIAL ACTION**

### **Use of dispute resolution provisions of the Directorate Agreement**

20. In some circumstances an effective response could be for the Directorate to deal with the action by invoking the dispute settlement procedures of the Collective/Enterprise Agreement. The aim would be to try to discuss and address the issue or issues that appear to be a cause for the industrial action. If this proves unsuccessful, this could then open the way for the Directorate to refer the matter to FWA under the terms of the dispute resolution procedure in the collective/enterprise agreement.

### **Application to stop or prevent industrial action where the action is not protected industrial action**

21. A Directorate may apply to FWA for an order to prevent or to stop industrial action where the industrial action is not protected. FWA must issue an order where it concludes that the industrial action:

- is or would not be protected action; and
- is either happening, or is threatened, impending or probable or is being organised.

22. An application will be heard as far as practicable within 2 days. There is provision for FWA to make either an interim order or a final order. An order of FWA may be enforced through an injunction.

Note: An [application](#) for this purpose must be made on FWA Form 14.

### **Application to stop or prevent industrial action during the life of an agreement**

23. It is an offence for a union, an employee or an employer to take industrial action before the nominal expiry date of an enterprise agreement.

24. Where this occurs, a Directorate may apply to a court (Federal Court or Federal Magistrates Court), without the need for any prior order from FWA, for

an injunction or other order to stop or to remedy the effects of the industrial action.

Note: An [application](#) for this purpose must be made on FWA Form 14.

### **Application to suspend or terminate the protected industrial action.**

25. A Directorate may apply to FWA for an order to suspend or terminate protected industrial action in certain circumstances.

26. FWA must be satisfied that the industrial action is causing or threatening to cause significant economic harm to the employer and any of the employees who will be covered by the enterprise agreement.

27. There are various factors that are relevant to assessing significant economic harm, including whether the bargaining representatives have met the good faith bargaining obligations, whether any bargaining orders have been contravened, the prospects of agreement being reached and the objective of promoting and facilitating bargaining.

28. There are other processes available for terminating or suspending protected industrial action where the action has or is threatening life, personal health and safety or the welfare of the population, or has or is threatening to cause significant damage to the economy or part of it.

29. FWA may also suspend protected industrial action for a cooling off period or where the action is or is threatening to cause significant harm to a third party.

30. Where a bargaining period is terminated by FWA or by the Minister, FWA may make a Workplace Determination, which will contain terms and conditions of employment. Such a Workplace Determination may operate for up to 4 years, but will be superseded and overridden if the parties enter into a workplace agreement during the life of the Workplace Determination.

**Note: An [application](#) for this purpose must be made on FWA Form 37.**

### **Conclusion**

31. In general, it will be the responsibility of a Directorate to determine what response is appropriate, taking into account such factors as the nature of the industrial action, its impact on the Directorate, its staff and the community and the duration of the action.

32. In the event of any threatened or actual protected or unprotected industrial action, Directorates will need to advise all staff and relevant unions of the actions the Directorate may take in response, including the obligations the Directorate has regarding strike pay.

33. In the first instance, Directorates should consider invoking the dispute resolution procedures of the Collective/Enterprise Agreement, CMD should be advised and the portfolio Minister briefed.

34. Any action to seek pecuniary penalties or injunctive relief should be taken only in exceptional circumstances, such as where the action is causing a major threat to the life, the personal safety or health, or the welfare of the ACT community or a part of the community. Directorates should consult with CMD in considering such action and, if a Directorate then decides to proceed, the Directorate will need to seek approval from the portfolio Minister. Similarly, any action by an Directorate to FWA to suspend or terminate protected industrial action will need to be discussed with CMD and approved by the portfolio Minister.

35. In addition, Directorates will need to inform CMD of the following:

- any threatened or actual industrial action, whether it is protected or unprotected;
- any application for a protected action ballot; and
- any application made by the Directorate to FWA in response to actual or threatened industrial action.

**Note: Reference may also be made to fact sheets Fair Work Australia has prepared on industrial action – see [www.fwa.gov.au](http://www.fwa.gov.au).**

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**Review Date**

These Guidelines are due for review in November 2012.

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