

## GUIDANCE TO AGENCIES ABOUT INDUSTRIAL ACTION AND THE REQUIREMENTS OF THE *FAIR WORK ACT 2009*

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- Directors-General and Agency Heads
- HR Directors/Managers
- Shared Services Centre

### PURPOSE

1. The purpose of this Advice is to provide Directorates and Agencies with guidance about the requirements of the *Fair Work Act 2009* (FW Act) concerning industrial action and how Directorates and Agencies should deal with industrial action in their own workplaces.
2. This Advice replaces the Policy Guideline 01/2009 issued in November 2009.

### APPLICATION

3. This Advice will apply to all ACT Public Sector Directorates and Agencies.

### ISSUES

#### WHAT IS INDUSTRIAL ACTION FOR PURPOSES OF THE FAIR WORK ACT?

4. The FW Act contains a very broad definition of “industrial action” (see s19).
5. Industrial action 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;
  - a lockout of employees from their employment by an employer.
6. 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, and the employee did not unreasonably fail to comply with a direction of the employer to perform other available work at the same or another location, that was safe and appropriate for the employee to perform.

## WHEN DOES AN EMPLOYEE CLAIM ACTION BECOME PROTECTED INDUSTRIAL ACTION?

7. The scope of “protected” industrial action (or “employee claim action”) under the FW Act pertains to action against the employer in support of claims in relation to a proposed enterprise agreement that are about, or reasonably believed to be about, permitted matters and is authorised by a protected action ballot. Permitted matters now expressly include matters pertaining to the relationship between an employer and a union (e.g. union involvement about change or redundancy action) and deductions from wages for any purpose authorised by an employee (e.g. union dues).
8. 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 industrial action.
9. An “employee claim action” for a proposed enterprise agreement will **only** be “protected” industrial action if certain requirements have been satisfied. These requirements include:
  - a) the industrial action is in support of claims made in relation to a proposed new single enterprise agreement for which bargaining has commenced; and
  - b) any current applicable enterprise agreement has passed its nominal expiry date; and
  - c) the industrial action is authorised by a protected action ballot; and
  - d) the industrial action is **not** in support of the inclusion of unlawful terms in the proposed enterprise agreement, or in support of pattern bargaining in relation to the agreement; and
  - e) the bargaining representative must be genuinely trying to reach an agreement with the employer; and
  - f) the bargaining representative has given the employer at least three full working days written notice of the action to the employer, or longer if specified in the protected action ballot order, before the employee claim action commences; and
  - g) there is no order suspending or terminating industrial action in relation to the agreement.
10. An application for a protected action ballot may be made up to 30 days before the nominal expiry date of the current enterprise agreement. The application may be made by an employee who will be covered by the proposed enterprise agreement, or by two or more bargaining representatives of the employee to be covered by the agreement. The applicant must give the employer a copy of an application for a protected action ballot order within 24 hours of making an application to the Fair Work Commission (FWC). The FWC must give the employer a copy of a protected action ballot order as soon as practicable after making the order, and as far as practicable, within two working days after the application is made.
11. The FWC must make a protected action ballot order in relation to a proposed enterprise agreement if an application has been made and the FWC is satisfied that each of the applicants for the order has been, and is, genuinely trying to reach an agreement with the employer. The protected action ballot may be conducted either by the Australian Electoral Commission, or by another person where specified in the application for the protected action ballot order, provided the FWC is satisfied the person is a fit and proper person to conduct the ballot and any other requirements of the regulations are met.

12. An employee may vote in a protected action ballot if:
  - a) the employee will be covered by the proposed enterprise agreement to which the protected action ballot relates; and
  - b) the employee is represented by a bargaining representative who applied for and was granted a protected action ballot order; and
  - c) the employee's name is included on the roll of voters for the ballot.
13. Industrial action is authorised by a protected action ballot where:
  - a) the action was the subject of the ballot; and
  - b) at least 50% of those on the roll of voters for the ballot voted in the protected action ballot; and
  - c) more than 50% of those who voted approved the proposed industrial action; and
  - d) the action commences within a 30-day period starting on the date of declaration of the ballot results, unless extended by the FWC; and
  - e) a period of at least three working days written notice of the action is given to the employer, or up to seven working days in exceptional circumstances where justified.
14. All employees have the right to join, or not join a union and the right to participate, or not participate, in lawful protected Industrial action. It is unlawful for employers (and unions) to take "adverse action" against an employee because they are, or are not, a union member or against any employee who lawfully chooses to participate, or not participate, in protected industrial action.
15. Where an employee is not eligible to participate in protected industrial action, or they are eligible but have chosen not to participate in that action, the employee cannot refuse to perform work that they are lawfully and reasonably directed to perform. A refusal to perform such work could result in a breach of the ACTPS Code of Conduct and, as a result, the employee could be subject to disciplinary action.
16. Employees are only eligible to participate in protected industrial action where all of the legal requirements for the taking of industrial action have been met. If these requirements are not met, participation in industrial action will be unlawful.

## **EMPLOYEE PAYMENTS**

### **Unprotected Industrial Action**

17. In relation to payments to an employee who engages, or has engaged, in **unprotected** industrial action against an employer, the employer must not make payment to the employee for:
  - a) the duration of the industrial action, if the total duration of the action on that day is at least four hours; or
  - b) 4 hours of that day.

### **Protected Industrial Action**

18. In relation to payments to an employee who engages, or has engaged, in **protected** industrial action against an employer, the employer must withhold payment to an employee for the actual period of industrial action, except where the action relates to a partial work ban.

19. Where a partial work ban is applied, the employer may decide to either:
  - a) reduce the employee's payments proportionate to the duties not performed where the employer has provided a written notice to the employee stating that, because of the ban, the employee's payments will be reduced by a proportion specified in the notice; or
  - b) withhold payments altogether for the industrial action period where the employer has provided a written notice to the employee stating that, because of the ban, the employee will not be entitled to any payments and that the employer refuses to accept the partial performance of any work; or
  - c) not reduce the employee's payments because of the ban.
20. In relation to overtime bans, payment may only be withheld where the employer has requested or required the employee to work overtime and the employee has refused to work the period of overtime in contravention of the employee's obligations under an employment contract, modern award or enterprise agreement.
21. 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 of the FW Act).
22. Directorates and Agencies should take the following steps to ensure they meet these requirements when industrial action occurs:
  - a) identify the nature of any industrial action that employees are taking; and
  - b) document the industrial action and those who are participating in the action; and
  - c) put in place arrangements to cease payments to those employees who are identified as taking industrial action for the period that action is taken; and
  - d) in the case of partial work bans, determine whether to withhold pay or reduce pay proportionately and, if so determined, give affected employees the required written notice; and
  - e) decline approval for employees to take leave (including access to flextime credits) for the purposes of participating in industrial action.

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

### **Use of Dispute Avoidance/Settlement Provisions of the Enterprise Agreement**

23. In some circumstances an appropriate and effective response could be for the Directorate or Agency to deal with the industrial action by invoking the dispute avoidance/settlement procedures of the enterprise agreement. The aim would be to attempt to discuss and resolve the causal issue or issues. If this proves unsuccessful, an avenue exists under the terms of the dispute avoidance/settlement procedure for the Directorate or Agency to refer the matter to FWC, or other agreed party, for resolution.

### **Application for an Order to Stop or Prevent Industrial Action where the Action is not Protected Industrial Action**

24. A Directorate or Agency may apply to the FWC for an order to prevent or to stop industrial action where the industrial action is not protected. The FWC must issue an order where it concludes that the industrial action:
  - a) is or would not be protected action; and
  - b) is either happening, or is threatened, impending or probable or is being organised.

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

**Note: An application for this purpose must be made on FWC Form 14.**

### **Application to Stop or Prevent Industrial Action During the Life of an Enterprise Agreement**

26. 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.
27. Where this occurs, a Directorate or Agency may apply to a court (Federal Court or Federal Magistrates Court), without the need for any prior order from the FWC, for an injunction or other order to stop or to remedy the effects of the industrial action.

### **Application for an Order to Suspend or Terminate Protected Industrial Action**

28. A Directorate or Agency may apply to the FWC for an order to suspend or terminate protected industrial action in certain circumstances.
29. The FWC 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.
30. 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.
31. 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.
32. The FWC 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.
33. Where a bargaining period is terminated by the FWC, or by the Minister, the FWC may make a Workplace Determination, which will contain terms and conditions of employment. Such a Workplace Determination may operate for up to four 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 FWC Form 37.**

## **CONCLUSION**

34. In general, it will be the responsibility of a Directorate or Agency to determine what response is appropriate, taking into account such factors as the nature of the industrial action, its impact on the Directorate or Agency, its staff and the community, and the duration of the action.
35. In the event of any threatened or actual protected or unprotected industrial action, Directorates and Agencies will need to advise all staff and relevant unions of the actions the Directorate or Agency may take in response, including the obligations the Directorate or Agency has regarding employee payments.

36. In the first instance, Directorates and Agencies should consider invoking the dispute avoidance/settlement procedures of the enterprise agreement, CMTEDD should be advised and the portfolio Minister briefed.
37. 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 and Agencies should consult with CMTEDD in considering such action and, if a Directorate or Agency then decides to proceed, the Directorate or Agency will need to seek approval from the portfolio Minister. Similarly, any action by a Directorate or Agency to FWC to suspend or terminate protected industrial action will need to be discussed with CMTEDD and approved by the portfolio Minister.
38. In addition, Directorates and Agencies will need to inform CMTEDD of the following:
  - any threatened or actual industrial action, and whether it is protected or unprotected; and
  - any application for a protected action ballot order; and
  - any application made by the Directorate or Agency to FWC in response to actual or threatened industrial action.

## REFERENCE

39. The key references for this Advice are:
  - > The *Fair Work Act 2009* which can be accessed at the following website [http://www.austlii.edu.au/au/legis/cth/consol\\_act/fwa2009114/](http://www.austlii.edu.au/au/legis/cth/consol_act/fwa2009114/); and
  - > Fact sheets on industrial action which can be accessed at the Fair Work Commission website at [www.fwc.gov.au](http://www.fwc.gov.au).
40. The contact for further information is Mr Russell Noud, Director Public Sector Workplace Relations, Chief Minister, Treasury and Economic Development Directorate (CMTEDD).



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2 December 2016