employment LAW BULLETIN

"Small cheer and great welcome makes a merry feast":[1] Recent trends in majority support determinations

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As many predicted prior to the introduction of the Fair Work Act 2009 (Cth) (the Fair Work Act), majority support determinations have quickly become an important weapon in the arsenal of a union seeking to bargain with a reluctant employer. Successfully bringing such an application requires a bargaining representative to demonstrate, amongst other things, that a majority of the workforce wishes to bargain. The Fair Work Act does not specify what is required to meet this test but some trends and principles have arisen from the decisions of Fair Work Australia which provide useful guidance.

Requirements under the Act

Section 336 of the Fair Work Act requires Fair Work Australia to make a majority support determination (MSD) if a bargaining representative of an employee who will be covered by a proposed single enterprise agreement has demonstrated that a majority of the employees who will be covered by the agreement wish to bargain with the employer. Fair Work Australia must be satisfied that:

(a) a majority of the employees who are employed, and who will be covered by the agreement, want to bargain;

(b) the employer that will be covered by the agreement has not yet agreed to bargain, or initiated bargaining, for the agreement;

(c) that the group of employees who would be covered by the agreement is fairly chosen (if not all of the employer's employees are covered by the proposed agreement, Fair Work Australia must take into account whether the group is geographically, operationally or organisationally distinct); and

(d) it is reasonable under the circumstances to make the determination.

If an MSD application is successful, an employer is required to issue a representational notice under s 173 of the Act and commence bargaining.

The cases to date reveal that the main stumbling block for a bargaining representative to obtain an MSD is demonstrating to the satisfaction of Fair Work Australia that a majority of employees wish to bargain. For this assessment to be made, evidence needs to be produced as to the number of employees who will be covered by the proposed enterprise agreement and which of those wish to bargain.

Number of employees

The number of employees in a workplace is information which, in many companies, will only be known to the employer. SDP Richards in *ASU v Regent Taxis Ltd*[2] (*Regent Taxis*) held that there was no obligation on an employer under the Fair Work Act to disclose this fact. A bargaining representative may therefore be left in the dark as to whether they have majority support until the hearing before Fair Work Australia.

Evidence of a majority

Petitions or "pledge cards" signed on behalf of a majority of the affected employees generally have proven to meet the evidentiary requirements of the Fair Work Act. The general position is that a petition signed by a majority of the affected employees will, in the absence of any evidence to the contrary, meet the Fair Work Act's requirements.[3]

Some companies have opposed an MSD application by seeking to undermine the veracity of the petition. In *CFMEU v Mammoet Pty Ltd*,[4] the company claimed that the petition lacked the necessary integrity and could not be relied on. Criticisms were levelled at the way in which the signatures had been obtained including the lack of privacy and the absence of an opportunity for the employees to obtain other advice. These arguments were ultimately not successful in the circumstances of the

case, partly because Fair Work Australia found the workers involved to be industrially experienced and familiar with the agreement-making process. On another set of facts this approach might find more success.

The words used in petitions have also come under scrutiny. In *AWU v Austral Bricks*[5] the company unsuccessfully argued that the petition was not a sufficient demonstration of the informed wishes of the employees because the statement in the petition was unclear.

Ballots

Fair Work Australia is able to satisfy itself in any way it considers appropriate that a majority of employees wish to bargain.[6] In the cases where there has been some doubt, Fair Work Australia has been prepared to order a ballot of the employees to be conducted by the Australian Electoral Commission (AEC) in spite of an otherwise valid petition on behalf of a majority of employees.

In *AMOU v DP Weld Sydney Limited*[7] (*DP Weld*) the value of the petition was in dispute because it asked whether the employees wanted to be represented by the union and did not specifically address the issue of whether the employees wanted to bargain for an enterprise agreement. It just assumed that they wanted to. Fair Work Australia ordered that a ballot be conducted by the AEC but, interestingly, also allowed employees the opportunity to vote "yes", "no" or "maybe" to the question of whether they wished to bargain for an enterprise agreement.

Timing

Section 237(2)(a)(i) of the Fair Work Act requires Fair Work Australia to be satisfied that a majority of employees want to bargain "at a time determined by FWA". In order to determine whether the required majority wish to bargain Fair Work Australia needs to understand the number of employees to be covered by the proposed enterprise agreement and the number of employees who wish to bargain. The appropriate time for these assessments to be made may be crucial to the final conclusion. On the issue of timing, McCarthy DP in *CFMEU v CBI Constructors Pty Ltd* (*CBI Constructors*) held:[8]

> I have decided that the time appropriate to determine whether a majority of employees want to bargain is the time when employees then employed by CBI signed a petition that they wished to bargain.

Yet Richards SDP in *Regent Taxis* held:[9]

> (A)s I informed the parties at the hearing, the number of employees employed by an employer must be taken from the time that Fair Work Australia makes the determination (and not from any prior point in time).

The prevailing view at Fair Work Australia seems to be that the assessment should occur at the time of the hearing of the MSD application. This is implicit from the decisions in which the tribunal has accepted evidence those employees who previously expressed a desire to bargain in a petition or on a pledge card no longer wish to bargain by the time the matter has come on for hearing in Fair Work Australia.

Withdrawal of support

The fact that an employee has signed a petition or pledge card does not mean they are unable to resile from this view. Richards SDP in *Regent Taxis* stated on this point:[10]

> An employee might reasonably withdraw their support to bargain before any determination is made under s 237 of the FW Act. There is no legislative stipulation to the contrary.

There have been several cases in which employers have made persuasive arguments to this effect. While the general position is that if there is sufficient doubt around the intentions of the employees a ballot will follow, it is not the only approach. For example, Lawler VP in *APESMA v Endeavour Coal Pty Ltd*[11] was prompted to send the following letter to the affected employees:

> If you have signed the petition but, having regard to the dot points above, you in fact do not want to bargain for an enterprise agreement covering staff employees, please send an email to this effect to my associate ... On the other hand, if you did not sign the petition and now wish to indicate that you want to bargain for an enterprise agreement you may do so by sending an email to that effect ...[12]

Another employer, perhaps deciding to fight fire with fire, produced its own "employer petition" as evidence that a majority of staff did *not* (emphasis added) wish to bargain for a new enterprise agreement. This prompted the tribunal in *CFMEU v Sunbury Wall Frames and Trusses Pty Ltd*[13] (*Sunbury*) to order a ballot to be conducted by the AEC which, in the end, indicated an insufficient level of support for bargaining to commence. An "employer petition" brings its own hazards and could be subject to the criticism that the employees were unable to freely express themselves. The company in *Sunbury* was seemingly alive to this possibility when it chose to include with the petition a statement from the local mayor which read:

> I attended the meeting where the shop floor employees of Sunbury Wall Frames and Trusses were asked to reconfirm that they did NOT want an EBA in place ... there was no bullying pressure or harassment of staff ...[14]

Conclusion

It is clear from the Fair Work Australia decisions thus far that a set of principles are forming around the proper approach to dealing with an MSD application. The

employees' intentions are amongst the key factors in determining whether the affected employees wish to bargain. Fair Work Australia has sought to decipher this intention by assessing the wording in the petition, the circumstances in which it was signed and the views of the affected employees at the time that the MSD application is heard by Fair Work Australia.

The strategies employed by companies seeking to demonstrate that majority support is not present have, in addition to a straight out mathematical calculation demonstrating less than 50% support, mostly focussed on either undermining the integrity of the petition or establishing that a sufficient number of employees have altered their view by the time of the hearing and no longer wish to bargain. We can expect employers to continue to develop sophisticated arguments devaluing or demonstrating the unreliability of evidence produced by bargaining representatives though "employer petitions" are unlikely to be viewed favourably or encouraged by Fair Work Australia. Where sufficient doubt is created in the mind of the tribunal about the existence of majority support we can expect to continue to see the tribunal order a further ballot to occur.

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Footnotes

1. William Shakespeare The Comedy of Errors, (Balthazar at III (i).
2. *ASU v Regent Taxis Ltd* [2009] FWA 1642 at [15].
3. *APESMA v Endeavour Coal Pty Ltd* [2010] FWA 1997 per Commissioner Roe at [9].
4. *CFMEU v Mammoet Pty Ltd* [2009] FWA 1945.
5. *AWU v Austral Bricks* [2010] FWA 5819.
6. Fair Work Act 2009 (Cth) s 237(3).
7. *AMOU v DP Weld Sydney Limited* (B2010/3339).
8. *CFMEU v CBI Constructors Pty Ltd* [2010] FWA 2164 (under appeal) held at [11].
9. *ASU v Regent Taxis Ltd* [2009] FWA 1642 at [14].
10. *ASU v Regent Taxis Ltd* [2009] FWA 1642 at [17].
11. *APESMA v Endeavour Coal Pty Ltd* [2010] FWA 7497.
12. Above at [6].
13. *CFMEU v Sunbury Wall Frames and Trusses Pty Ltd* [2010] FWA 3681.
14. *CFMEU v Sunbury Wall Frames and Trusses Pty Ltd*, B2010/39 at PN44 of Transcript of hearing, 7 April 2010.