

## Majority Support for Bargaining – FWA Issues First Orders

Fair Work Australia (“FWA”) has recently dealt with two applications by unions seeking “Majority Support Determination Orders” in respect to Enterprise Agreements. This EMA Note examines both applications and explores the practical implications for employers.

### Case 1 – Cochlear and the Australian Manufacturing Workers Union (“AMWU”)

Cochlear is a manufacturing company that produces cochlear implants and other hearing devices for the hearing impaired.

Cochlear and the AMWU have been in dispute for a significant period of time about the style and form of agreement that should operate at Cochlear’s Plant in NSW – Cochlear had proposed a non union collective agreement (which was previously available under the *Workplace Relations Act 1996* [“the WR Act”]) whilst the AMWU sought a union collective agreement (also available under the WR Act). The non union collective agreement proposed by Cochlear had been rejected on at least two (2) occasions by the employees at Cochlear.

The problem for both Cochlear and the AMWU was that the WR Act did not provide a mechanism for resolving a dispute of this kind – this in part explains why the dispute has been going on for so long.

Against this background the AMWU made application to Fair Work Australia for a majority support determination.

### Case 2 – The LHMU and various Hotels

The Liquor, Hospitality and Miscellaneous Union (“LHMU”) also made application to FWA for Majority Support Determinations in separate proceedings.

The LHMU applications are against a range of hotels – including the Stamford Plaza Sydney Airport; Stamford Circular Quay; Sheraton Perth Hotel; Hilton Perth; Stamford Plaza Adelaide; Hilton Brisbane; Brisbane Stamford; Holiday Inn Darling Harbour; Marriott Brisbane; Novotel Perth Langley; Sofitel Wentworth and Sofitel Brisbane.

### What is a Majority Support determination?

Under the *Fair Work Act 2009* (“the FW Act”), a bargaining representative of an employee (in most cases a **union**) may apply to FWA for a determination (a **majority support determination**) that a majority of the employees who will be covered by the agreement want to bargain with the employer, or employers, that will be covered by the agreement. If FWA grants such an order, the employer is by implication obliged to bargain in good faith with the applicable Union or other bargaining representatives (whether it wants to or not) or face the possibility of being subjected to further FWA proceedings in the form of Good Faith Bargaining Orders.

FWA must make a majority support determination, where the Union can demonstrate that:

- a majority of the employees (51% or more) who will be covered by the agreement want to bargain; and
- the employer has not yet agreed to bargain, or initiated bargaining, for the agreement; and
- that the group of employees who will be covered by the agreement was fairly chosen (taking into account whether the group of employees is geographically, operationally or organisationally distinct); and
- it is reasonable for FWA to make the majority support determination.

## **FWA Proceedings**

The AMWU and Cochlear FWA proceedings were fiercely contested. The AMWU had asked Cochlear employees to complete a survey. The AMWU claimed that some 171 employees in the survey indicated that firstly, they wanted a new agreement, and secondly, that they wanted the AMWU to negotiate that agreement.

The accuracy of the surveys was questioned by Cochlear. At the conclusion of the proceedings, the Commissioner indicated that the best way to determine whether there was in fact majority support of employees was to conduct a postal ballot overseen by FWA. The postal ballot will be conducted over the next couple of weeks.

The LHMU hotel proceedings were also contested. Questions were asked of the ability of the LHMU to make such an application, especially where some of the Hotels had existing agreements that had yet to pass their nominal expiry date. The LHMU application was adjourned by FWA for a period of four (4) weeks.

### **What does it mean?**

In the AMWU Cochlear case, if FWA make the majority support determination as requested by the AMWU, it will simply demonstrate that a majority of the employees who would potentially be covered by the agreement want the AMWU to be their bargaining representative and that they want an Enterprise Agreement.

Whilst the making of a majority support determination by FWA does not in itself compel Cochlear to meet with the AMWU (or to recognise the AMWU as the bargaining representative), it would give the AMWU the capacity to apply for Good Faith Bargaining Orders under Section 229 of the FW Act. A Good Faith Bargaining Order can compel an employer to participate in the bargaining process.

The AMWU's application demonstrates that many of the traditional strategies used by employers under the WR Act to circumvent union influence over agreement making are now redundant and that the FW Act places new obligations on the employer that will in most cases compel it to bargain collectively.

### **Require further information or assistance?**

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