



Bargaining under the Workplace Relations Act 1996

INFORMATION FOR CPSU MEMBERS

'Forward with Fairness'

How CPSU negotiates agreements is regulated by the Workplace Relations Act 1996 and Workplace Relations Regulations 2006.

With Labor forming Government following last year's Federal election, industrial relations laws are currently in a transitional phase. Federal Labor has already made some changes to Work Choices. Labor's changes provide for:

- ✚ No more AWA's
- ✚ 'No disadvantage test' reintroduced requiring agreements to be assessed against award
- ✚ Option to 'vary/extend' Certified Agreement (avoid Work Choices)

During the transition to Labor's new national IR laws the Work Choices bargaining system still applies. New IR laws may not apply in full until January 2010 (subject to passage through the Federal Parliament).

Bargaining under WR Act

The Act is designed to promote bargaining at the workplace between workers and employers. A union must have members to participate in bargaining. A log of claims can be submitted and a bargaining period notified. 'Prohibited content' cannot be claimed or included in an agreement. Penalties apply for claiming such matters, including:

- ✚ prohibiting AWA's
- ✚ restricting the use of independent contractors or on-hire arrangements
- ✚ allowing for industrial action during the term of an agreement
- ✚ providing for trade union training leave, bargaining fees to trade unions or paid union meetings
- ✚ providing that any future agreement must be a union collective agreement
- ✚ mandating union involvement in dispute resolution
- ✚ providing a remedy for unfair dismissal
- ✚ other matters prescribed by regulation/legislation.

Prohibited content does not need to be removed if an existing Certified Agreement is 'varied or extended' under the transitional provisions. Once negotiations are completed an employee ballot is required to approve agreement. Approved agreements must be lodged with the Workplace Authority. An agreement legally comes into effect after the Workplace Authority has approved the 'no disadvantage test' compared to the Award.

Protected Industrial Action

The Act protects the right of employees to take lawful industrial action when negotiating a new workplace agreement.

To be regarded as protected, or immune from adverse legal consequences, industrial action must take place during a bargaining period for a collective agreement.

Industrial action is prohibited during the life of a collective agreement or Australian workplace agreement.

Industrial action cannot be taken to extend/vary an existing certified agreement.

The Australian Industrial Relations Commission (AIRC) continues to supervise protected industrial action.

It retains the power to issue orders to prevent or stop unprotected industrial action.

Examples of industrial action include:

- ✚ for employees—a failure or refusal to attend or perform work or a ban or limitation on the performance of work;
- ✚ for employers—the employer locks the workers out of their workplace (known as a **lock-out**).

An employer **must not** pay an employee who is participating in industrial action (whether or not protected action).

Payment must not be made for the duration of the action or for a minimum of 4 hours.

An employee must not accept payment from an employer for industrial action.

Penalties apply for breach of these laws.

Effectively this provision means that strike action of at least 4 hours duration is the minimum type of industrial action that should be considered.

Bans and limitations - common industrial tactics previously - must result in the loss of at least 4 hours pay.

Even if you continue to perform the major part of your job, participation in a ban means an employer must dock at least 4 hours pay.

Secret Ballots for Protected Action

A secret ballot must be held before protected industrial action can be taken.

If a union initiates a bargaining period it may apply to the AIRC to order a secret ballot.

Only members are eligible to vote on industrial action.

Secret Ballots (continued)

An application for a secret ballot is only able to be made:

- ✚ after the expiry of an existing collective agreement
- ✚ if a bargaining period for a new collective agreement has been notified to the AIRC
- ✚ if the proposed agreement does not contain prohibited content.

The AIRC will be able to order a secret ballot only if during the bargaining period, the applicant genuinely tried to reach agreement with the employer, the employees or unions are genuinely trying to reach agreement with the employer, and no pattern bargaining is taking place.

If a union applies for a secret ballot, only union members who would be covered by the proposed agreement will be eligible to vote.

To approve the industrial action, at least 50 per cent of eligible employees need to vote and, of them; more than 50 per cent need to vote in favor of the proposed industrial action.

The Australian Government will cover 80 per cent of the cost of the ballot.

The other 20 per cent of the cost will be covered by either the union or the group of employees who applied for the ballot.

The Australian Electoral Commission (AEC) will be able to conduct secret ballots.

Suspending and Terminating a Bargaining Period

If a bargaining period has been suspended or terminated, industrial action is not protected and not immune from adverse legal consequences.

The AIRC can be required to either to suspend or terminate a bargaining period in a range of circumstances.

These are where:

- ✚ a party has failed to genuinely try and reach agreement with other parties
- ✚ there has been a failure to comply with an AIRC direction or order
- ✚ a union is organising industrial action in relation to employees who are not eligible to be members
- ✚ the industrial action relates to a demarcation dispute
- ✚ the industrial action is threatening to endanger life, personal safety, health or welfare
- ✚ cause significant economic damage
- ✚ suspension or termination if 'pattern bargaining' is taking place
- ✚ a cooling-off suspension where this would assist the parties to resolve the dispute
- ✚ a suspension where third parties are directly threatened with significant harm from the industrial action.

Can the AIRC ARBITRATE?

The AIRC's power to arbitrate bargaining disputes is limited and strictly defined.

A full bench can issue a 'workplace determination', but must only have regard to:

- ✚ the matters at issue
- ✚ the merits of the case
- ✚ the interests of the negotiating parties and the public interest
- ✚ how productivity might be improved
- ✚ the level of the reasonableness of the negotiating parties' conduct during the bargaining period
- ✚ incentives to encourage future negotiated outcomes
- ✚ the employer's ability to pay
- ✚ decisions of the Australian Fair Pay Commission
- ✚ any other factors specified in the Regulations.

It must also contain the model dispute resolution process (NB this does not include access to compulsory arbitration as currently applies under the Certified Agreement).

The AIRC does not have power to make a 'workplace determination' when it involves direct Crown employees, as in Victorian Government Departmental and Agency staff.

What about Awards

Another core aspect of Labor's industrial relations policy vision is that Australian workers should be protected by a comprehensive safety net, of which awards comprise a central component.

This represents a significant departure from the Work Choices position, which aimed to reduce the role of awards in the Australian workplace relations system, allowing them eventually, in the words of one commentator, to "wither on the vine".

Consistent with Labor's ideologies, the central role of awards will be restored.

They will form one of two pillars of a national safety net with the National Employment Standard (NES).

The NES will replace the Australian Fair Pay and Condition Standard (AFPCS). Unlike under Work Choices, they will not cease to operate as a result of parties entering into a workplace agreement.

The AIRC has commenced a process of reviewing awards and will make new industry based 'modern awards'.

In the meantime, there are limited opportunities to vary awards. Rates of pay are now no longer included in awards. Adjustments to award rates of pay are subject to decisions of the Australian Fair Pay Commission (AFPC).

Rates of pay in existing awards are now called 'pay and classification scales'.

The AFPC has published rates for key awards; however the rates are not available for most enterprise awards.