FACT SHEET 1: PROTECTED INDUSTRIAL ACTION

What is industrial action?

Industrial action can take a number of forms and is defined in the Fair Work Act 2009 (Cth) (FW Act). It can include strikes, stoppages of work, work bans, lock-outs and the performance of work by an employee in a manner different from that in which it is customarily performed.

Industrial action is generally unlawful and prohibited unless it is protected industrial action. Employees who engage in industrial action which is not protected under the FW Act can be exposed to penalties and disciplinary action.

What is protected industrial action?

Protected industrial action is industrial action which is taken by employees or an employer for the purpose of supporting or advancing claims in relation to an agreement under the FW Act. There are various requirements which need to be met before industrial action is protected industrial action. For instance, in the case of industrial action taken by employees, the industrial action must:

- be authorised by a protected action ballot;
- not be in support of, or advance, claims to include unlawful terms in the agreement; and
- be taken only if the required notice has been given to the other party.

Further, the bargaining representative of the employees must not be engaging in pattern bargaining in relation to the agreement.

What is a protected action ballot?

A protected action ballot is a process by which employees can choose, by means of a fair and democratic secret ballot, whether or not to authorise protected industrial action for a proposed enterprise agreement. In other words, the protected action ballot is conducted to determine whether employees wish to engage in particular protected industrial action.

In order for a protected action ballot to be conducted, an application must be made to Fair Work Australia by a bargaining representative who is representing employees who will be covered by the proposed enterprise agreement. The application must, among other requirements, specify the question or questions to be put to employees who are to be balloted, including the nature of the proposed industrial action. Fair Work Australia will then determine whether or not to approve the conduct of the protected action ballot having regard to relevant requirements, including whether the bargaining representative has been, and is genuinely trying to reach an agreement with the employer of the employees to be balloted.
Who can vote on a protected action ballot?

Generally speaking, a roll of voters is required to be prepared following a protected action ballot order being made by Fair Work Australia. An employee is eligible to be included in the roll of voters only if the employee:

- will be covered by the proposed enterprise agreement;
- was represented by the bargaining representative who was an applicant for the order at the time that protected action ballot order was made; and
- was included in the group of employees specified in the order.

Protected industrial action will be authorised if, among other requirements, at least 50% of the employees on the roll of voters voted in the ballot and more than 50% of the valid votes were votes approving the industrial action.

Can I participate in any protected industrial action if I have not participated in the protected action ballot?

If protected industrial action is validly authorised, then you can participate in the protected industrial action if you are an employee who is included in the group or groups of employees specified in the protected action ballot order.

Conversely, if you are an employee who is not included in the group or groups of employees specified in the protected action ballot order, then you are unable to engage in protected industrial action.

What is the timeframe for protected industrial action to occur?

If protected industrial action is validly authorised, then the industrial action can commence during the 30 day period starting on the date of the declaration of the results of the ballot by Fair Work Australia. In some circumstances, a longer period may be approved.

Do I get paid when I participate in protected industrial action?

No, the University is not allowed under the FW Act to make any payment to you in relation to the total duration of any protected industrial action on a particular day. The exception is if the protected industrial action is a partial work ban in which case the University can take steps to reduce any payment to you completely or by a specified proportionate amount.

If I have participated in the protected industrial action can I ask the University to pay me?

Generally speaking, no. Under the FW Act, such an employee must not accept a payment from an employer or otherwise ask for a payment to be made in relation to a period of industrial action which is not a partial work ban. Different rules apply in the case of a partial work ban.
Do I have to participate in industrial action?

No, you do not have to participate in the industrial action even if you participated in the protected action ballot. Under the FW Act it is unlawful for anyone (including the University, members of staff or union representatives) to take adverse action against you or otherwise require you to participate or not to participate in a protected action ballot or any subsequent protected industrial action.

Do I have to come to work whilst protected industrial action is happening?

Members of staff who are not participating and not entitled to participate in the protected industrial action are expected to attend work and continue with the performance of their work.

For further information you can visit:

Fair Work Online: www.fairwork.gov.au
Fair Work Australia: www.fwa.gov.au