Rulings Round Up

Productivity and Workplace Relations into the Future
ALERA National Conference – August 2014

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Emerging issues

Outline

1. Representation
2. Coverage
3. FWC Approval

Questions to ask

Will we see a return of union representation disputes?

Are "Trojan horse" agreements a legitimate tactic?

Have we seen the end of opt out clauses?

Has the FWC approval process become overly technical?

Maritime Union of Australia; Mr Glenn Bale v Esperance Ports Sea and Land [2014] FWC 3803

Background

- PABO sought
- Employee bargaining representatives were:
  - for employees covered by the MUA membership rules - the MUA; and
  - for other employees - an individual (Mr Bale) who was also the MUA delegate

Issue

- Whether the FW Act prevented a delegate of a union which had no coverage for particular employees to be a bargaining representative for those employees

Representation

Decision

- The MUA delegate was able to be a bargaining representative for the employees to whom the MUA did not have coverage

Bargaining implications

- Will we see this tactic as a means for a particular union to expand membership and represent people they ordinarily are not entitled to represent?

Coverage issues

John Holland Pty Ltd v Construction Forestry Mining and Energy Union [2014] FCA 286

Subject to appeal to the Full Federal Court (heard in August 2014 - decision reserved)

Background

- Approval of an enterprise agreement made with three employees, which could cover a greater number of employees in the future depending on whether the other employees were then covered by other agreements
- Full Bench overturned approval

Issue

- Did the Full Bench correctly approach the question of whether the Commission could be satisfied that the group of employees to be covered was fairly chosen?

Coverage issues

The Agreement covered…

"(b) All employees of John Holland… performing building or civil construction work in Western Australia in accordance with a classification specified in this Agreement…

[however]

1.2 Any project or site specific agreement entered into by the Company or by any Joint Venture or similar business arrangement of which the Company is a part, will cover and apply to the Company and any employees at that particular project or site to the exclusion of this Agreement."

Coverage issues

Subdivision B—Approval of enterprise agreements by the FWC

186 When the FWC must approve an enterprise agreement—general requirements

…

(3) The FWC must be satisfied that the group of employees covered by the agreement was fairly chosen.

(3A) If the agreement does not cover all of the employees of the employer or employers covered by the agreement, the FWC must, in deciding whether the group of employees covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Coverage issues

Decision

- The Full Bench was incorrect, in particular:
  - the inclusion of a clause contemplating a potential change in coverage could not affect whether the group was fairly chosen; and
  - the words "was fairly chosen" is not to be read as "was chosen in a manner which would not undermine collective bargaining"

- The decision to overturn the approval of the Agreement was quashed

Coverage issues

CEPU & Ors v MI&E Holdings Pty Ltd [2013] FWCFB 2142

Subject to appeal to the Full Federal Court (heard in August 2014 - decision reserved)

Background

- Approval sought for an enterprise agreement made with four employees, which could cover a greater number of employees in the future depending on whether the other employees were then covered by other agreements

Issue

- Whether the Commission was correct to find that the group of employees to be covered by the Agreement was fairly chosen

Coverage issues

The Agreement coverage clause relevantly provided:

"*2(a) Subject to clause 2(b), this Agreement shall apply to…Employees of the Company employed in and performing work as set out in the classifications specified in Schedule 1 - Classifications, of this Agreement in Western Australia.*

(b) The Company undertakes separate project or site specific work that is regulated by its own site specific terms and conditions. This Agreement does not cover or apply to any employees working at those project sites where any of the following agreements are in operation (whether before or after their nominal expiry dates or not);

(a) A greenfields agreement made in accordance with section 172(4) of the Act or predecessor legislation; or

(b) Any other enterprise agreement made with employees in replacement or, or as a successor to, a greenfields agreement in (a)."

Coverage issues

Decision

- The Commission incorrectly found that the group of employees was fairly chosen
- The group of employees was not fairly chosen, because
  - the Agreement coverage clause was not consistent with legislative provisions about the application of transitional industrial instruments;
  - the Agreement coverage clause was not consistent with interaction rules about enterprise agreements; and
  - the Agreement coverage clause contemplated circumstances where there may be future greenfield agreements when it was not apparent that the employer would even be able to enter a greenfield agreement under the FW Act
- The Full Bench overturned the approval of the Agreement

Coverage issues

Bargaining implications – *John Holland* and *MI&E*

- Emerging "Trojan horse" tactic?

- Use of coverage clause to exclude categories of employees?
  - Section 53(1) - An enterprise agreement covers an employee or an employer if the agreement is expressed to cover the employee or the employer
  - An employee who moves from one site to another, or changes classification, could move in and out of coverage of an enterprise agreement. What if they are 'promoted' to a position which attracts a salary, outside of the agreement?
  - Could this be another type of "opt out" clause?

Coverage issues

Section 94 - Meaning of unlawful term

A term of an enterprise agreement is an unlawful term if it is:

…

(ba) a term that provides a method by which an employee or employer may elect (unilaterally or otherwise) not to be covered by the agreement …".

Coverage issues

Section 94 - Meaning of unlawful term

A term of an enterprise agreement is an unlawful term if it is:

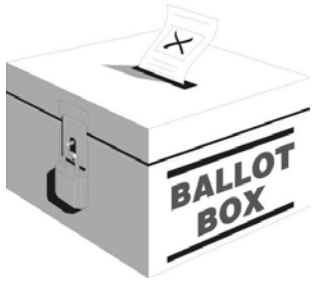
…

(ba) a term that provides a method by which an employee or employer may elect (unilaterally or otherwise) not to be covered by the agreement …".

- Is 'promotion' to salary an *election* not to be covered?

Coverage issues

The Australian Workers' Union v BP Refinery (Kwinana) Pty Ltd [2014] FWCFB 1476



Background

- Operators and laboratory technicians 200 metres apart
- Had bargained separately since 1997
- Employee petitions suggested majority support for bargaining as a single group
- Scope orders sought as to whether bargaining for operators and laboratory technicians should proceed separately, or together

Issues

- Whether scope promoted fair and efficient conduct of bargaining
- Whether group fairly chosen
- Whether reasonable to make the order

Coverage issues

Decision

- Largely neutral as to separate or together on promoting fairness and efficiency
- The single group together was fairly chosen, because 'whole of enterprise' groups are generally fair
- The weight to be attached to the geographical, operational or organisational distinctness of groups within a broader group will be neutral unless it is the distinctness that makes selecting the broader group unfair
- The preferences of employees as to the appropriate collective should be respected and preferred over the employer unless there is a good reason to decide otherwise
- Bargaining should proceed for an enterprise agreement covering the groups together

Coverage issues

Bargaining implications

- Will this mean those who are negotiating an agreement for a distinct geographical, operational or organisational part of a business will need to positively identify the fairness of the choice of coverage by reference to something other than the distinctness?
- When it comes to the disputed coverage of a proposed enterprise agreement, the views of the employees to be covered by the agreement will be paramount
- Does it follow that a successful ballot of a proposed agreement for a distinct geographical, operational or organisational part of a business is enough therefore to demonstrate fairness?

FWC Approval process

Collinsville Coal Operations Pty Ltd [2014] FWC 5628

Background

- Application for approval of an enterprise agreement
- All 21 employees to be covered had nominated as employee bargaining representatives
- CFMEU sought to intervene in the application and oppose approval of the agreement

Issues

- Whether the CFMEU was a bargaining representative
- If not, whether the CFMEU could make submissions, call evidence, and cross examine

FWC Approval process

Decision

- As the only CFMEU member had appointed himself as a bargaining representative, the CFMEU was not a bargaining representative

Bargaining implications

- Using a smaller number of employees has emerged as a "Trojan horse" tactic for some agreements, including to create a "non-union" type agreement
- It can sometimes be a difficult and challenging process to obtain FWC approval for an enterprise agreement

FWC Approval process

Peabody Moorvale Pty Ltd v CFMEU [2014] FWCFB 2042

Background

- Application for approval of an enterprise agreement
- The Notice of Employee Representational Rights given by the employer at the commencement of bargaining was stapled to other information

Issues

- Whether the Notice of Employee Representational Rights had been properly given
- Signature clause – 'address' of employee

FWC Approval process

Decision

- By attaching other information to the Notice, the Notice did not comply with the FW Act, and the Agreement was not approved by the FWC as a result
- Signature clause – residential address not required

Bargaining implications

- The bargaining process seems to require a very technical approach
- It can sometimes be a difficult and challenging process to obtain FWC approval for an enterprise agreement

FWC Approval process

Australian Municipal, Administrative, Clerical & Services Union v Yarra Valley Water Corporation [2013] FWCFB 7453

Background

- Application for approval of an enterprise agreement
- The employer provided misleading information about the effect of certain terms of the agreement

Issue

- Whether the misleading information meant there were reasonable grounds for the Commission to believe that the Agreement had not been genuinely agreed to by the employees

FWC Approval process

Decision

- There were no reasonable grounds for the Commission to believe that the Agreement had not been genuinely agreed to by the employees, because:
  - the misleading information did not affect employee entitlements to any appreciable degree; and
  - the Union conducted a robust campaign alerting employees to consider all the provisions of the Agreement

FWC Approval process

Bargaining implications

- *"Reasonable steps"* to explain the terms of a proposed agreement do not require a full explanation
- Now also, even if that explanation is misleading - that may not, of itself, prevent FWC approval
- Any information distributed by a union or group of employees prior to voting on an agreement can be relevant to support a conclusion the agreement has been genuinely agreed to
- Highlights the complicated regime of registration, negotiation and approval of enterprise agreements under the FW Act

FWC Approval process

Hydro Electric Corporation [2014] FWC 4169

Background

- Application for approval of an enterprise agreement
- The employer gave seven days' (of 24 hour periods) notice to employees of the date and time of the ballot

Issue

- Whether seven 'clear' days are required

FWC Approval process

Decision

- Seven clear days required, and the application for approval of the Agreement was accordingly denied.

Bargaining implications

- An overly technical issue caused a further impediment to an Agreement which had been otherwise been explained to and voted up by employees

Questions about the enterprise bargaining process

- *Will we see a return of union representation disputes?*
- *"Trojan horse" agreements as a bargaining tactic*
- *Have we seen the end of opt out clauses?*
- *Has the FWC approval process become overly technical?*

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