BARGAINING CASES - RULINGS ROUND-UP

2014 ALERA NATIONAL CONFERENCE

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1. REPRESENTATION DURING BARGAINING

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

Commissioner Cloghan – 16 June 2014

SNAPSHOT

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

Held

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

Bargaining implications

- Will those involved in bargaining experience this tactic as a means for a particular union to expand membership and represent people they ordinarily are not entitled to represent?

DECISION SUMMARY

A protected action ballot order application was filed by the MUA and Mr Bale on 23 May 2014. The PABO related to bargaining for a replacement enterprise agreement to the *Esperance Ports Sea and Land and MUA Enterprise Agreement 2011/14*.

The type of work performed by the employees the subject of negotiations for the replacement agreement (not the PABO) was port operations, including stevedoring, maintenance, civil and administration. One of the MUA's WA

organisers represented the MUA as a bargaining representative in negotiations for the replacement enterprise agreement.

The employer asserted that the employer's maintenance employees were not capable of being represented by the MUA because the MUA's registered rules exclude *"maintenance technicians"* from employees eligible to form part of the union.

Mr Bale was an employee of the employer. The majority of the 23 employees who nominated Mr Bale as a bargaining representative were maintenance employees. Mr Bale was a leading hand within the group of maintenance employees.

The Commissioner summed up the issue for the employer as follows, at [37]:

"The real grievance, it appears, for the Employer, is that the MUA is attempting to achieve indirectly what it cannot do directly and that the MUA is effectively representing all the employees, including the maintenance employees."

The employer argued that Mr Bale was prevented from representing the 23 employees who had nominated him as their bargaining representative by section 176(3)(b) of the *Fair Work Act 2009*.

That section has the following relevant characteristics.

1. The section has the effect that an *"official"* of a union (whether acting in that capacity or otherwise) cannot be a bargaining representative of an employee unless the organisation is entitled to represent the industrial interests of the employee in relation to work that will be performed.

2. The section was inserted into the FW Act on recommendation from the Fair Work Act Review Panel. The recommendation was designed to overcome a situation where an official of the MUA had been appointed as a bargaining representative by employees who were not eligible to be members of the MUA. The Panel commented *"in the long run, this straightforward rule will help to facilitate bargaining and avoid unnecessary litigation and potential demarcation issues."*

The issue for consideration was whether Mr Bale, as a local delegate at the workplace of the employer, was an *"official"* within the meaning of section 176(3)(b).

On this issue, the Commission referred to the MUA's registered rules, which do not include delegates as persons who hold *"office"*. Accordingly, the Commission found that the provisions of section 176(3) were not operative because Mr Bale is neither an employee nor an official of the MUA.

It followed that Mr Bale was entitled to be a bargaining representative for the employees.

2. COVERAGE OF ENTERPRISE AGREEMENTS

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

Justice Siopsis - 27 March 2014

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

SNAPSHOT

Background

- Approval sought for 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

Issue

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

Held

- 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.

Bargaining implications

- Will employers use this tactic as a "Trojan horse", or even to revisit "opt out" clauses? (See *MI&E* below)

DECISION SUMMARY

This was a successful appeal of an earlier Full Bench decision of the FWC. The Full Bench had quashed the approval of John Holland's *Western Region Agreement Western Australia 2012–2016*.

The coverage clause of the Agreement relevantly provided:

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

[subject to]

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."

At the time the Agreement was made, it covered three John Holland employees. The three employees had nominated themselves in writing as bargaining representatives and all three employees approved the Agreement by ballot.

The CFMEU opposed the approval of the Agreement. Deputy President McCarthy decided to approve the Agreement.

The CFMEU appealed the decision on a number of grounds, relevantly including that the Commission could not be satisfied that the group of employees to be covered by the Agreement was fairly chosen.

The Full Bench upheld the appeal. Further, the Full Bench quashed the decision made by Deputy President McCarthy to approve the Agreement. The Full Bench did so for three main reasons, as follows.

- The coverage clause excluded site specific and project agreements. The Full Bench was therefore not in a position to know how many employees would be covered by the Agreement in the future. It followed that the Full Bench was not in a position to find whether the employees were geographically, operationally or organisationally distinct.

- In determining whether the group of employees covered by the Agreement was fairly chosen, regard should be had to whether the selection was based on criteria that would have the effect of undermining collective bargaining. This was consistent with previous Full Bench decisions, in particular, *Cimeco*[1]. The Full Bench observed: *"In this case three employees on one site have bargained and agreed on an agreement with potentially very wide application to other employees who have not engaged in bargaining under Part 2–4 of the Act and will not be given the opportunity to bargain."*

[1] *Cimeco v CFMEU* [2012] FWAFB 2206

- The Agreement coverage clause seemed to have the effect that agreements other than those made under the FW Act would exclude employees from coverage of the Agreement. Again the Full Bench followed *Cimeco* in concluding that the interests of the employees excluded from the coverage of an agreement, along with the interests of those covered, are relevant considerations in determining whether the group of employees was fairly chosen.

John Holland applied to the Federal Court of Australia for judicial review, seeking to quash the Full Bench's decision. The application for review relevantly contended that the Full Bench was in error because the Full Bench:

- asked itself the wrong question about the possible future size and composition of the group of employees to be covered, rather than identifying the chosen group; and

- used a test it was not permitted to use when it considered that the chosen group could not be geographically distinct because a project or site agreement could be ad hoc or random.

The Federal Court found that the Full Bench fell into error by not properly considering the requirements of section 186(3) and section 186(3A) of the FW Act - that is, whether the group of employees covered by the Agreement was fairly chosen. The Court quashed the decision of the Full Bench.

The Court identified that the task of the Commission in this context is to be satisfied that the group of employees covered by the Agreement was fairly chosen. The Court observed some significance in the past tense *"was"* and considered the Commission is not required to be satisfied as to the number of employees who may, during the term of the Agreement, be covered.

The fact that the Agreement coverage clause contemplated that there may be a change in circumstances as to which group of employees were to be covered by the Agreement did not and could not affect the fairness of the criteria at the time it was chosen.

The Court further held the words *"was fairly chosen"* are not to be construed as *"was chosen in a manner which would not undermine collective bargaining"*. This is an important finding because it contradicts a line of Full Bench authority derived from *Cimeco*.

The CFMEU placed reliance on section 578(a), which relevantly provides that the Commission must, in exercising its powers, take into account any objects of the FW Act and the objects of any part of the FW Act. In this regard the Court observed (at [38]):

"…I am of the view that the general words in section 578(a) do not permit [the Commission] *to imbue the words of the statute with concepts which are*

not to be found in those words when properly construed. In my view, the proper construction of section 186(3) is informed by section 186(3A). That section prescribes the nature of the considerations to which [the Commission] *is to have regard in exercising its power under section 186(3). Therefore, in my view,* [the Commission] *is not at liberty to exercise its section 186(3) powers on some other basis in reliance upon the general provisions in section 578(a) of the Fair Work Act. In other words, the general words in 578(a) must yield to the specificity embodied in section 186(3A) in relation to the proper construction of the words 'was fairly chosen' in section 186(3)."*

The Court took into account sections in other parts of the FW Act, which give powers to the Commission to withhold approval if approval is not consistent with, or would undermine, good faith bargaining. So in the absence of a power to withhold approval if approval would undermine collective bargaining, it was not open to the Full Bench to exercise that power when it came to section 186(3). The Court went on to observe:

"Plainly, the Full Bench was of the view that there was something wrong with three employees being able to make an agreement which covered work classifications other than their own. However, if there is a lacuna in the Fair Work Act, on which I express no view, then the remedy would appear to lie in legislative amendment."

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

Senior Deputy President Harrison, Deputy President Smith, Commissioner Roberts - 11 April 2013

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

SNAPSHOT

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

Held

- 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 greenfields 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

Bargaining implications

- Given the Federal Court decision in *John Holland* (above), will employers increasingly use this tactic as a "Trojan horse"?
- Depending on the outcome of the Federal Court appeal, could we see a form of opt out clauses revisited? What meaning is to be given to

section 53(1) of the FW Act, which simply says that an enterprise agreement covers an employee or an employer if the agreement is expressed to cover the employee or the employer? It has never been controversial that if an employee moves from one classification to another, or is promoted from operations to management, the employee can move in and out of coverage of an enterprise agreement. What if the change is only from 'wages' to 'salary', and the agreement covers only 'wages' employees? Is that a "method" of "election" within the meaning of section 194(ba) of the FW Act?

DECISION SUMMARY

This Full Bench decision overturned an earlier decision of the FWC to approve the *MI&E Holdings Pty Ltd Western Division Enterprise Agreement 2012*. Like John Holland's Agreement discussed above, this Agreement supported an arrangement whereby the employer could move employees from one site to another where they would move in and out of coverage of the Agreement.

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)."

At the time the Agreement was made, four employees fell within the proposed coverage and approximately 200 other employees were covered by greenfields agreements on other sites. One of those agreements had been made under previous legislation and operated as a Transitional Agreement. At the time the Agreement was before the Commission, 200 other employees were engaged on other sites.

The Full Bench was concerned the coverage clause was inconsistent with instrument interaction rules set out in the FW Act.

In that regard, so far as the Transitional Agreement was concerned, the Full Bench considered the effect of the relevant transitional legislation was that if the Agreement was approved, it immediately applied to the employees otherwise subject to the Transitional Agreement, and the Transitional Agreement then ceased to cover and could never cover those employees again.

Item 30(2) of Schedule 3 of the FW (TPCA) Act provides:

"(2) If an enterprise agreement or workplace determination (under the FW Act) starts to apply to an employee, or an employer or other person ***in relation to the employee****, then a collective agreement - based transitional instrument ceases to cover (and can never again cover) the employee, or the employer or other person in relation to the employee"* (emphasis added).

Leaving that aside however, the Full Bench said there was no good reason for excluding that group of employees. In applying *Cimeco*, the Full Bench concluded the exclusion was unfair.

The Full Bench further found that it could not be satisfied the group of employees was fairly chosen because the coverage clause:

- created significant doubt as to who will be covered by the Agreement;
- purported to "save" other agreements which had passed their nominal expiry date, which was inconsistent with section 58 of the FW Act (which deals with the application of enterprise agreements where two or more enterprise agreements cover an employee);
- envisaged that common law agreements could displace coverage of the Agreement; and
- contemplated future greenfields agreements when it was not apparent that the employer would even be able to enter a greenfields agreement under the FW Act.

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

Vice President Catanzariti, Vice President Lawler, Commissioner Lewin - 3 April 2014

SNAPSHOT

Background

- Employer operates a refinery. Operators and laboratory technicians work on the refinery site in separate locations 200 metres apart, and since 1997 had bargained separately
- 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

Issue

- Whether the scope promotes fair and efficient conduct of bargaining
- Whether the group of employees proposed to be covered is fairly chosen
- Whether it is reasonable to make the order

Held

- 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

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 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?

DECISION SUMMARY

This was an appeal of a decision of Commissioner Cloghan granting an application for a scope order made by the employer, and refusing an application for a scope order by the AWU. The Full Bench upheld the appeal and substituted its own decision, finding in favour of the AWU.

The employer operates a refinery. About 165 operators and 17 laboratory technicians work on the refinery site in separate locations 200 metres apart. The operators have different working hours and skill sets to the laboratory technicians, and had bargained separately for enterprise agreements since 1997.

The employer had proposed to maintain the separation of the two groups in bargaining for replacement agreements. The AWU proposed to combine the two groups into the one agreement. The AWU had petitioned the employees, which suggested majority support for bargaining as a single group.

The FW Act relevantly provides that:

1. the FWC may make the scope order sought if it is satisfied:

    - that making the order will promote the fair and efficient conduct of bargaining;

    - that the group of employees who will be covered by the agreement proposed to be specified in the scope order was fairly chosen; and

    - it is reasonable in all the circumstances to make the order, and

2. if the scope will not cover all employees, the FWC must, in deciding whether the group of employees who will be covered was fairly chosen, take into account whether the group is geographically, operationally or organisationally distinct.

Departing somewhat from previous decisions of the Full Bench (such as in *Cimeco*), the Full Bench observed (at [16]) *"the weight to be attached to the geographical, operational or organisational distinctness of groups with a broader group will be neutral in determining whether an order ought be made, unless there are particular features of, or circumstances associated with, that distinctness that render the broader group one that is not fairly chosen."*

That is, it is always likely to be the case that a 'whole of enterprise' agreement is the fair choice.

But the Full Bench also observed (at [29]):

"It is implicit in the right to bargain collectively that the preferences of employees as to the appropriate collective should be respected unless there is some good reason under the legislation to decide otherwise - a reason that relates to the conduct and efficiency of bargaining or to the efficient operation of the employer's business. It is, after all, the employees who are in the best position to determine the collective that best suits their legitimate interests."

The Full Bench reinforced this position citing a previous Full Bench decision which had concluded that the views of the employees are significant and should carry greater weight than the views of the employer, unless there are particular circumstances in a given case that make a contrary conclusion appropriate.

3. APPROVAL PROCESS IN THE COMMISSION

Collinsville Coal Operations Pty Ltd [2014] FWC 5628

Senior Deputy President Harrison - 18 August 2014

SNAPSHOT

Background

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

Issue

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

Held

- As the only CFMEU member had appointed himself as a bargaining representative, the CFMEU was not a bargaining representative, but could make submissions as the relevant industry union

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

DECISION SUMMARY

This decision concerned an application for approval of the *Collinsville Coal Operations Enterprise Agreement 2014*. The Agreement proposed to cover employees engaged as mine workers at the employer's Collinsville Mine.

There were 21 employees proposed to be covered by the Agreement. All 21 employees nominated themselves in writing as employee bargaining representatives. All 21 of the employees voted in favour of the Agreement.

The CFMEU sought to intervene in the application and oppose approval of the Agreement. The CFMEU asserted it was a bargaining representative, and also sought to obtain from the Commission a number of documents connected with the application.

In determining whether the CFMEU was a bargaining representative, the Commission considered evidence that only one employee was a member of the CFMEU at any relevant time. That employee had appointed himself as a bargaining representative and gave notice of the appointment to the employer. Accordingly, at no time did the CFMEU assume the status of being a default bargaining representative. It followed that the CFMEU's application to be covered by the Agreement should fail. Section 590 of the FW Act gives the Commission the power to inform itself in relation to any matter before it in such manner as it considers appropriate. The FWC was not persuaded the CFMEU should be given a role akin to a party, respondent or intervener, which would have entitled the CFMEU to call witnesses or make submissions. In any event, the Commission considered the CFMEU' s evidence largely contained "*irrelevant and hearsay material"*.

The CFMEU argued the Commission should require the employer to produce to it a broad range of documents including offers of employment, start dates, classifications and notes of any meetings or presentations in respect of the provision of the notice of representational rights to the employees. In exercising its discretion, the Commission observed that the relevance of many of the documents is doubtful and agreed with the employer that it reflected *"a general fishing expedition in a desperate attempt to build a case"*.

When the Commission refused to provide the material sought by the CFMEU, the CFMEU sought a direction under section 582 of the FW Act that a Full Bench hear and determine the issue. That application was refused by President Ross on the ground that it was not in the public interest to refer the application to the Full Bench.

Despite its attitude on those matters, the Commission invited the CFMEU to make submissions in relation to one matter - the better off overall test. The determinative factor in that regard was the CFMEU's role as a major union in the black coal mining industry and in respect of the *Black Coal Mining Award*.

Ultimately, with some undertakings in respect of representation in grievance procedures and accrual of leave, the Commission approved the Agreement.

Peabody Moorvale Pty Ltd v CFMEU [2014] FWCFB 2042

Justice Ross - President, Vice President Hatcher, Deputy President Asbury, Deputy President Gostenik, Commissioner Simpson - 2 April 2014

SNAPSHOT

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

Issue

- Whether the Notice of Employee Representational Rights had been properly given

Held

- By attaching other information to the Notice, the Notice did not comply with the FW Act, and the Agreement was not approved by the Commission as a result

Bargaining implications

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

DECISION SUMMARY

This decision considered an application for approval of an enterprise agreement where irregularities had been identified in the Notice of Employee Representational Rights given to the employees to be covered by the proposed Agreement, and the signature requirements for the Agreement.

Section 174(1A) of the FW Act provides that a Notice of Employee Representational Rights must contain the content, and be in the form, prescribed in the Regulations. The Regulations prescribe a template.

The Notice that had been provided to the employees consisted of the Notice as prescribed by the Regulations, stapled to which were:

- a piece of paper called a "*Bargaining Representative Nomination Form (Employer Form)*", apparently created by the employer; and

- a piece of paper called a *"Bargaining Representative Nomination Form (Nominee Form)"*, apparently also created by the employer.

The evidence was that the three pages were provided to employees at the same time. There was no evidence that any employee was misled, was confused or did not understand what their bargaining rights were.

The Full Bench found that the first page, together with the subsequent two pages, formed the Notice. As the Notice included other content, it did not comply with section 174(1A) and hence was invalid. The consequence was that the Agreement could not be validly approved by the Commission.

The Full Bench observed however that section 174(1A) is not to be construed so as to preclude an employer from providing additional material to employees at the same time as the Notice is given .

Importantly, the Full Bench considered the apparent intention of the issuer of the documents at the time of issue, which seemed to be that the documents together formed the Notice.

A further issue arose which was that the FW Act requires that an application for approval of an enterprise agreement must be accompanied by a *"signed copy of the Agreement"*, and the relevant requirements for signing are to include *"the … address of each person who signs the Agreement"*. The issue was whether *"address"* meant the person's residential address or whether it is sufficient if the person's work address is supplied. The CFMEU contended that the requirement for the employee's address was a requirement for the employee to insert their residential address.

The Full Bench observed that the legislature has chosen to use different expressions in different parts of the FW Act when it comes to identifying addresses. Some of which are *"residential address"*, some of which are *"postal address"* and others, simply *"address"*.

The Full Bench remarked (at [101]):

"It should also be borne in mind that the effect of the CFMEU's submission is that we would be implying the word 'residential' into Regulation 2.06A. As observed by Northrop and Pincus JJ in Dallikavak v Minister for Immigration & Ethnic Affairs:

> *'There is a general disinclination manifested in the authorities to make implications in statutes, unless it is strictly necessary to do so'."*

Accordingly in that context, the Full Bench was persuaded that it was not necessary to read *"address"* to mean *"residential address"*.

Because of the failure by the employer to comply with the FW Act in respect of the Notice, the application to approve the Agreement was dismissed.

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

Vice President Hatcher, Senior Deputy President Watson, Commissioner Lewin - 30 September 2013

SNAPSHOT

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

Held

- 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,

  there were no reasonable grounds for the Commission to believe that the Agreement had not been genuinely agreed to by the employees

Bargaining implications

- It seems to be well settled that *"reasonable steps"* to explain the terms of a proposed agreement, and the effect of those terms, do not require a full explanation of every detail about what is contained in the proposed agreement and its intended effect. Now also, even if that explanation is misleading - that may not, of itself, prevent Commission 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.
- This decision highlights the complicated regime of registration, negotiation and approval of enterprise agreements under the FW Act.

DECISION SUMMARY

This was an appeal of a decision of the Commission to approve the *Yarra Valley Water Enterprise Agreement 2012*. The ASU had opposed approval on a number of grounds, including that the Agreement had not been "genuinely agreed to" by the employees covered by the Agreement. That was said to be because inaccurate explanatory material had been provided to those employees by the employer during bargaining and as part of the pre-approval steps.

The Agreement was approved and the ASU brought the appeal on various grounds including relevantly that the Commission did not have jurisdiction to approve the Agreement because of the "genuine agreement" issue.

In the course of making the Agreement, it had been necessary for the employer, being a State-owned corporation, to obtain the approval of the Victorian State Government for the Agreement in order to be able to finalise the Agreement. During this process, the State required the employer to make some changes to the draft Agreement. Those changes broadly related to two matters:

- those said by the State to be driven by a previous Full Bench decision concerning constitutional and jurisdictional matters - without which, it was said, the Agreement could not be validly approved; and

- those driven by Government policy, such as on union neutrality in agreements.

A number of changes were explained to the employees by the employer setting them out in a table, with corresponding short comments about the rationale for the modifications. In all but a few cases, the rationale was along the lines that the change was *"required to gain approval"*.

The ASU had distributed and placed on union notice boards leaflets and other material which advocated a 'no' vote and set out a number of terms and conditions which had been changed or removed compared to previous versions.

The employer responded with its own *"myth busting"* document which referred to the fact that it had *"already provided a complete list about all the changes to the EA which were necessary to comply with the Parks v Victoria decision and Government policy"*.

In fact, a number of the changes set out in the table had nothing to do with any arguable interpretation of the previous Full Bench decision concerning jurisdiction, but were changes made in order to comply with State Government policy. That was not explained to the employees.

The Agreement was approved by the employees, with about 74% of those who voted voting in favour.

The ASU's case on appeal emphasised the misleading nature of the information provided to the employees in respect of the comment *"required to gain approval"*.

The Full Bench observed:

"[27] We regard this as a serious matter. To falsely represent that a provision of a proposed enterprise agreement is incapable of approval by the Commission, or must be altered in a certain way to make it capable of approval, necessarily involves the misleading propositions that the subject matter of the provision is removed from any further negotiation and that acceptance of the provision proposed by the employer is non-optional if any valid enterprise agreement is to be made at all. It also has the effect of improperly putting the imprimatur of this Commission on employer proposals which merely represent the employer's preferred view as to the relevant subject matter.

[28] A false representation or a material non-disclosure by an employer in the course of bargaining for an enterprise agreement may constitute a reasonable ground for believing under section 188(c) of the Act that an enterprise agreement has not genuinely been agreed to by employees if it could reasonably be expected to have had the effect of deceiving those employees into voting for something which, if they had known the true position, they would not have voted for".

The Full Bench examined each of the changes that referred to being *"required to gain approval"*. It concluded that many of them did not detrimentally affect employee entitlements to any appreciable degree.

Importantly also, *"because the issue of genuine agreement under section 188(c) is to be assessed by reference to the relevant circumstances existing as at the date the employees voted"*, it was necessary to take into account all of the information, including the emails and tables, and the robustly expressed ASU leaflets. The Full Bench found that those leaflets were *"sufficient to alert employees to the need to carefully consider all the provisions of the Agreement, including those that had been changed since the original … draft, in making their decision as to whether to vote to approve the Agreement"*.

Accordingly, despite the finding that the information provided to employees by the employer was misleading, the Full Bench concluded that there were no reasonable grounds for believing that the Agreement was not genuinely agreed to by the employees covered by the Agreement.

Hydro Electric Corporation [2014] FWC 4169

Senior Deputy President Harrison - 24 June 2014

SNAPSHOT

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

Held

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

Bargaining implications

- An overly technical issue resulted in non-approval of an enterprise agreement which had been otherwise been explained to and voted upon by employees. This decision highlights the complicated regime of registration, negotiation and approval of enterprise agreements under the FW Act.

DECISION SUMMARY

This decision refused the approval of the Hydro Tasmania Enterprise Agreement 2013-2017.

In short, the refusal was because the employer failed to observe the seven day access period for the proposed Agreement.

The access period began when the employer sent an email at 10.34am on 11 December 2013 to all eligible employees to advise that the formal access period commenced at 10.30am on that day, and would continue for seven days. The email advised that voting for the Agreement would open at 11.00am on 18 December 2013.

The employer argued that there were seven clear 24 hour periods from the giving of the notice until the vote commencing.

In rejecting that argument, the Commission relied on previous decisions in which it had considered the *Acts Interpretation Act 1901* to have the effect that time is to be reckoned exclusive of the day of the relevant event.

As a result, the employer failed to comply with the seven day access period in section 180(4) of the FW Act and the Commission could not therefore be satisfied that the employees to be covered by the Agreement "genuinely agreed" to the Agreement as is required by the Act. The Agreement was not capable of approval.