SUBMISSIONS OF THE AUSTRALIAN INDUSTRY GROUP

18 FEBRUARY 2014

AG2013/12223 APPLICATION FOR APPROVAL OF THE PEABODY ENERGY AUSTRALIA MOORVALE ENTERPRISE AGREEMENT 2013

AUSTRALIAN INDUSTRY GROUP

1. Introduction

1.1 Ai Group makes this submission as a Peak Council under the *Fair Work Act 2009* (Cth) (**the FW Act)** in accordance with the Commission's Directions of 4 February 2014 regarding application **AG2013/12223**.

1.2 AG2013/12223 is an application under section 185 of the FW Act by Peabody Moorvale Pty Ltd (**Peabody**) for the approval of the *Peabody Energy Australia Moorvale Enterprise Agreement 2013* (**the Agreement**).

1.3 The Agreement covers the employees of Peabody engaged in the production and maintenance teams.

1.4 The application was not determined at first instance by a Commission Member. Rather, the application has been allocated by the President for determination by a Full Bench, due to the significance of the issues raised in the proceedings.

1.5 Ai Group was not involved in the negotiations for the Agreement and accordingly has limited its submissions to three significant issues concerning the construction of the FW Act, namely:

- Whether or not an employee organisation which was not a bargaining representative at the time when an enterprise agreement was made has the right to be covered by the agreement;
- Whether or not a Notice of Employee Representational Rights (NERR) is valid if it is issued to employees at the same time as additional documentation is issued;
- The requirements of s.180(2)(a) regarding awards which are referred to in an enterprise agreement.

1.6 Given the Directions which the Full Bench has issued inviting Ai Group to make submissions in these proceedings, we assume that it is not necessary for us to establish that we have an interest in these proceedings beyond that of an ordinary member of the public: *Tweed Valley Fruit Processors Pty Ltd v Ross* (1996) 137 ALR 70 at 90-91. In any event, Ai Group has such an interest and we seek to reserve our right to make further submissions on this issue should any party seek to challenge our standing in the proceedings.

2. The right of unions to be covered by an enterprise agreement

2.1 The CFMEU has argued that it has the right to be covered by the Agreement because it was a bargaining representative for employees covered by the Agreement at an early stage of the negotiations. Ai Group disagrees with this view.

2.2 Subsection 183(1) of the FW Act provides:

> *"After an enterprise agreement that is not a greenfields agreement is made, an employee organisation that was a bargaining representative for the proposed enterprise agreement concerned may give the FWC a written notice stating that the organisation wants the enterprise agreement to cover it." (emphasis added)*

2.3 The CFMEU in advancing its submission on the operation of s.183 have focussed on the phrase *"an employee organisation that was a bargaining representative"* and have asserted that it *"was"* such an organisation. Ai Group contends that the isolation of this phrase without due regard to the language that precedes and follows it has caused the CFMEU to erroneously construe the operation of the provision.

2.4 Read in its context s.183 requires an employee organisation to demonstrate it "*was a bargaining representative for the proposed enterprise agreement concerned*". *"(T)he proposed enterprise agreement concerned"* is the agreement which is *"made"*. This requires a factual determination as to whether an employee organisation was a bargaining representative at the time when the agreement was made.

2.5 *"(T)he proposed enterprise agreement concerned"* is the one that was approved by the majority of Peabody employees and consequently made on 20 December 2013 as the *Peabody Energy Moorvale Enterprise Agreement 2013.*

2.6 The definition of "*bargaining representatives"* is found in s.176 of the Act. For a single-enterprise agreement, s.176(1)(b) makes it clear that an employee organisation can only be a bargaining representative of an employee for a proposed enterprise agreement if:

- The employee is a member of the employee organisation; and
- The employee has not appointed another person under paragraph s.176(1)(c) or revoked the status of the employee organisation as his or her bargaining representative under s.178A(2).

2.7 Paragraph 176(1)(c) recognises a person as a bargaining representative of an employee if that person has been appointed in writing by the employee.

2.8 Where an employee has appointed in writing another person, or has appointed him/herself, as a bargaining representative, that person is the bargaining representative and not any employee organisation of which the employee is a member. In other words, there can only be one bargaining representative for each employee at any one time.

2.9 In this instance, the evidence shows that all 26 Peabody employees who negotiated and approved the Agreement appointed themselves, in writing, as bargaining representatives. Once this occurred, the CFMEU was not a bargaining representative for any employee.

2.10 The CFMEU's asserts that it has the right to be covered by the Agreement because it was a default bargaining representative for the employees from the time when Peabody issued the NERR until the time when the employees returned the instruments of appointment, appointing themselves as bargaining representatives. Such an interpretation of the Act is not valid or logical.

2.11 To apply s.183 in the way suggested by the CFMEU, would result in:

- Employee organisations being entitled to be covered by an enterprise agreement even if every employee decided at the start of the negotiations that they did not want the organisation negotiating on their behalf or involved in the agreement;

- A particular employee organisation being entitled to be covered by an enterprise agreement even if every employee decided to resign from that organisation and join a different employee organisation at the start of the negotiations or during the negotiations;

- An employee organisation being entitled to be covered by an enterprise agreement if it no longer had any members within an enterprise, providing that it could demonstrate that it had one member at the commencement of negotiations;

- An employee organisation becoming entitled to be covered by an enterprise agreement based on the time taken between issuing the NERR and an employee completing an instrument of appointment appointing another person (or him/herself) as a bargaining representative, which could be as little as 5 minutes;

- The employees being required to appoint a bargaining representative before the NERR is issued (and consequently before they are advised of their bargaining rights) if they want to be sure that a union will not be covered by their agreement;

- The wishes of employees to not have union involvement in their enterprise agreement being overridden; and

- Increased disputation, litigation and confusion, in conflict with the objects of the FW Act.

2.12 Ai Group submits that s.183 should be read as recognising only those employee organisations who were bargaining representatives for the *"proposed enterprise agreement concerned"*, being the agreement that was made at the time when it was approved by the employees.

3. The Notice of Employee Representational Rights

3.1 The CFMEU contends that Peabody did not provide an NERR in compliance with s.174 of the FW Act because at the same as issuing the NERR it provided two additional documents to employees comprising of a Bargaining Representative Nomination Form for both the nominee and the employer.

3.2 The CFMEU does not take issue with the first document, being a document which is consistent with the prescribed NERR in the FW Regulations. However, it argues that the NERR in its entirety includes the three pages comprising:

- The NERR;
- The Bargaining Representative Form for the nominee; and
- The Bargaining Representative Form as the employer's copy.

3.3 The CFMEU relies on Mr Paterson's statutory declaration in support of the company's application for approval of the enterprise agreement which states in response to section 2.3:

"All employees were provided the attached notice of employee representational rights and provided an avenue to lodge this by returning it to the Company."

3.4 Mr Paterson's evidence does not in any way determine, or infer, that he believed, knowingly or otherwise, that the additional two documents formed part of the NERR. Regardless, it is irrelevant what Mr Paterson's perceived or considered. The relevant question is whether as a matter of fact and law, the distribution of the two additional documents resulted in a failure by Peabody to comply with ss.173 and 174 of the FW Act.

3.5 The Full Bench decision in *Galintel Rolling Mills Pty Ltd T/A The Graham Group [2011] FWAFB 6772* has some relevance to these proceedings. Ai Group represented the company in the initial proceedings before Commissioner Ryan and in the appeal before the Full Bench.

3.6 The *Galintel* case concerned an employer which issued an NERR which contained on the same side of the same piece of paper the prescribed wording of the NERR as well as a tear-away slip for the use of employees should they wish to appoint a bargaining representative to represent them in the negotiations.

3.7 The Full Bench upheld Ai Group's arguments that the tear-away slip was not misleading to employees (as the Commission had held in other cases such as *Leane Electrical Pty Ltd [2010] FWA 1605)* and that substantial compliance with the requirements of s.174 and relevant FW regulations was all that was required.

3.8 The Full Bench's *Galintel* decision was handed down prior to the amendment to s.174 of the Act in 2012.

3.9 The 2012 amendment inserted the following s.174(1A):

"Notice Requirements

(1A) The notice must:

(a) Contain the content prescribed by the regulations; and

(b) Not contain any other content; and

(c) Be in the form prescribed by the regulations."

3.10 The *Fair Work Amendment Bill 2012* Explanatory Memorandum stated that:

"*This amendment responds to Panel recommendation 19. The amendment is intended to eliminate confusion about whether employers may modify the content or form of the notice of employee representational rights. The amendment would make clear that the notice must contain only the content prescribed by the regulations and no other content expect that which the regulations require an employer to insert or omit."*

3.15 Section 174(1A) was in response to the Fair Work Act Review Panel's Recommendation 19. Recommendation 19 was made to eliminate confusion and opportunities for malpractice in respect to NERRs. The Panel said:

"*The s.173 notice is an integral element in the bargaining regime. To eliminate confusion and any opportunities for malpractice, we recommend that the Government amend s.174 to make it clear that a bargaining notice may only contain the requirements as specified in the section and its attendant regulations"*

3.11 Essentially, the purpose of s.174(1A) was to eliminate confusion about whether employers may modify the content of an NERR, and to eliminate any opportunity for malpractice.

3.12 In the case of Peabody, the prescribed content of the NERR was not modified in any respect and there was no malpractice. The employees were given a completely separate and completely neutral form which enabled them to appoint a natural person or a union as their bargaining representative

3.13 The CFMEU's argument that the three separate documents somehow merged into one:

- Is inconsistent with the plain wording of the FW Act;
- Is inconsistent with the purpose of the s.174(1A) amendment;
- Would results in absurd and arbitrary processes for employers when issuing NERRs;

- Would unjustifiably restrict and interfer with an employer's right to communicate with its employees about the bargaining process.

3.14 The CFMEU relies heavily on Deputy President Gooley's decision in *Shape Shopfitters Pty Ltd [2013] FWC 3161 (**Shape Shopfitters**)* to support its interpretation of s.174(1A)

3.15 We submit that the decision of the Commission in *Shape Shopfitters* should not be adopted by the Full Bench.

3.16 In *Shape Shopfitters,* Deputy President Gooley interpreted s.174(1A) in a way that held an NERR to be invalid if supplied to employees at the same time as a separate document. Her Honour stated at para [12]:

"*In my view it would make the amendment to the FW Act otiose and defeat the purpose of the legislative change if all that was required was that the additional content be included in a separate document provided to employees at the same time as a document which set out the matters required by the FW Act and regulations."*

3.17 The logical extension of Deputy President Gooley's reasoning in *Shape Shopfitters* would appear to be that an employer cannot provide additional information in relation to bargaining or representation at the same time as issuing the NERR, as the simultaneous timing would render the additional information to be a modification to the NERR.

3.18 In *Shape Shopfitters,* Her Honour appeared to place some relevance on the content of the separate document which required employees to nominate their bargaining representative, including any employee organisation they were a member of. Her Honour said at para [14] "*This information is in direct conflict with the information required to be included in the notice of representational rights."*

3.19 While Her Honour may have raised valid concerns about how the employer sought information from employees as to whether they were union members, the deeming of the two documents to be one NERR does not provide a valid or reliable principle of general application.

3.20 The legislative intent to "*eliminate confusion about whether employers may modify the content or form*" of the NERR is, respectfully, not served by the approach in *Shape Shopfitters.*

3.21 Adopting the *Shape Shopfitters* decision would lead to arbitrary, confusing and uncertain requirements about the process for issuing an NERR to employees.

3.22 The outcome would lead to the Commission having to arbitrarily determine matters such as:

- When does additional information provided by an employer to employees about the bargaining process become additional content to a NERR?
- What form must any additional information take to adequately distinguish itself from additional content of an NERR?
- Is only written information deemed to be additional content or is verbal information communicated to employees around the same time as issuing the NERR additional content?
- Must the additional information be stapled or affixed together, or is it sufficient that the information be distributed at the same time?
- What must any additional information be about for it to be considered (or not considered) additional content of an NERR?
- What period of time must lapse after issuing the NERR before an employer can provide additional bargaining information, so that it can be distinguished from additional content to an NERR?

3.23 The CFMEU's proposed approach would clearly be confusing and uncertain for parties involved in enterprise bargaining, and not in the interests of employers or employees alike in aiding their understanding of the bargaining process, nor in ensuring a fair, consistent and efficient process.

3.24 The adoption of the approach in *Shape Shopfitters* would impede an employer's ability to communicate with, and provide information to, employees about the bargaining process and proposed changes to employment conditions.

3.25 An employer's decision to bargain and make changes to employment terms and conditions is rarely communicated solely with a prescribed form, and nor should it be. A decision to bargain often involves discussions about why an employer is seeking an enterprise agreement, and information as to how that particular employer will accommodate the employees' and employer's respective rights and obligations during the bargaining process. Indeed Peabody was no exception in communicating with its employees about these matters, as evidenced in Mr Patterson's statement at paras [21 – [35].

3.26 While the NERR serves a formal and important purpose of informing employees of their rights in respect of bargaining representation, it is unreasonable and unjustifiably restrictive to think that a prescribed form is the only form of communication that an employer has with employees at the commencement of bargaining.

3.27 The purpose of the s.174(1A) amendment was not to provide a blanket restriction on an employer's ability to communicate and provide written information to its employees about bargaining or representation at the same time as issuing an NERR. Indeed there is nothing in the Explanatory Memorandum or recommendations from the Review Panel that support this view.

3.28 The NERR issued by Peabody complies with the requirements of ss.173 and 174 of the FW Act and accordingly is a valid notice under the FW Act.

4. Incorporation of Award

4.1 Ai Group notes that the Agreement does not incorporate the *Black Coal Mining Award 2010* either expressly or by reference.

4.2 The Agreement states that the *"Award will cover matters not addressed by the Agreement.*" This is not incorporation by reference for the purpose of s.180(2).

4.3 The provision in the Agreement is consistent with ss. 46-54 of the FW Act which provide for awards to cover (but not apply) to employers and employees while an enterprise agreement is in force.

4.4 The CFMEU's concerns that Peabody did not provide copies of any incorporated Award, accordingly, do not have weight.

4.5 Even if the Agreement was drafted to incorporate the terms of a modern award by reference (and it is not), a copy of the relevant award would not need to be provided to the employees because modern awards are readily available to employees in the public domain. Support for this view is found in the Full Bench's decision in *McDonald's Australia Pty Ltd V Shop, Distributive and Allied Employees' Association [2010] FWAFB 4602,* a case in which Ai Group represented the employer and also intervened in its own right. In its decision, the Full Bench held that the employer was not required to provide copies of legislation incorporated into the agreement by reference because the legislation was readily available in the public domain. Similarly modern awards are readily available in the public domain.

5. The Commission should take a practical, non-technical approach when approving agreements

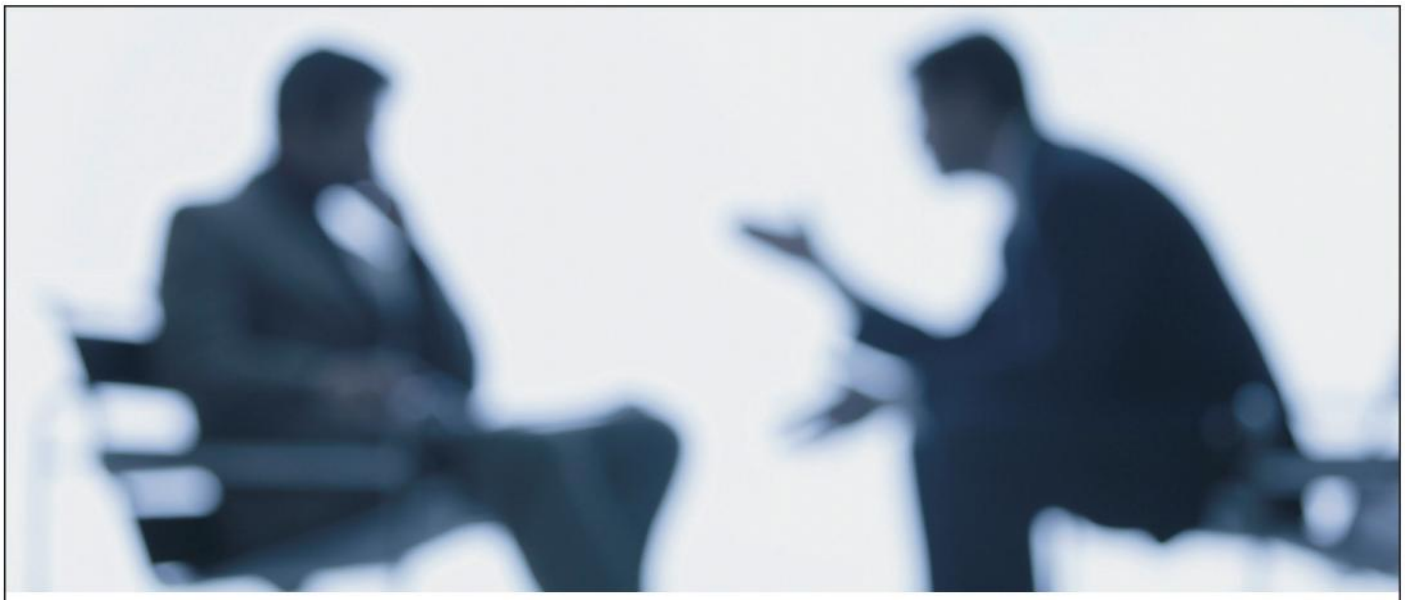
5.1 In the abovementioned *McDonald's* decision, the Full Bench said:

> ***"[13]*** *The appellants emphasised the facilitative aspects of these objectives. We agree that these objectives place the primary role for making enterprise agreements on the parties to those agreements and their representatives and that the role of Fair Work Australia (FWA) includes facilitating the making of enterprise agreements. In general we believe that the*

requirements for approval should be considered in a practical, non-technical manner and that reasonable efforts should be made to clarify matters with the parties and consider undertakings to clarify or remedy concerns to the extent that these may be available under s 190 of the Act."

5.2 In conflict with the approach described by the Full Bench, the CFMEU's arguments in these proceedings reflect an impractical approach to applying the approval requirements of the FW Act.

5.3 The CFMEU's arguments should be rejected by the Full Bench



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