Australian Industry Group

Submission

AG2018/3842 and others -
Enterprise Agreements – Amending Act

20 December 2018

AG2018/3842 AND OTHERS –

ENTERPRISE AGREEMENTS – AMENDING ACT

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1. INTRODUCTION

1. The *Fair Work Act 2009* (**FW Act**) has been amended by the *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* (**Amendment Act**). The effect of the Amendment Act is to grant the Fair Work Commission (**Commission**) a discretion to find that an agreement has been genuinely agreed to for the purposes of s.188 of the FW Act despite certain minor procedural or technical errors. The new discretion is contained within s.188(2) of the Act (**New Legislative Provision**),

2. On 11 December 2018, the Commission issued a statement[1] (**Statement**) that identifies eight applications that have been made for the approval of an enterprise agreement, pursuant to s.185 of the FW Act (**Referred Matters**). Each of those Referred Matters give rise to issues that require a consideration of the proper interpretation and application of the New Legislative Provision. The Matters have been referred to a Full Bench for consideration.

3. The Statement invites "the Peak Councils (including the Australian Industry Group …) … to lodge in the Commission written submissions on the proper construction of s.188(2) of the [FW Act] and its application to one or more of the Matters, on or before 12 noon on Thursday 20 December 2018".

4. The Australian Industry Group (**Ai Group**) files this submission accordingly.

5. This submission argues that:

    - The new discretion in s.188(2) of the Act, needs to be exercised in practical, common sense manner.

    - The new discretion in s.188(2) needs to be exercised, from start to finish, by appointed Commission Members drawing upon the extensive experience that led to their appointment, and uninfluenced by views of

[1] *4 yearly review of modern awards – Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Act 2018* [2018] FWCFB 7528.

the staff in the Member Assist Team. The discretion is a matter for the impression and judgement of Commission Members.

- The Commission Member that is dealing with the relevant application should determine what material they wish to see in order to be satisfied that it is appropriate to exercise their discretion under s.188(2). The material will vary depending upon what the error is. In most circumstances, the Member will be able to make an appropriate judgement based on the nature of the error, without obtaining any further materials from the bargaining representatives.

- It is appropriate for the Commission to consider whether the non-compliance was unintended or deliberate. If there is evidence of deliberate non-compliance, it would be reasonable for the Commission not to exercise the discretion under the New Legislative Provision because the employer's actions would not constitute an 'error' for the purposes of s.188(2).

- Consideration of 'recklessness' is not appropriate as it would lead to too much uncertainty and could potentially frustrate the intended operation of the New Legislative Provision.

- It would only be in rare circumstances that an employee would be disadvantaged by a 'minor procedural or technical error'. An example would be where the error confuses, misleads or intimidates the employees to the extent that it affected the employees' nomination of representative/s.

- Consideration of the effect of an error and the circumstances of an error includes, as central considerations, taking into account the likely costs and inconvenience to the employer and employees covered by the agreement, associated with further delaying the approval of the agreement. In this regard:

- A requirement to repeat the pre-approval steps typically involves very substantial costs and risks for an employer, including:
    - Management time;
    - Employee time (e.g. in voting and participating in consultation processes) that would otherwise be spent on carrying out normal duties;
    - The cost of obtaining professional advice;
    - Travel costs;
    - Postage, telecommunications and other costs; and
    - The risk of additional claims being pursued, including the risk of workplace disharmony and protected industrial action; and
- A requirement to repeat the pre-approval steps often results in significant costs for employees because wage increases are typically not passed on to employees until an enterprise agreement is approved. Also, often wage increases are operative from a date that relates to the timing of approval of the agreement.

6. This submission include numerous examples of minor procedural or technical errors within the meaning of s.188(2).

7. The Commission's current enterprise agreement approval process is not working effectively and has become a significant deterrent to agreement making. The focus of the approval process needs to be on approving agreements reached between employers and employees in a practical and efficient manner and, wherever possible, not allowing technical and procedural issues, that are unlikely to have disadvantaged employees, to frustrate or delay the approval of the parties' agreements.

8. The Amendment Act provides a valuable opportunity for many of the current problems to be addressed and for a more practical and workable enterprise agreement approval process to be implemented.

2. THE NEW LEGISLATIVE PROVISION

9. The Amendment Act amend the FW Act to insert the following New Legislative Provision:

> **188(2)** An enterprise agreement has also been ***genuinely agreed*** to by the employees covered by the agreement if the [Commission] is satisfied that:
>
> **(a)** the agreement would have been ***genuinely agreed*** to within the meaning of subsection (1) but for minor procedural or technical errors made in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174 relating to a notice of employee representational rights; and
>
> **(b)** the employees covered by the agreement were not likely to have been disadvantaged by errors, in relation to the requirements mentioned in paragraph (1)(a) or (b), or the requirements of sections 173 and 174.

10. The intent and proper construction of the new legislative provision are dealt with in section 5 below.

3. THE REFERRED MATTERS

11. The five Referred Matters are identified in paragraph [14] of the Statement, as follows:

a. **Referred Matter 1:** An earlier version of the NERR appears to have been given to employees who will be covered by the agreement, not the current prescribed form (s.174(1A)).

The referred application that provided an example of this matter (*AG2018/6505 – Application by Core Toughened Pty Ltd*) has been withdrawn.

b. **Referred Matter 2:** The content of the prescribed form of the NERR appears to have been altered (s.174(1A)).

Examples:

- *AG2018/6614 –Application by The Trustee for the Neish-King Family Trust T/A Kew Swimming Pools* [Issue – whether prescribed content has been omitted from the NERR]
- *AG2018/6679 – Application by Royal Automobile Club of Victoria (RACV) Limited* [Issue – it appears that the reference to 'employer' in the final paragraph of the prescribed NERR has been replaced with a reference to a particular person or position title]
- *AG2018/6550 – Application by Axis Plumbing Services WA Pty Ltd* [Issue – it appears that the NERR was provided to employees as a memorandum on company letterhead]

c. **Referred Matter 3:** Blank fields in the NERR may not have been properly completed (s.174(1A)).

Example:

- *AG2018/4986 – N T Seaman T/A United Wolves* [Issue – whether the legal name of the employer has been included in the NERR]
- *AG2018/6679 – Application by Royal Automobile Club of Victoria (RACV) Limited* [Issue – whether the legal name of the employer has been included in the NERR]

d. **Referred Matter 4:** Material provided with the NERR.

The referred application that provided an example of this matter (*AG2018/5778 – Application by CMTP Pty Ltd*) has been withdrawn.

e. **Referred Matter 5:** Pre-approval statutory timeframes may not have been met.

Examples:

- *AG2018/3482 – Application by Huntsman Chemical Company Australia Pty Limited* [Issue – whether the vote commenced less than 7 clear days from the date on which employees were notified of the time, place and method of voting]
- *AG2018/6664 – Application by Meredith Roof Plumbing Pty Ltd* [Issue – whether the vote commenced less than 7 clear days from the date on which employees were notified of the time, place and method of voting]
- *AG2018/4986 – N T Seaman T/A United Wolves* [Issue – whether the vote commenced less than 21 clear days after the last NERR was given to an employee]

4. ADDRESSING PROBLEMS WITH THE COMMISSION'S CURRENT ENTERPRISE AGREEMENT APPROVAL PROCESS

12. Ai Group's members are expressing consistent, strong concerns about the lengthy delays that they are experiencing in having their agreements approved. There is also concern about the large number of undertakings that they are very often required to give in order to have their agreements approved.

13. In Ai Group's view, the current enterprise agreement approval process is not working effectively and has become a significant deterrent to agreement making. Some, but not all, of the problems that have been occurring are the result of the Commission having little discretion to overlook procedural or technical problems. The lack of discretion has been addressed through the Amendment Act.

14. The focus of the Commission's enterprise agreement approval process needs to be on approving agreements reached between employers and employees in a practical and efficient manner and, wherever possible, not allowing technical and procedural issues, that are unlikely to have disadvantaged employees, to frustrate or delay the approval of agreements.

15. Paragraph 768 of the Explanatory Memorandum for the *Fair Work Bill 2008* states that *"It is intended that FWA will usually act speedily and informally to approve agreements with most agreements being approved on the papers within 7 days".*

16. Under the FW Act, the primary responsibility for determining wages and conditions is on employers and employees at the enterprise level, on a foundation of minimum standards. The Act is designed to encourage enterprise agreement making (s.134(1)(b)) through a simple, flexible and fair framework for enterprise agreements that deliver productivity benefits (s.171).

17. The Commission's role is to *"facilitate…the making of enterprise agreements through…ensuring that applications to the FWC for the approval of enterprise agreements are dealt with without delay"* (s.171).

18. In *McDonald's*[2] a Full Bench of the Commission stated: (emphasis added)

> **[13]** …..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……

19. Ai Group represented McDonald's in the above case, and also intervened in the case in its own right.

20. The Amendment Act provides a valuable opportunity for many of the current problems to be addressed and for a more practical and workable enterprise agreement approval process to be implemented.

[2] *McDonald's Australia Pty Limited and SDA* [2010] FWAFB 4602.

21. The new discretion in s.188(2) of the Act, needs to be exercised in practical, common sense manner.

22. The new discretion in s.188(2) (and the Better Off Overall Test) needs to be exercised, from start to finish, by appointed Commission Members drawing upon the extensive experience that led to their appointment, and uninfluenced by views of the staff in the Member Assist Team. The discretion is a matter for the impression and judgement of Commission Members.

5. THE INTENT AND PROPER CONSTRUCTION OF THE NEW LEGISLATIVE PROVISION

23. Various pieces of extrinsic material provide useful context to the New Legislative Provision and the intention underlying its implementation.

24. The genesis of the New Legislative Provision lies in a recommendation made by the Productivity Commission in a report dated 30 November 2015 (**Productivity Commission Report**): (Emphasis added, footnotes omitted)

> **20.4 Adequacy of current arrangements and possible reforms**
>
> While enterprise bargaining allows some employers and employees to craft flexible arrangements that suit the circumstances of the particular enterprises, several features have made enterprise bargaining more rigid and costly than necessary.
>
> **Make procedure a servant, not the king**
>
> …
>
> While the FWC approves agreements relatively efficiently, the whole bargaining process from start to finish can be protracted. Data from the Department of Employment provided to the Productivity Commission suggest that, where the old agreement has a direct relationship with the new one, it takes an average of 151 days (including approval processing time) to replace an EA under the FW Act.
>
> As noted by various participants, sometimes undue emphasis is placed on procedural requirements when agreements are submitted for approval (Victorian Employers' Chamber of Commerce and Industry (VECCI), sub. 79; Catholic Commission for Employment Relations, sub. 99; Minerals Council of Australia, sub. 129; Peabody Energy, sub. 241; Ports Australia, sub. 249). The infamous 'staple case' illustrates the dominance of form over substance, where a bargaining representative nomination form that was stapled to the NERR tainted the entire bargaining process, requiring the employer to begin the agreement making process again (Caspersz 2014).

While there are often good reasons for having procedural requirements (for example, to prevent a party engaging in potentially misleading conduct during the approval process), substance rather than form should prevail, which is a recurring theme in this report. Where the FWC rejects an EA on procedural grounds, it can trigger a fresh round of complex negotiations. This is not only a costly and tedious process, but can also compromise the relationship between employers and employees. This was noted by a member of the Launceston Chamber of Commerce, whose EA was rejected by the FWC due to a technical defect in their NERR:

> We are now forced to go back to the ballot again. Whilst I understand and respect the legalities imposed by legislation, the pedantic nature in which the provisions are applied has a significant impact on the productivity of the organisation for no apparent reason or protection of the employees from any wrongdoing. The situation has now caused a potentially detrimental relationship between the organisation and the workforce. Because it has been on a knife-edge before, so to speak, they do not understand the reasons for the rejection. Rather, they are becoming suspicious that they must have done something wrong because the Fair Work Commission rejected the agreement. (Launceston Chamber of Commerce, trans., p. 114)

There are other strong grounds for avoiding rejection of fundamentally-sound EAs on the basis of technical purity:

- Once expired, EAs do not provide for further wage increases, with possible adverse financial consequences for employees if delays continue. They would also delay any new benefits for employees that might have been a feature of the EA.

- Pedantic, legalistic decisions can influence perceptions of the cost and complexity of bargaining, and thus discourage businesses and employees from pursuing EAs.

- Procedural issues when negotiating a greenfields agreement can delay the commencement of new projects.

- Even where an agreement is not a greenfields agreement, businesses want some certainty when making large investments, innovating and introducing efficiency improving measures. Delays in EAs leave them susceptible to several risks. Decisions about capital, in part, depend on the cost of competing inputs, of which labour is one. Equally, uncertainty about future labour costs, and therefore overall costs, can affect a business's capacity to self-finance investments or may raise the cost of capital when seeking external finance.

- Moreover, to the extent that any business strategy (investment, entry into new markets, new product lines or restructuring) is contingent on striking an agreement, the consumer benefits of that strategy are also delayed, imposing costs on not just the participants in the negotiation but also third parties.

To its credit, the FWC is also embarking on early intervention and outreach programs by identifying trends in errors and providing education and guidelines to employers (Justice Iain Ross, sub. DR357; Inca Consulting 2015a). This should help reduce the prevalence of inadvertent procedural errors.

However, even with education and guidelines, some parties, especially those with little or no dedicated HR staff, will still make inadvertent errors. Further, governments will inevitably 'tinker' with regulations or processes from time to time, which can lead to parties making procedural errors (for example, by using an outdated form or following outdated guidelines). Where these inadvertent errors arise, the agreement process should not be unnecessarily derailed.

The FWC should be allowed to overlook minor procedural defects without undertakings

In its current form, Division 4 of Part 2−4 only allows the FWC to approve an EA if it meets all the requirements in ss. 186 and 187 (such as being genuinely agreed to by employees, passing the BOOT, no unlawful terms, etc.), and in other limited circumstances (where approval of the EA would not be contrary to the public interest and where the employer agrees to undertakings). However, s. 190 of the FW Act currently gives the FWC the power to approve an agreement that does not meet these requirements if the employer agrees to undertakings that will meet the FWC's concerns. Any such undertakings must not be likely to cause financial detriment to any employee or result in substantial changes to the agreement.

…

However, there can be some cases where a procedural defect in an agreement cannot be addressed by an undertaking and the FWC is left with no choice but to reject the application for approval. This is so even in circumstances where the unmet requirement has not materially affected bargaining or the proposed EA.

For example, s. 181(2) requires that an employer not request its employees vote on approving an EA until at least 21 days after the last NERR is issued. Satisfying s. 181(2) is a precondition for establishing that an EA was genuinely agreed to by employees, which is a requirement for an agreement to be approved. The FWC has previously rejected applications for agreement approval on the grounds that the agreement was voted on by employees before this 21 day period was reached. While s. 190 would theoretically permit an undertaking to address this concern, it seems unlikely (in the absence of time travel) that an undertaking to meet this requirement would be feasible.

In cases where an undertaking is not feasible or would cause undue inconvenience, the FWC should have the discretion to determine whether a procedural defect did not materially affect the bargaining or approval process and therefore does not require an undertaking to remedy it. The key test for exercising discretion could be that the FWC is satisfied that employees were not likely to have been placed at a disadvantage during bargaining or the pre-approval process because of the unmet procedural requirement. The FWC should also have regard to the likely costs to the parties — including the employees — associated with further delaying approval of the agreement. To help maintain consistency and transparency for all parties, the FWC could develop and publish guidelines about how members should exercise their discretion with respect to procedural defects.

The goal of this proposed change is to resolve procedural inflexibilities and prevent minor procedural errors or defects in the bargaining process derailing an otherwise fundamentally sound agreement at the approval stage. Numerous inquiry participants, primarily employers and employer groups, were supportive of such a change. The capacity for the FWC to overlook minor procedural defects is also not without

precedent — s. 461 of the FW Act currently allows a protected action ballot order (chapter 27) to be valid even if where there is a 'technical breach' of the provisions.

Allowing the FWC the discretion to overlook a procedural defect without an undertaking should not be seen as an avenue to allow some employers to skirt procedural requirements in order to gain an edge during bargaining. Employers generally do not have an incentive to expose themselves to the FWC over procedural issues. It is also unlikely that a deliberate procedural error by an employer would both lead to a meaningful advantage in bargaining and yet also escape the scrutiny of the FWC.

Deficiencies in notices of employee representational rights (NERR)

Some participants have raised concerns specifically with the overly prescriptive treatment of deficiencies in a NERR (Catholic Commission for Employment Relations, sub. 99). This is not isolated to the 'staple case'. For example, another agreement was deemed invalid because the NERR had contained an omission reading '[Name of employer]', notwithstanding that the letterhead on the notice contained the employer's name.3

In another case, an agreement was rejected because the employer had inadvertently issued a NERR template from the FWC website which had not been updated, and as such was technically not compliant. According to the employer's HR manager:

> … the substance of the content between the two forms is the same. For example, on the old former NERR, one inserted a specific union, i.e., HACSU in our case, whereas the new NERR refers to 'union'. It just seems to be bureaucracy at its best.
>
> At this time, as it came to light, I was speaking with the industrial organiser from the union and he said that the Fair Work Commission had struck down another eight enterprise agreement applications that week for the same reasons and were equally annoyed. (Launceston Chamber of Commerce, trans. pp. 114–15)

A FWC decision invalidating a NERR can particularly delay an agreement because the parties must issue a new NERR and wait at least 21 days after issuing it before the agreement can be approved by holding another employee vote.

One proposed solution is that the FWC should have the legal discretion to decide whether deficiencies in the notice should prevent the agreement from being approved, rather than simply invalidating the notice and forcing bargaining to start over. Indeed, in the 'letterhead' case outlined above, the FWC member noted:

> If it seemed the Act allowed discretion in relation to the matter, I would exercise it; that is, the departure in the content of the notices of representational rights from the prescribed form might be considered to be something akin to a misnomer of no real consequence, rather than anything that, in a practical sense, alters the advice to employees of their rights in such respects.13

In assessing whether the departure was 'something akin to a misnomer of no real consequence', the FWC should take into account the views of the employer, bargaining representatives, the employees to be covered by the agreement, and any evidence on

3 *Catholic Commission for Employment Relations through Executive Director Anthony Farley* (2013) FWC 8686.

whether the deficiency in the NERR had disadvantaged an employee who would be covered by the agreement (for example, by being confusing, misleading or intimidatory to the extent that it affected an employee's nomination of a representative).

Some employee groups opposed this proposal, arguing that any loosening of the prescriptive requirements would allow employers to mislead employees as to their representational rights, and thus undermine the capacity for unions to act as bargaining representatives for employees (Community and Public Sector Union (CPSU) (SPSF Group), sub. DR270; Australian Council of Trade Unions (ACTU), trans., pp. 88–9).

However, the Productivity Commission is unconvinced by these arguments. The proposed approach would not give employers carte blanche with respect to the NERR's content. Were an employer to issue a NERR which appeared to be materially misleading, it is likely that the FWC would reject it. Preventing the small possibility that a misleading NERR may slip through the FWC's discretion does not justify the tangible costs and delays to bargaining participants that arise from the prescriptiveness of the existing rules.

RECOMMENDATION 20.1

The Australian Government should amend the *Fair Work Act 2009* (Cth) to:

- allow the Fair Work Commission wider discretion to overlook minor procedural or technical errors when approving an agreement, as long as it is satisfied that the employees were not likely to have been placed at a disadvantage because of an unmet procedural requirement.
- extend the scope of this discretion to include minor errors or defects relating to the issuing or content of a notice of employee representational rights.[4]

25. The *Fair Work Amendment (Repeal of 4 Yearly Reviews and Other Measures) Bill 2017* was introduced to Parliament on 1 March 2017. The following passage of the Second Reading Speech is relevant: (Emphasis added)

With this bill, the government is continuing to implement common sense reforms to the workplace relations system to reduce complexity and costs.

…

… the bill also responds to Productivity Commission recommendation 20.1, by amending the Fair Work Act to allow the Fair Work Commission to overlook minor procedural or technical errors when approving an enterprise agreement, as long as it is satisfied that the employees were not likely to have been disadvantaged by the error.

Currently, the Fair Work Commission is handcuffed. Prospective, inflexible rules set out in the Fair Work Act mean that inconsequential procedural or technical errors made during bargaining prevent it from approving an enterprise agreement. This means that fundamentally sound enterprise agreements which have received broad support from

[4] Productivity Commission, *Workplace Relations Framework, Final Report* (2015) at pages 662 – 667.

employees are being knocked back because undue emphasis has been placed on procedural requirements set out in the Fair Work Act.

…

The government is therefore proposing to introduce a common sense reform to give the Fair Work Commission the capacity to approve enterprise agreements despite minor procedural or technical errors made during enterprise bargaining, as long as the errors were not likely to have disadvantaged employees. The amendment will not give carte blanche to employers to ignore the proper processes. What it will do is ensure that minor procedural or technical mistakes in bargaining do not unduly prevent the approval of enterprise agreements that employers and employees have genuinely agreed to. This is a win for everyone.

26. The Bill was referred to the Senate Education and Employment Legislation Committee for inquiry. Ai Group made a submission to the Senate Committee on 10 April 2017 which relevantly included the following passage:

> Numerous enterprise agreements which benefit all parties are being routinely rejected by the Commission because of very minor alleged deficiencies in procedural requirements:
>
> …
>
> The decision of the majority in the *Uniline* case (Deputy President Gostencnik and Commissioner Riordan) took the view that it is up to Parliament to address the overly technical approach mandated by the FW Act. They said:
>
> > **[120]** We would observe in passing that we are not unsympathetic to the position in which an employer or indeed other bargaining representatives might find themselves upon discovering that a Notice is not valid. If the legislative provisions provided some discretion about this and other pre-approval technical requirements then an examination of the actual impact of any deficiency upon the bargaining process and its outcome might result in the deficiency being disregarded. But that is not the legislative scheme the Commission is required to administer. It is a matter for Parliament to make such amendments to the scheme of the Act as it sees fit.
>
> The proposed amendments in Schedule 2 of the Bill have obvious merit for employers, employees and the Commission.

27. The Senate Committee recommended that the Bill be passed, subject to an amendment to provide for the new approval discretion to apply to applications made prior to the commencement of the New Legislative Provision: (Emphasis added)

> 3.25 Similarly, allowing the FWC to overlook minor technical or procedural issues, especially in relation to the Notice of Employee Representation Rights (NERR), when approving agreements is a win for productivity and harmony in the workplace. It is truly a ridiculous state of affairs when a staple can send parties

back to the negotiating table, as pointed out in the Productivity Commission's Final Report into the Workplace Relations Framework (PC Report). The committee is satisfied that the fairness of the outcomes for employees won't be negatively impacted by this provision.

3.26 The committee acknowledges the point raised by the FWC that the new discretion to approve applications, despite minor or technical errors will only apply when the application is made after the commencement of Schedule 2. So as to avoid agreements from being unnecessarily rejected, the committee agrees that the bill should be amended to provide for the new approval discretion to apply to applications made prior to the commencement of Schedule 2.

Recommendation 1

3.27 The committee recommends that the bill be amended to provide for the new approval discretion to apply to applications made prior to the commencement of Schedule 2.

3.28 The proposed amendments in relation to the application of the JMIPC Act also represent a common-sense approach to reform. It is undesirable for transitioned and non-transitioned members of the FWC to have inconsistent terms and conditions of employment, and on that basis the committee supports the provision.

Recommendation 2

3.29 The committee recommends that subject to Recommendation 1 the bill be passed by the Senate.[5]

28. Finally, the Revised Explanatory Memorandum to the Bill contains the following relevant passage: (our emphasis)

Overview

…

40. The PC Report recommended that the FWC should be able to overlook minor procedural or technical errors when approving an enterprise agreement, if it is satisfied that employees were not likely to have been disadvantaged by those errors. The PC Report also recommended that this be extended to the requirements relating to the Notice given under subsection 173(1) (Recommendation 20.1).

41. Schedule 2 to the Bill responds to Recommendation 20.1.

Fair Work Act 2009

Item 1 – Section 188

[5] Senate Standing Committee on Education and Employment, *Fair Work Amendment (Repeal of 4 Yearly Review and Other Measures) Bill 2017* (May 2017) at page 16.

…

44. This item inserts new subsection 188(2), which provides that an enterprise agreement will also have been genuinely agreed to by the employees covered by the agreement if the FWC is satisfied that the agreement would have been genuinely agreed to under subsection 188(1), but for any minor procedural or technical errors made in relation to:

- the requirements referred to in paragraph 188(1)(a) or (b), or
- the requirements of sections 173 and 174, relating to the Notice.

45. The FWC must also be satisfied that the employees covered by the agreement were not likely to have been disadvantaged by the errors, in relation to the procedural requirements in paragraphs 188(1)(a) or (b) or sections 173 and 174. These procedural requirements relate to the Notice and other steps required to be taken for employees to approve a proposed enterprise agreement. It is intended that any disadvantage likely to have been suffered by employees, for the purpose of paragraph 188(2)(b), must relate to the employees' ability to genuinely agree to the terms of the proposed agreement.

46. The effect of new subsection 188(2) is that an enterprise agreement will have been genuinely agreed to despite any minor procedural or technical error if the employees (as a whole) were not likely to have been disadvantaged by those errors.

47. Examples of minor procedural or technical errors could include (without limitation):

    - employees being informed of the time and place for voting on the proposed enterprise agreement or the voting method that will be used for the agreement just after the start of the access period rather than by the start of the access period (subsection 180(3));
    - employees being requested to approve a proposed enterprise agreement on the 21st day after the last Notice was given, rather than at least 21 days after the day on which the last Notice was given (subsection 181(2));
    - the inclusion of the employer's company logo or letterhead on a Notice;
    - the inclusion of additional materials that are stapled with a Notice; or
    - minor changes to the text of the Notice that had no relevant effect on the information that was being communicated in it (for example, the Notice may say to contact a particular person in the human resources department rather than 'contact your employer').

48. When considering whether the employees were not likely to have been disadvantaged by an error, in relation to the relevant procedural requirements, the FWC could take into account, for example, the effect of the error and the circumstances of the error.

29. The intention underpinning the New Legislative Provision is clear from the extrinsic material cited above.

30. The new s.188(2) is intended to prevent the strict application of ss.180(2), 180(3), 180(5), 173 and 174 resulting in the refusal of applications for the approval of an enterprise agreement in circumstances where employees covered by the agreement were not likely to have been disadvantaged by minor procedural or technical errors made in relation to those provisions.

31. Set out below are numerous practical examples of the unreasonable and illogical outcomes that can flow from the absence of any discretion of the nature contemplated by s.188(2). Those outcomes are not in the interests of employers, employees or the operation of the enterprise bargaining scheme more generally. The New Legislative Provision is clearly intended to avoid such outcomes by granting the Commission a discretion to approve an agreement notwithstanding a minor procedural or technical error of the relevant sort.

32. Subsection 188(2) should be interpreted and applied by the Commission having regard to this backdrop and in a manner that does not undermine the intention underpinning this important legislative change.

33. The Revised Explanatory Memorandum makes the following matters relevant to the application of s.188(2)(b) explicit:

    a. The assessment required by s.188(2)(b) is to be undertaken in relation to the relevant group of employees *as a whole*. Subsection 188(2) does *not* turn on whether an individual employee was (or individual employees were) likely to have been disadvantaged.

    b. The assessment required by s.188(2)(b) about any potential disadvantage suffered by the employees must be focussed on the employees' ability to genuinely agree to the terms of the proposed agreement. A purported disadvantage that does not relate to the employees' ability to genuinely agree to the terms of the proposed agreement is not relevant to s.188(2)(b).

34. We also note that s.188(2)(b) requires that employees covered by the agreement "*were not likely to have been* disadvantaged by the errors". It does not require the Commission to make a definitive finding as to whether, as a question of fact, employees were or were not disadvantaged by the errors. It simply requires the Commission to form a view as to whether the employees were *likely* to have been disadvantaged by the errors. To that end, it is sufficient that the relevant employees were not *likely* to have been disadvantaged by the errors in order for the Commission to be able to exercise the direction granted to it by s.188(2).

35. Other issues pertaining to the proper interpretation of s.188(2) are dealt with below.

6. NERR CONTENT AND THE PROVISION OF MATERIALS WITH THE NERR

36. The New Legislative Provision is intended to re-establish a better balance between technical and procedural requirements in the enterprise agreement approval process and ensuring that applications for approval of enterprise agreements are not frustrated by minor technical or procedural errors in the content of the NERR.

37. Section 174 of the FW Act sets the form and content requirements of the NERR. In recent years, the Commission has departed from the previously dominant approach of allowing for substantial compliance with the requirements in s.174 in favour of a stricter application. The change in approach arose from a legislative amendment on 1 January 2013, as discussed below.

38. In *AMWU v Inghams Enterprises*,[6] the NERR failed to include material qualifying the right to appoint a bargaining representative relevant to employees covered by Australian Workplace Agreements (AWAs), Individual Transitional Employment Agreements (ITEA) and preserved individual State agreements. Despite the fact that at least one of the relevant employees provided with the

[6] [2011] FWAFB 6106.

notice was covered by an individual agreement-based transitional instrument, the omission was found not to invalidate the notice as it did not affect the legislative entitlement of such an employee to appoint a bargaining representative. A Full Bench of Commission said:[7] (emphasis added)

> **[46]** The notice of employee representational rights that Inghams provided did not include the qualification set out in item 2(3) of Schedule 13 of the TPCA Act or the additional paragraph in Schedule 2.1 of the FW Regulations. The question arises as to whether that omission was sufficient to render the notice of employee representational rights invalid.
>
> **[47]** In *Tasker and others v Fullwood and others*, the New South Wales Court of appeal enunciated the following propositions in respect of determining whether an act done in breach of a statutory provision is invalid:
>
> > "(1) The problem is to be solved in the process of construing the relevant statute. Little, if any, assistance, will be derived from the terms of other statutes or any supposed judicial classification of them by reference to subject matter. (2) The task of construction is to determine whether the legislature intended that a failure to comply with the stipulated requirement would invalidate the act done, or whether the validity of the act would be preserved notwithstanding non-compliance: the *Franklins Stores Pty. Ltd.* case. (3) The only true guide to the statutory intention is to be found in the language of the relevant provision and the scope and object of the whole statute: *Hatton v. Beaumont*. (4) The intention being sought is the effect upon the validity of the act in question, having regard to the nature of the precondition, its place in the legislative scheme and the extent of the failure to observe its requirement: *Victoria v. The Commonwealth*. (5) It can mislead if one substitutes for the question thus posed an investigation as to whether the statute is mandatory or directory in its terms. It is an invitation to error, not only because the true inquiry will thereby be sidetracked, but also because these descriptions have been used with varying significations. (6) In particular, it is wrong to say that, if a statute is couched in directory terms, the act will be invalid, unless substantial performance is demonstrated: the *Franklins Stores Pty. Ltd.* case. A statute which, on its proper construction, does not nullify the act in question, even for total non-observance of the stipulation, is also described as directory in its terms: *Victoria v The Commonwealth.*" (Footnotes omitted)
>
> **[48]** *Tasker's* case was cited with approval by the High Court in *Project Blue Sky Inc and others* v *Australian Broadcasting Authority*. In the *Project Blue Sky* case, McHugh, Gummow, Kirby and Hayne JJ in a joint judgment said:
>
> > "In our opinion, the Court of Appeal of New South Wales was correct in *Tasker v Fullwood* in criticising the continued use of the 'elusive distinction between directory and mandatory requirements' and the division of directory acts into those which have substantially complied with a statutory command and those which have not. They are classifications that have outlived their

[7] Ibid, [53].

> usefulness because they deflect attention from the real issue which is whether an act done in breach of the legislative provision is invalid. The classification of a statutory provision as mandatory or directory records a result which has been reached on other grounds. The classification is the end of the inquiry, not the beginning. That being so, a court, determining the validity of an act done in breach of a statutory provision, may easily focus on the wrong factors if it asks itself whether compliance with the provision is mandatory or directory and, if directory, whether there has been substantial compliance with the provision. A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particularly in New South Wales. In determining the question of purpose, regard must be had to the 'language of the relevant provision and the scope and object of the whole statute'." (Footnotes omitted)

[49] An object of the FW Act emphasises "enterprise-level collective bargaining underpinned by simple good faith bargaining obligations" and the objects of Part 2-4 of the FW Act concerning enterprise agreements include providing "a simple, flexible and fair framework that enables collective bargaining in good faith ... for enterprise agreements" and enabling "FWA to facilitate good faith bargaining and the making of enterprise agreements, including through ... ensuring that applications to FWA for approval of enterprise agreements are dealt with without delay."

[50] Provisions in Part 2-4 of the FW Act require that an employer that will be covered by a proposed enterprise agreement that is not a greenfields agreement must take all reasonable steps to give the notice of the right to be represented by a bargaining representative to each relevant employee and the employer cannot request the relevant employees to approve the proposed enterprise agreement by voting for it until at least 21 days after the day on which the last notice is given. Further, in order to approve an enterprise agreement, FWA must be satisfied the enterprise agreement has been genuinely agreed to by the employees covered by it and FWA will be so satisfied if it is satisfied the employer, amongst other things, did not request that the relevant employees approve the enterprise agreement until 21 days after giving the last notice of employee representational rights.

[51] A notice of employee representational rights consistent with Schedule 2.1 of the FW Regulations, except for an omission of the type made by Inghams, still notifies the employee in question that they have a right to appoint a bargaining representative. The failure to include the qualification to that right set out in item 2(3) of Schedule 13 of the TPCA Act and the additional paragraph in Schedule 2.1 of the FW Regulations merely means the employee is not notified through the notice that their right to appoint a bargaining representative or for a person to become their bargaining representative is qualified.

[52] The omission does not affect the legislative entitlement of an employee covered by an individual agreement-based transitional instrument to appoint a bargaining representative or for a person to become the bargaining representative of such an employee. That legislative entitlement is governed by item 2(2) of Schedule 13 of the TPCA Act.

> **[53]** Against this background we have come to the view that the legislature did not intend a notice of employee representational rights to be rendered invalid because of an omission of the type made by Inghams. Given the limited effect of the omission and the centrality under the FW Act of a valid notice of employee representational rights to the making and approval of an enterprise agreement, such a conclusion is the most consistent with the attainment of the objects of the FW Act.
>
> **[54]** Accordingly, we are not persuaded the omission of the qualification in item 2(3) of Schedule 13 of the TPCA Act or the additional paragraph concerning an employee covered by an individual agreement-based transitional instrument from the notice of employee representational rights given by Inghams affected the validity of the notice or was of any consequence for the making and approval of the Somerville Agreement. We dismiss the AMWU's ground of appeal concerning the notice of employee representational rights.

39. The Full Bench decision in *Inghams* was considered by the Full Bench in *Galintel Rolling Mills Pty Ltd T/A The Graham Group.*[8] This matter was an appeal against a decision of Ryan C to reject an enterprise agreement because a bargaining representative appointment slip had been included underneath the prescribed wording for the NERR. Ai Group represented the Graham Group (an Ai Group member) in the appeal.

40. The Full Bench found that the addition of the slip to the NERR did not have the effect of altering its nature to the extent that it ceased to be an effective notice under ss.173 and 174. The Full Bench relevantly said:

> **[45]** We also note that in *AMWU v Inghams Enterprises Pty Ltd* a Full Bench of FWA held that the omission of certain words from a notice of representational rights did not result in its invalidity.
>
> **[46]** While it is generally unwise for an employer to alter or add to the terms of a Notice of Representational Rights because an alteration may alter its nature, we are unable to agree with the Commissioner or the AMWU that the slip added at the base of the notice given by Galintel had any such effect. It may have been preferable to reiterate the optional nature of any appointment of a bargaining representative, perhaps by including the words "If you wish to appoint a bargaining representative" before the words on the slip "Please complete...". Importantly however there was no evidence that any of the six employees to be covered by the Agreement were mislead into a belief that appointment was mandatory. As a valid notice was provided to employees and as the requisite 21 days expired before the request was made to approve the agreement, s181(2) was satisfied in the circumstances of this case.

[8] [2011] FWAFB 6772.

41. The approach taken by the Commission in *Inghams* and *Galintel* is consistent with s.25C of the *Acts Interpretations Act 1901* (Cth):

> **25C Compliance with forms**
>
> Where an Act prescribes a form, then strict compliance with the form is not required and substantial compliance is sufficient.

42. Section 40A of the FW Act provides that the *Acts Interpretation Act 1901 (Cth)*, as in force on 25 June 2009, applies to the Act.

43. A further relevant decision that articulates that Commission's approach to NERR content requirements for NERR's issued prior to the legislative amendments on 1 January 2013 coming into effect, is the decision of Asbury DP in *Application by Uniting Church in Australia Property Trust (Q).*[9] This case concerned an application for approval of an enterprise agreement where additional content was included in the NERR and the name of the agreement was not included. Asbury DP held that the NERR was valid, and stated:

> **[17]** The issue of what amounts to substantial compliance were considered in; *Galintel Rolling Mills Pty Ltd r/a The Graham Group* (Galintel); *Automotive, Food, Metals, Engineering, Printing and Kindred Industries Union "known as the Australian Manufacturing Workers' Union (AMWU) v Inghams Enterprises Pty Ltd* (Inghams); and *Ostwald Bros Pty Ltd v Construction, Forestry, Mining and Energy Union* (Ostwald Bros).
>
> **[18]** *Inghams* and *Ostwald Bros* dealt with omissions from the prescribed form. In *Inghams*, the omission was information qualifying the right of employees to appoint a bargaining representative while in *Ostwald Bros* information that informed employees of the existence of that right was omitted. In *Inghams* a Full Bench of the Commission held that the omission was not fatal to the validity of the notice on the basis that notwithstanding the omission, the NERR still notified employees that they had the right to appoint a bargaining representative and that the omission of information about a qualification to that right had limited effect.
>
> **[19]** In *Ostwald Bros* the omission was a provision that was an express statutory requirement in s.174(3) and s.25 of the *Acts Interpretation Act* did not apply. The Full Bench in that case also found that the effect of the omission was to deny employees advice as to the fact of default representation.
>
> **[20]** In *Galintel*, the issue was whether the addition to the bottom of an NERR of a nomination slip for employees to appoint a bargaining representative, rendered the NERR invalid. The Full Bench considered the issue in the context of whether the addition to the information required to be contained in the NERR altered its nature or was misleading. The Full Bench concluded that there was no evidence

[9] [2014] FWC 7635.

that employees were mislead and that the additional words did not have the effect of invalidating the NERR.

[21] These cases stand as authority for the following propositions with respect to the terms of the Act at the point the NERR subject of this case was issued to employees:

- Additions or omissions to the terms of NERRs did not necessarily render them invalid;
- Substantial compliance with the prescribed form of the notice found in the Regulations was sufficient;
- Omission of content that was specified in s.174 would render a notice invalid; and
- Addition or omission of content that could mislead employees in relation to their rights to appoint a bargaining representative or of the fact an employee organisation entitled to represent employees in relation to work to be performed under a proposed agreement would be a default representative would render a notice invalid.

44. In 2012, the Report of the Fair Work Act Review Panel discussed the Commission's decision in *Galintel* and recommended that the Government amend s.174 of the FW Act to make it clear that "a bargaining notice may only contain the requirements as specified in the section and its attendant regulations". [10] This recommendation arose from union submissions that expressed strong concerns about the Commission's decision in *Galintel*. Union submissions pursuing changes to s.174 would have perhaps not been made were it not for the fact that the issue in *Galintel* was the addition of a slip which allowed employees to appoint a non-union bargaining representative on the same piece of paper, and directly under, the prescribed wording setting out the representational rights of employees.

45. Unlike their response to *Galintel*, there was no outcry from unions about the Commission's decision in *Inghams* or other relevant decisions where substantial compliance with the NERR requirements was held to be sufficient.

[10] *Towards more productive and equitable workplaces*: *an evaluation of the Fair Work Legislation*, Australian Government. Fair Work Act Review, p.144.

46. The ‘mischief’ that the Panel recommended be addressed was ‘confusion and any opportunities for malpractice’.[11]

47. The *Fair Work Amendment Act 2012 (Cth)* implemented the Fair Work Act Review Panel’s recommendation through the addition of s.174(1A) and (1B) in the FW Act which are in the following terms:

> **174 – Content and form of notice of employee representational rights**
>
> 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.
>
> (1B) When prescribing the content of the notice for the purposes of paragraph (1A)(a), the regulations must ensure that the notice complies with this section.

48. The Explanatory Memorandum to the *Fair Work Amendment Bill 2012* states at [147]:

> 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 except that which the regulations require an employer to insert or omit.

49. The impact of s.174(1A) and (1B) has been dramatic and problematic for all parties.

50. In *Peabody,*[12] the Full Bench considered circumstances in which the employer had provided three documents, stapled together, to relevant employees in the context of bargaining for an enterprise agreement. One of the three documents was intended to reflect the form and content requirements of the prescribed NERR. Relying on the mandatory form of the language in s 174(1A) of the FW

[11] Ibid.

[12] [2014] FWCFB 2042.

Act, the Full Bench found that the three documents together purported to be the NERR and as such, invalidated the notice. The Full Bench stated:

> The consequence of failing to give a Notice which complies with the content and form requirements of s.174(1A) is that the Commission cannot approve the enterprise agreement. We note that this does not prevent the employer from recommencing the bargaining process, completing the pre-approval steps (including the giving of valid Notices) and making application to have the resultant enterprise agreement approved by the Commission.

51. Referring to the Report of the Fair Work Act Review Panel which recommended the reforms brought about by the *Fair Work Amendment Act 2012* (Cth), the Full Bench stated:

> The Panel characterised the decision in Galintel as supporting the proposition that a Notice need only substantially comply with the requirements of s.174 and Schedule 2.1. The recommendation was a repudiation of the proposition that substantial compliance with the content and form of the Notice in Schedule 2.1 was sufficient. The 'mischief' Parliament was seeking to address in responding to the Panel's recommendation and enacting subsection 174(1A) was the past practice of making alterations to the content or form of the Notice.

52. In the Productivity Commission's Inquiry Report into the Workplace Relations Framework, the Commission expressed the following views in the context of *Peabody*:[13]

> While there are often good reasons for having procedural requirements (for example, to prevent a party engaging in potentially misleading conduct during the approval process), substance rather than form should prevail... Where the FWC rejects an EA on procedural grounds, it can trigger a fresh round of complex negotiations. This is not only a costly and tedious process, but can also compromise the relationship between employers and employees.

53. Other examples illustrating the elevation of form over substance in the context of enterprise agreement approvals were highlighted by the Productivity Commission. These include:

    a. The rejection of an enterprise agreement due to the inadvertent use of a former NERR template which was, in substance, the same as the current template.[14]

[13] Productivity Commission, *Workplace Relations Framework* (Productivity Commission Inquiry Report No. 76, 30 November 2015), Volume 2, 663.

[14] Ibid, 666.

b. The invalidation of an agreement due to an NERR failing to include the name of the employer with the result that part of the notice retained the template wording: ""[Name of employer]", despite the fact that the notice was issued on letterhead paper that contained the name of the employer.[15] At paragraph [11] of the decision in *Application by Catholic Commission for Employment Relations through its Executive Director Anthony Farley*, McKenna C stated:

> The Act does not appear to allow discretion concerning the form and content of a notice of representational rights, given the word "must" in relation to the matters specified in subsections (a)-(c) of s.174(1A). If it seemed the Act allowed discretion in relation to the matter, I would exercise it; that is, the departure in the content of the notices of representational rights from the prescribed form might be considered to be something akin to a misnomer of no real consequence, rather than anything that, in a practical sense, alters the advice to employees of their rights in such respects.

54. More recent relevant cases which highlight issues of form over substance include:

a. *ALDI v SDA*:[16] In this case, Aldi substituted the word 'leader' for the word 'employer'. The Full Bench found:[17]

> Section 25C of the Interpretation Act does not apply because the contrary intention is manifest. Nothing less than strict compliance is sufficient. This is apparent from the language of s 174(1A), which makes clear that the notice must contain no more and no less than the content prescribed by the regulations. It is also apparent from the legislative history. Section 174(1A) was introduced for the purpose of eliminating confusion about whether strict or substantial compliance was required.

b. *Application by Hawker Pacific Pty Ltd:*[18] In this matter, the NERR issued by the employer included additional content including a company logo and letterhead information. The NERR also omitted certain other content which was acknowledged by Cambridge C to be

[15] Ibid; [2013] FWC 8686.

[16] [2018] FWCFB 2485. Note: ALDI has since applied for judicial review of this decision. The matter was heard by Flick, Rangiah and Bromwich JJ on 15 November 2018 but a decision has not yet been issued.

[17] Ibid, [66].

[18] [2016] FWC 416.

of 'little practical significance'. Nevertheless, the enterprise agreement approval application was rejected. The Commissioner stated:

> "Unfortunately, the NERR has departed from the form and content of the notice template provided in the Regulations. The Commission does not have discretion to consider any rectification of the departure from the form and content as prescribed for a NERR.

c. *Australian Maritime Officers' Union v Harbour City Ferries Pty Ltd & Maritime Union of Australia, The and Another*: [19] Although the NERR was ultimately found to be invalid as it lacked a description of the proposed coverage of the prospective agreement, the Full Bench indicated, at paragraph [21] that failure to capitalise each of the words in the title could, on a strict reading of s.174(1A), invalidate the NERR.

d. *Application by FNQ Sugar Services Pty Ltd*: [20] In this case, the employer issued the NERR with the prescribed wording in a text box. At the top of the same page which contained the NERR, and outside the text box, were words identifying the date when bargaining would commence. Although Asbury DP found that the additional words did not invalidate the agreement as they were effectively separated from the NERR by the text box, she held that, were it not for the test box, the outcome may have been different:

> **[9]** When the Commission is placed in the position of being required to refuse to approve an enterprise agreement that would otherwise be capable of approval, because of an invalid notice being provided to employees, the consequences for the employer, the employees and bargaining representatives are significant. All concerned in the making and approval of an enterprise agreement generally invest considerable time and effort in the process. The result of an invalid notice is that the approval process may be required to repeated, resulting in inconvenience and in cases where the group of employees to be balloted is large, significant cost.
>
> **[10]** To refuse an agreement solely on the basis of what should be a simple administrative matter, also places the Commission in a difficult position. The Commission has no discretion to approve an agreement on the basis that there is substantial compliance with the Notice requirements. In recent times I have been required to consider a number

[19] [2015] FWCFB 3337.

[20] [2015] FWC 6290.

of enterprise agreements made by employers that I know to be large employers with dedicated human resource management expertise or access to such expertise, and who have not provided a valid notice to their employees. As a result, I have been required to inform those employers and the bargaining representatives that their agreement – which would otherwise be capable of approval – cannot be approved.

[11] In the present case, the Notice given to employees by FNQ Sugar Services Pty Ltd was set out on a single page. An introductory paragraph in the following terms appears at the top of the page:

> "To South Johnstone Mill Wages Employees
>
> It is intended that negotiation for the enterprise Bargaining Agreement outlined in the notice below will commence on Thursday 5 February 2015.
>
> EBA REPESENTATION (sic) NOTICE"

[12] Immediately below this heading and introductory paragraph, contained within a thick black border, is the Notice. It is not the current Notice as prescribed in Schedule 2.1 of Regulation but a previous version that refers to "Fair Work Australia".

[13] There are two issues with the Notice as provided by FNQ Sugar Services Pty Ltd. The Notice contains additional content to that prescribed in the mandatory template. As a Full Bench of the Commission held in *Peabody Moorvale Pty Ltd v CFMEU*:

> "…First, s 174(1)(A) is not to be construed so as to preclude an employer from providing additional material to its employees at the same time as the notice is given to them. Subsection 174(1)(A) is directed at the form and content of the Notice. It does not require the notice to be provided in isolation and to construe the provision in that way would produce some absurd results, for example, it would prevent an employer from providing employees with a simple covering letter or an offer of interpreter services..
>
> Secondly, where additional material accompanies a document which contains the content, and is in the form, prescribed in the Regulations, the issue to be determined is what purports to be the Notice. This is a question of fact.
>
> Thirdly, where additional material is provided with the Notice and that material has the character of being, for example, misleading or intimidatory, then this will be relevant to the Commission's assessment of whether the enterprise agreement had been 'genuinely agreed' by the employees. However, it is not a basis for finding that a Notice has not been given in accordance with the Act.

[14] In the present case, the Notice is set out inside a text box. The additional content is outside the text box. It is introductory and is not purported to be part of the Notice. The inclusion of a text box makes it clear that the text within the box is the Notice and that other text is not

> part of the Notice. But for the text box, the outcome in this case may have been different. The additional content is innocuous and cannot in any way be said to be misleading or intimidatory so that no issue arises as to whether the agreement has been genuinely agreed to.
>
> **[15]** The notice also refers to the Commission by its former name – "Fair Work Australia". This issue was dealt with by a Full Bench of the Commission in *Serco Australia Pty Limited v United Voice and the Union of Christmas Island Workers*. In that case the Full Bench held that s. 25B(1)(b) of the *Acts Interpretation Act* as it was at 25 June 2009, operated in respect of a Notice to render it compliant with s. 174(1A) of the Act, notwithstanding that it referred to the Fair Work Commission by its former name.
>
> **[16]** Consistent with the Full Bench Decisions in *Peabody Moorvale* and *Serco* the Notice in the present case is valid, despite its disconformity with the prescribed form. As I was otherwise satisfied that the requirements of the Act with respect to approval were met, I approved the Agreement.

e. *Application by Seymour College Inc*:[21] In this case, the NERR included the website for the Fair Work Commission rather than the Fair Work Ombudsman. This alone was held by Lee C to be sufficient to invalidate the notice.

f. *Appeal by KCL Industries Pty Ltd*:[22] In this matter, the last paragraph of the NERR directed employees to the 'Fair Work Infoline – 13 13 94' rather than the 'Fair Work Commission Infoline'. The NERR was therefore held by a Full Bench of the Commission to be invalid.

g. *Maritime Union of Australia v MMA Offshore Logistics Pty Ltd*:[23] In this case, the NERR included the telephone number for the Fair Work Ombudsman rather than the number for the Fair Work Commission Infoline. This mistake led to the Full Bench quashing the approval of two enterprise agreements.

55. The New Legislative Provision has the effect of giving the Commission discretion to approve an enterprise agreement if the NERR issued to employees differs from the template contained in Schedule 2.1 of the *Fair Work*

[21] [2016] FWC 147.

[22] [2016] FWCFB 3048.

[23] [2017] FWCFB 660.

Regulations 2009 (Cth) and the differences can be legitimately held to be a 'minor procedural or technical error'.

56. Ai Group submits that this discretion would be available to approve an enterprise agreement where:

a. The inclusion or omission of information in the NERR does not have the effect of misleading employees as to their right to representation.

b. Deviation from the prescribed form of the NERR is not of 'practical significance'.

c. The NERR invites employees to respond in a certain reasonable form or by a certain reasonable time.

d. Cosmetic changes are made to the NERR which are of no practical significance.

e. Information is included on the same page of a NERR which is not expressed to form part of the notice, provided the additional information does not contradict the content of the NERR.

f. Information is attached to a NERR (say by a staple or paper clip) which is not expressed to form part of the notice.

g. The NERR is attached to the same email as other relevant documents relating to the bargaining.

h. The NERR issued by the employer contains an incorrect telephone number or website.

i. An earlier version of the NERR has been inadvertently provided to one or more employees who will be covered by the agreement where this has not caused employees to be misled as to their right to representation.

j. Information has been omitted from a NERR where that information has been provided to employees in another appropriate manner.

k. Details included on a NERR are overtaken by later events during the bargaining (e.g. the proposed coverage or title of the agreement changes as an outcome of the bargaining process).

57. The Commission should use its discretion to approve enterprise agreements in the following Referred Matters that involve minor errors in the form or content of the NERR that are unlikely to disadvantage employees covered by the agreement:

a. *AG2018/6679 – Application by Royal Automobile Club of Victoria (RACV) Limited* – Issues highlighted by the FWC include:

- it appears that the reference to 'employer' in the final paragraph of the prescribed NERR has been replaced with a reference to a particular person or position title;
- the legal name of the employer may not have been included in the NERR

The inclusion of an acronym which employees would readily recognise as the employer in place of the employer's legal name constitutes a minor technical deviation from the prescribed form of the NERR that should not preclude approval of the agreement.

Also, the inclusion of additional persons or positions of whom an employee may ask questions in the final paragraph of the NERR does not detract from the benefits of including the prescribed sources of assistance and should not preclude approval of the agreement.

b. *AG2018/6550 – Application by Axis Plumbing Services WA Pty Ltd* [Issue – it appears that the NERR was provided to employees as a memorandum on company letterhead].

The issuing of the NERR on company letterhead and in the form of a memorandum in no way detracts from the prescribed content in the NERR or diminishes the effect of the NERR for relevant employees. This should not preclude approval of the agreement.

c. *AG2018/4986 – N T Seaman T/A United Wolves* [Issue – whether the legal name of the employer has been included in the NERR].

The use of a 'trading name' in place of the legal name of the employer in the NERR should not invalidate the notice where employees are accustomed to referring to their employer by the trading name and would understand this name to denote their employer. This should not preclude approval of the agreement.

7. PRE-APPROVAL STATUTORY TIMEFRAMES

The statutory timeframes in ss.173(3) and 181(2)

58. Subsection 173(3), requires that the employer give the NERR as soon as practicable, and not later than 14 days, after the notification time for the agreement.

59. Under s.181(2), employees cannot be requested to approve a proposed enterprise agreement until at least 21 days after the day on which the last NERR was given.

60. The question of whether non-compliance with s.173(3) has the effect of causing an application to fail the requirement in s.186(2)(a) and s.188 that an enterprise agreement be *"genuinely agreed"* to by the employees, was considered in *Uniline*.[24] The case involved an appeal by Uniline Australia Limited against a decision of Commissioner Roe to dismiss the employer's application to approve the *Uniline Australia Limited Enterprise Agreement 2016*. Ai Group represented Uniline (an Ai Group member) in the appeal.

[24] *Uniline Australia Limited* [2016] FWCFB 4969.

61. The Majority (Gostencnik DP and Riordan C) agreed with the reasoning of Hatcher VP in *TWU v Hunter Operations*[25] that s.173(3) requires strict compliance and that failure to provide a NERR within the timeframe prescribed invalidates the notice, preventing the applicant's reliance on the notice for the purpose of the 21 day requirement in s.181(2).

62. The Majority held that where an employer issues an invalid NERR, its only option would be to cease bargaining with its employees and agree to bargain or initiate bargaining afresh thus triggering a new notification time and a new period within which a valid NERR may be issued. This solution was understood by the Majority to be 'artificial'.[26] Even this 'solution' is inadequate under circumstances where a majority support determination has been issued, because the employer does not have a right to unilaterally cease bargaining.

63. As Watson VP observed in his dissenting decision, there is no clear and simple means of remedying an invalidly issued NERR: 'To a lay observer, the proposition need only be stated to demonstrate its absurdity'.[27] Watson VP noted that the effect of the Majority's decision was to subject the workplace relations system to ridicule and to 'arm those opposed to an agreement with the means to dismantle an agreement otherwise genuinely agreed'.[28]

64. Uniline's application for approval of the enterprise agreement was rejected despite the fact that a NERR was issued to the employees during bargaining more than 21 days before the employees voted to approve the agreement and that 25 out of 30 employees who cast a valid vote, voted to approve the agreement.

[25] [2014] FWC 7469.

[26] [2016] FWCFB 4969 [113].

[27] Ibid, [2].

[28] Ibid, [3].

65. The Majority highlighted that the technical requirement which prevented the agreement being approved could be addressed by a legislative amendment to give the Commission more discretion to disregard pre-approval technical requirements:

> **[120]** We would observe in passing that we are not unsympathetic to the position in which an employer or indeed other bargaining representatives might find themselves upon discovering that a Notice is not valid. If the legislative provisions provided some discretion about this and other pre-approval technical requirements then an examination of the actual impact of any deficiency upon the bargaining process and its outcome might result in the deficiency being disregarded. But that is not the legislative scheme the Commission is required to administer. It is a matter for Parliament to make such amendments to the scheme of the Act as it sees fit.

66. The decision in *Uniline* has been applied by the Commission to preclude a finding of 'genuine agreement' in various matters, including the following:

a. *Light Industries Laundry Pty Ltd T/A Sunfresh Linen*:[29] In this matter, a majority support determination commenced the bargaining process. The parties agreed that the first NERR was defective. A new NERR that was issued to 'reset' the bargaining process was found to be invalid on the basis of the interpretation adopted in *Uniline*. Spencer C stated:

> **[60]** While I echo the artificiality of the process adverted to by the majority in *Uniline* I am unable to find that on the facts as presently before me, that bargaining in respect of the notification time of 22 June 2014 had ceased such that a new notification time was triggered on 10 June 2016.

b. *Geelong Racing Club Inc*:[30] In this matter, errors were identified in the NERR provided to staff at the commencement of bargaining prompting the employer to issue a further NERR outside the required statutory period of 14 days from the notification time. The issuing of the second NERR had the support of the AWU which was a bargaining representative on behalf of employees for the agreement. Masson DP found that as no steps were taken to halt and restart bargaining in order

[29] [2017] FWC 1703.

[30] [2018] FWC 3938.

to establish a new notification time, the employer had failed to strictly comply with s.173(3) of the FW Act.[31]

67. The New Legislative Provision has the effect of allowing the Commission to approve an enterprise agreement where the 14 day requirement in s.173(3) and/or the 21 day requirement in s.181(2) are not met, in circumstances that can be described as a 'minor procedural or technical error' which is not likely to have disadvantaged the employees, including in the following circumstances:

a. Where the 14 day requirement in s.173(3) is not met and the non-compliance is not deliberate.

b. Where a second NERR is issued during bargaining (e.g. because an error is discovered in the original NERR), and bargaining is not artificially stopped and restarted (similar to the circumstances in *Uniline*).

c. 'Employees being requested to approve a proposed enterprise agreement on the 21st day after the last NERR was given, rather than at least 21 days after the day on which the last NERR was given'. (NB. This is one of the examples given at paragraph 47 in the Revised Explanatory Memorandum for the Bill.

68. The Commission should use its new discretion to approve the enterprise agreement in the following Referred Matter, which involved technical and unintentional non-compliance with the statutory timeframe in s.181(2):

- *AG2018/4986 – N T Seaman T/A United Wolves* [Issue – whether the vote commenced less than 21 clear days after the last NERR was given to an employee]

[31] [2018] FWC 3938, [15] – [16].

69. The F17 submitted by the employer in the above matter states that the last NERR was given to the employees on 8 August 2018 and that the vote to approve the agreement commenced on 29 August 2018. Accordingly, the employer failed to meet the 21 day timeframe by no more than 24 hours.

The statutory timeframe in s.180(2), (3) and (4)

70. Subsection 180(2) of the FW Act requires that the employer take all reasonable steps to ensure that during the 'access period' for the agreement, the employees who will be covered by the agreement are given a copy of the written text of the agreement and any other material incorporated by reference in the agreement.

71. Under s.180(3), the employer must take all reasonable steps to notify the relevant employees of the time and place at which the vote will occur and the voting method that will be used, by the start of the 'access period'.

72. The 'access period' is defined in s.180(4) as the 7-day period ending immediately before the start of the voting process referred to in s.181(1).

73. In *CFMMEU v CBI Constructors*[32] the Full Bench quashed a decision to approve the *Project Agreement 2017* on the basis that it could not be satisfied, pursuant to s.186(2)(a) of the FW Act, that the agreement was genuinely agreed to by the employees to be covered by it because the employer had failed to provide relevant materials to voting employees for the full 'access period'. The Full Bench interpreted s.180(4) on the basis that the 'access period' consists of seven clear calendar days. The interpretation was inconsistent with the Commission's 'Date Calculator' that was available on the Commission's website.

[32] [2018] FWCFB 2732.

74. Following *CFMMEU v CBI*, the Commission has declined to approve enterprise agreements in numerous cases on the basis that the employer did not comply with the 7-day timeframe in s.180, in circumstances where the period of non-compliance was 24 hours or less. For example:

a. *Section One Security Pty Ltd*;[33]

b. *Civica BPO Pty Ltd*:[34] In this matter, Masson DP said:

> **[38]** This is not a case where Civica BPO was careless or set about a course of conduct with a purpose of denying employees a reasonable opportunity to review and consider the Agreement prior to the ballot. Nor was it a case of the employer obtaining appropriate advice and then failing to follow it. There was clearly an intention on the part of Civica BPO to comply with the requirements of the Act. They consulted the Commission's website, accessed the Date Calculator and then applied the resultant dates to their notification and ballot timetable.

c. *Corporate Image Security & Surveillance Pty Ltd T/A CI Security*;[35]. In this matter, McKinnon C said:

> **[4]** I find that voting for the Agreement commenced on 8 June 2018. That means the access period for the Agreement commenced on 1 June 2018 and the Applicant was required to take all reasonable steps to notify employees of the time, place and method of the vote by no later than 31 May 2018. I accept that the Applicant took reasonable steps to provide the requisite information to relevant employees on 1 June 2018. It did so in reliance on the Commission's "Date Calculator", and prior to consideration of the meaning of 'access period' in *CBI*. The result was that voting commenced one day too early.

d. *Dominance Enterprises Pty Ltd T/A Dominance Guardian Services*.[36]

e. *Metalrig Pty Ltd*;[37]

f. *Casair Pty Ltd*;[38]

[33] [2018] FWC 4469.

[34] [2018] FWC 4376.

[35] [2018] FWC 6367.

[36] [2018] FWC 6366.

[37] [2018] FWC 5588.

[38] [2018] FWCA 5567.

g. *Monja Holdings Pty Ltd*;[39]

h. *Marubeni-Itochu Tubulars Oceania Pty Ltd*;[40] and

i. *CFMMEU v Fusion Labour Pty Ltd*.[41]

75. The New Legislative Provision has the effect of allowing the Commission to approve an enterprise agreement where the 7-day timeframe in s.180(2), (3) and (4) is not met, in circumstances that can be described as a 'minor procedural or technical error' which is not likely to have disadvantaged the employees, including in the following circumstances:

a. Where employees are informed of the time and place for voting on the proposed enterprise agreement or the voting method that will be used for the agreement just after the start of the 'access period' rather than by the start of the 'access period' (NB. This is one of the examples given at paragraph 47 in the Revised Explanatory Memorandum for the Bill.

b. Where employees are given a copy of the written text of the proposed agreement and any other material incorporated by reference in the agreement just after the start of the 'access period'.

c. Where the employer distributes a ballot paper and other voting materials at or about the same time that the employees are given a copy of the proposed enterprise agreement and other material incorporated by reference. See the decision of Ryan C in *Australian Char Pty Ltd*.[42] Ai Group disagrees with the interpretation of the expression 'voting process' adopted by the Ryan C but there is risk that one or more other Members of the Commission may adopt a similar interpretation in the future. In the decision, Ryan C said:

> **[18]** The term "voting process" as used in s.180(4) and s.182(2) must include the systematic series of actions by which an employer initiates

[39] [2018] FWC 5569.

[40] [2018] FWC 5566.

[41] [2018] FWCFB 5843.

[42] [2011] FWA 1627

> the request for employees to approve the agreement by voting on it, carries out the request for employees to approve the agreement by voting on it and determines the outcome of the request for employees to approve the agreement by voting on it. This must be so as the end of the process is to determine whether or not the employees approve the agreement.
>
> **[19]** I note that s.180(3) requires the employer to take all reasonable steps by the start of the access period to notify relevant employees of both the time and place at which the vote will occur and the voting method that will be used. This requirement to give early notice to employees of what will occur does not detract from what constitutes the "voting process referred to in subsection 181(1)".
>
> **[20]** Whilst it is not necessary to detail every likely action that would comprise the systematic series of actions directed to having employees vote to approve an enterprise agreement, it would appear obvious that at least two of the actions would include the distribution of voting material to the employees and, where the vote is by postal ballot, the distribution to employees of the means to return their votes.
>
> **[21]** As identified in paragraph 2 above the employer had at the very least commenced the "voting process' on 21 December by sending to employees the covering letter for the vote, the ballot paper and the return envelope for the ballot paper.
>
> **[22]** The access period as defined by s.180(4) was therefore the 7 day period ending immediately before the 21 December.
>
> **[23]** Section 180(2)(a) required that the employer take all reasonable steps to ensure that during the 7 day period ending immediately before the 21 December 2010 that employees were given a copy of the written text of the agreement and any other material incorporated by reference in the agreement. As the employer declares in the Form F17 the material required to be given to employees at least 7 days before the 21 December 2010 was not in fact given until the 21 December 2010.

76. The Commission should use its new discretion to approve the enterprise agreements in the following Referred Matters, which involved technical and unintentional non-compliance with the statutory timeframe in s.180(3) and (4):

- *AG2018/3482 – Application by Huntsman Chemical Company Australia Pty Limited* [Issue – whether the vote commenced less than 7 clear days from the date on which employees were notified of the time, place and method of voting]

- *AG2018/6664 – Application by Meredith Roof Plumbing Pty Ltd* [Issue – whether the vote commenced less than 7 clear days from the date on which employees were notified of the time, place and method of voting]

8. SPECIFIC QUESTIONS POSED BY THE FULL BENCH AND OTHER RELEVANT QUESTIONS

77. At paragraph [15] of the Statement, the Full Bench posed various relevant questions as follows:

> **[15]** To assist the parties, the Commission has identified some issues as to the proper construction of the new s.188(2) that might be raised by one or more of the Matters, as follows
>
> 1. What constitutes a '*minor* procedural or technical *error*' within the meaning of s.188(2)? Is it material whether the non-compliance with the relevant procedural or technical requirement was unintended or deliberate or reckless?
>
> 2. In what ways might employees be 'disadvantaged' by a 'minor procedural or technical error' for the purposes of s.188(2)?
>
> 3. In what circumstances are employees 'not likely' to be disadvantaged by a 'minor procedural or technical error' for the purposes of s.188(2)? In what circumstances are employees 'likely' to be disadvantaged by a 'minor procedural or technical error'?
>
> 4. The EM at paragraph 48 suggests that in considering whether the employees were not likely to have been disadvantaged by a procedural or technical error, the Commission 'could take into account, for example, the effect of the error and circumstances of the error.' What sort of material might the Commission need to consider in assessing this?
>
> 5. Would considering the effect of an error and the circumstances of an error include taking into account the likely costs and inconvenience to the employer and the employees covered by the agreement, associated with further delaying the approval of the agreement?

78. The above questions are addressed below.

Question 1(a) – What constitutes a '*minor* procedural or technical *error*' within the meaning of s.188(2)?

79. Paragraphs 50, 53-57, 60-69 and 73-76 of this submission include numerous examples of minor procedural or technical errors within the meaning of s.188(2).

Question 1(b) – Is it material whether the non-compliance with the relevant procedural or technical requirement was unintended or deliberate or reckless?

80. It is appropriate for the Commission to consider whether the non-compliance was unintended or deliberate. If there is evidence of deliberate non-compliance, it would be reasonable for the Commission not to exercise the discretion under the New Legislative Provision because the employer's actions would not constitute an 'error' for the purposes of s.188(2).

81. Consideration of 'recklessness' is not appropriate as it would lead to too much uncertainty and could potentially frustrate the intended operation of the New Legislative Provision.

Question 2 – In what ways might employees be 'disadvantaged' by a 'minor procedural or technical error' for the purposes of s.188(2)?

82. It would only be in rare circumstances that an employee would be disadvantaged by a 'minor procedural or technical error'. An example would be where the error confuses, misleads or intimidates the employees to the extent that it affected the employees' nomination of representative/s.

Question 3(a) – In what circumstances are employees 'not likely' to be disadvantaged by a 'minor procedural or technical error' for the purposes of s.188(2)?

83. Employee are not likely to be disadvantaged by minor procedural or technical errors that do not confuse, mislead or intimidate the employees to the extent that it affected the employees' nomination of representative/s.

84. Employees are not likely to be disadvantaged by the minor procedural or technical errors referred to in paragraphs 50, 53-57, 60-69 and 73-76 of this submission.

Question 3(b) – In what circumstances are employees 'likely' to be disadvantaged by a 'minor procedural or technical error'?

85. It would only be in rare circumstances that an employee would be 'likely' to disadvantaged by a 'minor procedural or technical error'. An example, would be where the error confuses, misleads or intimidates the employees to the extent that it affected the employees' nomination of representative/s.

Question 4 – The EM at paragraph 48 suggests that in considering whether the employees were not likely to have been disadvantaged by a procedural or technical error, the Commission 'could take into account, for example, the effect of the error and circumstances of the error.' What sort of material might the Commission need to consider in assessing this?

86. The assessment needs to be carried out in a practical, common sense manner, from start to finish, by appointed Commission Members drawing upon the extensive experience that led to their appointment, and uninfluenced by views of the staff in the Member Assist Team. The discretion is a matter for the impression and judgement of Commission Members.

87. The Commission Member that is dealing with the relevant application should determine what material they wish to see in order to be satisfied that it is appropriate to exercise their discretion under s.188(2). The material will vary depending upon what the error is. In most circumstances, the Member will be able to make an appropriate judgement based on the nature of the error, without obtaining any further materials from the bargaining representatives.

88. The Productivity Commission said that in determining whether a minor departure in the content of the NERR is of any real consequence, the Commission should consider:[43]

> "…the views of the employer, bargaining representatives, the employees to be covered by the agreement, and any evidence on whether the deficiency in the NERR had disadvantaged an employee who would be covered by the agreement (for example, by being confusing, misleading or intimidatory to the extent that it affected an employee's nomination of a representative)."

Question 5 – Would considering the effect of an error and the circumstances of an error include taking into account the likely costs and inconvenience to the employer and the employees covered by the agreement, associated with further delaying the approval of the agreement?

89. The answer to this question is definitely yes. These factors need to be central considerations when the Commission is considering exercising its discretion under the New Legislative Provision.

90. A requirement to repeat the pre-approval steps typically involves very substantial costs and risks for an employer, including:

a. Management time;

b. Employee time (e.g. in voting and participating in consultation processes) that would otherwise be spent on carrying out normal duties;

c. The cost of obtaining professional advice;

d. Travel costs;

e. Postage, telecommunications and other costs; and

f. The risk of additional claims being pursued, including the risk of workplace disharmony and protected industrial action.

[43] Productivity Commission, *Workplace Relations Framework* (Productivity Commission Inquiry Report No. 76, 30 November 2015), Volume 2, 667.

91. A requirement to repeat the pre-approval steps also often results in significant costs for employees because wage increases are typically not passed on to employees until an enterprise agreement is approved. Further, often wage increases are operative from a date that relates to the timing of approval. For example, wording like the following is not uncommon in agreements:

(a) A two per cent wage increase is payable from the first pay period to commence on or after the approval of this agreement by the Fair Work Commission;

(b) A two per cent wage increase is payable 12 months after the date in paragraph (a).