

Fair Work Act 2009 – Dispute and Grievance Procedure

A Fair Work Australia (“FWA”) Appeals Bench has decided that allowing FWA to arbitrate disputes is not an “essential element” of the disputes settlement procedures that must appear in enterprise agreements. This means it is necessary to provide only for the voluntary methods of dispute settlement, for an enterprise agreement to be approved.

The *Fair Work Act 2009* (“FW Act”) requires that an enterprise agreement must contain a term about “settling disputes” (s186(6) refers).

Original Decision

On 21 January 2010, Commissioner Smith dismissed an application by Woolworths Ltd (“Woolworths”) for the approval of the *SDAEA Mulgrave Produce and Recycling Enterprise Agreement 2009 – 2012* (“Agreement”). He said the Agreement “*appears to restrict access to arbitration to circumstances where the Director of Human Resources and the National Secretary of the Union agree*”. As a result, he determined that the Agreement did not contain a procedure to settle disputes as required under the FW Act and declined to approve it.

Commissioner Smith considered that, as the Woolworths’ agreement restricted access to arbitration, it could not be approved under the FW Act. Amongst other things, he expressed the view that “*access to arbitration is a prerequisite to approval of an agreement*”. He was reinforced in this view by the terms of the model clause appearing in the FW Act. Whilst acknowledging that its use was not mandatory, he considered the terms of a disputes settlement clause must contain the essential ingredients of the model clause.

One implication of Commissioner Smith’s decision, if it had been upheld, was that enterprise agreements without a compulsory arbitration option were likely to be found non-compliant and, therefore, invalid,

Woolworths appealed Commissioner Smith’s decision. The appeal attracted much interest, with a range of interveners, including the Commonwealth, making submissions to FWA. It should be noted that similar decisions had been applied by FWA up until this time, but there had been no appeal on this point.

Appeals Bench Decision

The Appeals Bench found that the legislature intended that FWA “*can deploy voluntary methods of dispute resolution, without the consent of the parties, provided the dispute is one with which it is authorised to deal, but can only arbitrate if it has been specifically empowered to do so*”. The voluntary methods of dispute resolution referred to by the Appeals Bench are mediation, conciliation, making recommendations and expressing an opinion.

The Appeals Bench pointed out that the FW Act (s739(4) refers) “*... strongly implies ... that if the parties have not agreed, FWA has no power to arbitrate*”.

In rejecting the view that compulsory arbitration was an “*essential ingredient*” in the dispute settling procedures required by the FW Act, the Appeals Bench referred to the following paragraph [2731] of the Explanatory Memorandum which accompanied the legislation:

“Employers and employees (and their bargaining representatives) can refer to the model clause for guidance, and may agree to include a term, or part of it, in a proposed enterprise agreement.”

In addition, the Appeals Bench relied upon a leading authority dealing with the same question under the previous legislation. It said that "*if the legislature had intended to alter the effect of [the earlier authority] it could easily have made that intention explicit. The absence of an express statement of intention suggests there is no such intention*".

The Appeals Bench was satisfied that the relevant parts of the FW Act "*do not support the conclusions the Commissioner reached, rather they tell strongly against it*".

Implications for Clients

Clients who are party to enterprise agreements that do not contain a compulsory arbitration option in the dispute settlement provisions can rest assured their agreement will not be invalidated provided that it meets the other stated requirements of the Act.

Clients who are contemplating or negotiating enterprise agreements are not compelled to use the model disputes clause appearing in the FW Act and should determine whether mandatory arbitration or suits their particular industrial and operational circumstances.

Require further Information/Assistance?

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